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# The Artist's Resale Royalty Right: Overcoming the Information Problem

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*The artist's resale royalty right, commonly called the droit de suite, has proven politically popular in a diverse range of countries. Since France first codified the right into law in 1920, at least fifty countries have followed suit. To date, the United States, with the exception of California, has been notably absent from this picture. But a federal resale royalty law is now on the horizon for American artists. In December 2011, delegates in both the U.S. House of Representatives and the U.S. Senate introduced the Equity for Visual Artists Act of 2011 (EVAA), a bill which would amend the existing copyright law to include a resale royalty provision.*

*This Article evaluates whether Congress should adopt the EVAA, or some other variation of the resale royalty right, and provides guidance to lawmakers in considering such legislation. Specifically, this Article points out that an informational deficit, which it terms the information problem, looms over the resale royalty right. Scholars and lawmakers must have access to information about sales of artwork in order to evaluate the effect and efficacy of the right in practice. Likewise, the structure of the right requires that various parties have access to information about sales in order to carry out the requirements of resale royalty laws. However, secrecy norms pervade the art market, especially in the United States, making such information difficult, if not impossible, to come by. This Article considers several possibilities for how federal lawmakers might overcome, or at least minimize, this information problem, and concludes that the most promising scheme would be one that requires parties to disclose relevant information through a registration system.*

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## I. INTRODUCTION

The artist's resale royalty right, commonly called the *droit de suite*,<sup>1</sup> has proven politically popular in a diverse range of countries. This right, which entitles artists to share in the proceeds from resales of their works, was first codified into law in France in 1920. Since then, at least fifty countries have followed suit.<sup>2</sup> The right initially attracted mostly civil law countries, which have long recognized various protections, including moral rights, for creative persons.<sup>3</sup> In recent years, however, the right has garnered support in common law countries.<sup>4</sup>

<sup>1</sup> Scholars often use this French term, which is translated literally as "follow-up right," because France was the first country to codify the right into law. This Article uses "resale royalty right" instead, as this phrase has become popular in recent years among lawmakers and commentators, especially in the United States.

<sup>2</sup> See *infra* Part II.A for a detailed account of this development.

<sup>3</sup> See *infra* note 47 and accompanying text. See generally Jonathan D. Tepper, *Le Droit de Suite: An Unartistic Approach to American Law*, at 6 (Aug. 2007) (unpublished manuscript), available at [http://works.bepress.com/jonathan\\_tepper/1](http://works.bepress.com/jonathan_tepper/1).

<sup>4</sup> Common law countries do not have the strong tradition of recognizing artists' rights that is

For example, in 2001, a European Union (EU) directive codified the right in all member states, including the United Kingdom;<sup>5</sup> and in 2009, Australia implemented a resale royalty scheme.<sup>6</sup>

To date, the United States, with the exception of California,<sup>7</sup> has been conspicuously absent from this picture. But a federal resale royalty law is now on the horizon for American artists. In the Visual Artists Rights Act of 1990 (VARA), Congress granted certain moral rights to artists and directed the U.S. Copyright Office to compose a report exploring the feasibility of implementing resale royalty legislation at a later date.<sup>8</sup> The report concluded that Congress should consider codifying the right into law if the EU were to harmonize its resale royalty laws.<sup>9</sup> That time has come.<sup>10</sup> In addition, pressure has been mounting from the international community and domestic advocacy groups, leading one commentator to predict in 2008 that Congress would “probably acquiesce in resale royalties” in the near future.<sup>11</sup>

As predicted, in December 2011, delegates in both the U.S. House of Representatives and the U.S. Senate introduced the Equity for Visual Artists Act of 2011 (EVAA).<sup>12</sup> This bill would amend the

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found in civil law countries. For a discussion of this distinction, see *infra* note 48 and accompanying text.

<sup>5</sup> Artist's Resale Right Regulations 2006, available at [http://www.legislation.gov.uk/ukxi/2006/346/pdfs/ukxi\\_20060346\\_en.pdf](http://www.legislation.gov.uk/ukxi/2006/346/pdfs/ukxi_20060346_en.pdf).

<sup>6</sup> Resale Royalty Right for Visual Artists Act 2009, available at <http://www.comlaw.gov.au/Details/C2009A00125>.

<sup>7</sup> In addition to California, Puerto Rico and Georgia have enacted laws that include resale royalty provisions. See GA. CODE ANN. § 8-5-1 (the “Art-in-State Buildings Program”); 31 P.R. LAWS ANN. tit. 31 § 1401(h) (outlining a comprehensive moral rights law, which includes a resale royalty requirement). A federal district judge recently ruled that the California law is unconstitutional on Commerce Clause grounds. See *supra* notes 64-70 and accompanying text.

<sup>8</sup> 17 U.S.C. § 106A (1990).

<sup>9</sup> U.S. COPYRIGHT OFFICE, DROIT DE SUITE: THE ARTIST'S RESALE ROYALTY (1992) [hereinafter COPYRIGHT OFFICE REPORT].

<sup>10</sup> See Mara Gumbo, Comment, *Accepting Droit de Suite as an Equal and Fair Measure Under Intellectual Property Law and Contemplation of its Implementation in the United States Post Passage of the EU Directive*, 30 HASTINGS COMM. & ENT. L.J. 357, 375 (2008) (“Following the enactment of the EU Directive, the United States should be hard-pressed to implement its own federal measures.”).

<sup>11</sup> See, e.g., Edward J. Damich, *Moral Rights Protection and Resale Royalties for Visual Art in the United States: Development and Current Status*, 12 CARDOZO ARTS & ENT. L.J. 387, 406 (1994). Part I.B, *infra*, provides further details.

<sup>12</sup> H.R. 3688, 112th Cong. (2011), available at <http://www.opencongress.org/bill/112-3688/text>; S. 2000, 112th Cong. (2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS->

existing federal copyright law<sup>13</sup> to include a resale royalty right for visual artists.<sup>14</sup> Specifically, it would require large auction houses (those that sell over \$25 million in artwork annually) to pay a royalty upon selling an artist's work at auction for more than \$10,000. These auction houses would have to pay seven percent of the total price of the artwork to a collecting society,<sup>15</sup> which would be established to monitor sales and to collect and distribute royalties.<sup>16</sup> From that seven percent (less an administration fee for the collecting society), fifty percent would go to the artist, and the remaining fifty percent would go to an art acquisition fund for nonprofit art museums.<sup>17</sup> This version of the resale royalty right resembles those that have been adopted in California, France, and various other places, with some minor differences.<sup>18</sup>

This Article evaluates whether Congress should adopt the EVAA, or some other variation of the resale royalty right, and provides guidance to lawmakers in considering such legislation. To do so, it taps into the longstanding scholarly debate surrounding the right. Despite the fact that “the right remains politically popular,” scholars have always been fiercely divided on this topic.<sup>19</sup> Supporters have put forth several rationales: that the resale royalty right puts artists on par legally with other creative persons,<sup>20</sup> that it fairly compensates artists

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112s2000is/pdf/BILLS-112s2000is.pdf. The sponsors of this bill are Representative Jerrold Nadler, a democrat from New York, and Senator Herb Kohl, a democrat from Wisconsin.

<sup>13</sup> See 17 U.S.C. chs. 1-13.

<sup>14</sup> Both VARA and the EVAA limit coverage to visual artists. In the EVAA, “visual art” is defined as:

[A] painting, drawing, print, sculpture, or photograph, existing either in the original embodiment or in a limited edition of 200 copies or fewer that bear the signature or other identifying mark of the author and are consecutively numbered by the author, or, in the case of a sculpture in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author.

H.R. 3688, § 5, 112th Cong. (2011).

<sup>15</sup> For a discussion of the role of the collecting society, see *infra* Part V.B.

<sup>16</sup> See S. 2000, 112th Cong. (2011).

<sup>17</sup> *Id.* The bill specifies that the collecting society may retain up to eighteen percent of the royalty to cover administrative costs. *Id.*

<sup>18</sup> See *infra* Part VI.A.

<sup>19</sup> Henry Hansmann & Marina Santilli, *Royalties for Artists versus Royalties for Authors and Composers*, 25 J. CULTURAL ECON. 259, 260 (2001) (noting the disconnect between the political reality and the scholarly current).

<sup>20</sup> See, e.g. Thomas M. Goetzl, *In Support of the Resale Royalty*, 7 CARDOZO ARTS & ENT. L.J. 249, 255 (1988); Carole M. Vickers, Comment, *The Applicability of the Droit de Suite In*

for their genius and reputation,<sup>21</sup> and that it provides incentives for artistic creation.<sup>22</sup> But the “academic commentary [on the right] . . . has often been unfavorable.”<sup>23</sup> Critics contend, for instance, that artists are not in need of special treatment;<sup>24</sup> that the right harms artists, sellers, and the art market generally;<sup>25</sup> and that it rarely gets enforced in practice.<sup>26</sup>

These criticisms are so serious that it is striking that lawmakers have failed to address them. Why have these critiques not been more devastating to the political popularity of the resale royalty right? What might explain the disconnect between the scholarly debate and the legal reality? And how, if at all, should the scholarly conversation inform lawmakers in the United States and elsewhere? This Article attempts to answer these questions.<sup>27</sup>

First, this Article points out that scholars commenting on the resale royalty right, on both sides of the debate, share a common problem. In short, they lack empirical data to support their claims—a deficit that this Article calls the information problem. This information problem explains why scholarly arguments about, and especially criticisms of, the right have lacked force and failed to influence lawmakers.<sup>28</sup>

Second, this Article argues that lawmakers should pay attention to the scholarly debate surrounding the right—but not in the way that one might expect. Rather than focus on the normative and economic

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*the United States*, 3 B.C. INT'L & COMP. L. REV. 433 (1980).

<sup>21</sup> See, e.g., SIMON STOKES, ARTIST'S RESALE RIGHT (DROIT DE SUITE): LAW AND PRACTICE 5 (2006).

<sup>22</sup> See, e.g., Hansmann & Santilli, *supra* note 19, at 264, 267.

<sup>23</sup> *Id.* at 260.

<sup>24</sup> See, e.g., John Henry Merryman, *The Wrath of Robert Rauschenberg*, 41 AM. J. OF COMP. L. 103, 123 (1993).

<sup>25</sup> See, e.g., STOKES, *supra* note 21, at 7 (detailing arguments that the *droit de suite* has a negative economic effect on various parties); ROLAND KIRSTEIN & DIETER SCHMIDTCHEN, DO ARTISTS BENEFIT FROM RESALE ROYALTIES? AN ECONOMIC ANALYSIS OF A NEW EU DIRECTIVE, at 16, 7 (2000), [http://econstor.eu/bitstream/10419/23109/1/2000-07\\_dds4.pdf](http://econstor.eu/bitstream/10419/23109/1/2000-07_dds4.pdf) (arguing that the *droit de suite* “places the artists in a worse position” because “[a] rational dealer will discount the expected resale royalty and subtract its present value from the amount he [would be] willing to pay if a *droit de suite* were not in place,” resulting in lower overall profits for artists).

<sup>26</sup> See, e.g., Merryman, *supra* note 24.

<sup>27</sup> Given that the right already exists in many countries, and the United States may soon adopt it, this Article does not consider whether the right should exist as a normative matter. Instead, it takes a practical approach to the resale royalty right.

<sup>28</sup> See *infra* Part III.C.

arguments for and against the right, lawmakers must take note of the information problem, as it could have serious implications for the efficacy of the resale royalty right in practice. Lawmakers clearly have some awareness of this deficit, as recently passed and proposed resale royalty laws demonstrate.<sup>29</sup> But no scholar to date has fleshed out why the information problem exists in the first place and how it affects the right in practice.

This Article illustrates that existing resale royalty laws assume a world in which certain information is available to various parties, such as sellers, artists, and collecting societies.<sup>30</sup> However, the art world does not meet this description. Secrecy norms pervade the art market, especially in the United States: market players fiercely guard information about art sales—the very information that is necessary for the resale royalty right to operate effectively in practice.<sup>31</sup> This conflict between law and norms poses significant challenges for various forms of the resale royalty right.<sup>32</sup>

This Article's conclusion suggests that it may not be prudent for Congress to codify the right at this time. Nonetheless, the history of the right indicates that federal lawmakers may adopt the right in the near future despite this practical roadblock; indeed, there is something about the resale royalty right that appeals strongly to the popular imagination. Thus, this Article carefully considers both the recently proposed EVAA and several other possibilities for how lawmakers might overcome, or at least minimize, the information problem. While it may be impossible to ensure that the right always operates effectively in practice, lawmakers can, and should, structure the right in a way that recognizes, and pushes back against, the secrecy norms that loom over the art market. Lawmakers could achieve this goal in several ways, but the most promising option would be a scheme requiring parties to art transactions to disclose relevant information through a registration system.<sup>33</sup>

This Article proceeds in six substantive parts. Part II provides an updated history of the right and describes recent developments in the United States. Part III describes the scholarly debate surrounding the

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<sup>29</sup> See *infra* Part III.C & Part VI.

<sup>30</sup> See *infra* Part VI.

<sup>31</sup> See *infra* Part IV.

<sup>32</sup> See *infra* Part V.

<sup>33</sup> See *infra* Part VI.

right and points out that scholars face an information problem. Part IV goes to the root of the problem: the secrecy norms that pervade the art market. Part V demonstrates how these norms conflict with the structure of existing resale royalty laws, creating an information problem for the resale royalty right itself. Part VI considers the EVAA and several other possibilities for ameliorating this conflict; it then argues that a registration scheme would provide the most promising solution, albeit an incomplete one. This Article concludes by highlighting the implications of the information problem and the suggested fixes for other areas of art law.

## II. THE HISTORY OF THE RIGHT

The resale royalty right has garnered tremendous political popularity over the years. To date, at least fifty countries have adopted some form of the right, and the United States may be next in line.

### A. *The Right Abroad*

The resale royalty right originated in Europe almost a century ago. In 1920, France became the first country to enact resale royalty legislation.<sup>34</sup> The French parliament adopted the *droit de suite* “after hearing lengthy descriptions of artists who died in misery at a time when their paintings were bringing enormous sums, among them Millet, Cezanne, and Gauguin.”<sup>35</sup> In order “to permit the participation of the artist in future sales of his creative work,”<sup>36</sup> French lawmakers

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<sup>34</sup> See Loi de 20 mai 1920 (1921) Recueil Dalloz Périodique et critique (D.P. IV) 335, (1920) Duvergier & Bocquet (Duv. & Boc.) 539, as amended by Loi de 11 mars 1957 [Copyright Act of 1957], art. 42 [1957] J.O. 2723, 2726-27 (1957) B.L.D. 197, 202 [hereinafter 1957 Act]. The 1920 Act was later incorporated into the copyright law of 1957. For a description of the differences between the two versions, see Rita E. Hauser, *The French Droit de Suite: The Problem of Protection for the Underprivileged Artist Under the Copyright Law*, 11. COPYRIGHT L. SYMP. (ASCAP) I (1962). It is not surprising that France was the first country to codify the resale royalty right into law, given that moral rights, which are closely related to the resale royalty right, originated in France as well. See Robert C. Bird & Lucille M. Ponte, *Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities Under the U.K.'s New Performances Regulations*, 24 B.U. INT'L L.J. 213, 213-14 (2006) (providing an overview of how moral rights developed in France through judicial decisions, starting in the 1700s). To this day, “[i]t is generally undisputed that France has offered the most advanced protection of moral rights, including the rights of disclosure, retraction, attribution, integrity, and resale royalties, as well as protections against misattribution, excessive criticism, and attacks on the creator’s personality.” *Id.*

<sup>35</sup> Hauser, *supra* note 34, at 2-3.

<sup>36</sup> *Id.* at 3.

provided that artists would be entitled to collect three percent of the total sales price of their original artworks when such works are sold through public auction or private sale.<sup>37</sup> This right is inalienable: it is “both unwaivable (that is, the artist cannot sell works that are free of the obligation to pay a resale royalty) and nonassignable (that is, the right to collect resale royalties in a given work cannot be transferred by the artist to another person).”<sup>38</sup>

Within fifty years after France adopted the resale royalty right, several European countries followed suit.<sup>39</sup> In each country, the basic structure of the resale royalty right remained the same; that is, the laws provide that artists receive a payment when their works are sold on the secondary market.<sup>40</sup> But each country made alterations as well. For example, the German law applies only to public auctions, and it entitles artists to collect five percent of the total sale price.<sup>41</sup> Under the Italian law, artists may collect between two and ten percent of any profit (rather than the total sales price) made on sales of their works; the exact percentage is determined based on a complicated sliding scale mechanism.<sup>42</sup>

In the 1960s and 1970s, the resale royalty right saw a huge surge in popularity.<sup>43</sup> In 1971, the drafters of the Berne Convention, the

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<sup>37</sup> The 1920 law covered only public auction sales; the 1957 law added private sales. Several commentators point out, however, that “the extension of the *droit du suite* to dealers by the law of March 11, 1957, appears not to have been followed or enforced.” TAD CRAWFORD, LEGAL GUIDE FOR THE VISUAL ARTIST 115 (4th ed. 1999); see also Vickers, *supra* note 20, at 439 (“The 1957 Act was . . . expanded to include private sales by art dealers, but this aspect of the law has not been implemented” (footnote omitted)). This right lasts for the term of the copyright. See 1957 Act, *supra* note 34. If an artist has died, the royalty goes to his or her heirs. *Id.*

<sup>38</sup> Hansman & Santilli, *supra* note 19, at 260. The right is similarly inalienable in other countries. *Id.*

<sup>39</sup> LILIANE DE PIERREDON-FAWCETT, THE DROIT DE SUITE IN LITERARY AND ARTISTIC PROPERTY 4-5 (1991). Belgium enacted resale royalty legislation in 1921, Poland in 1931, Italy in 1941, and Germany in 1965. *Id.*

<sup>40</sup> Although these laws are similar in form, one commentator suggests that the German and Italian laws “differ fundamentally [from the French law] in [their] underlying conceptual justification.” Vickers, *supra* note 20, at 441 (“The German Law is based on the ‘theory of intrinsic value’ which is premised on the notion that the greater value which is later recognized in the work has always existed in latent form and any increase in the value is due solely to the artist’s earlier labors.”).

<sup>41</sup> *Id.* at 441.

<sup>42</sup> See Hansmann & Santilli, *supra* note 19, at 259. Artists are “entitled to collect between two and ten per cent of the amount by which any subsequent sale price of his work, in a public sale, exceeds the work’s first sale price.” *Id.*

<sup>43</sup> As one commentator put it, the right “found a second wind” at this time. PIERREDON-

international agreement governing copyright law, added a provision to the treaty encouraging signatories to codify the right in their respective countries.<sup>44</sup> Article 14*ter* states that artists shall “enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.”<sup>45</sup> During this period, numerous countries in Europe and elsewhere—including Algeria, Chile, Czechoslovakia, Guinea, Mali, and Turkey, to name just a few—adopted variations of the right.<sup>46</sup> Not surprisingly, the right proved especially popular in civil law countries, which have long recognized various protections for creative persons, including moral rights.<sup>47</sup>

This momentum has continued into the past decade. In recent years, numerous common law countries, which do not have the strong tradition of artists' rights found in civil law countries,<sup>48</sup> have adopted variations of the resale royalty right.<sup>49</sup> In 2001, for example, the EU

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FAWCETT, *supra* note 39, at 6.

<sup>44</sup> Berne Convention for the Protection of Literary and Artistic Works, art. 14*ter*, § 1, Sept. 9, 1886, revised July 24, 1971, 828 U.N.T.S. 221, available at <http://www.wipo.int/clea/docs/en/wo/wo001en.htm> [hereinafter Berne Convention]. See generally Robert Plaisant, *Droit de Suite and Droit Moral under the Berne Convention*, 11 COLUM.-VLA J.L. & ARTS 157 (1986-87).

<sup>45</sup> Berne Convention, *supra* note 44, art. 14*ter*, § 1. Article 14*ter* further provides that this protection “may be claimed in a country of the Union only if legislation in the country to which the [artist] belongs so permits and to the extent permitted by the country where this protection is claimed.” *Id.*, art. 14*ter*, § 2. In other words, the exercise of the right “is conditional on reciprocity,” a “very rare derogation from the fundamental principles of the convention.” Plaisant, *supra* note 44, at 158.

<sup>46</sup> For a more comprehensive list, see PIERREDON-FAWCETT, *supra* note 39.

<sup>47</sup> Bird & Ponte, *supra* note 34, at 213-14. As Bird and Ponte explain, “Civil law nations typically take a dualistic approach [to providing legal protections for creative persons], asserting that a creator’s legal rights involve two distinct elements: one based in property or economic rights; the other in moral or personal rights.” *Id.* The resale royalty right, and moral rights such as the right of integrity and attribution, are easily recognized within this kind of system. *Id.* at 214 (“The civil law dualistic approach, and its projection of a creator’s moral rights, is favored in the provisions of major international agreements, such as the Berne Convention . . .”).

<sup>48</sup> *Id.* at 414. In contrast to civil law countries, “[c]ommon law nations generally apply a monist legal perspective in which moral rights are not separately recognized but are rolled into the general protections afforded a creator’s property or economic rights under copyright.” *Id.* Certain common law countries, including the United Kingdom and the United States, “have clung steadfastly to th[is] monist legal perspective that provides very limited moral rights protections.” *Id.*

<sup>49</sup> The addition of the resale royalty right to the Berne Convention undoubtedly played a role in this trend. Bird and Ponte also point to the importance of the Internet: “In earlier times, the[] conflicting approaches [between civil law and common law countries] were allowed to operate quietly within each respective nation’s borders. However, the explosive growth of the Internet and online services and technological tools . . . has resulted in growing international

issued a directive harmonizing the resale royalty laws of all its member states and implementing the right in those countries that did not already have such laws.<sup>50</sup> Following this directive, the United Kingdom codified the right in 2006.<sup>51</sup> In addition, in 2009, the Australian government enacted a resale royalty scheme, which became effective in 2010.<sup>52</sup>

### B. *The Right in the United States*

Although Congress has not yet codified the right in the United States, federal lawmakers have considered adopting resale royalty legislation several times in the past fifty years. Indeed, in the 1960s and 1970s, the right became the focus of popular attention in the United States just as it did abroad. This popularity may have been spurred by several prominent law review articles published at the time, all of which focused on the resale royalty trend in Europe.<sup>53</sup> However, resale royalty legislation did not become a real possibility in the United States until a famous incident involving the artist Robert Rauschenberg. In 1973, Rauschenberg publicly lashed out against art collector Robert Scull after Scull sold one of Rauschenberg's works—which Scull had purchased from the artist for \$900—for over \$85,000 at a public auction.<sup>54</sup> Rauschenberg and many other artists were outraged.<sup>55</sup> Within five years of this incident, resale royalty bills appeared before several state legislatures and in Congress.<sup>56</sup>

Ultimately, only a few states incorporated the resale royalty right into law. Most notably, in 1976, California passed the California

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pressures on the U.K. and the U.S. to move toward greater recognition of, and respect for, moral rights." *Id.* at 215.

<sup>50</sup> See generally STOKES, *supra* note 21, at 11. Only Austria, the Netherlands, Ireland, and the United Kingdom had not adopted resale royalty legislation prior to the EU Directive. *Id.*

<sup>51</sup> See The Artist's Resale Right Regulations 2006, available at [http://www.legislation.gov.uk/uksi/2006/346/pdfs/uksi\\_20060346\\_en.pdf](http://www.legislation.gov.uk/uksi/2006/346/pdfs/uksi_20060346_en.pdf). The right becomes fully effective in the United Kingdom in 2012. *Id.*

<sup>52</sup> See Resale Royalty Right for Visual Artists Act 2009, available at <http://www.comlaw.gov.au/Details/C2009A00125>.

<sup>53</sup> See, e.g., Hauser, *supra* note 34; Diane B. 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); Paul Sherman, *Incorporation of the Droit de Suite into United States Copyright Law*, 18 COPYRIGHT L. SYMP. 50 (1970).

<sup>54</sup> Merryman, *supra* note 24, at 109-11.

<sup>55</sup> *Id.*

<sup>56</sup> Michael B. Reddy, *The Droit de Suite: Why American Fine Artists Should Have a Right to a Resale Royalty*, 15 LOY. L.A. ENT. L. REV. 509, 521 (1995).

Resale Royalty Act.<sup>57</sup> Some observers were surprised that the law passed with “little fanfare or opposition from either side of the debate.”<sup>58</sup> Still, this statute has generated much debate since it was enacted, mostly because many opponents believe the law to be unconstitutional.<sup>59</sup> Observers have suggested that the California law violates the Commerce Clause,<sup>60</sup> the Takings Clause,<sup>61</sup> the first sale doctrine,<sup>62</sup> and/or that it is preempted by the federal copyright statute.<sup>63</sup>

In October 2011, three classes of artists sued Christie's and Sotheby's, the two largest auction houses in the United States,<sup>64</sup> for allegedly failing to make payments under the California law.<sup>65</sup> On May 17, 2012, Judge Jacqueline Nguyen of the U.S. District Court for the Central District of California granted the auction houses' motion to

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<sup>57</sup> See CAL. CIVIL CODE 986. In addition to California, Puerto Rico and Georgia enacted statutes that include resale royalty provisions. See GA. CODE ANN. § 91-507(c) (the “Art-in-State Buildings Program”); 31 PUERTO RICO CIV. CODE § 1401(h) (outlining a comprehensive moral rights law, which includes a resale royalty requirement). Eleven other states (Florida, Illinois, Iowa, Maine, Michigan, Nebraska, New York, Ohio, Rhode Island, and Texas) have introduced, but never passed, resale royalty legislation. See Marilyn J. Kretsinger, *Droit de Suite: The Artist's Right to a Resale Royalty*, 15 HASTINGS COMM. & ENT. L.J. 967, 969 n.8 (1992).

<sup>58</sup> Reddy, *supra* note 56, at 521; see John E. McInerney III, *California Resale Royalties Act: Private Sector Enforcement*, 19 U.S.F. L. REV. 1, 7 (1984).

<sup>59</sup> Many of the general criticisms of the right, discussed in Part III.B, *infra*, also apply to California.

<sup>60</sup> U.S. CONST. art. I, § 8, cl. 3. The argument here is that the California law “may be overreaching” because it attempts to regulate interstate commerce, a power that is reserved to the federal government. Andrew Russeth, *The California Resale Royalties Law: A Primer*, GALLERIST NY (Oct. 28, 2011) <http://www.galleristny.com/2011/10/the-california-resale-royalties-law-a-primer/>.

<sup>61</sup> U.S. CONST., amend. 5; see, e.g., Emily Eschenbach Barker, *The California Resale Royalty Act: Droit de [not so] Suite*, 38 HASTINGS CONST. L.Q. 387 (2011) (arguing that “California’s statutory version of *droit de suite* . . . effects a Fifth Amendment taking of property and thus requires just compensation”).

<sup>62</sup> 17 U.S.C. §109(a). The first sale doctrine provides that creators have no right to control the subsequent dissemination of copies of works once they have been sold. *Id.* See generally I. Neel Chatterjee, *Imperishable Intellectual Creations: The Limits of the First Sale Doctrine*, 5 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 383 (1995).

<sup>63</sup> In *Morseburg v. Baylon*, 621 F.2d 972 (9th Cir. 1980), the Ninth Circuit Court of Appeals held that the Copyright Act of 1909 did not preempt the state law. But some commentators have argued that the law would be preempted under the amendments made in the Copyright Act of 1976. See, e.g., Gordon P. Katz, *Copyright Preemption Under the Copyright Act of 1976: The Case of Droit de Suite*, 47 GEO. WASH. L. REV. 200 (1978).

<sup>64</sup> The online auction company eBay was also named as a defendant.

<sup>65</sup> Complaint at 3, *Sam Francis Foundation v. Christie's, Inc.*, No. CV11-8605 (C.D.C.A. 2011).

dismiss, declaring that the California Resale Royalty Act is unconstitutional on Commerce Clause grounds.<sup>66</sup> Nguyen explained that the statute violates the Commerce Clause per se because it “explicitly regulates applicable sales of fine art occurring wholly outside California.”<sup>67</sup> “Under its clear terms, the [law] regulates transactions occurring anywhere in the United States, so long as the seller resides in California,” Nguyen wrote, and therefore it overreaches, attempting to regulate an area that only Congress may regulate constitutionally.<sup>68</sup> As of this writing, it is unclear whether the artists will take their case to the Ninth Circuit, but an appeal seems likely.<sup>69</sup> If no appeal occurs, or if the Ninth Circuit affirms the district court’s ruling that the law is unconstitutional, then a federal law would be the only option for the resale royalty right in the United States.<sup>70</sup>

Congress has refused thus far to adopt a federal resale royalty law, though it has considered bills on several occasions. In 1978, Representative Henry Waxman of California sponsored a resale royalty bill, which would have granted artists five percent of the sale price of works sold in interstate commerce for \$1000 or more.<sup>71</sup> In 1986 and 1987, Senator Edward Kennedy and Representative Edward Markey (both of Massachusetts) proposed, in two separate bills, a royalty of seven percent of the resale profit.<sup>72</sup> After the United States joined the Berne Convention in 1988, Congress was pressured to provide more protections for artists in the form of the Visual Artists Rights Act of

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<sup>66</sup> Estate of Graham v. Sotheby’s Inc., 2012 WL 1765445 (May 17, 2012).

<sup>67</sup> *Id.* at \*5.

<sup>68</sup> *Id.* As Nguyen recognized, “[e]ven the artist—the intended beneficiary of the CRR—does not have to be a citizen of, or reside in, California.” *Id.* (citation omitted). Part V.A, *infra*, explains how the California law operates in more detail.

<sup>69</sup> Eric George, attorney for the plaintiffs, told the *Los Angeles Times* that “[f]or a single federal judge to invalidate the law . . . marks a departure from established constitutional law. We are confident, as both sides have always believed, this case will ultimately be resolved by the Ninth Circuit Court of Appeals, which already upheld this very statute in 1981.” Jori Finkel, *Federal Judge Finds California Resale Royalty Act Unconstitutional*, L.A. TIMES (May 21, 2012), <http://www.latimes.com/entertainment/arts/culture/la-et-cm-california-art-resale-royalty-act-unconstitutional-20120521,0,705518.story>.

<sup>70</sup> Under the Commerce Clause reasoning, other states could not pass laws that similarly apply to interstate transactions. Presumably, these states could still codify the right for intrastate transactions, but that kind of law would have little effect, as few art sales occur entirely within one state.

<sup>71</sup> H.R. 11403, 95th Cong. (1978).

<sup>72</sup> S. 2796, 99th Cong. (1986); H.R. 5722, 99th Cong. (1986); S. 1619, 100th Cong. (1987). The resale profit is the difference between the purchase and resale prices. *Id.*

1990.<sup>73</sup> The early drafts of VARA, which codifies certain moral rights for American artists,<sup>74</sup> encompassed the resale royalty right. However, “due to opposition from art dealers, gallery owners, auction houses, and others,” the provision was dropped before Congress passed VARA in 1990.<sup>75</sup> Instead, the final version of VARA required the U.S. Copyright Office to compose a report exploring the feasibility of incorporating the right into American copyright law in the near future.<sup>76</sup>

On December 1, 1992, after a notice-and-comment period and hearings, the Copyright Office issued its report.<sup>77</sup> Although one scholar has suggested that a majority of those who submitted comments supported the grant of the resale royalty right to American artists,<sup>78</sup> the Copyright Office ultimately recommended that the United States not implement the right at that time. The report explained that the Copyright Office lacked “sufficient current empirical data” with which to make an informed decision.<sup>79</sup> Since “[a]ny conclusions that [it] could make . . . would be based on anecdotal evidence,” the Copyright Office determined that “sufficient economic and copyright policy justification [did not] exist[] to establish droit de suite in the United States.”<sup>80</sup> In other words, Congress should wait for more conclusive data.<sup>81</sup> Moreover, the report indicated that, even if such data did not become available, Congress should reconsider enacting the

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<sup>73</sup> 17 U.S.C. § 106A. See *infra* notes 85-86 for a discussion of how signatories of the Berne Convention exerted pressure on Congress. It is worth noting that VARA “was only reluctantly signed [by federal lawmakers] to bring the States into compliance with the Berne Convention (indeed, the United States resisted joining the Berne Convention because of opposition to granting artists moral rights).” Xiyin Tang, Note, *Another Economic Justification for Moral Rights, or, the Artist as Brand*, 122 YALE L.J. (forthcoming 2012) (citing Adolf Dietz, *The Artist's Right of Integrity Under Copyright Law—A Comparative Approach*, 25 I.I.C. 177, 179 (1994)); see also ART LAW HANDBOOK 53 (Roy S. Kaufman ed., 2000) (noting that “the United States has resisted implementing moral rights,” and that “[t]his became a significant issue when the United States acceded to the Berne Convention”).

<sup>74</sup> VARA covers only the moral rights of attribution and integrity. See 17 U.S.C. § 106A(a).

<sup>75</sup> Reddy, *supra* note 56, at 525.

<sup>76</sup> Pub. L. No. 101-650, § 608(b).

<sup>77</sup> COPYRIGHT OFFICE REPORT, *supra* note 9, at xv.

<sup>78</sup> Kretsinger, *supra* note 57, at 971 (noting that only a “vocal minority” opposed such legislation).

<sup>79</sup> COPYRIGHT OFFICE REPORT, *supra* note 77, at xv.

<sup>80</sup> *Id.* Indeed, the report hinted at the information problem discussed in Part III, *infra*.

<sup>81</sup> The authors of the report pushed for further empirical studies. See COPYRIGHT OFFICE REPORT, *supra* note 77.

right if the EU were to decide to harmonize its resale royalty laws.<sup>82</sup> As the previous Part noted, that time has come.<sup>83</sup>

### C. *Reconsidering the Right in the United States*

In addition to the EU directive, several factors led to the introduction of the EVAA in Congress this past December. First, as this Part has already described, numerous common law countries have codified the right in recent years.<sup>84</sup> As a result, international pressure, especially from other signatories of the Berne Convention, has been mounting against the United States. Because the Berne Convention contains a reciprocity component for the resale royalty right,<sup>85</sup> these countries, and some commentators, warn that the “survival of *droit de suite* depends on its internationalization.”<sup>86</sup> Observers have further suggested that Congress should adopt the right “in order to remain in step with other developed countries.”<sup>87</sup>

Second, on the domestic front, artists’ advocacy groups increasingly have been lobbying Congress. For example, as of August 2011, *The Art Newspaper* reported that the Artists’ Rights Society, a copyright and licensing collecting agency in the United States, was “pushing for legislation that would see *droit de suite*, or artists’ resale rights, become federal law.”<sup>88</sup> In November 2011, the Visual Artists and Galleries Association and the Artists’ Rights Society, among other advocacy groups, joined the lobbying push.<sup>89</sup> These domestic efforts

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<sup>82</sup> Presumably, the Copyright Office worried that American artists would move to Europe, or at least exploit their works only in Europe, should the laws be more favorable there.

<sup>83</sup> See *supra* Part II.A; see, e.g., Katreina Eden, *Fine Artists’ Resale Royalty Right Should Be Enacted in the United States*, 18 N.Y. INT’L L. REV. 121, 122-23 (2005) (“In July 2001, the European Union came to an agreement that resale royalties for artists should be statutory as early as 2006 and no later than 2012. With this unification in Europe, Congress should now reconsider enacting an artists’ resale royalty right in the United States.”).

<sup>84</sup> See *supra* Part II.A.

<sup>85</sup> See *supra* note 45 and accompanying text.

<sup>86</sup> Kretsinger, *supra* note 57, at 973. The idea here is that if the right exists only in some countries, the art market may move to those countries that do not have the right; countries that have the right would be harmed, which might lead them to repeal the right.

<sup>87</sup> Damich, *supra* note 11, at 406; see also Gumbo, *supra* note 10, at 375 (“Following the enactment of the EU Directive, the United States should be hard-pressed to implement its own federal measures.”).

<sup>88</sup> Helen Stoilas, *US Congress Lobbied Over Resale Rights*, THE ART NEWSPAPER (Aug. 4, 2011), <http://www.theartnewspaper.com/articles/US-Congress-lobbied-over-resale-rights/24284>.

<sup>89</sup> See Francie Kammeraad, *Droit de Suite: Lobbying for Resale Rights in the United States*

have recently gained momentum due to the California lawsuit,<sup>90</sup> which has garnered significant media attention and reinvigorated the conversation about codifying the right on the federal level.<sup>91</sup> Furthermore, in the past year and in the wake of the economic recession, the art market has “soared to stupefying heights.”<sup>92</sup> For example, in May 2012, Edvard Munch’s famous pastel, entitled *The Scream*, sold at auction for \$119.9 million, the highest price ever achieved for a single work at auction.<sup>93</sup> Such enormous transactions have drawn attention to the art market and underscore advocates’ efforts.

Thus, it came as no surprise that, in December 2011, congressional delegates in both the House and the Senate introduced resale royalty legislation in the form of the EVAA. Still, the fact that the right has proven popular in other countries, and that Congress has been facing pressure from both the international community and domestic groups, does not mean that the United States should adopt the right at this time. Accordingly, the next parts of this Article attempt to evaluate whether Congress should pass the EVAA or some other variation of the resale royalty right—or refuse to follow the trend that started a century ago in France.

### III. THE SCHOLARLY DEBATE

In order to determine whether Congress should codify the resale royalty right into law, this Part probes into the longstanding scholarly conversation surrounding the right.

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(Nov. 17, 2011), JETLaw, <http://www.jetlaw.org/?p=9448>; Andrew Russeth, *VAGA Will Lobby for Federal Resale Royalties Bill* (Nov. 2, 2011), GALLERIST NY, <http://www.galleristny.com/2011/11/vaga-plans-federal-resale-royalties-bill-as-artists-and-auction-houses-battle/>.

<sup>90</sup> See *supra* notes 65-70 and accompanying text.

<sup>91</sup> See, e.g., Patricia Cohen, *Artists File Lawsuits, Seeking Royalties*, N.Y. TIMES (Nov. 1, 2011), <http://www.nytimes.com/2011/11/02/arts/design/artists-file-suit-against-sothebys-christies-and-ebay.html?pagewanted=all>.

<sup>92</sup> Adam Lindeman, *The 1% of the 1%: Stratospheric Prices at Auction Mask the Teeth Grinding of the Real Art Market*, N.Y. OBSERVER (Nov. 16, 2011), <http://www.adam.lindemann.com/the-1-of-the-1-stratospheric-prices-at-auction-mask-the-teeth-grinding-of-the-real-art-market/>.

<sup>93</sup> Carol Vogel, *'The Scream' Is Auctioned for a Record \$119.9 Million*, N.Y. TIMES (May 2, 2012), <http://www.nytimes.com/2012/05/03/arts/design/the-scream-sells-for-nearly-120-million-at-sothebys-auction.html>.

*A. Rationales Behind the Right*

Proponents of the resale royalty right advance several normative rationales.<sup>94</sup> The primary justification for the right is the motivation behind the EVAA: equity for visual artists, or the notion that the right would “put artists on par with [other creative persons] who may continue to earn royalties on the use of their works throughout the term of copyright.”<sup>95</sup> Under most countries’ copyright laws, a book author, for example, reaps continuous benefits from the sale of his books; he generally receives royalties each time his book is sold, so that “when his book is popular, he is enriched.”<sup>96</sup> In contrast, in a world with no resale royalty right, “[t]he sale of [an artist’s] painting or sculpture is a single, final event for him; the copyright mechanism offers him no technique for obtaining the comforts of continuing financial stake in future sales of his art work.”<sup>97</sup> This rationale, which relies on “a vision of the starving artist,”<sup>98</sup> views the right as a necessary remedy for “unjust treatment.”<sup>99</sup>

Some commentators further highlight the “personal link” between the artist and his artwork.<sup>100</sup> They contend that any appreciation in value of a work is “attributable to the artist’s ‘genius’ and increasing reputation.”<sup>101</sup> Even though “[a]rtists will initially sell their works . . . often as a matter of necessity,” at unfairly low prices, they nonetheless continue to participate in the process by which their works appreciate in value.<sup>102</sup> The right thus recognizes that it is “equitable that the artist

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<sup>94</sup> Many of these rationales resemble those that are advanced with respect to moral rights. See generally Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1 (1997).

<sup>95</sup> STOKES, *supra* note 21, at 5; see also Gumbo, *supra* note 10; Reddy, *supra* note 56, at 517.

<sup>96</sup> Monroe E. Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite*, 77 YALE L.J. 1333, 1343 (1968) (describing arguments in favor of the right).

<sup>97</sup> *Id.* As Merryman explains, “The art market has two major sectors: the primary (first sale) market and the secondary (resale) market. The artist’s main source of income is the primary market.” Merryman, *supra* note 24, at 105. Note that artists can enter into private contracts with dealers to earn royalties on future sales, but this practice is rare, because “most artists simply do not have sufficient bargaining power to persuade potential purchasers to sign” such agreements. Vickers, *supra* note 20, at 449.

<sup>98</sup> Price, *supra* note 96, at 1335.

<sup>99</sup> Gumbo, *supra* note 10, at 359-60.

<sup>100</sup> Reddy, *supra* note 56, at 517 (1995); see also PIERREDON-FAWCETT, *supra* note 39, at 11.

<sup>101</sup> STOKES, *supra* note 21, at 5; see also Merryman, *supra* note 24, at 111.

<sup>102</sup> STOKES, *supra* note 21, at 5.

should take a share of the increasing value of their works.”<sup>103</sup> Furthermore, the right is generally inalienable and unwaivable because of the concern that the uneven “bargaining situation of young artists vis-à-vis gallerists and collectors” might lead artists to bargain away their right even when doing so is not in their best interests.<sup>104</sup>

Finally, some proponents take an economic approach and argue that, like copyright laws more generally, the right encourages artistic endeavors.<sup>105</sup> The idea is that “[t]he artist will strive to create a significant body of work to enhance their reputation and thereby increase the amount they will receive” in royalty payments.<sup>106</sup> The right might even create incentives for artists to work to improve their reputations in order to increase the value of their works,<sup>107</sup> which would result in an overall “richer artistic patrimony.”<sup>108</sup>

### B. *Criticisms of the Right*

Although these rationales have held strong over the years, the scholarly attitude toward the resale royalty right has commonly been negative.<sup>109</sup> Some critics simply disagree with the aforementioned rationales as a normative matter. Such critics argue, for example, that artists do not actually receive unfair treatment relative to authors and composers: while “authors’ and composers’ royalties are associated with the reproduction of a work of art,” resale royalties for artists are based on resales of the original work.<sup>110</sup> Critics also contend that the right relies on “romantic nineteenth-century notions about the artist in

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<sup>103</sup> *Id.*

<sup>104</sup> Clare McAndrew & Lorna Dallas-Conte, *Implementing Droit de Suite in England*, at 19, available at <http://www.artscouncil.org.uk/media/uploads/documents/publications/325.pdf>.

<sup>105</sup> See Maryam Dilmaghani, *Visual Artists’ Resale Royalty: An Application of the Principal and Agent Model*, 5 REV. ECON. RESEARCH COPYRIGHT ISSUES 37, 39 (2008); Hansmann & Santilli, *supra* note 19, at 265; Sam Ricketson, *Moral Rights and the Droit de Suite: International Conditions and Australian Obligations*, 1 ENT. L. REV. 78, 85-86 (1990).

<sup>106</sup> STOKES, *supra* note 21, at 6.

<sup>107</sup> See generally John L. Solow, *An Economic Analysis of the Droit de Suite*, 22 J. OF CULTURAL ECON. 209 (1998).

<sup>108</sup> Hansmann & Santilli, *supra* note 19, at 265.

<sup>109</sup> See *id.* at 260.

<sup>110</sup> *Id.* at 268 (discussing this objection).

society,”<sup>111</sup> and that the idea that “the artist is the sole source of the work’s market value” is “folklore.”<sup>112</sup>

With regard to common law countries in particular, opponents often denounce the right because they say that it conflicts with fundamental common law principles, such as the free alienability of property and freedom of contract.<sup>113</sup> Professor Merryman asks, for example: “Why should the artist who wishes to do so be unable to transfer her resale proceeds right along with the painting, drawing or sculpture on the first sale to the collector or museum?”<sup>114</sup> “If the artist is competent to set a price on her work and sell it,” then she should also be competent, it would seem, to “put a price on the proceeds right and sell that.”<sup>115</sup> These critics point out that “no similar rule prohibits authors or composers from selling their works for a lump sum and waiving their rights to future royalties,”<sup>116</sup> so that making the right inalienable seems to undercut the rationale that artists should be treated similarly to other creative persons.<sup>117</sup>

Furthermore, many critics attack the right on economic grounds. They suggest that the right does more harm than good—that it actually harms the artists whom it is meant to help. These critics suggest that the right ultimately “places the artist in a worse position.”<sup>118</sup> The idea is that, when purchasing a work from an artist, “[t]he dealer will . . . pay the artist less for the work than if the *droit de suite* did not apply, as the dealer will have to share any future gains with the artist.”<sup>119</sup>

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<sup>111</sup> Price, *supra* note 96, at 1351.

<sup>112</sup> Merryman, *supra* note 24, at 109; *see also* Amy Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 271 (2009) (arguing that “the best thing for the public’s interest in art might be to free art from the shackles of the artist—or more precisely, from our fantasies of the solo genius artist”).

<sup>113</sup> *See* Michael Rushton, *The Law and Economics of Artists’ Inalienable Rights*, J. CULTURAL ECON. (2001) (“[W]hether or not the case can be made that *droit de suite* can lead to efficiency gains, a government mandated scheme that is inalienable and unwaivable is difficult to justify.”); *see also* Tepper, *supra* note 3, at 6. Still, the United States and other common law countries have adopted moral rights laws, which are similarly inalienable and unwaivable, so this criticism alone should not be fatal to the resale royalty right.

<sup>114</sup> Merryman, *supra* note 24, at 123.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* 123-24.

<sup>117</sup> *See supra* notes 95-99 and accompanying text.

<sup>118</sup> KIRSTEIN & DIETER SCHMIDTCHEN, *supra* note 25.

<sup>119</sup> STOKES, *supra* note 21, at 7. In some cases, dealers might choose not to purchase artworks at all. *See* Gilbert S. Edelson, *The Case Against an American Droit de Suite*, 7 CARDOZO ARTS & ENT. L.J. 260, 262 (1989).

Moreover, since “the only realistic source of income for their art is, for most working artists, first sales,” many artists would never even receive the promised royalty.<sup>120</sup> This effect could “resound throughout the system” and cause harm to the market more generally.<sup>121</sup>

Lastly, some opponents point out that the resale royalty right does not get enforced in practice. They argue that, in many countries where the right has been enacted, it is “neglected, underused, even moribund.”<sup>122</sup> This argument has been put forth especially with regard to the California statute. For instance, one commentator has said of the California law, that “[n]obody’s paid, nobody’s sued, everybody’s avoiding it.”<sup>123</sup> This criticism is especially troublesome, for if the right does not operate effectively in practice, then it would never achieve the stated rationales.

### C. *The Information Problem*

This academic debate, which has raged on for almost a century, stands in stark contrast to the political picture described earlier in this Article. Indeed, while scholars have always been divided on, and often negative toward, the resale royalty right, the right continues to enjoy tremendous political popularity throughout the world.<sup>124</sup> What might explain this disconnect? And how, if at all, should the scholarly conversation be informing lawmakers?

Despite commentators’ widespread disagreement with regard to the right, a common thread runs through the scholarly conversation: both sides of the debate lack empirical data—that is, they lack information—to support their claims regarding the resale royalty right. Commentators do not focus on this point, but they subtly refer to it often. One academic notes, for example, that “there is very little

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<sup>120</sup> Merryman, *supra* note 24, at 107.

<sup>121</sup> *Id.* at 105.

<sup>122</sup> Goetzl, *supra* note 20, at 255.

<sup>123</sup> William Bates, *Royalties for Artists: California Becomes the Testing Ground*, N.Y. TIMES (Aug. 14, 1977), at Arts & Leisure 67 (quoting art dealer Ben Horowitz); see also McNerney, *supra* note 58, at 13 (referring to enforcement as “the major problem of the act”); Russeth, *supra* note 60 (“[T]he law is not frequently enforced . . .”); Lewis D. Solomon & Linda V. Gill, *Federal and State Resale Royalty Legislation: “What Hath Art Wrought?”*, 26 UCLA L. REV. 322, 335 (1978) (“To date, there is no evidence that a royalty has actually been paid [in California].”).

<sup>124</sup> See *supra* Part II.

factual information [about the art market] available.”<sup>125</sup> Another commentator points out that there is “no reliable official source of information” on the frequency or amount of resales, the prices paid for works, or how often royalties are paid in countries that have adopted the right (to name just a few examples).<sup>126</sup> And yet another observer explains that “the problem [of evaluating the effect of the droit de suite on the primary market] is compounded by a lack of empirical data on the art market.”<sup>127</sup>

Of course, such information would be crucial support for arguments for and against the right, especially those focusing on the right’s effects in practice.<sup>128</sup> It is *this* aspect of the scholarly debate—this information problem—to which lawmakers in the United States (and elsewhere)<sup>129</sup> should turn their attention.

Some studies on the right do exist, but they do not provide any definitive answers. For example, several studies suggest that, in the countries in which the right has been adopted, it has resulted in considerable amounts of royalty payments being distributed to artists and “no decrease in the price of first sales due to the resale royalty.”<sup>130</sup> Another study found, in direct contrast, that “[a]mong 29 jurisdictions . . . that recognize the right in their domestic legislation, 24 apply it little or not at all.”<sup>131</sup> Most recently, an EU study was inconclusive, unable “to establish how far the Right’s introduction is linked to the recent decline in the European art market” or find a link to “indicate systematic trade diversion within the EU away from those Member

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<sup>125</sup> Solomon & Gill, *supra* note 123, at 357.

<sup>126</sup> Goetzl, *supra* note 20, at 255.

<sup>127</sup> Vickers, *supra* note 20, at 459.

<sup>128</sup> As Professor Merryman recognizes, an “empirical basis” is necessary to make any “definitive judgment.” Merryman, *supra* note 24, at 118.

<sup>129</sup> Artists in Canada recently have been lobbying for resale royalty legislation as well. See *Visual Artists Vie for Cut of Resale Profits*, CBC NEWS (Nov. 28, 2011), <http://www.cbc.ca/news/arts/story/2011/11/28/art-resale-right-carfac-auction-gallery.html>.

<sup>130</sup> See, e.g., Eden, *supra* note 83, at 132; Plaisant, *supra* note 44, at 159.

<sup>131</sup> PIERREDON-FAWCETT, *supra* note 39, at 106.

States who introduced the right for living artists in 2006.”<sup>132</sup> The data that has been collected is at best “incomplete.”<sup>133</sup>

Thus, for the most part, scholars are left to “rely upon anecdotal evidence” to support their claims about the resale royalty right,<sup>134</sup> and the discussion has remained “primarily theoretical in nature.”<sup>135</sup> For instance, one author notes that “[o]pponents will occasionally refer to instances in which resale royalties were not paid . . . . On the other hand, in my capacity as an arts advocate . . . I hear of countless royalties paid to many artists [in California].”<sup>136</sup> Another scholar, prefacing his description of the art world, explains that “[t]his description is based on the writer’s decades of empirical observation, both as a teacher of art law and as the spouse and companion of an internationally active dealer in contemporary art.”<sup>137</sup> This kind of analysis is not problematic in itself; anecdotes can be quite helpful in thinking about how the right affects real players. But this reliance on anecdotal evidence may explain why scholarly arguments about, and especially criticisms of, the right have lacked force in the policy arena.

Lawmakers, including those in the United States, are undoubtedly aware of the information problem. Indeed, the Copyright Office’s report noted this deficit in 1992 when it recommended against adopting the right in the United States because it lacked “sufficient empirical data” with which to evaluate the potential effects of implementing the

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<sup>132</sup> Ivan Macquisten, *EU Impact Study on Resale Right Inconclusive*, ANTIQUES TRADE GAZETTE (Dec. 19, 2011), <http://www.antiquestradegazette.com/news/8101.aspx>; see also Marion Maneker, *Study Inconclusive on Artist Resale Rights Effect on the Secondary Market in Europe*, ART MARKET MONITOR (Dec. 19, 2011), <http://artmarketmonitor.com/2011/12/19/study-inconclusive-on-artist-resale-rights-effect-on-the-secondary-market-in-europe/>.

<sup>133</sup> Merryman, *supra* note 24, at 119. Another study, conducted by Jeffrey Wu in 1999, found only that the contemporary art market in the United States is very small and that it skews in favor of a few established artists. Wu conceded that empirical research on the art market is limited, especially with regard to the market in the United States compared to the market in other countries. See Jeffrey C. Wu, *Art Resale Rights and the Art Resale Market: A Follow-up Study*, 46 J. COPYRIGHT SOC’Y U.S.A., 531, 538-39 (1999).

<sup>134</sup> Goetzl, *supra* note 20, at 255.

<sup>135</sup> Alexander Weatherhall, *Harmonising the Droit de Suite; a Legal and Economic Analysis of the EC Directive and an Overview of the Recent Literature* 3 (German Working Papers in Law and Economics, Paper No. 22, 2003), available at [www.bepress.com/gwp/default/vol2003/iss1/art22](http://www.bepress.com/gwp/default/vol2003/iss1/art22) (“The analysis of droit de suite legislation here has to be primarily theoretical in nature as the field lacks extensive empirical research . . . .”); see Vickers, *supra* note 20, at 459 (“[I]n spite of this lack of statistical data, it is possible to make a tentative analysis.”).

<sup>136</sup> Goetzl, *supra* note 20, at 255.

<sup>137</sup> Merryman, *supra* note 24, at 105 n.4.

right.<sup>138</sup> Moreover, as later parts of this Article illustrate, the structures of several recently passed and proposed resale royalty laws—including the EVAA—suggest that lawmakers have some awareness of the problem.<sup>139</sup> Yet, they have approached the problem only hesitantly, and their efforts to ameliorate it have been limited.<sup>140</sup>

This Article argues, however, that lawmakers should address the information problem head-on, as it has significant implications for efforts to evaluate the resale royalty right. Without data, it is difficult for lawmakers to go beyond the theoretical realm occupied by scholars and to determine, for instance, whether the resale royalty right hurts or helps, whether it gets enforced, and so on—details that are of great importance from a policy perspective.<sup>141</sup> But in order to do so, it is necessary to understand why the problem exists in the first place.

#### IV. SECRECY NORMS IN THE ART MARKET

The information problem can be traced to the “wall of silence” that surrounds the art market.<sup>142</sup> As this Part shows, secrecy norms dominate both private sales and public auctions, making information about art transactions difficult, if not impossible, to come by.

##### A. *Private Sales*

Private sales, which account for approximately sixty percent of all art transactions,<sup>143</sup> “compose the most opaque segment of the largely

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<sup>138</sup> COPYRIGHT OFFICE REPORT, *supra* note 77, at xv; *see supra* notes 79-82 and accompanying text.

<sup>139</sup> *See supra* Part VI for descriptions of several mechanisms—including limiting the right to public auctions and including in a right to information provision—that legislators have employed.

<sup>140</sup> *See supra* Part VI.

<sup>141</sup> *See* Vickers, *supra* note 20, at 459 (“Without this information it is difficult to assess the impact that the *droit de suite* might have on these first sales upon which artists depend for their steady income.”).

<sup>142</sup> Sarah S. Conley, *International Art Theft*, 13 WIS. INT’L L.J. 493, 493 (1994); *see also* Olav Velthuis, *Art Markets*, in A HANDBOOK OF CULTURAL ECONOMICS 33, 36 (Ruth Towse ed., 2011) (noting that “the art market is characterized by a lack of transparency”).

<sup>143</sup> Erica Coslor, *Transparency in an Opaque Market: Auction Prices as Anchors and Guideposts* (Mar. 22, 2011) (unpublished manuscript), available at [http://aahvs.duke.edu/uploads/media\\_items/coslor-transparency-in-an-opaque-market-03-22-2011.original.pdf](http://aahvs.duke.edu/uploads/media_items/coslor-transparency-in-an-opaque-market-03-22-2011.original.pdf).

Interestingly, “the most expensive painting ever”—Jackson Pollock’s abstract expressionist painting No. 5, which reportedly sold for \$140 million in 2006—“was not sold at auction, but through a private deal,” which meant that because “neither the buyer nor the seller ever confirmed the sale, we cannot know for sure which work of art is the most expensive ever and

unregulated art market.”<sup>144</sup> In such transactions, the seller or his agent communicates directly with buyers without advertising or disclosing the sale publicly.<sup>145</sup> It may seem obvious that private sales are just that—private. But the extent to which secrecy pervades these transactions is striking.

In order to understand this point, one must consider why sellers and buyers choose to engage in private sales instead of public auctions, where works often sell for higher prices, in the first place.<sup>146</sup> The reasons, of course, are varied, but generally parties choose the private route specifically because they want to keep the sale secret. As one commentator suggests, “For many sellers, the driving factor is fear. Fear that their friends will discover they need money. Fear that if a Picasso, Warhol, Monet or Modigliani does not sell at auction, it will be considered yesterday’s goods.”<sup>147</sup> Buyers may also prefer private sales for other reasons: because they “want to avoid household burglaries, art historians, or art fans,” or, more cynically, because they do not want “the IRS or other members of their estates” to know that they own valuable artworks.<sup>148</sup>

Those who conduct private sales—often art dealers or increasingly even auction houses, such as Christie’s and Sotheby’s—understand

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who owns it.” Velthuis, *Art Markets*, *supra* note 142, at 36.

<sup>144</sup> Katya Kazakina, *Bargain Warhols, Secrecy Bring Collectors to Private Art Sales*, BLOOMBERG NEWS (July 27, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=apWHlzppllaM>.

<sup>145</sup> Solomon & Gill, *supra* note 123, at 357 (“[T]he business is conducted by countless small galleries across the country with little contact between them, and each promoting its own type of art and those artists in which it seems to have faith.”).

<sup>146</sup> Carol Vogel, *More Artworks Sell in Private in Slowdown*, N.Y. TIMES (Apr. 26, 2009), <http://www.nytimes.com/2009/04/26/arts/design/26private.html> (“During good times, an auction is the obvious choice for any collector wanting to sell a work of art. But as the recession takes its toll, many collectors have changed strategies and retreated to the more hidden, and potentially less lucrative, world of private sales.”). For a fascinating look at how art pricing at auctions works, see generally Orley Ashenfelter & Kathryn Graddy, *Auctions and the Price of Art*, J. ECON. LITERATURE (Sept. 2003), at 763, available at <http://www.ppge.ufrgs.br/giacomo/arquivos/econ-cultura/ashenfelter-graddy-2003.pdf>.

<sup>147</sup> Vogel, *supra* note 146. The concern that a work will not sell at auction seems particularly salient in recent years. See Ivan Lindsay, *Bid Farewell—The Rise in Private Art Sales*, LINDSAY FINE ART, (Sept. 6, 2010), <http://www.oldmasters.net/journal/bid-farewell-the-rise-in-private-art-sales-spears-wms-issue-no-16-summer-2010/> (“When a painting fails at auction there is a perception that there must be something wrong with it and it normally means it is unsellable for at least five years, whereas if a private sale does not work, less damage is done to the picture’s reputation.”).

<sup>148</sup> Constance S. Bates, *An Unexplored International Market: The Art Market*, 11 ACAD. MARKETING SCI. 240, 244 (1983).

that their clients want privacy. Therefore, these parties generally “do not release sale information,”<sup>149</sup> even when prompted; and indeed, they are not required “to make public disclosure of any kind.”<sup>150</sup> In many cases, these parties do not encode the sale in a contract at all, for to put the sale into writing would be to risk revealing too much information.<sup>151</sup> Alternatively, the parties sign a written contract in which they agree to keep all aspects of the sale completely confidential.<sup>152</sup>

However, these private sales may come to light if confidentiality is broken. Take, for example, a 2010 case. Craig Robins, a collector, sued art dealer David Zwirner for allegedly breaking their confidentiality agreement. Zwirner told the artist Marlene Dumas that he had sold her painting, *Reinhardt's Daughter*, on Robins's behalf.<sup>153</sup> In response, Dumas apparently “blacklisted” Robins, preventing him from purchasing any more of her works on the primary market.<sup>154</sup> Dumas's response gives additional insight into why a seller might want to keep his sales secret: because he does not want to anger the artist when he makes a large profit from selling the artist's work.<sup>155</sup>

Private sales have become especially prevalent in recent years.<sup>156</sup> Many observers believe that the recent economic crisis in the United States has “chased speculators and other buyers out of the public art market and scared sellers with the risk of costly artworks flopping at auction.”<sup>157</sup> As uncertainty infiltrates the market, and prices are in

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<sup>149</sup> *Id.*; see Kazakina, *supra* note 144 (“The secrecy that makes these deals appealing to clients also precludes most participants from revealing any specifics about the transactions.”).

<sup>150</sup> Bates, *supra* note 148, at 244.

<sup>151</sup> In addition, some commentators say that to “interrupt [a sale] with legal documents” could harm “the relationship between collectors and dealers, which is built on trust, knowledge, and a sense of fairness.” Charlotte Burns, *Court Battles Fuels Calls for Less Art Market Secrecy*, ART NEWSPAPER (Apr. 29, 2010), <http://www.theartnewspaper.com/articles/Court-battle-fuels-calls-for-less-art-market-secrecy/20674> (quoting Lucy Mitchell-Innes, president of the ADAA).

<sup>152</sup> See *infra* notes 153-156 and accompanying text.

<sup>153</sup> Zwirner reportedly told Dumas about the sale because he was courting Dumas to work with his gallery. Edward Winkleman, *The Case for Droit de Suite in New York*, ART NEWSPAPER (Apr. 28, 2010), <http://theartnewspaper.com/articles/The-case-for-droit-de-suite-in-New-York/20673>.

<sup>154</sup> See *id.* (“[T]he perception persists today that to profit grossly from a living artist's work is unfair. This might explain why an artist, in anger, would choose to blacklist a collector who had flipped a painting.”).

<sup>155</sup> *Id.* Robins lost his case, in part because he could provide “no written evidence that the gallery ever agreed to keep the . . . sale confidential.” *Id.*

<sup>156</sup> See Vogel, *supra* note 146.

<sup>157</sup> Kazakina, *supra* note 144.

flux, “many collectors prefer the discretion and flexibility of a private sale over the auction room’s risk and visibility.”<sup>158</sup> Christie’s and Sotheby’s have responded to this trend by focusing on the private sales sectors of their businesses.<sup>159</sup> As more of the art market moves toward private sales, secrecy norms are becoming even more deeply entrenched.

The result of all this secrecy is that it is practically impossible to collect any information about private sales for empirical observation. Given the way in which these sales are conducted, third parties—including the artist herself—may never know a sale occurred in the first place. The details of a particular sale—such as the parties involved, the chain of title for the work, and the ultimate purchase price—are cloaked in confidentiality.<sup>160</sup>

### B. *Public Auctions*

Public auctions are, not surprisingly, more transparent than private sales. As the name suggests, these auctions are usually open to the public, and auction houses release certain information before and after bidding takes place. For instance, prior to an auction, the auction house may distribute a catalog of the sale; and afterwards, it will publish a price list.<sup>161</sup> As a result, the public can obtain certain information fairly easily, such as the fact that a sale is taking place and the ultimate purchase price for particular works.<sup>162</sup>

Nonetheless, public auctions, like private sales, often “leave[] a trail of question marks.”<sup>163</sup> Most sellers choose to auction their works

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<sup>158</sup> *Id.*

<sup>159</sup> Lindsay, *supra* note 147.

<sup>160</sup> See Conley, *supra* note 142, at 493 (“Dealers are reluctant to reveal their suppliers and buyers of art, or any other details surrounding their art transactions.”); see also Kathryn Walker Tubb, *The Antiquities Trade: an Archaeological Conservator’s Perspective*, in *ANTIQUITIES TRADE OR BETRAYED: LEGAL, ETHICAL AND CONSERVATION ISSUES* (K.W. Tubb ed., 1995) (“The art market cloaks itself in secrecy. The ownership, origins, history, and destination of an artifact are rarely divulged even in response to a direct question and are regarded as privileged information.”).

<sup>161</sup> Merryman, *supra* note 24, at 106.

<sup>162</sup> See Ashenfelter & Graddy, *supra* note 146, at 765 (“Included in the pre-sale catalogue is information on the title of a painting, the artist, the size of the painting, and the medium. The auction houses also publish low- and high-price estimates for the work. The auction house does not publish, and indeed is very secretive about, the seller’s reserve price for the work.”).

<sup>163</sup> Roberta Smith, *The Coy Art of the Mystery Bidder*, N.Y. TIMES (May 8, 2010), <http://www.nytimes.com/2010/05/09/weekinreview/09smith.html>.

through either Christie's or Sotheby's.<sup>164</sup> These auction houses gladly comply with sellers' requests to keep certain information—for example, the seller's name, location, contact information, and the chain of title for a work of art—strictly confidential.<sup>165</sup> Buyers often remain anonymous as well. As one commentator explains, “[M]any of the most serious bidders aren't even present at the time of the auction. Museums and prominent collectors often prefer to bid anonymously by phone or leave a maximum bid with an auction house representative because a sign of their interest could drive up the price.”<sup>166</sup>

Other aspects of public auctions are shrouded in secrecy as well. For example, most auctions operate with a reserve price, or “the minimum price the seller (consignor) is willing to accept and below which the seller's property will not be sold.”<sup>167</sup> The reserve price, which is agreed upon mutually by the seller and the auction house, is kept confidential; thus, art auction attendees are not privy to this information.<sup>168</sup> In many cases, during the auction, the auctioneer will announce and record bids called “chandelier bids,” which are essentially phantom bids that are meant “to get the bidding up to that reserve.”<sup>169</sup> This practice has been criticized for various reasons,<sup>170</sup> but the important point for the purposes of this Article is the element of secrecy that this practice entails: “None of the other bidders in the

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<sup>164</sup> *But see* Eric Smith, *Can You Still Love Fine Art in the Digital Age?*, FOXNEWS.COM (Mar. 21, 2012), <http://www.foxnews.com/opinion/2012/03/21/can-still-love-fine-art-in-digital-age/> (pointing to the growing popularity of online art auctions in recent years).

<sup>165</sup> This information may be kept confidential for many of the reasons described in Part IV.A, *supra*. Of course, in some cases it is easy to figure out who is the seller for a particularly well-known work of art. *See* Lindsay Pollock, *Steve Wynn, Christie's Anonymous Seller—Not So Much*, ART MARKET VIEWS (Oct. 18, 2010), <http://lindsaypollock.com/news/steve-wynn-christies-anonymous-seller-not-so-much/> (explaining that, even though Christie's did not officially disclose that Steve Wynn was the seller of a painting by Roy Lichtenstein, art market players undoubtedly knew that Wynn owned this famous painting).

<sup>166</sup> Sean Rocha, *How Does a Sotheby's Art Auction Work*, SLATE (May 7, 2004), <http://seanrocha.com/slate/how-art-auctions-work/>.

<sup>167</sup> *Frequently Asked Questions*, <http://www.christies.com/about/help/faq/faqtopic.aspx?language=&faqsubid=39> (last visited June 15, 2012).

<sup>168</sup> *Id.*; Orley Ashenfelter, *How Auctions Work for Wine and Art*, 3 J. ECON. PERSPECTIVE 23, 25 (1989) (“Auctioneers are very secretive about whether and at what level a reserve price may have been set, and there is a real auctioneer's art in getting the bid started on each item without revealing the reserve price.”).

<sup>169</sup> Daniel Grant, *Secrets of the (High-End) Art Market*, HUFFINGTON POST (Dec. 14, 2010), [http://www.huffingtonpost.com/daniel-grant/secrets-of-the-highend-ar\\_b\\_796356.html](http://www.huffingtonpost.com/daniel-grant/secrets-of-the-highend-ar_b_796356.html).

<sup>170</sup> *See* Daniel Grant, *Secrets of the Auction Houses*, WALL ST. J. (Oct. 31, 2007), <http://online.wsj.com/article/SB119378936198176920-email.html> (describing both arguments in favor and criticisms of this practice).

room (or online or on the telephone) will be told anything about what they are up against.”<sup>171</sup>

In sum, in the case of public auctions, third parties have access to some, but not all, information regarding sales. Those who do not participate in a given sale can learn that the sale has occurred and the prices for which particular works of art are sold at auction. However, other information—such as the parties’ identities and the chains of title for particular artworks—is far less accessible.

### C. *Additional Points on Secrecy*

It should be clear by now that the secrecy norms that pervade the art market make it difficult, and often impossible, to collect certain information about art transactions. Without this information, scholars and lawmakers cannot evaluate, in any empirical way, the effect or efficacy of the resale royalty right in practice. The result is the information problem, which scholars have been unable to overcome and which concerned the Copyright Office in 1992.<sup>172</sup>

Before describing why and how these secrecy norms matter for the operation of the resale royalty right itself, a few points are worth addressing. First, some scholars have recognized that the “reliance on keeping things hush-hush”<sup>173</sup> described above is problematic for the art trade generally. For example, economists decry secrecy in the art market because the “information asymmetry”<sup>174</sup> that results creates inefficient outcomes and “prevents the market mechanisms from working as they should.”<sup>175</sup> Observers have recognized, moreover, that secrecy norms pose problems for various areas of law and policy. For instance,

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<sup>171</sup> *Id.*

<sup>172</sup> See *supra* Parts II.C & III.B.

<sup>173</sup> Winkleman, *supra* note 153.

<sup>174</sup> There is an “information asymmetry” in the market because sellers and/or auction houses often know much more information about sales than do potential buyers. In addition, “[s]ome participants may . . . have better knowledge about the authorship, authenticity or provenance of a work of art than their competitors, which enables them to make excess returns. For instance, a work may be sold at auction as a work made by a member of Rembrandt’s studio, while some parties may have information indicating that the work was made by Rembrandt himself.” Velthuis, *supra* note 142, at 36. See generally George A. Akerlof, *The Market for “Lemons”*: *Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970).

<sup>175</sup> Grant, *supra* note 169. In particular, secrecy may prevent buyers from knowing whether they are “paying too much” for a given work. *Id.* (quoting Rachel Campbell, economics professor at the University of Maastricht (Holland) and adviser to London’s Fine Art Fund).

the lack of transparency in the art market creates “ample opportunities for fraud and deceit,”<sup>176</sup> which facilitates art theft. And as one scholar explains, “The effect of such secrecy . . . makes the international art market a prime medium through which to launder money.”<sup>177</sup> Given that participants in art sales rarely leave a paper trail, claims of art theft and adverse possession may be impossible to trace.<sup>178</sup> Likewise, because so little information about the purchase prices of works of art is made public, valuation of those works—including for tax law purposes—can be difficult.<sup>179</sup>

Second, this lack of transparency may be especially characteristic of the American art market. In France, for example, auctions are “run by a *commissaire-priseur*, a civil servant trained in both law and another relevant discipline such as art history.”<sup>180</sup> The *commissaire-priseur* serves as a neutral third party who supervises auctions, “ensuring the system’s fairness and transparency.”<sup>181</sup> The involvement of a *commissaire-priseur* means that “items offered at auction have been authenticated and the seller’s name and contact information recorded.”<sup>182</sup> The United States has no such mechanism; indeed, the American art market is mostly unregulated.<sup>183</sup>

Most importantly, the secrecy norms that dominate the art market may have significant consequences not just for scholars and lawmakers seeking to evaluate the efficacy of the resale royalty right, but also for the operation of the right itself.

## V. EXISTING LAWS AND THE IMPORTANCE OF INFORMATION

Resale royalty laws rely on the availability of information to various parties—such as sellers, artists, and collecting societies—in order to operate effectively. Yet, as the last Part showed, such information is rarely available. The result is a significant conflict between law and norms.

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<sup>176</sup> Velthuis, *supra* note 142, at 36.

<sup>177</sup> Conley, *supra* note 142, at 493.

<sup>178</sup> *Id.*

<sup>179</sup> See generally John G. Steinkamp, *Fair Market Value, Blockage, and the Valuation of Art*, 71 DENV. U. L. REV. 335 (1994).

<sup>180</sup> Eliza Hall, *The French Exception: Why the Resale Royalty Works in France and Why It Matters to the U.S.*, 1 J. INT’L MEDIA & ENT. L. 321, 326 (2007).

<sup>181</sup> *Id.* at 327.

<sup>182</sup> *Id.* at 328-29.

<sup>183</sup> See Solomon & Gill, *supra* note 123, at 357.

*A. California*

Many observers have considered the California Resale Royalties Act (the Act) to be a “testing case”<sup>184</sup> for federal legislation. Indeed, the sponsors of the EVAA undoubtedly looked to the language of this statute in drafting the new bill. Although this law may now be defunct,<sup>185</sup> it serves as an appropriate starting point for this study, because it represents perhaps the most basic version of a resale royalty law.<sup>186</sup> The Act provides that:

Whenever a work of fine art is sold and the seller resides in California or the sale takes place in California, the seller or the seller's agent shall pay to the artist of such work of fine art or to such artist's agent 5 percent of the amount of such sale.<sup>187</sup>

The Act directs sellers (or their agents), when reselling an artist's work on the secondary market, to “withhold 5 percent of the amount of the sale, locate the artist and pay the artist.”<sup>188</sup> If the seller cannot locate the artist within ninety days after the sale, she should transfer “an amount equal to 5 percent of the amount of the sale” to the California Arts Council (the Council).<sup>189</sup> At that point, the Council takes over the task of locating the artist; if it is unable to do so within seven years, the Council may use the funds for other arts-related programs.<sup>190</sup> Finally, if the seller fails to make the royalty payment within the specified timeframe, the Act dictates that “the artist may bring an action for damages.”<sup>191</sup>

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<sup>184</sup> Bates, *supra* note 123.

<sup>185</sup> See *supra* notes 64-69 and accompanying text. Although the fate of the California law is somewhat unclear as of this writing, this Part discusses the law in the present tense.

<sup>186</sup> This version is “basic” in that it does not include the additional measures described *infra* Part V.B.

<sup>187</sup> CAL. CIV. CODE 986(a) (West 2007). The Act does not apply to: resales of works that are sold for less than one thousand dollars; to resales at which the gross sales price is less than the purchase price paid by the seller; and in certain other circumstances. *Id.* Also, note that the Act applies to *all* sales, including private sales. For more detailed descriptions of the provisions of the California law, see Kathryn L. Boe, Note, *The Droit de Suite Has Arrived: Can It Thrive in California as It Has in Calais?*, 11 CREIGHTON L. REV. 529 (1977); see also McInerney, *supra* note 58.

<sup>188</sup> CAL. CIV. CODE 986(a) (West 2007).

<sup>189</sup> *Id.* (a)(2), (5).

<sup>190</sup> *Id.* (a)(5). The Arts Council is charged with attempting to locate the artist. If it is unable to do so within seven years, the Act states that the Arts Council may then use the money for the “Art and Public Buildings” program. *Id.*

<sup>191</sup> *Id.* (a)(3). The artist must initiate the action within three years after the date of sale or

Several aspects of this statute are worth emphasizing. First, the Act puts the initial burden on the seller to locate the artist and pay the royalty. In order to locate the artist, the seller must know where the artist resides, or at least how to contact her. The seller is not required to give the artist notice that her painting has been resold.<sup>192</sup> Second, that burden shifts to the Council after ninety days. Like the seller, the Council must be able to access the artist's contact information in order to locate the artist. And of course, the Council's duty to locate the artist arises only if the Council knows that the resale has occurred in the first place.<sup>193</sup> Third, the artist holds the enforcement power: if the seller does not pay a royalty that is due, then the artist must sue the seller within the specified time frame in order to claim her royalty. To do so, the artist must know that her work of art has been resold, for how much, and by whom;<sup>194</sup> that is, "[i]t becomes [the artist's] responsibility to police the marketplace to keep track of public and private sales."<sup>195</sup>

Essentially, the Act assumes a world in which various parties—namely sellers, artists, and the Council—have access to the information specified above. Indeed, information is *the* crucial element of the law, for if any party does not have access to information, then the right could be interrupted at various stages of the process. For example, if the Council and the artist never learn of the sale, then the seller will never have to pay the royalty to either party. In other words, "the seller can avoid paying a royalty simply by keeping the sale secret."<sup>196</sup> If the Council knows of the sale but cannot locate the artist, and the artist never learns of the sale, then the artist will never receive her royalty.

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one year after the discovery of the sale, whichever is longer. *Id.* Note that the artist's heirs may sue under the law as well. The artist and her heirs retain the right until twenty years after the artist's death. *Id.* (a)(7).

<sup>192</sup> See McInerney, *supra* note 58, at 13.

<sup>193</sup> Just as the seller is not required to notify the artist, the Act is silent as to whether the seller must notify the Council after a resale.

<sup>194</sup> In 1982, the California legislature amended the original statute to make clear that artists are permitted to assign the right to collect royalties "to another individual or entity, such as an agent." McInerney, *supra* note 58, at 18. McInerney explains that "[t]his provision was evidently drafted in response to critics who charge that artists have neither the time nor inclination to track down non-complying sellers of their works." *Id.* (footnotes omitted) (citing Solomon & Gill, *supra* note 125, at 335-36). He suggests, moreover, that "artists could assign their right to collect to a privately-run organization . . . that would serve as the artists' agent with the exclusive right to collect resale royalties." *Id.* at 19.

<sup>195</sup> Boe, *supra* note 187, at 538.

<sup>196</sup> McInerney, *supra* note 58, at 13. Boe suggests that sellers "can pay the occasional artist who demands his royalty, and forget about any who do not." Boe, *supra* note 187, at 537.

Indeed, given that the artist effectively has “no way of checking how many times his art has changed hands or what the selling prices have been,” this scenario does not seem outlandish.<sup>197</sup> As the previous Part suggested,<sup>198</sup> and as many commentators have pointed out anecdotally,<sup>199</sup> it is likely that these examples have been a reality in California.

### B. *Other Variations*

Resale royalty laws in other countries have generally taken the same basic form as the California law, with some differences,<sup>200</sup> but the importance of information is a common theme. In Germany, like in California, *droit de suite* payments “are collected directly, i.e. the seller or his agent subtracts the royalty due from the sales price and passes it to the author or his representative.”<sup>201</sup> Similarly, in Belgium, auctioneers often pay royalties directly to artists.<sup>202</sup> Accordingly, these countries likely face similar difficulties to those seen in California.

One notable difference between the California, German, and Belgian laws, and those in other countries, is that many resale royalty laws provide for a collecting society. These societies—which may be government agencies, artists’ unions, or private organizations—serve a similar function to the California Arts Council with regard to the California law. However, in contrast to the California Council, which assumes responsibility for collection and distribution ninety days post-sale,<sup>203</sup> these collecting societies generally assume the responsibility of collecting royalties from sellers and distributing payments to artists as soon as a resale has taken place. The laws in Australia, Denmark,

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<sup>197</sup> Boe, *supra* note 187, at 537.

<sup>198</sup> See *supra* Part IV for a discussion of how secrecy norms make certain information practically impossible to obtain.

<sup>199</sup> See *supra* note 123 and accompanying text; see also McInerney, *supra* note 58, at 3 (“[T]he Act is perhaps the State’s most neglected and underused law.”).

<sup>200</sup> For example, these laws differ in terms of whether they require sellers to pay artists a percentage of the resale or of the entire profit, how large that percentage is, which kinds of works of art they cover, which kinds of sales they cover, and so on. This Part focuses mainly on differences that relate to the right’s effectiveness, because if the right does not operate in practice, then none of these details really matter.

<sup>201</sup> McAndrew & Dallas-Conte, *supra* note 104, at 29. In practice, an authors’ society, VG Bild-Kunst, now collects most payments, after making an agreement with the Association of German Art Dealers and Auctioneers and gallery owners. *Id.*

<sup>202</sup> *Id.* at 35. Auctioneers may pay either one of three recognized collection societies or the artist directly. See *id.*

<sup>203</sup> See *supra* note 189 and accompanying text.

Finland, and the United Kingdom explicitly provide for such societies.<sup>204</sup> In some other countries—for example, France—collecting societies have taken over these tasks, even though the laws do not explicitly require such entities.<sup>205</sup>

For instance, under the recently adopted Australian law, the collecting society “must use best efforts to collect the resale royalty payable under this Act, and, if necessary, enforce any resale royalty right held under this Act, on the commercial resale of the artwork on behalf of the holder or holders of the resale royalty right.”<sup>206</sup> Moreover, the law directs the collecting society “to publish notice of the commercial resale of an artwork on its website” if “the collecting society becomes aware of the commercial resale of an artwork” and “the collecting society believes, on reasonable grounds, that an entity may hold [a] resale royalty right, or an interest in the resale royalty right, on the commercial resale under this Act.”<sup>207</sup> These measures are meant to inform artists that a resale has taken place.

The rationale behind the collecting society is ease of administration: “It is easier to establish and maintain cooperation with artists and the art trade if one central agency has sole responsibility for collecting royalties.”<sup>208</sup> Surely, it is simpler “for dealers and other sellers to report sales and turnover to a single organization” than to have to track down individual artists;<sup>209</sup> however, this way, the collecting society scheme takes some of the information burden off of the seller and the artist relative to the more basic scheme found in California. In addition, “[e]specially in the case of private dealers where individual resales may be hard to track,” the collecting society has “the possibility of charging sellers a levy on the basis of overall turnover and paying royalties due in a lump sum.”<sup>210</sup> Nonetheless, this sort of scheme undoubtedly comes with administrative costs. It is for this reason that the California legislature rejected early proposals to

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<sup>204</sup> See McAndrew & Dallas-Conte, *supra* note 104, at 37, 41. See generally PIERREDON-FAWCETT, *supra* note 100.

<sup>205</sup> See Hauser, *supra* note 34, at 9; McAndrew & Dallas-Conte, *supra* note 104, at 33.

<sup>206</sup> Resale Royalty Right for Visual Artists Act 2009, C2009A00125, available at <http://www.comlaw.gov.au/Details/C2009A00125>.

<sup>207</sup> McAndrew & Dallas-Conte, *supra* note 104, at 46.

<sup>208</sup> *Id.* This service comes at a cost; these societies generally deduct a percentage of the royalty (ranging from five to twenty percent). *Id.* at 9.

<sup>209</sup> *Id.* at 46.

<sup>210</sup> *Id.*

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provide for a full-fledged collecting society; “as the Executive Secretary of the State Board of Equalization pointed out, ‘the proposed program would be extremely expensive to administer [resulting in] . . . substantial losses of state revenue.’”<sup>211</sup>

Furthermore, despite the projected benefits of adopting a collecting society scheme, these laws, like the California law, still face an information problem. Just as the California scheme does, the collecting society scheme envisions a world in which relevant information is readily available to the parties, most notably to the collecting society itself. That is, the collecting society’s obligation is triggered only when it *becomes aware* that a resale has taken place; the society must know that a resale has occurred before it can perform any of the tasks set out in the law. Thus, if the seller never informs the collecting society of the resale, and the society has no mechanism for learning that the transaction has occurred, then the society will not collect and pay the royalty to the artist. Additionally, the collecting society must be able to locate the artist in order to pay royalties that are due; that is, even if the society collects the royalty, the artist may never get paid if the society cannot locate her. In the case of private sales especially, the collecting society may be unable to gather the information that is required to carry out its purposes.<sup>212</sup>

### C. *The Conflict*

As should be evident by now, the realities of the art market conflict with the structure of many existing resale royalty laws. The right, in order to be effective, requires that various parties have access to certain information. However, secrecy norms in the art market dictate that this information is rarely, if ever, disclosed.

Of course, this information problem exists only if parties are willing to adhere to the norms of the art market rather than follow resale royalty laws.<sup>213</sup> Indeed, some anecdotal evidence suggests that secrecy norms *do* trump the law in places where the right has been implemented. For example, ten years after the California law was passed,

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<sup>211</sup> McInerney, *supra* note 58, at 14 (quoting Letter from W.W. Dunlop, Executive Secretary of the State Board of Equalization, to Assemblyman Alan Sieroty (May 9, 1975) (available in State Archives, Sacramento, California)).

<sup>212</sup> See *supra* Part IV.A.

<sup>213</sup> For example, in California, a seller would technically be breaking the law if she chose not to disclose the fact that a sale occurred and not to pay the royalty.

an advocacy group conducted a survey of artists. According to the results, thirty-two percent of respondents indicated that “dealers had refused to give them the name or address of the buyer or even the resale price”—the very information that an artist would need to enforce her right under the law—when asked.<sup>214</sup> Likewise, at least one study reports that in many countries—including Greece, Italy, Luxembourg, Portugal, and Spain—royalties are never actually collected.<sup>215</sup>

More recently, the artists’ complaint in the recent lawsuit against Christie’s and Sotheby’s suggested that these auction houses failed to make payments under the California law.<sup>216</sup> According to the artists’ complaint, both auction houses “engaged in a pattern of conduct intended to conceal from [the artists] those circumstances in which a Fine Art sale . . . entitled [them] to a Royalty.”<sup>217</sup> For instance, their “catalogs generally conceal from the reader the state of residency of a seller, and they will refuse—upon inquiry—to reveal said information.”<sup>218</sup> The complaint implied that these auction houses concealed such information specifically to avoid paying royalties. While this may be true, the auction houses’ practices in fact align with the art market norms described in Part IV.

If parties to art transactions choose to adhere to the norms of the art market (by concealing information) rather than follow the law (by revealing information), then the resale royalty right could be rendered meaningless. The right might still serve some purposes; for example, it may still serve an expressive function, encouraging respect for artists in society.<sup>219</sup> But the right would not effectuate the goals that lawmakers set out to achieve: if artists are never paid royalties in practice, then they will not be put on par with other creative persons, who are compensated for sales of their works; they will not be compensated for their reputation and genius; and they will not be incentivized to

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<sup>214</sup> Reddy, *supra* note 56, at 523.

<sup>215</sup> McAndrew & Dallas-Conte, *supra* note 104, at 26.

<sup>216</sup> See *supra* notes 64-69 and accompanying text.

<sup>217</sup> Complaint at 3, Sam Francis Found. v. Christie’s, Inc., No. CV11-8605 (C.D.C.A. Oct. 18, 2011).

<sup>218</sup> *Id.* The plaintiffs “seek to force the auction houses to reveal” information such as “the identities or locations of sellers,” because these details are ““necessary to know whether a royalty is due.”” Cohen, *supra* note 91.

<sup>219</sup> See generally Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PENN. L. REV. 2021 (1996).

create more works of art.<sup>220</sup> This result, surely, would trouble lawmakers.<sup>221</sup>

Ultimately, this conflict may indicate that the resale royalty right is doomed to fail—or at least fall short of its intended outcome. Nonetheless, the history of the right demonstrates that lawmakers often have adopted the right even in the face of serious criticisms, and the United States may be next.<sup>222</sup>

## VI. RESTRUCTURING THE RIGHT

Assuming that federal lawmakers may adopt the right despite the information problem, this Part provides possibilities for ways in which lawmakers can structure the right to overcome, or at least push back against, art market norms.

### A. *The EVAA*

The drafters of the EVAA apparently understood, at least to some extent, the importance of information in the traditional resale royalty scheme. Accordingly, they included certain provisions which may make this version of the right more effective than the more basic schemes found in California and elsewhere. First, the law would apply only to parties who sell large amounts of artwork (i.e., more than \$25 million annually).<sup>223</sup> Second, this law would come into play only when an artwork is sold at a public auction for more than \$10,000.<sup>224</sup> Third, the bill provides for a collecting society, much like those found in other countries.<sup>225</sup> This entity would assume the responsibility of collecting royalties from sellers and distributing payments to artists at some point after a resale has taken place.<sup>226</sup>

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<sup>220</sup> See *supra* Part III.A for the rationales behind the right.

<sup>221</sup> Moreover, the right might entrench secrecy norms more deeply. In a world with the resale royalty right, buyers and sellers might choose to conduct more transactions through private sales in order to keep their sales secret and to avoid paying royalties to artists. This result would be problematic not just for the resale royalty right, but for other areas of the law in which secrecy norms already pose problems.

<sup>222</sup> See *supra* Part II.A.

<sup>223</sup> H.R. 3688, 112th Cong. (2011); S. 2000, 112th Cong. § 2 (2011).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* § 3.

<sup>226</sup> See *supra* Part V.B. The current version of the bill explains that, within 90 days of receiving payment for a qualifying sale, the seller must “pay out the proceeds out of the

The scheme laid out in this bill could ease the information problem in several respects. By focusing only on public auctions, for example, it avoids the sector of the art market—private sales—that is most shrouded in secrecy. Since auctions are public and auction houses publish price lists following sales,<sup>227</sup> artists should be able to learn fairly easily that a resale has occurred as well as the purchase price of her work on the secondary market—two crucial pieces of information for enforcing the right.<sup>228</sup> For this reason, several current resale royalty laws apply only to public auctions,<sup>229</sup> and some commentators and lobbyists have recently proposed that the United States should adopt this kind of scheme.<sup>230</sup>

Of course, the collecting society must know that an auction sale has occurred in order to ensure that it receives payments. The bill responds to this potential problem by limiting application only to the largest auction houses (those that sell over \$25 million in artworks annually, of which there are undoubtedly few) and to the largest sales (those coming in at over \$10,000). Since relatively few sales would meet this description, the collecting society could enforce the resale royalty relatively easily. This entity simply would have to police an elite group of auction houses, including Christie's and Sotheby's.

Still, there are troubling aspects to the proposed scheme. Most notably, “auctions play an insignificant role in the art resale market” in the United States, especially in recent years.<sup>231</sup> Thus, as one commentator has suggested with regard to other such limited resale royalty laws, this provision “would make the law almost meaningless,” because it would apply to so few resales.<sup>232</sup> This kind of scheme might

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proceeds of the sale a royalty equal to 7 percent of the price . . . to a visual artists' collecting society.” See H.R. 3688, 112th Cong. (2011); S. 2000, 112th Cong. § 3 (2011). Thereafter, the “collecting society shall distribute . . . 50 percent of the net royalty to the artist or his or her successor as copyright owner,” and the “remaining 50 percent . . . shall be deposited into an escrow account established by the collecting society for the purposes of funding purchases by nonprofit art museums in the United States.” *Id.*

<sup>227</sup> See *supra* note 161 and accompanying text.

<sup>228</sup> See *supra* Part V.

<sup>229</sup> Belgium and Spain are two examples. See PIERREDON-FAWCETT, *supra* note 39.

<sup>230</sup> See, e.g., Merryman, *supra* note 24; Stoilas, *supra* note 87 (“Although previous attempts to bring a royalties scheme to the US have largely failed, the new legislation will be different,” said Theodore Feder, president of the ARS. Resale fees ‘would not be applied to galleries,’ partly because they are such vocal opponents of droit de suite, ‘but also because auction sales are public, while gallery sales are private, so it would be difficult to track resales.”).

<sup>231</sup> Vickers, *supra* note 20, at 463.

<sup>232</sup> *Id.*

even drive the art market further toward conducting all sales privately, rendering the right useless. In addition, it would benefit only accomplished artists, whose works sell for high prices at auction,<sup>233</sup> while it might hurt auctioneers. As Professor Merryman points out, because this system applies to auctioneers but not to private dealers, it “appears to discriminate against auctioneers . . . in favor of dealers . . . .”<sup>234</sup> Lawmakers might determine that ease of administration outweighs these concerns, but ultimately the following two options may prove less controversial.

### B. *The Right to Information*

Several recently passed resale royalty laws explicitly include a “right to information,” subtly recognizing the information problem described above. Under the United Kingdom law, for example, the artist has an affirmative right to request “any [information] that may be necessary in order to secure payment of the resale royalty, and in particular to ascertain . . . the amount of royalty that is due . . . and the name and address of any person who is liable.”<sup>235</sup> The seller “shall do everything within his power to supply the information requested within 90 days of the receipt of the request.”<sup>236</sup> If she does not provide such information, the artist may apply for a court order “requiring the [seller] to supply the information.”<sup>237</sup>

This kind of provision provides a partial solution. If the artist or the collecting society has the right to obtain necessary information

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<sup>233</sup> Of course, opponents of the right have made this criticism with regard to the right more generally. See *supra* Part III.B. But this criticism is especially apt for laws that cover only public auctions. Generally speaking, public auctions work best for works of art that are well known and widely coveted. *Id.*

<sup>234</sup> Merryman, *supra* note 24.

<sup>235</sup> The Artist's Resale Right Regulations 2006, available at <http://www.legislation.gov.uk/uksi/2006/346/regulation/15/made>. The German law similarly includes a “right to information.” But under the German law, the collecting society exercises the right on the artist's behalf. The society maintains the right “to inspect the seller's accounts or other documents of the seller if there are justified doubts concerning the completeness or correctness of the information.” McAndrew & Dallas-Conte, *supra* note 104, at 29.

<sup>236</sup> The Artist's Resale Right Regulations 2006, available at <http://www.legislation.gov.uk/uksi/2006/346/regulation/15/made>.

<sup>237</sup> *Id.* Some countries provide for a partial right to information. For example, in Germany, “artists are entitled to information from art dealers and auction houses concerning works of art they have sold,” but “[t]his is restricted to the name and address of the seller and the sales price.” McAndrew & Dallas-Conte, *supra* note 104, at 29.

from the seller (usually within a certain timeframe), then theoretically it should be easier to enforce the right. If the seller refuses to hand over such information, then the artist would have a legal cause of action against the seller. Still, this provision on its own does not add much to the basic resale royalty structure, because the artist must know about a resale in order for the right to information to be triggered. If the artist never learns that a resale has occurred—as often happens with private sales<sup>238</sup>—then she would have no reason to invoke the right to information, and her resale royalty right would not be fulfilled. Still, this kind of requirement could be combined with some of the other possible fixes described in this Part to provide a more comprehensive solution.

### C. *Registration Requirement*

Although numerous commentators have suggested, for various reasons, that the resale royalty right should include a registration requirement,<sup>239</sup> the information problem described in this Article sheds new light on why exactly this sort of requirement could prove helpful, and even integral, to enforcing the right.

Notably, the drafters of the original *droit de suite* in France envisioned the right as encompassing a registration component. Under the 1920 law, an artist was “required to place a notice of intent to collect on a specific, identified work in the *Journal Officiel*, a public record.”<sup>240</sup> Thereafter, “[a]uctioneers were required to maintain a register of sales and to inform the artist of the name, address, and the amount owed by the vendor upon demand.”<sup>241</sup> The reason for this registration requirement was that “authentication [of works of art] was considered an important goal” of enacting the law.<sup>242</sup>

This formal registration procedure has never actually been carried out in practice, mostly because a “dichotomy arose between the formal procedure, set out in the French act, and the actual procedure” on the

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<sup>238</sup> See *supra* Part IV.A.

<sup>239</sup> See, e.g., Hauser, *supra* note 34; Carol P. Glucksman, *Art Resale Royalties: Symbolic or Economic Relief for the Fine Artist*, 1 CARDOZO ARTS & ENT. L.J. 115, 130-31 (1982); McInerney, *supra* note 58, at 13-14; Schulder, *supra* note 53, at 22.

<sup>240</sup> Sherman, *supra* note 53, at 51.

<sup>241</sup> *Id.* at 52.

<sup>242</sup> Schulder, *supra* note 53, at 25.

ground.<sup>243</sup> Diane Schulder has suggested that “[t]he French act was unable to combine the two goals of proceeds and authentication into a workable system, because the act, as written, did not contemplate the existence of the [Union of Artistic Property],” a private organization to which most French artists belong and which has come to serve as a collecting society.<sup>244</sup> With this entity overseeing the proceeds process, the French apparently found it unnecessary to employ the registration system.<sup>245</sup> Instead, the organization has created an “informal system” to keep track of sales, using “the register kept by the public auction officers, the auctioneer’s catalog, and the information in the trade papers to police the sales and collect the sums due.”<sup>246</sup> (This system is unhelpful in the context of private sales, where no such information is available.<sup>247</sup>)

A formal registration system similar to the one contemplated in the original French law might prove more successful in the United States. Here, “people . . . are accustomed to registering officially for copyrights.”<sup>248</sup> Under American copyright law, an artist must register her work with the Copyright Office before she is eligible to bring a lawsuit for copyright infringement.<sup>249</sup> The office allows artists to register online for a small fee, and all information provided becomes publicly available on the Internet.<sup>250</sup> The resale royalty system could be added to this already existing system, or the copyright registration system could serve as a model.

Like the current copyright scheme, the resale royalty scheme would likely require the involvement of an administrative agency, such as the Copyright Office or the National Endowment for the Arts, to be carried out properly.<sup>251</sup> Under this scheme, the artist would be required to

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<sup>243</sup> See *id.* at 26.

<sup>244</sup> *Id.* at 25-26.

<sup>245</sup> *Id.* But see Part V.B, *supra*, for an explanation of why the collecting society scheme does not itself overcome the information problem.

<sup>246</sup> Solomon & Gill, *supra* note 123, at 326.

<sup>247</sup> See *supra* Part IV.A.

<sup>248</sup> Schulder, *supra* note 53, at 26.

<sup>249</sup> See *Registering a Work*, COPYRIGHT OFFICE, <http://www.copyright.gov/help/faq/faq-register.html> (last visited June. 15, 2012).

<sup>250</sup> *Id.*

<sup>251</sup> Cf. Glucksman, *supra* note 239, at 130-31 (“[E]ven assuming the existence of a recording system which would provide artists, sellers and subsequent purchasers with notice of transfer, an administrative agency would be necessary to oversee such a function. It is

register the first sale of a work of art with the agency in order to be eligible to claim royalties later. The artist would have to include her name, contact information, and the first sale price of the work. The agency would then be on notice that the work might be resold down the road, and it would have the information necessary to get in touch with the artist should it learn that a resale has occurred on the secondary market at a later date.

In addition, sellers would be required to register or disclose all resales to the agency. From there, the agency could contact the artist, whose information would be on file, and put the artist and the seller in touch to coordinate payment. Alternatively, the seller could pay the royalty directly to the agency, which could then pay the royalty to the artist.<sup>252</sup> Like the right to information, this requirement would be helpful in combating art market norms, because it would require the parties to disclose the information that is required to carry out the law.

This scheme would be the most radical of the three possibilities proposed in this Part, and it likely would not provide a complete solution. Setting up the registration system and maintaining effective enforcement would be costly, because it would involve supplementing the existing registration system or creating a new one and charging an administrative agency with monitoring transactions. However, most (if not all) laws come with enforcement costs, and in the case of the resale royalty right, lawmakers may have to choose between imposing administrative costs and maintaining an inoperative law.

In addition, art collectors, dealers, and auction houses would probably oppose this scheme because it would require them to reveal information that they would rather keep secret for various reasons.<sup>253</sup> Indeed, as under current resale royalty laws, these parties might choose not to comply at all.<sup>254</sup> However, involving an agency in monitoring

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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." This institution would be similar to the Council in California or collecting societies in other countries, *see supra* Part V.B, and it would have "registration, notification, and enforcement powers." Glucksman, *supra* note 239, at 132.

<sup>252</sup> A similar proposal was put forth in Representative Henry A. Waxman's 1978 resale royalty bill. *See* H.R. 11403, 95th Cong. (1978). Under the Waxman bill, sellers were to make a payment directly to a commission (established to collect payments) within thirty days of the date of sale. Sellers were required to submit a statement of sale (which would include the artist's name, the purchase price, etc.) to the commission. Sellers who failed to file such statements could face a civil penalty of up to \$1000. *Id.*

<sup>253</sup> *See supra* Part IV.

<sup>254</sup> Legislators might consider putting into place certain enforcement mechanisms to ensure

sales should alleviate the enforcement problem to some extent, and information regarding transactions could even be kept confidentially within the agency, rather than made completely public.<sup>255</sup>

Importantly, this scheme would allow for a more effective resale royalty right, while it would alleviate the information problem that scholars and lawmakers have experienced for almost a century. With such a system in place, it would be considerably easier to collect data on art sales and the art market generally, which would allow scholars and lawmakers to evaluate the efficacy of the resale royalty right, its effects on the art market, and so on, much more extensively. Armed with such information, lawmakers could more definitively determine whether the resale royalty right makes for good policy in the long term; and if does not, then legislators would, of course, remain free to repeal the law.

Furthermore, the registration scheme could help to solve other problems that have long plagued art law. As Part IV.C described, secrecy norms in the art market create complications for numerous areas of art law, facilitating theft, adverse possession, and problems with valuation for tax purposes.<sup>256</sup> All of these areas would benefit from a repository of information on art sales, which the registration system would create. Such a registry “could become the central source for accurate information on . . . art.”<sup>257</sup> This registry would be useful, for example, in tracing a given work’s chain of title and in gauging a work’s fair market value. Finally, it could serve an authentication function, “extending protection to purchasers of art works,”<sup>258</sup> much like the drafters of the original French law envisioned.<sup>259</sup> These

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higher compliance with the law. For example, one option would be to put into place an audit system, akin to the one that the Internal Revenue Service uses to monitor federal income tax payments, to make sure that sellers disclose all sales. And, like the Waxman proposal, described in *supra* note 252, the law could specify that sellers who fail to register sales would be fined.

<sup>255</sup> For example, the agency could keep all of this information in a private database and reveal it only to artists who have registered. This would alleviate some privacy concerns, such as embarrassment about selling a work.

<sup>256</sup> See *supra* Part IV.C.

<sup>257</sup> Phil McLeod, *California's Resale Royalty Act*, 2 HASTINGS COMMENT & ENT L.J. 733, 742 (1979).

<sup>258</sup> Sherman, *supra* note 53, at 72.

<sup>259</sup> See *id.* (“Such a system of registration, showing a work’s chain of title, would provide, in addition to a method of monitoring resales, some assurance to collectors that the work was genuine, thus reducing the frequency of forgery.”); see also Vickers, *supra* note 20, at 455.

benefits provide additional support for putting into place a system like the one described in this Part.

## VII. CONCLUSION

This Article has described the information problem that looms over the resale royalty right. The secrecy norms that operate in the art market, especially in the United States, make it difficult to collect any information about art transactions. Unfortunately, this is the very information that scholars and lawmakers need in order to evaluate the right—to determine, for example, the effect of the right on artists and the efficacy of the right in practice. Moreover, the basic structure of the right itself requires a world in which various parties—including sellers, artists, and collecting societies—have access to relevant information about art sales.

Although scholars and lawmakers have demonstrated some awareness of this information problem, no scholar to date has fleshed out the roots of the problem, its implications for the resale royalty right and other areas of art law, and the possible solutions. This Article has attempted to do just that. Ultimately, the options enumerated herein may not completely erase the information problem, but in recognizing and attempting to push back against the secrecy norms that pervade the art market, they take a step in the right direction. The most promising option would be a registration scheme, requiring parties to art transactions to disclose information regarding their sales. This system could create a more effective resale royalty right, and it could even help to solve the various other problems, discussed in this Article, that have long plagued art law.