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Art Resale Royalty Options

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I. Introduction

Resale royalty laws provide that when art is resold by an owner, the artist who created the work receives a payment based on either the sales price or the net profit.

Most of the United States' major fine art trading partners[1] are among the 78 foreign countries that require a resale royalty.[2] The Berne Convention[3] calls for resale royalties, but does

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[1]The volume of U.S. trade (imports and exports) in the fine arts for 2013 comprised the first three classifications in Harmonized Tariff Schedule chapter 97. *See* U.S. INT'L TRADE COMM'N, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES REVISION 1, CHAPTER 97, USITC Pub. No. 4542 (2015). HTS 9701, paintings and drawings, constituted 82% of the value; HTS 9703, sculptures, accounted for 16%; the remaining 2% were in HTS 9702, prints. Our leading fine art trading partners were the UK (24%, primarily exports), France (22%, primarily imports), Switzerland (14%, primarily exports), Germany (8%) and Italy (6%, primarily imports). Spain, Netherlands (both primarily imports) and Hong Kong (primarily exports) account for around 3% each. Rounding out the top ten are China and Japan with 2% each. Of the top five trading partners that accounted for 75% of the trade, all (61%) but Switzerland (14%) have resale royalty laws; of the top ten who have 86% of the trade, all but Switzerland, Hong Kong, China and Japan have resale royalty laws. China is considering such an enactment. Of those top ten art trading partners, fine arts trade with countries that have resale royalties is more than three times greater than trade with countries that lack them.

Our fine arts trade contrasts sharply with our overall trade, where Canada is #1 (16%), China #2 (15%, mostly imports), Mexico #3 (13%), then Japan (5%), Germany (4%), South Korea and the UK (3%), followed by France, Brazil, Saudi Arabia (imports), India (imports), Taiwan and the Netherlands (exports) at 2%. tse.export.gov.

A larger list of our trading partners that lack resale royalty laws includes Canada, PRC, Japan, Rep. of Korea, Saudi Arabia, Taiwan, Switzerland, Malaysia, RSA, Indonesia, Thailand, Vietnam, Israel, Colombia, Singapore, Iraq, Kuwait, Argentina, New Zealand, Egypt, and Ukraine. Important countries with resale royalties are: Mexico; all of Central America; all of South America except Argentina; in Europe all 28 members of the European Union plus Russia; in Asia: India, Turkey and the Philippines; Australia; and in Africa: Nigeria, Algeria and Tunisia.

[2]78 as of December 2013. UNITED STATES COPYRIGHT OFFICE, RESALE ROYALTIES: AN UPDATED ANALYSIS Appendix E (2013), *available at* http://copyright.gov/docs/resale_royalty/usco-resaleroyalty.pdf [hereinafter cited as COPYRIGHT REP] updating UNITED STATES COPYRIGHT OFFICE, *DROIT DE SUITE*: THE ARTIST'S RESALE ROYALTY (12/1992), available at http://www.copyright.gov/history/droit_de_suite.pdf. The first resale royalty law was in France, soon

not make them mandatory. The United States is one of a small number of major developed countries that lacks a nationwide resale royalty law. Within the United States, a true resale royalty law exists only in California[4]. The enactment of a federal resale royalty seems possible now that the Register of Copyrights withdrew her opposition to it and issued a generally favorable report.[5] A federal right is much more likely to be effective than rights enacted by individual states.[6]

The purpose of this paper is to explore the options available to Congress in framing a resale royalty law. Most resale royalty laws are quite general, leaving many important issues to the courts or to negotiations between sellers' agents and buyers' collecting societies.[7] I hope that Congress will provide guidance, or mandate interpretive regulations, rather than leaving most important issues to case-by-case development, thereby providing certainty for buyers, sellers, art professionals, artists and collecting societies.

This paper discusses the advantages and disadvantages of each provision, and suggests which provisions are particularly compatible or incompatible with which other provisions and with the underlying rationale for the payment. Part II sets forth potential purposes for the law. Part III treats the kinds of artwork on which a resale royalty might be payable. Part IV discusses the sales that might trigger such a royalty. Part V details the bases on which such a royalty might be computed. Part VI deals with rates. Part VII treats the potential beneficiaries and duration of

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followed by Belgium and Czechoslovakia. The history is traced at LILIANE DE PIERREDON-FAWCETT, THE DROIT DE SUITE IN LITERARY AND ARTISTIC PROPERTY: A COMPARATIVE LAW STUDY 1-6 (1991).

[3]Berne Convention for the Protection of Literary and Artistic Works (1886, last revised 1979), http://www.wipo.int/treaties/en/text.jsp?file_id=283698, art. 14ter.

[4]CALIF. CIV. CODE §986. Georgia and South Dakota have limited resale royalty laws. They apply only to artwork financed under state law requiring that a percentage of the cost of public buildings be allocated to artwork. A resale royalty is due only if the art is sold separately from the building. It is not a true resale royalty statute because it applies only if the resale royalty is mandated in a written contract, and also because subsequent purchasers from the state and their successors are not bound to pay resale royalties. GA. CODE ANN. §8-5-7; S.D. CODIFIED LAWS §1-22-16(5), (6). The Seattle Art in Public Places ordinance was similar. Leonard D. DuBoff, *Artists' Rights: The Kennedy Proposal to Amend the Copyright Law*, 7 CARDOZO ARTS & ENT. L.J. 227, 230 (1989). Puerto Rico had a resale royalty law providing for payment of 5% of the increase in value, P.R. LAWS ANN. tit. 31 §1401h, but it appears to have been repealed in a 2012 revision of the law on intellectual property. On June 4, 2015, Westlaw in English showed the old version; in Spanish it showed that section repealed.

[5]Based on studies in the intervening twenty years indicating that it is unlikely that a resale royalty would substantially reduce prices in the primary art market or shift the secondary art market away from the United States. COPYRIGHT REP 3.

[6]Nithin Kumar, *Constitutional Hazard: The California Resale Royalty Act and the Futility of State-Level Implementation of Droit de Suite Legislation*, 37 COLUM. J. L. & ARTS 443, 448 (2014). The problem is not only the ability of art owners to shift sales to other states (though not without significant costs), but the overbroad (in my opinion) interpretation given to the dormant commerce clause that prohibits California from requiring out-of-state corporations doing business in California to report to the artists whose work has been sold art sales made outside California. Sam Francis Foundation v. Christies, Inc., 784 F.3d 1320 (9th Cir. 2015).

[7]Australia is a notable exception. *Resale Royalty Right for Visual Artists Act 2009* (Cth) (Austl.) [herinafter cited as Australia with the section number indicated].

such a right. Part VIII discusses aspects such as waiver, transfer, duplicated royalties, pre-emption, and tax consequences. Part IX closes with the all-important enforcement options that are designed to assure that the law functions in the real world. Where California, Australia or United Kingdom[8] law is helpful on issues, specific citation is provided.

II. Purposes[9]

A. Substitute for a copyright royalty

One purpose of a resale royalty is to function as a substitute for a copyright royalty. It is argued that the fine artist who produces an item that is valued largely because of its relatively unique nature, such as a painting or an original manuscript, does not receive the periodic income from copyright royalties that the author of a book or the songwriter enjoys.[10] His sole compensation is from the initial sale of the work. Under the current system, the fine artist is excluded from potentially significant income created by his work– its appreciation in value over

[8]United Kingdom Intellectual Property Law, Statutory Instrument (SI) 2006 No 346, as amended by SI 2011 No 2873, effective 1/1/2012 [hereinafter cited as UK with the section number].

[9]A discussion of the advantages and disadvantages of a resale royalty is beyond the scope of this article, and has spawned an immense literature. Those interested might consult JOHN HENRY MERRYMAN, ALBERT E. ELSEN & STEPHEN K. URICE, LAW ETHICS AND THE VISUAL ARTS 595-612 (5th ed. 2007) or LEONARD D. DUBOFF, SHERRI BURR & MICHAEL D. MURRAY, ART LAW 235-246 (Rev'd ed. 2010). Works supporting the right include LILIANE DE PIERREDON-FAWCETT, THE *DROIT DE SUITE* IN LITERARY AND ARTISTIC PROPERTY: A COMPARATIVE LAW STUDY (1991); Thomas M. Goetzl, *In Support of the Resale Royalty*, 7 CARDOZO ARTS & ENT. L.J. 249 (1988); Michael B. Reddy, *The Droit de Suite: Why American Fine Artists Should Have a Right to a Resale Royalty*, 15 LOYOLA LA ENT. L. REV. 509 (1995); Katreina Eden, *Fine Artists' Resale Royalty Right Should Be Enacted in the United States*, 18 N.Y. INT'L L. REV. #2 121 (2005); Mara Grumbo, *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. (COMM/ENT) 357 (2008); Toni Mione, *Resale Royalties for Visual Artists: the United States Taking Cues from Europe*, 21 CARDOZO J. INT'L & COMP. L. 461 (2013). Articles opposing such a right include: Monroe E. Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite*, 77 YALE L.J. 1333 (1968); Carole M. Vickers, *The Applicability of the Droit de Suite in the United States*, 3 B.C. INT'L & COMP. L. REV. 433 (1980); John Henry Merryman, *The Wrath of Robert Rauschenberg*, 41 AM. J. COMP. L. 103 (1993); Gilbert S. Edelson, *The Case Against an American Droit de Suite*, 7 CARDOZO ARTS & ENT. L.J. 260 (1989); Stephen E. Weil, *Resale Royalties: Nobody Benefits*, 77 ARTNEWS #3 58 (3/1978); Michael Asimow, *Aspects of the Droit de Suite* in MELVILLE B. NIMMER, LEGAL RIGHTS OF THE ARTIST III-1 (1971); Victor Ginsburgh, The Economic Consequences of Droit de Suite in the European Union 5 (2006), available at http:// www.ecare.personal/ginsburgh/papers/143.consequences.pdf, last visited 6/29/2015; M. Elizabeth Petty, *Rauschenberg, Royalties, and Artists' Rights: Potential Droit de Suite Legilsation in the United States*, 22 WM. & MARY BILL RTS. J. 977 (2014). A more neutral analysis is Henry Hansmann & Marina Santilli, *Royalties for Artists Versus Royalties for Authors and Composers*, 25 J. CULTURAL ECON. 259 (2001). Marilyn J. Kretsinger, *Droit de Suite: The Artist's Right to a Resale Royalty*, 15 HASTINGS COMM. & ENT. L.J. (COMM/ENT) 967 (1992) is reportage that does not take a position.

[10]While it is true that an artist receives a royalty whenever his work is used in an advertisement, poster, or as part of the set for a movie or television program, such royalties do not constitute a significant amount of income for most artists. COPYRIGHT REP 31.

time. It is not practical to construct a royalty based on viewing fine art.[11] A resale royalty is designed to compensate for the lack of those continuing copyright royalties.[12] Just as a copyright royalty is normally paid when someone uses the copyrighted material in his business, the concept of the resale royalty is that use of the artwork is an ingredient in the owner's business project of holding the work for appreciation. This will be called the "royalties purpose". The royalties purpose is the sole purpose that the Register of Copyrights states.[13] The British and French clearly contemplate other possible purposes, as they have named their right a "resale right", rather than a "royalty".[14]

B. Joint venture or just compensation

Another purpose may be to provide just compensation to the artist. This purpose posits that the artwork of the artist, both previous and subsequent, is a substantial factor in increasing the market price of the art. Promotion of other works by the artist may stimulate the market. Under the present system, the artist receives nothing for this increase in value he helps create. A resale royalty gives the artist a share in that increased value. The analogy is to a joint venture, where the owner of the artwork provides the capital and the artist provides the labor. This will be called the "joint venture purpose".[15]

C. The operative facts

Both theories assume certain operative underlying facts. They assume that the initial purchase price paid to the artist is insufficient compensation for the value added by his work. They also assume that artworks of the type produced by the artist have the potential for significant appreciation in value.

III. Works covered

A. "Work of visual art"

The Register of Copyright proposes that the appropriate definition of works covered should be lifted from the copyright law's definition of "work of visual art", which defines the works that are eligible for moral rights.[16] Were resale royalties analogous to moral rights, one

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[11] 17 U.S.C. §109 enacts the first sale doctrine, authorizing the owner of copyrighted property to display or sell it without the owner's consent.

[12] This can be expressed as the failure of the copyright law to provide equal opportunities to persons who create different kinds of work, or as a market failure to adjust appropriately to different kinds of work.

[13] COPYRIGHT REP. 31-64.

[14] UK §3. France, Law of 11 March 1957, No. 296 (Merryman translation), art. 42. Italian law does its best to avoid characterizing the payment, but in the one instance in which it does so, it calls it a "right". Italy, Law of April 22, 1941, No. 633, art. 150 (Merryman translation).

[15] German law refers to the payment as "a participation". Germany, Law of September 16, 1965, No. 51, art. 26 (Merryman translation).

[16] COPYRIGHT REP. 76.

Mara Grumbo, *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. (COMM/ENT) 357, 363-65, notes 18 & 44 (2008) argues that a resale royalty should be viewed as a moral right, but does so using an unusual definition of moral rights as rights that are non-waivable. While moral rights are usually nonwaivable and sometimes nontransferable, their essence is their intimate connection to the personality of their creator and the existence of injunctive relief to prevent their violation. Moral rights relate to the artist's control over the

might well agree.

Moral rights and resale royalties are conceived very differently. Resale royalties are economic rights. If one adheres to the royalties theory, resale royalties replace copyright royalties, an economic right. A joint venture theory adherent would point out that resale royalties replace profits, also an economic right.

There is also a difference of remedies. Money damages are the sole remedy for failue to pay resale royalties. On the other hand, moral rights are designated as personal rights. They are designed to assure the artist's identification with his work, that the artist is not identified with the work of others, and that the artist's work not be modified or destroyed. Primary enforcement is by injunction to prevent the threatened act. If the threatened act occurs, money damages are available, but they are conceived primarily to deter similar actions in the future when it is too late to prevent this action.

Notwithstanding the differences, it is perfectly appropriate to re-use a term coined for one purpose to satisfy another– if it fits. To discuss fit, we will examine some artwork included and excluded by the definition of "work of visual art" to see if the term is appropriate to describe the field of resale royalties.[17]

1. Paintings, drawings, sculptures and prints

Universally covered by resale royalty laws are paintings, drawings and sculptures.[18] Paintings, drawings and sculptures are also included in the definition of "work of visual art" if they are not excluded by a negative part of the definition.[19]

For resale royalty purposes, there is a significant difference between paintings and drawings on the one hand, which are usually unique, and sculptures, of which numerous copies are often made. Sculptures are only included in the definition of "work of visual art" if there are 200 or fewer in number, consecutively numbered by the artist, and bear either his signature or his mark. One of the first questions that Congress needs to confront is whether a work that is not unique deserves to generate resale royalties. If so, is 200 the correct number to separate works deserving resale royalties from those that do not? A similar problem occurs with prints such as

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"personal and reputational aspects of the creation." Sarah Leggin, *Contains Extremely Offensive Material: David Wojnarowicz v. American Family Ass'n, the Visual Artists Rights Act, and a Proposal to Expand Fair Use to Include Artists' Moral Rights*, 22 UCLA ENT. L. REV. 75, 75-76 (2014). Elisa D. Doll, *The Equity for Visual Artists Act of 2011 (EVAA): Crafting an Effective Resale Royalty Scheme for the United States through Comparative Meditation*, 24 IND. INT'L & COMP. L. REV. 461, 462 (2014) (resale royalties are economic rights); Benjamin S. Hayes, *Intergrating Moral Rights into U.S. Law and the Problem of the Works for Hire Doctrine*, 61 OH. ST. L. J. 1013, 1019, 1021 (2000) (resale royalties are economic rights, though often classified as moral rights). An extensive discussion of the reasons for this confusion is found at LILIANE DE PIERREDON-FAWCETT, THE *DROIT DE SUITE* IN LITERARY AND ARTISTIC PROPERTY: A COMPARATIVE LAW STUDY 30-47 (1991).

[17]I have summarized the ambiguities of the definition of "work of visual art" in 17 U.S.C. §101 in 14 pages elsewhere, and will not repeat it here. HERBERT LAZEROW, MASTERING ART LAW 144-157 (2015).

[18]E.g., CALIF. CIV. CODE §986(c)(2); UK §4(1), specifies the general rule as "any work of graphic or plastic art" and illustrates it with a picture, a painting, a drawing, a sculpture and other things.

[19]17 U.S.C. §101; for a case where a painting was disqualified by a negative requirement, that no advertisement could be a work of visual arts, see Pollara v. Seymour, 344 F.3d 265 (2d Cir. 2003).

lithographs, etchings or serigraphs, and photographs,[20] which must meet the same signature and numbering requirements to be considered a "work of visual art".

The California statute does not mention prints or photographs.[21] Neither prints nor photographs seem to call for a California resale royalty unless qualified under a different rubrique.[22]

The British have a different solution to multiples, taken directly from the European Union directive. After enumerating a large number of items that are "work", including several types of prints and photographs, it says "[A] copy of a work is not to be regarded as a work unless the copy is one of a limited number which have been made by the author or under his authority." The law does not state what number constitutes a limited number.[23] This is a significant defect, as it causes uncertainty in an area where there is no need for uncertainty. The limitation to copies made by the author or under his authority might cast question on copies produced posthumously unless specifically authorized by the artist– or even if specifically authorized.[24]

The problem here is that the artist's ability to make additional copies means that the artist is not excluded from deriving royalties-like income by making copies and selling them.[25] Perhaps

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[20]Opinions differ about whether prints should be covered. See Duffy, *Royalties for Visual Artists*, 11 J. BEV. HILLS BAR ASS'N 27 at 29 (Jan.Feb. 1977) (for without discussion); Solomon & Gill, *Federal and State Resale Royalty Legislation: "What Hath Art Wrought?"*, 26 U.C.L.A. L. REV. 322, 344 n. 145 (1978) (against because of multiple sales); John E. McInerney III, *California Resale Royalties Act: Private Sector Enforcement*, 19 U.S.F. L. REV. 1, 10 (1984) (in favor of coverage because multiples mean multiple exploitation of the artist).

[21]CALIF. CIV. CODE §986 (c)(2).

[22]My contact with the San Diego Society of Digital Photography has taught me that there are artists who are creating works that they call photographs that are entirely done by computer programming. The San Diego artist and professor Harold Cohen has programmed a computer to create paintings based on random choices. It is unclear that legal consequences should attach depending on whether the creator calls the work a painting because the computer executes it with paint, a drawing because it is executed with ink, or a photograph because it is created in a photography-like process. In each case (as with a cast sculpture), it is an original item produced by the artist. Because of the computer (or, in the case of the sculptor, the mold), the artist can produce additional items identical to the original. It may be that the law might wish to attach a resale royalty to such items, with a provision that the right to the royalty would be cancelled if the artist produced more than a fixed number of exemplars.

[23]UK §4. LILIANE DE PIERREDON-FAWCETT, THE *DROIT DE SUITE* IN LITERARY AND ARTISTIC PROPERTY: A COMPARATIVE LAW STUDY 53-70 (1991) suggests that the key distinction is between works produced under the supervision of the artist and other works, regardless of numbers or the signature of the artist. She suggests that the proper function of the signature is to be evidence that the work was produced under the supervision of the artist. Work without such a signature could be proven to have been produced under the supervision of the artist, but the burden of proof on works without the artist's signature would shift to the person demanding the resale royalty. *Id.* at 62.

[24]Edward Weston left instructions that only his son Cole could print his images. Allan Kozinn, *Edward Weston Photographs to Be Auctioned*, NY TIMES Aug. 26, 2014 at C3 cols. 1-2. Is a photo printed by Cole a "work of visual art"? It is not signed and numbered personally by Edward, but it was authorized by him. A resale royalty might be due in the U.K. but not in the U.S. if the "work of visual art" is to be the defining United States qualification.

[25]Michael Asimow, *Aspects of the Droit de Suite* in MELVILLE NIMMER, LEGAL RIGHTS OF THE ARTIST III-1, 21 (1971). In theory, producing more copies should reduce the sale price of each individual

twenty or fewer copies might not be enough to give the artist a reasonable stream of income, but the ability to make 200 copies for sale might produce an income stream comparable to copyright royalties. Some countries have put the limit at eight or twelve sculptures and seventy-five prints.[26] Any number selected will be arbitrary, but it is better to have an arbitrary certain number than leave the criteria uncertain.

In practice, this problem may not arise as long as there is a minimum price required to justify a resale royalty that is adjusted for inflation. That minimum is unlikely to be frequently reached when there are large numbers of identical works on the market.[27]

2. Collage, glass, ceramics, tapestries, jewelry

Other resale royalty laws may include collage, tapestry, ceramic and glassware.[28] Whether collage is already covered as "painting", a two-dimensional representation with color, has yet to be decided. If that is the definition of painting, a tapestry might also be a painting. Some pieces of glassware or ceramics may be sculptures, depending on how "sculpture" is defined.[29]

The problem with all these items, and furniture also, is that they are both craft and art. A sliding scale runs between one extreme of the purely functional and the other of the purely artistic, not at all functional. All of these items can be made and usually are made as multiples. They are occasionally made as unique items.[30]

3. Antiques

The definition of an antique for customs purposes is an item that is at least one hundred years old.[31] If resale royalties are limited to the life of the creator, there will be few problems with antiques until the maximum lifetime of man is stretched a bit. If the right to resale royalties were to continue for the period of copyright, or for the lives of the artist's surviving spouse or children, this would raise the question of whether there should be resale royalties on antiques. Like much artwork, antiques derive some of their value from their rareness today. Sometimes that is a copy, thereby reducing the resale royalty on its resale.

[26]SIMON STOKES, ARTIST'S RESALE RIGHT (*DROIT DE SUITE*): UK LAW & PRACTICE (2d ed. 2012) [hereinafter cited as STOKES] 25-26, 38.

[27]One might also ask whether the sale of the plate for an engraving or the mold to make a metal sculpture is a "work of visual art". It is rare that these items are sold, and even less common that they are resold. The fact that they are clearer examples of the artist's work than the products they produce does not bring them within the definition of "work of visual art". LILIANE DE PIERREDON-FAWCETT, THE DROIT DE SUITE IN LITERARY AND ARTISTIC PROPERTY: A COMPARATIVE LAW STUDY 59-61 (1991) believes that their sale should trigger a resale royalty.

[28]UK §4 for all, and Calif. Civ. Code §968(c)(2) for "an original work of art in glass".

[29]I am thinking of the work of Dale Chihuly (Lime Green Icicle Tower at the Boston Museum of Fine Arts) or Robert Arneson (Portrait of George [Moscone] at the San Francisco Museum of Modern Art). One court refused to extend the definition of sculpture to a garden, including the choice and placement of trees, shrubs and flowers. Kelley v. Chicago Park District, 635 F.3d 290 (7th Cir. 2011).

[30]The British collecting society DACS' website suggests that pottery, book bindings, hand painted tiles, stained glass windows, wrought iron gates, cutlery and needlework can be subject to resale royalties depending on the artist's intention and the aesthetic quality of the work. http://www.dacs.org.uk/knowledge-base/factsheets/works-of-artistic-craftsmanship (last visited Apr. 11, 2015). Of course, DACS, which retains 15% of what it collects, has an interest in expanding the types of works that are covered by resale rights.

[31]U.S. INT'L TRADE COMM'N, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES Revision 1, Chapter 97, Section XXI, Heading 9706, USITC Pub. No. 4542 (2015).

matter of a few of the many identical works created surviving; sometimes there were few of the items originally made. Either way, one might ask whether the production of an antique requires sufficient creativity to justify a resale royalty. The definition of an antique only requires survival, not creativity.

4. Wine

Wine suffers from the same problem as antiques, plus it is usually a product that was originally made in quantity.

Thus, antiques and wine would not fall within the definition of "work of visual art" as it currently exists, and collage, glass, ceramics, tapestry and jewelry would only fall within that definition if they were also deemed to be painting or sculpture. This is probably appropriate.

5. Works made for hire

A work made for hire is not a "work of visual art". The definition of a work made for hire is unclear. A work made for hire can be either a work created by an employee within the scope of his employment, or a work created by an independent contractor who agrees in writing that it is a work made for hire and that falls within one of nine categories.[32] According to the Supreme Court, whether a person is an employee depends on weighing thirteen different factors.[33] While the Second Circuit has opined that five of the factors are more important than the others, the determination is still– indeterminate.[34] Commentators have analyzed the cases since the Supreme Court decided *Reid*; the latest has concluded that the criteria fall on a 5-category continuum of importance, some but not all of the Second Circuit's criteria falling within the most important two categories. It remains to be seen whether this study will have the predictive power its author alleges.[35]

A second problem is whether the artist who hires employee assistants has created a work made for hire. The work literally meets the technical definition of a work made for hire, and the original function of the work made for hire doctrine vests the copyright in the artist. In all the litigated cases, the question has been whether people who provided the creative input are employees; most are directed to the question of who owns the copyright.[36] Excluding work made for hire from the definition of "work of visual art" when the hirees are subordinate to the person providing the principal creative input from the definition of work of visual art makes no sense for moral rights. It likewise makes no sense for resale royalties. Such a rule would deprive a creative artist of both moral rights and resale royalties from a work because he did not perform 100% of the labor needed to produce the work. One hopes that no court would so hold even in the face of the plain words of the statute, but such a case has yet to be litigated.[37]

[32]17 U.S.C. §101.

[33]Cmnty. For Creative Non-Violence v. Reid, 490 U.S. 730 (1989).

[34]Aymes v. Bonelli, 980 F.2d 857 (2d Cir. 1992).

[35]Ryan Vacca, *Work Made for Hire– Analyzing the Multifactor Balancing Test*, 42 FL. ST. U. L. REV. 197 (2015).

[36]*See* Carter v. Helmsley-Spear, Inc., 71 F.3d 77 (2d Cir. 1995), a moral rights case; *but see* 109 HARV. L. REV. 2110 (1996) (criticizing the decision).

[37]Put from a different perspective "...is the increasing acceptance by the art world of the industrial practice of separating invention from execution. With the proliferation of industrial techniques adaptable to current aesthetic tendencies, the concept of an 'original' will probably weaken considerably. The 'original' in art, as in architecture, will be a blueprint, a set of sketches and instructions to the craftsman." Monroe E. Price, *Government Policy and Economic Security for Artists: The Case of the*

A third problem is where the employer disclaims the copyright in advance. "...[T]he university asserts no interest in its employees' creations...."[38] Such a clause implies an intent that the copyright belong to the employee *ab initio*. A technical reading of the statute sees the work completed as a work made for hire the copyright to which belongs initially to the University, with the policy disclaimer being an assignment of that copyright to the faculty member. This would result in no moral rights and no resale rights because of the exclusion of work made for hire from the definition of "work of visual art".

B. Compatibility with the laws of other countries

One important consideration is whether United State law on resale royalties should be harmonized with comparable laws of other countries. This may be desirable for two reasons. It may be important to assure reciprocity when the works of United States artists are resold in those countries. It may also assure that the United States is not put at a competitive disadvantage in seeking to have art sold on its own soil. It might thus be useful to compare the items covered by resale royalties, as well as the rates and limits, to those of other countries, particularly those that are our major art trading partners.

IV. Sales covered

A. Location of the sale[39]

One possibility would be to impose the royalty obligation on all sales within the United States.[40] Such a rule would immediately raise the problem of localizing the sale. United States commercial and tax law provides that the sale takes place where title passes. Title passes where the parties agree that title passes.[41] In the absence of agreement, title passes at the place where delivery is made or the risk of loss is transferred.[42]

Droit de Suite, 77 YALE L.J. 1333, 1341 (1968).

[38]University of San Diego Policy 2.8.1 Intellectual Creativity (Feb. 1994) at http://www.sandiego.edu/legal/policies/community/Intellectualproperty/Intelectualcreativity.pdf, last visited May 27, 2015.

[39]Copyright Rep. takes no position on whether sales covered should be determined by the location of the sale, the status of the seller or the status of the buyer. The normal European understanding seems to be that each national law covers only sales within that state, as no mention is made of sales by nationals or residents. *See* Collins v. Imtrat Handels Gmbh, [1993] 3 Com.Mkt.L.Rev. 773 (copyright law is left to each member state, but the law cannot discriminate against citizens or residents of other states); Bild-Kunst re Joseph Beuys, 17 Eur. Intell. Prop. Rev. 1995 #4 D94-95 (Federal Supreme Ct 16 June 1994) (German resale rights law does not apply to sale by a German citizen by auction in London even when the listing was largely negotiated by the German branch of the auction house and the work was delivered to the German branch for shipment to London).

[40]Place of sale is one criterion for application of the California law. CALIF. CIV. CODE §986(a). Australian law states that the resale royalty is only enforceable in an Australian court. Australia §§25, 50, 51. This does not reveal whether it is limited to sales within Australia, to sales by Australian citizens or residents, or to any sale of a work anywhere by anyone if the artist is an Australian citizen or resident or a citizen of a reciprocating country. Then there is the absolutely impenetrable §52, Additional effect of Act, which reads: "Without limiting its effect apart from this section, this Act also has the effect it would have if its operation were expressly confined to: (a) giving effect to [the Berne Convention]; (b) matters external to Australia; or (c) matters of international concern." British law is shorter, but no clearer on this point. It applies throughout the United Kingdom, but does not state how. UK §1(2).

[41]UNIFORM COMMERCIAL CODE §2-401.

[42]UNIFORM COMMERCIAL CODE §2-401(2), (3).

Such a rule creates the possibility of manipulation. By using insurance, the parties can, with very little change in risk, shift the place of sale by providing that the seller will deliver the artwork at a point outside the United States.

While one's immediate reaction is to find a criterion to determine the place of sale that is less subject to manipulation, that is not easily done. Alternate non-manipulable criteria are hard to find. The solution of the income tax regulations, to consider all factors of the transaction, is quite indefinite.

Artwork is a special case because most post-distribution transfers of artwork take place through professional intermediaries, such as galleries, agents or auction houses. One solution might be to provide that any sale made through a professional intermediary takes place at the location of the intermediary's office through which the seller did business or, in default of an office, at the intermediary's habitual residence.

B. Sales by status of seller

Resale royalties could be based instead of, or in addition, on the status of the seller. It could be imposed on sellers who are United States residents,[43] on sellers who are United States citizens, or both. If resale royalties are imposed on both United States citizens and residents, it would be congruent with United States income taxation of the sale.

If a resale royalty rests on the seller's status, care should be taken to prevent evasion, either by having controlled entities such as partnerships, trusts or corporations buy and hold the art, or to prevent the art from being held by close relatives who do not share the person's residence or citizenship. "Sold by a resident, or sold by another person controlled directly or

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Treas. Reg. §1.861-7(c) provides: "... Country in which sold. ... [A] sale of personal property is consummated at the time when, and the place where, the rights, title, and interest of the seller in the property are transferred to the buyer. Where bare legal title is retained by the seller, the sale shall be deemed to have occurred at the time and place of passage to the buyer of beneficial ownership and the risk of loss. However, in any case in which the sales transaction is arranged in a particular manner for the primary purpose of tax avoidance, the foregoing rules will not be applied. In such cases, all factors of the transaction, such as negotiations, the execution of the agreement, the location of the property, and the place of payment, will be considered, and the sale will be treated as having been consummated at the place where the substance of the sale occurred."

[43]California imposes the obligation of paying a resale royalty on sellers who are California residents. CALIF. CIV. CODE §986(a). A sale of an artwork or a royalty on it would be subject to United States income tax if the seller were a United States citizen or a United States resident, as defined in INT. REV. CODE OF 1986 §7701(b). If a nonresident alien or foreign corporation sold art in the United States, it would only be subject to United States income tax if the sale were effectively connected to an office or other fixed place of business in the United States, INT. REV. CODE OF 1986 §§871, 881, or, in the case of a person resident in a country that has a tax treaty with the United States, if it is attributable to a permanent establishment located in the United States. *I.e.*, Income Tax Convention between the United States and France art. 13(3). In the absence of a tax treaty, a royalty would be taxed in the U.S. at 30% if it were from United States sources, meaning for the use of the property in the United States or, if the recipient were engaged in trade or business in the United States, if the use of the property were effectively connected to that business. INT. REV. CODE OF 1986 §§861(a)(4), 871(a)(1), (b), 881(a)(1), 882(a)(1). Residents of treaty partners are generally exempt from income tax on royalties from sources in the other country unless they are attributable to a permanent establishment there, but the French treaty authorizes tax at up to 5%. The source of royalty income is the place of use or the payor's residence. E.g., Income Tax Convention between the United States and France arts. 12(2), (5), (6).

indirectly by, or closely related to, a resident," are words that come to mind.[44]

C. Sales by status of buyer

Alternatively or in addition, resale royalties could be imposed based on the buyer's status, usually involving either residence or nationality.[45] The same problems of evasion discussed when imposition is based on seller's status may apply to buyer's status.

D. Sales by status of the intermediary

If the art professional who is acting as an intermediary in the sale is obligated to withhold part of the payment or to file an information return, it may be important to consider the status of the intermediary as a United States citizen or resident, or as a person doing business regularly in the United States.

E. Sales by status of the artist[46]

The principal purpose of the resale royalty is to benefit the artist Most countries require a resale royalty only when the work was created by one of their own artists, or by an artist from a country that provides reciprocity by according a resale royalty to artists from the enacting country. To effectuate this purpose, Congress might want to extend the royalty to the sale of art made by any United States citizen or resident, regardless of where in the world it is sold or who the intermediary might be. Such an extension would have certain practical problems of enforcement.

F. Minimum proceeds required

Some resale royalties laws require that the sale price attain a certain monetary price level.[47] The theory here is that minimal amounts of royalties are not worth the cost of collecting them.[48] If that is the case, the minimum amount should be lower where it is anticipated that most collections will be done by a specialized collecting entity such as ASCAP. Such societies are likely to have lower per unit collection costs than individual artist collectors. On the other hand, the minimum should be sufficiently low that it would not exclude from benefits artists who have not yet attained star status.

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[44]INT. REV. CODE OF 1986 §482 says: "[O]wned or controlled directly or indirectly by the same interests..." For a definition of direct or indirect ownership, see INT. REV. CODE OF 1986 §958.

[45]British law makes the buyer liable for the royalty. where an intermediary was not involved in the sale. UK §13(2)(c).

[46]For more on who should benefit and for how long, see text *infra* at notes 129-146.

[47]The British minimum is 1,000 euros, currently around $1,200, so the smallest payment would be $48. The California minimum is $1,000, so the smallest payment would be $50. UK §12(3)(b); CALIF. CIV. CODE §986(b)(2). The European Union Directive requires that a threshold amount not exceed 3,000 euros. Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, O.J.E.C. 13.10.2001 L272/33 art. 3(2). LILIANE DE PIERREDON-FAWCETT, THE DROIT DE SUITE IN LITERARY AND ARTISTIC PROPERTY: A COMPARATIVE LAW STUDY 119-121 (1991) reports that a variety of minimums existed. They ranged from the equivalent of 5FF to California's, which is the equivalent of 5,600FF. Disregarding the outliers, the minimums ranged from the equivalent of 100FF to 300FF ($16-$45). Even considering the inflation that has occurred since 1990, it seems likely that the cost of collecting $2.50 ($50 x .05) would greatly exceed the amount collected. It has been suggested that the high minimum proceeds required by the European Directive was an inducement to certain European Union countries opposed to a resale royalty law to agree to the issuance of the Directive. *Id.* at 119.

[48]COPYRIGHT REP 74 recommends a threshold price in the $1,000-$5,000 range.

Requiring the receipt of a certain sales price is not consistent with the royalty purpose. A copyright royalty would be payable regardless of whether the use resulted in a specified minimum number of sales, though the amount of the royalty would normally depend in part on the number sold. It is consistent with the joint venture purpose. If the resale price was minimal, there is unlikely to be profit from the joint venture to be shared.

If a minimum sale price is imposed, a provision should be inserted authorizing an agency to revise the minimum to account for inflation. Otherwise, the minimum will no longer serve its purpose.[49]

G. Profit required

Some laws require a profit of some sort before a resale royalty is due.[50] This can be done by disqualifying the royalty if there is no profit, or by measuring the royalty by the profit. Either way, there would be no royalty payable without a profit.

It is possible that most laws do not require a profit because of the difficulty of discovering information necessary to determine if there is a profit. The gross sales price is hard enough to discover, but the costs incurred by the seller would be even more difficult. One possible remedy is to place the burden of proving costs on the seller, as those costs are within his knowledge and also in his interests to prove.[51]

Another reason may be that the law would then need to spell out what costs can be offset against the gross sales price. Such costs might include the buyer's premium, sales tax, value added tax, insurance during holding, security measures during holding, conservation costs, shipping costs, seller's commission, or other sales costs.[52]

H. Exemption for works in distribution

Some resale royalty laws exempt works in distribution. The purpose of this is to avoid hindering the artist's initial sale, where presumably the artist will receive a greater share of the sales price. If the artist's initial sale were subject to a royalty, it would simply be the transfer of money from one pocket of the artist to another.

If the initial distribution is to be exempted, it must be defined. It could be limited to a sale or exchange by the artist or by the artist's heirs.[53] It could extend to persons who received the artwork from the artist as a gift, though given the informal recordkeeping in which many artists engage, proving the gift could be difficult.

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[49]This should also be the case with other fixed amounts such as a cap, or increasing or decreasing rate brackets. IRS makes certain inflation adjustments annually based on the cost-of-living index. INT. REV. CODE OF 1986 §§1(f)(3), (i)(1)(C), 63(c)(4), 151(d)(4). If there were a reliable cost-of-art-sales index, it might be appropriate to use that. In default thereof, the cost-of-living index is probably best.

[50]CALIF. CIV. CODE §986(b)(4); COPYRIGHT REP. 75-76. The California solution only requires a certain kind of profit because it compares the gross (re)sale price and the purchase price paid by the seller. It does not allow any other costs, so there will often be a loss on the transaction, considering that it is not unusual for a gallery to take 50% of the gross sales price, even when the gross sales price exceeds the price at which the seller purchased the artwork.

[51]COPYRIGHT REP. 75-76.

[52]For further discussion, see text *infra* at notes 102-108..

[53]CALIF. CIV. CODE §986(b)(1)'s initial limit is to a sale "...where legal title to such work at the time of such initial sale is vested in the artist thereof." Since California is a community property state, one might well ask whether that provision would ever apply to a married artist, since title to an undivided one-half of the work would reside in the artist's spouse.

One way to encourage the initial sale of artwork is to not apply the resale royalty as long as the work is in professional hands, with a time limit. The hope is that dealers will then be willing to buy the work outright, as was the case more than a century ago[54], and resell it to clients or other dealers. California does not impose a resale royalty on any sale by a dealer within ten years of the initial sale by the artist providing that all intermediate purchasers have been art dealers.[55] The British rule exempts sales by a person who acquired the work directly from the artist and sells the work within three years of acquisition for no more than 10,000 euros.[56]

Such an exemption can be tricky, especially for prints, where a number of different scenarios can be envisioned. Where the publisher of the print is acting as the artist's agent, the sale by the publisher would not be a resale, but a first sale, from the artist to the customer. Where the publisher buys the print from the artist and resells it to a customer, this would be a resale, but would be exempt from resale royalties if the other limitations were met because the publisher's purchase was part of the initial distribution of the print. Where the publisher (perhaps even a publisher that is an artificial entity controlled by the artist) and the artist collaborate to produce the print, the work made for hire rule may come into play, which could prevent the work from ever justifying a resale royalty.[57]

This sort of exception can be justified under either the royalties purpose or the joint venture purpose on the grounds that the work is still in its initial distribution stage, rather than its exploitation stage.

I. All Sales or certain sales

Should resale royalties apply to all sales, or only to sales effectuated through artworld professionals? From a policy standpoint, neither the royalties theory nor the joint venture theory supports the application of resale royalties to less than every sale. However, practicality may dictate a different result.

French law originally applied only to sales at auction. The reason for this was practicality. Auction sales are public. The two important facts that an artist must know to determine his eligibility for resale royalties are mostly provided by public auctions: the fact that his work was sold, and the price at which it was sold.[58] The fact that a high proportion of high-value sales occur at auction makes it imperative that auction sales be covered.

The French government soon received pushback from the auction houses. They perceived themselves at a competitive disadvantage with galleries and private dealers. Whether or not the disadvantage was real given the publicity advantage that auctions have in securing high prices, auction houses perceived that they were at a disadvantage.

With proper enforcement provisions, it is hard to see a reason to differentiate between

[54]Beginning in the 1870s, Paul Durand-Ruel bought more than 4,500 Impressionist paintings from the artists, many at a time when there was little market for the works of these artists. Ken Johnson, A Portrait, Freely Brushed, of a Shrewd Dealer, New York Times 7/24/2015 p. C22 cols. 1-5.

[55]CALIF. CIV. CODE §986(b)(6).

[56]UK §12(4).

[57]STOKES 39-40.

[58]It should be noted that what appears to be a sale at auction may not be a sale. It is possible for an owner to consign a work for sale at auction with a reserve price. If the bids at the auction do not mount to at least the reserve price, the work is not sold and will be returned to the owner. Neither the seller nor the auction house wants it known that a particular lot was unsold, as it tends to taint the lot for future sales. See Cristallina v. Christie, Manson & Woods Int'l, Inc., 502 N.Y.S.2d 165 (App. Div. 1986).

auction houses and other professional art sellers. Each is in the business of selling art; each is likely to keep good records; and each can be conscripted as a withholding agent and a reporting agent without imposing serious costs on them.[59]

The more serious question is whether the resale royalty should apply to private sales. A first reaction to this suggestion might be that private sales are insignificant both in number and price. Whether or not that is true, recent experience with the music industry has shown that the internet can be harnessed for peer-to-peer transactions were it not for the impediment of the copyright laws. It should be made clear that anyone who facilitates peer-to-peer art sales transactions is an art world professional subject to the same rules as dealers and galleries. Applying the resale royalty to all sales creates a uniform rule and avoids the necessity of determining when a sale has been effectuated through an art world professional. It does, however, create extra enforcement headaches.[60] The fact that a small number of sales that should be subject to the royalty might present difficulties of enforcement should not result in their exemption.

J. What is a sale?

If the event that triggers liability for a resale royalty is a sale, it is important to specify what amounts to a sale. Clearly, the exchange of a work of art for cash, or for a cash equivalent such as a check or a negotiable note drawn by a solvent payor that can be easily discounted, would qualify as a sale.

Defining a sale at auction involves some unusual facts.

Some auction houses, in order to induce sellers to sell art through their auction house, will guarantee a specific price at the auction. If the bids at the auction exceed the guaranteed price, there is no difference between that situation and a standard auction sale. If the bidding does not reach the guaranteed price, the auction house (or a third party guarantor if there is one) pays the seller the guarantee price. This should be a sale, as the result is the same as a sale. The owner has cash, rather than the art, which now belongs to the guarantor.

Sellers can also protect themselves at auctions by insisting on a reserve price. With a reserve price, the work will not sell unless the bidding reaches the reserve price. The auction

[59]While the Register of Copyright originally thought the right should be confined to auction sales, her current preference is to include all sales by art professionals. COPYRIGHT REP 73-74. UK law takes the same point of view in a more roundabout way. UK §12(2),(3) defines a resale as only those taking place where the buyer or the seller or the agent of either "... is acting in the course of a business of dealing in works of art." This formulation suggests that a person who is in the business of dealing in works of art might make a sale or a purchase that is not in the course of that business. One can certainly imagine such a case. For instance, Peg Goldberg was a dealer in 19th and 20th century art and bought a Byzantine mosaic. This might have been for her personal collection. It was not for her personal collection, as she immediately tried to resell it, though she testified that she "fell in love" with it. Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374 (S.D.Ind. 1989), *aff'd* 917 F.2d 278 (7th Cir. 1990). One might well question whether the difficulties of tracing whether a work was bought or sold in the business or as part of a private collection should induce the legislature to classify all purchases and sales by art professionals as subject to the rules for professionals.

[60]Which is why COPYRIGHT REP 74 would exclude private sales, as does British law. UK §12(3)(a). While the UK regulation does not provide this additional exclusion, an administrator has stated that there are no resale royalties paid on sales to charitable museums open to the public. STOKES 28.

house must indicate in the catalogue those works that have a reserve price. The catalogue does not specify the reserve price, nor is there a public announcement when a work fails to sell because the last bid is below that reserve price. In the latter case, there is no sale. The seller receives no money, and the artwork is returned to the disappointed seller. That seller should not be obligated to pay a resale royalty because no resale occurred.[61]

Whether there has been a sale at auction where the buyer refuses to pay for the artwork may be subject to dispute. The Uniform Commercial Code provides that an auction sale takes place when the hammer falls.[62] Yet the context of the UCC pertains to whether the auctioneer and seller have a cause of action against the buyer for breach of contract. As a matter of policy, it would seem that no resale has taken place where the seller retains the work and does not receive any amount of the purchase price. If legal process is successfully undertaken to collect damages or the sale price, a sale has taken place. If the matter is settled for an amount less than the hammer price, a resale has taken place, but the sales price should be the amount collected, rather than the contract price.[63]

Imagine a sale where a portion of the sales price is paid when the contract is signed and a portion is to be paid later, evidenced by a note that cannot be discounted, or evidenced solely by the contract. If the balance is subsequently paid and the artwork transferred, a sale has taken place.[64] If the purchaser defaults on the contract and the seller retains the artwork, it is doubtful that a sale has taken place. However, the seller has profited by the down payment, so perhaps a sale has taken place to the extent of the down payment.[65] Alternatively, it might be argued that no sale has taken place because title has not been transferred, but the amount of the forfeited down payment should be added to the sales price when the artwork is eventually sold.

Another possibility is the long-term lease coupled with an option to purchase.[66] When the option to purchase is exercised, a sale has certainly taken place. Whether a sale has taken place when the lease is signed and the option is issued is a more difficult question. It might be resolved based on the substance of the transaction, taking into consideration the relationship between the lease payments, the option price and the fair market value of the work.[67] The same should be true

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[61]LILIANE DE PIERREDON-FAWCETT, THE DROIT DE SUITE IN LITERARY AND ARTISTIC PROPERTY: A COMPARATIVE LAW STUDY 79-81 (1991) concurs, criticizing a 1930 case holding that a resale royalty is due even if the high bid is below the reserve price.

[62]UCC §2-328(2).

[63]A similar problem arises in England as a result of the Sale of Goods Act 1979 §57. STOKES 25-26.

[64]This does not determine when the sale takes place. It might be when the contract is entered into, when the first payment is made, when possession of the work is transferred, or when the last payment is made.

[65]See the discussion of the amount of the sales price *infra* at notes 87-101.

[66]Suggested at Stephen S. Ashley, *A Critical Comment on California's Droit de Suite, Civil Code Section 986*, 29 HAST. L.J. 249, 257 (1977).

[67]UCC §1-203(a) reads: "Whether a transaction in the form of a lease creates a lease or security interest is determined by the facts of each case." In re Pillowtex, Inc., 349 F.3d 711 (3d Cir. 2003) (transaction in the form of a lease was a sale with a retained security interest where lessor received present value of payments in excess of the fair market value of the goods and the cost to lessor of retaking possession exceeded the residual value of the property); Gangloff Industries, Inc. v. Generic Financing and Leasing Corp., 907 N.E.2d 1059 (Ind. App. 2009) (transaction was a sale with a retained

of a lease with an option to renew.

What about an exchange? The owner of a Jeff Koons trades his sculpture for a Paul McCarthy. He no longer has the Koons, but he likewise does not derive from the transaction anything liquid with which to pay the resale royalty. Nonetheless, he should be liable for the resale royalty, as engaging in an exchange results in the receipt of something of value. One would not want a resale royalty to accelerate a trend where an exchange would be preferred to a sale.[68]

Some dealers offer their clients a different form of exchange. The customer may exchange the work purchased for any work in the dealer's stock of comparable or greater worth, with the customer paying the difference if the new work is pricier. One must decide whether a sale has taken place, as there is no refund of the original price, or whether the transaction is the equivalent of receiving the work on loan or for approval. If a resale royalty is due on the initial sale, a resale royalty should be due on the exchange also. This would result in two resale royalties due, but in truth only one sale has taken place.

A device growing in popularity is the creation of fractional shares in an artwork.[69] One reason relates to estate planning. To guarantee a discount from the work's fair market value for estate tax purposes, a percentage ownership in the work is sometimes transferred to the natural heirs of the owner.[70] If this is done gratuitously, the rules on gifts set forth below should apply. If it is a transfer for consideration, this should be considered a sale. The fact that it is a sale of a partial interest will reduce the amount of the resale royalty, but should not eliminate it.[71]

security interest where the option to purchase price was so small that the only rational action for lessee was to exercise the purchase option.) The same result occurs in tax cases without specific statutory authority. In Est. of Starr v. Comm'r, 274 F.2d 294 (9th Cir. 1959), taxpayer tried to deduct rental payments under a document purporting to lease a sprinkler system installed in taxpayer's building to taxpayer for $1,240 per year for 5 years, with a right to renew the lease for an additional 5 years at $32 per year. The court held that the lease with option to renew was actually a sale because the renewal rent was little more than a service charge, the cost of the sprinkler system was fully paid by the rental amounts in the first term, and the custom-made sprinkler system was close to worthless if removed from the building in which it was installed. Same result in similar circumstances in Mt. Mansfield Television, Inc. v. United States, 342 F.2d 994 (2d Cir. 1965). Where the lease payments were level with an option to purchase at a price reasonably estimated as the likely fair market value at the end of the lease, the transaction was held to be a lease rather than a sale. Lockhart Leasing Co. v. United States, 446 F.2d 269 (10th Cir. 1971).

[68]The trend is already in place in order to defer income tax on the transaction, which would be assessed at the special 28% rate for collectibles. For similar problems in real estate taxation and the establishment of an industry to arrange exchanges, see Biggs v. Commissioner, 632 F.2d 1171 (5th Cir 1980), Starker v. United States, 602 F.2d 1341 (9th Cir. 1979) and INT. REV. CODE OF 1986 §1031(a)(3).

Such a transaction would attract a resale royalty in California, which exempts only exchanges where the fair market value of the property exchanged is less than $1,000. CALIF. CIV. CODE §986(b)(5).

[69]Randy Kennedy, *Collector Sues Gagosian Over Met's Stake in Work*, NY TIMES Mar. 12, 2011 p. C2 cols. 5-6; Felicia Lee, *The Met Sues a Man Who Bought A Painting It Wasn't Selling*, NY TIMES May 13, 2011 p. C2 cols. 3-4. Creating fractional shares is not unique to art. It is done with almost any asset to create a discount in estate tax valuation.

[70]*E.g.*, Est. of Elkins, 767 F.3d 443 (5th Cir. 2014).

[71]A fine line may need to be drawn between sale of a fractional interest outright, and transfer of a

Gratuitous transfers should probably not be considered sales to trigger a resale royalty. Whether the property is passing by gift, by will or by intestate succession, this does not seem to be the use of the artwork in a commercial way that should invoke either the royalties or the joint venture theory.[72] However, a gift by the artist to someone outside his immediate family should count as an initial sale. A subsequent sale by the donee should command a resale royalty.

Not all gratuitous transfers are truly gratuitous. While the gift of art to a charitable organization does not result in a direct payment to the donor, in most such cases the federal (and perhaps state) government makes a payment to the donor or his estate in the form of a deduction.[73] The value of the deduction will vary with the marginal income or estate tax rate involved. Typically, when artwork is donated to a charitable organization, this signals the likely permanent removal of the work from potential future resales.[74] Such a donation should be considered a sale, albeit for the reduced amount received in the form of the tax benefit.[75] On the other hand, donation of a work to a charitable organization is likely to make the work more

fractional interest as part of syndication. Consider the gallery owner who would like to aquire a painting for resale but lacks both the capital to finance it and the creditworthiness to get a bank loan. After arranging a syndicate of dealers, she may buy the work outright, then transfer fractional shares to the other dealers (or investors) who put up the money to enable the gallery owner to buy the work. When a purchaser is found, the buyer will want the conveyance of title from a single individual, so the fractional interests of the investors will be transferred to the lead gallery owner. For resale royalties purposes, this should result in a sale when the gallery owner buys and a sale when the gallery owner sells, but not a sale when the fractional interests are either created or extinguished by reconveyance to the lead gallery owner. STOKES 40-41. If the gallery owner buys for her own account and later syndicates the work, the syndication should be considered a sale.

[72]The original French proposal applied a resale royalty to a disposition of art on death and to a division of community property on divorce. Those provisions did not become part of the law eventually enacted. LILIANE DE PIERREDON-FAWCETT, THE DROIT DE SUITE IN LITERARY AND ARTISTIC PROPERTY: A COMPARATIVE LAW STUDY 74-75 (1991). There is precedent in United States tax law for considering the transfer of appreciated property as part of a divorce settlement as a sale or exchange, United States v. Davis, 370 U.S. 65 (1962), though Congress later enacted INT. REV. CODE OF 1986, §1041, treating such a transfer as a gift and deferring the imposition of tax until the recipient spouse disposes of the property.

[73]INT. REV. CODE OF 1986 §§170, 2055, 2522.

[74]In some cases, the work will be added to the permanent collection of the museum, so there will be no further resales. Even in those cases, "permanent" may be a shorter time span than Webster's Dictionary would indicate when the institution falls on hard times and looks around for ways to meet its financial obligations. *See e.g.* In re Fisk Univ., 392 S.W.3d 582 (Tenn. App. 2011) and Georgia O'Keeffe Found. (Museum) v. Fisk Univ., 312 S.W.3d 1 (Tenn. App. 2009) (approving the sale by the University of a half interest in works by Ms. O'Keeffe and Alfred Steiglitz donated a generation ago). A second situation in which a donation may re-enter the art market is where the donee organization changes the nature of its collection so that the work no longer fits. In other cases, the work is accepted by the museum or university as an accommodation to the donor in hopes of receiving more worthwhile art donations or donations of cash in the future, the donee's expectation being that the work will be sold after the donor's death or earlier if the donor consents. To obtain an income tax deduction for the donor, the museum may need to use the work in its exempt functions for a period of time. INT. REV. CODE OF 1986 §170(e)(1)(B)(i)(1).

[75]The question of the appropriate sale price for a donated item is raised but not discussed at Henry Hansmann & Marina Santilli, *Royalties for Artists Versus Royalties for Authors and Composers*, 25 J. CULTURAL ECON. 259, 273 (2001).

accessible for public viewing, an important goal, that might in the marginal case be discouraged by application of a resale royalty to the transaction.[76]

The loan of the artwork should not be considered a sale unless the owner of the work is compensated for the loan.[77] If there is compensation for the loan in excess of the owner's expenses, the artwork has enabled the venture, and the artist should be compensated under the royalties theory. Under the joint venture theory, the artist should participate in the gain. But again, there has been no transfer of title, either *de jure* or *de facto*, so perhaps this should not be considered a sale.

A different question is raised when the artwork is used as collateral for a loan. In the normal case, there would be no sale because the cash received is offset by an obligation to repay the loan. However, where the loan is not repaid in a timely fashion and the lender either takes or sells the artwork, a sale has occurred for the amount of the loan proceeds. A similar case is where the artwork is put up as security for a nonrecourse loan, so that the owner has no personal liability and thus no obligation to repay.

Then there is the sad case of the work damaged or destroyed by flood, fire, mildew, ISIS activities[78] or by the careless owner who puts his elbow through it,[79] and the insurance company pays for the damage.[80] In the case of total destruction, that is the equivalent of a sale for the owner.[81] Where the work is damaged but not destroyed, the appropriate analogy might be a fractional sale which would count as a resale to the extent of the insurance proceeds.

K. Work created or purchased before the law's passage

As with any other statute, an effective date is required. This subjects some works to resale royalties, while other works escape them. The three important factors to be considered are the date the work was created, the date the work was first sold to a collector, and the passage of a fixed period of time.

The least comprehensive solution would be to require resale royalties only for works created and first sold to a collector (a person who is not an art dealer) after the law is enacted. Thus a work commissioned before the law is enacted, but not completed until after, would not be covered. A work completed before the law is enacted, but still owned by the artist's gallery on its

[76]One country, Hungary, exempts sales to a museum, thereby making it unnecessary to distinguish between a sale to a museum and a donation. LILIANE DE PIERREDON-FAWCETT, THE DROIT DE SUITE IN LITERARY AND ARTISTIC PROPERTY: A COMPARATIVE LAW STUDY 37 (1991).

[77]Only the Philippine law treats all loans as sales. Philippines Presidential Decree #49 of November 14, 1972 on the Protection of Intellectual Property §31.

[78]The reported cases thus far have been ancient artifacts that would not be subject to resale royalties, but there is no reason to believe that their destructive tendencies are so limited.

[79]http://www.nbcnews.com/id/15310601/ns/us_news-weird_news/t/picasso-dream-painting-nightmare-scenario/#.VYDLq03bJzg visited 6/16/2015.

[80]If the work is uninsured, the insurance does not cover the full amount of the damage, or the owner for some reason chooses not to collect insurance proceeds, one can argue that the artist is entitled to be compensated for the fact that when the work is eventually sold, it will fetch a lower price because of the damage, which in turn will lower his future resale royalties.

[81]It is worse than a sale for the artist because it means that he will receive no further resale royalties. On the other hand, he may be entitled to a moral rights recovery if the destruction was intentional or grossly negligent, but not if it was "merely" negligent. 17 U.S.C. §106A(a)(3)(B).

effective date, would likewise not be covered.

At the other extreme, resale royalties could be required of all existing works still subject to copyright on the effective date, and all works created thereafter. Such a rule would apply to resales by unsuspecting owners who had no reason to expect that resale royalties would apply to them because when they purchased the artwork there were no resale royalties. This is the British rule.[82] This option would require correlation with provisions on the duration of the resale royalties right, discussed below.

The key policy issue here is to avoid unfair surprise to a collector who may have purchased a work, justifiably thinking that he could sell it without paying the resale royalty. That collector could be adequately protected by a rule that exempts the first sale, after the effective date, of a work created before the act's effective date.[83] Alternatively, a work purchased before the act's effective date could become subject to resale royalties only at the expiration of a reasonable time, say ten years, after the effective date. It has been argued that it is unconstitutional to impose a resale royalty on any owner who bought the work at a time when there was no such law, that argument is unpersuasive in light of cases upholding the constitutionality of zoning changes that provide reasonable periods for amortization of earlier investments.[84] The Supreme Court's jurisprudence on takings only requires attention to reasonable investment expectations.[85]

The rule for moral rights puts an absolute cutoff at the date of the work's first sale.[86] Neither the royalties theory nor the joint venture theory supplies a reason to not apply resale royalties to work sold before the effective date of the law if the reasonable expectations of the earlier purchaser can be protected.

V. Base on which royalty computed

A. Sales price

Most resale royalty laws compute the royalty based on the sales price. This is simpler than computing it by some measure of profit. It fits better with the royalties justification, as a licensor of rights would demand a payment whether the use of the rights produced a profit or not. It is incompatible with the joint venture theory, as a joint venturer would not normally be paid unless there were a net profit.[87]

Simply specifying "sales price" or "gross sales price" does not provide much definitional guidance.

At an auction bidding takes place. The high bid is the winner. The buyer does not pay, nor does the seller receive, the amount of the winning bid, called the hammer price. The winning bid is, however, publicly announced.

The hammer price is the starting point in computing buyer's liability to the auction house.

[82]UK §16(1). The significant date is the contract date.

[83]Australia, Resale Royalty Right for Visual Artist 2009 (Cth) §11, exempts the first transfer after the effective date of the act.

[84]Harbison v. City of Buffalo, 4 N.Y.2d 553, 176 N.Y.S.2d 598, 152 N.E.2d 42 (1958); *contra*, Hoffman v. Kinealy, 389 S.W.2d 745 (Mo. 1965).

[85]Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

[86]Judicial Improvement Act of 1990, Pub.L. No. 101-650, Tit. VI, §610(b), 104 Stat. 5128.

[87]This theoretical incongruity was noted at an early time, and resulted in the 1926 Czechoslovak law being based on net profit. LILIANE DE PIERREDON-FAWCETT, THE DROIT DE SUITE IN LITERARY AND ARTISTIC PROPERTY: A COMPARATIVE LAW STUDY 5 (1991).

To that is always added the buyer's premium, which is likely to be 20%-25% depending on time of sale and location.[88] The buyer's premium goes to the auction house, not to the seller. The repeated question here is whether the sales price is what the buyer pays, what the seller receives, or something else.[89] In Australia, the starting point is what the buyer pays, but the buyer's premium is excluded from the sales price.[90]

Transform that auction sale to a gallery sale and the same problem arises. The buyer pays an agreed-upon price, not normally made public. The seller does not receive that price. Galleries often take a commission of 50% of the sales price on initial sales by the artist and half that amount in the resale market, though an established artist or a repeat seller may be able to negotiate a lower commission.

The resale royalty law should have as one of its goals as small a distortion of the market as possible. It would defeat that goal if the full amount paid by the buyer in a gallery sale were considered the sale price while the full amount were not considered the sale price in an auction sale. The rules should be the same.

Many states, counties and cities of the United States impose sales tax. While the rates vary considerably, the New York State sales tax is 4%, but the addition of local sales taxes may put the rate as high as 8.75%.[91] California is in the same general range, while certain Alabama cities may tax as much as 10%. This tax is added to what the buyer pays, but the seller does not receive it. In normal U.S. terminology, the sales tax is added to the sales price. In the absence of language to the contrary, it would not normally be included in the sales price.[92]

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[88]Oddly enough, the New York buyer's premium is uniform across the top four auction houses: 25% of the first $100,000, 20% of the excess up to $2 million, plus 12% of the excess over $2 million. Compare *Christie's Buyer's Premium Schedule*, http://www.christies.com/features/guides/buying-guide/related-information/buyers-premium, and *Sotheby's Buyer's Premium Chart*, http://www.sothebys.com/content/dam/sothebys/PDFs/Buyers%20Premium.pdf, with *How to Buy*, http://www.bonhams.com/how_to_buy/16398/, and *Buying*, http://www.phillips.com/buying.aspx, all last visited Mar. 6, 2015. Cue the antitrust lawyers.

[89]Two proposed resale royalty laws in the United States reached different results on this point. The unsuccessful Visual Artists Rights Act of 1987 §3(d)(2) began with the amount the seller actually received. The unsuccessful Equity for Visual Artists Act of 2011, §2(2), measured the sales price as the total amount paid by the buyer. Elisa D. Doll, *The Equity for Visual Artists Act of 2011 (EVAA): Crafting an Effective Resale Royalty Scheme for the United States through Comparative Meditation*, 24 IND. INT'L & COMP. L. REV. 461, 478, 481 (2014).

[90]Australia §10(2).

[91]http://www.tax.ny.gov/bus/st/stidx.htm, last visited 3/6/2015.

[92]The story of how sales and use taxes are avoided is not really relevant to this article, but is too good a tale to omit. It involves avoiding the sales tax at the place of sale, and avoiding the use tax at the place of use. Sales tax for export items can be avoided because sales tax is actually a destination tax. The point at which possession is transferred by the vendor to the purchaser determines whether the tax is imposed. If the artwork is delivered by the seller (or the seller's agent, the auction house) out of state, the place where the sale actually took place imposes no sales tax. How is the use tax avoided? There are four U.S. states (Delaware, Montana, New Hampshire, and Oregon) that impose neither sales nor use taxes, and the tax in Alaska is trivial. One ships the art to one of those states where it is exhibited for at least 90 days. It can then be brought to California without paying California use tax. There is no California use

Value Added Tax is a different story. Value Added Taxes are imposed in most countries outside the United States. Those taxes, which are collected by seller and remitted to the taxing authorities, are often not separately stated. They would be included in the stated sales price, but would not be kept by the seller.[93] Sensitive to this problem, any Value Added Tax is deducted from the gross amount received to calculate the sales price in Britain. Australia does include GST in the sales price, but not other taxes.[94]

The seller in most cases does not even receive the hammer price. The auction house takes a seller's commission. These commissions, the amount of which are not listed on the websites of the major auction houses, are substantially less than the buyer's premiums, and the differences between them tend to widen as the price for the art increases.[95] The amount the seller receives is the hammer price less the seller's commission. There may be additional deductions from the hammer price. Bonham's may charge a loss and damage warranty fee, an unsold charge, catalogue and web illustration fees and charges for restoration, shipping, packing, storage customs duties or import taxes.[96]

Since United Kingdom law specifies that the sales price is net of Value Added Tax but does not specify that it is net of any of these other expenses, arguably those other expenses may not be subtracted in determining the sales price.[97]

In at least one case, the seller received more than the hammer price. Peter Brant, when he sold Jeff Koons' "Balloon Dog (Orange)" at Christie's, negotiated a complete waiver of the seller's commission and also received all of the buyer's premium.[98] Presumably, in such a case, the sales price is the total amount seller received.

Christie's France inserted in its auction catalogues a provision that the buyer will also pay to Christie's the amount of the resale royalty imposed under French law. The European Court of Justice upheld that provision as consistent with European law.[99] If that payment is part of the sales price, a little algebra will be required to compute the precise sales price because when the amount of the resale royalty is added to the existing sales price, that in turn raises the amount of the resale royalty that buyer must pay.[100]

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tax on an item used for at least 90 days outside California.
http://www.boe.ca.gov/taxprograms/usetax/scenarios.html,
http://www.tax.ny.gov/bus/st/sales_tax_rates.htm, both last visited 3/6/2015.

[93]UK §3(4); STOKES 25, 35. The complies with the European Directive, *supra* note 47, art. 5.

[94]Australia §10(2).

[95]Daniel Costello & Ken Bensinger, *Auction Houses Overhaul Their Commission Rates*, WALL. ST. J., http://www.wsj.com/articles/SB952634149647403044, last visited Mar. 6, 2015. Sellers commissions for desirable items are highly negotiable.

[96]*How to Sell*, http://www.bonhams.com/how_to_sell/9884/, last visited Mar. 6, 2015.

[97]STOKES 25, citing a reference to this argument by the Patent Office.

[98]Graham Bowley, *The (Auction) House Doesn't Always Win*, NY TIMES, Jan. 15, 2014, http://www.nytimes.com/2014/01/16/arts/design/christies-and-sothebys-woo-big-sellers-with-a-cut.html?_r=0, last visited Mar. 6, 2015.

[99]Christie's France SNC c. Syndicat National des Antiquaires, Case C-41/14 decided 2/26/2015, http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30dd0dbf9960e015417fa97cf7b546e34e6e.e34KaxiLc3qMb40Rch0SaxuPb3z0?text=&docid=162539&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=673337, last visited 3/6/2015.

[100]I am told by those whose mathematics are superior to mine that the appropriate formula is x =

It is possible that additional duties may be imposed on the seller by contract. Buyer may want the work delivered to a particular place, framed in a special way, or restored, and is willing to pay extra for these services. Ordinarily, one would think that payment for extra services would not be part of the sales price. Seller will want to arrange for them in an entirely separate contract and assure that they are separately billed to buyer. It may be, however, that the extra work is absolutely essential to completing the sale, in which case the extra payment should be included in the sales price.[101]

B. Net profit

It is also possible to use net profit as the base upon which to compute the resale royalty.[102] While it is not common to base a copyright royalty on net profit, it is certainly not unprecedented. Where net profits are used as the measuring stick, the rate of the royalty is normally increased because net profit is a much smaller amount than sale price.

Using net profit as a measuring device does not avoid the problem of defining sales price because net profit begins with the sales price. Use of net profit requires a specification of what expenses will be allowed as a deduction from sales price. If the measure is net profit, the focus is on the seller's financial results. In the cases set forth above, the seller should be able to deduct the expenses of the sale, sales tax, and value added tax.

Several other expenses purely allocated to the sale must be considered. There may be a cost of transporting the art to the place of sale. Transporting art may incur additional insurance costs, as art is most likely to be damaged when moved. It may be useful to have the work authenticated or appraised as part of the sales process. It may be useful to have the artwork examined by experts to secure additional opinions about its authenticity or condition. Publicity expenses may be defrayed by the sales agent, or it may fall to the seller to pay them separately.[103]

Also, even after expending considerable sums for transportation, insurance, authentication and publicity, the work may not sell. Should the seller be able to offset those

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k (1 - r), where x is the ultimate sales price after which no further royalty will be due, k is the original contract price, and r is the rate of resale royalty. Assuming a painting sold in California for $1,000,000 and the rate is 5%, x = $1,000,000 / (1 - .05) = $1,052,631.50, the resale royalty would be $52,631.50. Where the rate is progressive or degressive, the math is a bit more complicated. I am indebted to David R. Brillinger, Professor of Statistics at UC Berkeley, and Stacy Langton, Professor of Mathematics and Computer Science at USD, for their help.

[101]Cf. STOKES at 42. In Levob Verzekeringen BV v. Staatsecretaris van Financien (Case C 41/04 of 27 Oct. 2005), [2006] Eur. Com. Cas. 424, 2005 Eur. Com. Rep. I-9433, the European Court of Justice held that where a purchaser bought software that needed to be customized to be useful in his business and the customization was called for by a separate contract, the two contracts would be considered a single contract for Value Added Tax purposes.

[102]COPYRIGHT REP App. C pp. 2, *Compare* Decreto No. 9.610, de 19 de Fevereiro de 1998, DIÁRIO OFICIAL [D.O.] de 20.2.1998, art. 38 (Braz.) (permitting a minimum of 5% in net profit), *with* Intellectual and Artistic Works Law No. 5728 art. 45 of 2008 (Turk.) (permitting an amount not to exceed 10%).

[103]In Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc., 1999 U.S. Dist. LEXIS 13257, 1999 WL 673347 (S.D.N.Y. 1999), seller sent the work to be examined by experts in Oxford, and also printed two hundred brochures, half in English and half in French, describing the Archimedes palimpsest that was for sale, and sent them to the institutions most likely to be interested in buying it.

expenses against the sales price in computing net income when the work sells at a later time?[104]

Certain other costs may be either costs of the sale, or costs of enjoying the work during the period for which seller has held it. The original cost of buying the work, for example, is in part a cost of the sale and also in part a cost of the pleasure of enjoying the art. How should the purchase cost be allocated between personal enjoyment and cost of the sale? Any system is likely to be arbitrary. One way might be to mimic depreciation. The income tax law permits the depreciation of assets over various periods. Since art is often held for long periods of time, perhaps one should assign art the longest period of asset depreciation in tax law, which is 39 years.[105] The purchase cost might be divided by that many years, with the assumption that 1/39 of the purchase price is exhausted for enjoyment in each year that the seller owns the property. A seller who could prove that the work was kept in a bank vault for the entire period of its holding could offset the entire purchase cost against the sales price.

Conservation costs may be allocable to both present enjoyment and future sale.

Costs of insuring the work should probably be allocated to current enjoyment, as the insurance premiums relate to periods of time during which the work was being enjoyed. Likewise, personnel or construction costs associated with increasing the security of the work should be costs of enjoying it. Again, if the work is kept in a bank vault so there is no enjoyment, these might be costs of the purchase and sale transaction.

In short, considerable guidance needs to be provided. If the measuring rod is sales price, the principles by which the sales price is determined need specification. If the measuring rod is net profit, principles for determining sales price still need specification, and principles specifying deductions from sales price to determine net profit also need to be set forth.

Some evidence about these figures is likely to be public, while other evidence may not be. With an auction sale, the hammer price is public. The amount paid by the buyer is not public in a gallery sale, but it is not unusual to require reporting by art world professionals of both the occurrence and amount of the sale.[106] The costs of the sale, however, are normally within the exclusive knowledge of the seller, or sometimes shared between the seller and his agent. One way of handling this asymmetry of information is to presume that the sales price is the net profit, and put the burden on the seller to establish the expenses of the sale.[107]

It is perhaps for this reason that most enacted resale royalty laws have chosen to measure the payment by the sale price rather than net profit.

It should be obvious that the determination of net profit requires much more participation by the seller, so it would appear that such a calculation is more likely to pierce the valued secrecy

[104]This is exactly what happened with the Archimedes palimpsest in Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc., 1999 U.S. Dist. LEXIS 13257, 1999 WL 673347 (S.D.N.Y. 1999). The expenses were incurred in the 1970s. The sale occurred in 2000.

[105]INT. REV. CODE OF 1986 §168(g)(3). Whether this is the correct measure from an economic point of view is doubtful, as the tax code permits depreciation over unreasonably short useful lives in order to encourage investment in depreciable property. MARVIN A. CHIRELSTEIN & LAWRENCE ZELENAK, FEDERAL INCOME TAXATION 192-93 (2012). Finding a better measure may not be easy, especially as different forms of art may have different useful lives.

[106]E.g., CALIF. CIV. CODE §986(a)(1); UK §13.

[107]COPYRIGHT REP 75-76 suggests a similar procedure in a different context.

Where copyright damages are based on the benefit received by the infringer, a similar system is used. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §14.03[B] (2015).

of the art world than a calculation based on the sales price. This impression is deceptive. In any litigation over a resale royalty, the artist or collecting society would certainly have the right to verify the figures supplied by seller's agent with both buyer and seller in discovery. Counsel for the agent asked to identify the buyer and seller could ask counsel for the artist or collecting society to enter into a confidentiality agreement prohibiting disclosure of that information outside the litigation and could request such a protective order from the court. Issuance of such an order is within the discretion of the court.[108]

VI. Rate of royalty

A. Fixed

The royalty rate under the royalties theory should be a fair representation of the value provided. Under the joint venture theory, it should approximate a just return. Practically, it should be large enough to provide an incentive for creative work, but small enough to neither disturb the art market nor provoke unnecessary inflation. It should be high enough that the amount of royalties collected justifies the costs of collecting them.

One option is to impose a fixed rate at 3-5% of the resale price.[109] This percentage coincides with the most common royalty rates in California and abroad..[110]

A 3-5% rate adds negligible transaction costs compared to pricier charges that are already imposed on the sale.[111] Buyers continue to purchase artwork subject to the steeper buyer's premiums (20-25%), and sales tax (6-10% in major states) and value added taxes (17-22% in major European Union countries); adding a comparatively small royalty is unlikely to seriously depress art sales.

Because fixed rates offer simplicity and predictability, they may be easier to administer than variable rates. However, the viability of fixed rates depends in part on the rate structure of our major art trading partners.

B. Variable declining

Similar to the European Union, the rate of royalty could be based on a scale that declines as the amount of the sales price increases. This is called a degressive rate. The royalty rates mandated for European Union Member States are:

(a) 4 percent of the portion of the sale price up to €50,000;

(b) 3 percent of the portion of the sale price from €50,000.01 to €200,000;

(c) 1 percent of the portion of the sale price from €200,000.01 to €350,000;

(d) 0.5 percent of the portion of the sale price from €350,000.01 to €500,000;

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[108] Fed. R. Civ. Proc. 26(c)(1) provides: "The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense... (A) forbidding the disclosure or discovery; (B) specifying terms …."

[109] The Register of Copyright recommends a royalty rate of 3-5% of the work's gross resale price– a common range of royalty rates in other countries– for works that have increased in value. COPYRIGHT REP 3, 76.

[110] See COPYRIGHT REP App. C for a comparative summary of royalty rates. It shows that the most common fixed rate is 5%. A few countries have lesser rates, while a few countries have greater rates. The most important group of countries, the European Union, have a degressive rate, but the highest rate is 4%.

[111] COPYRIGHT REP 46-47. See Olav Velthuis, *Art Markets*, in RUTH TOWSE, A HANDBOOK OF CULTURAL ECONOMICS 23-24, 35-36 (2d ed., 2011), for a general discussion of art world transaction costs.

(e) 0.25 percent of the portion of the sale price exceeding €500,000.74.[112]

A variable declining rate mitigates the financial impact of resale royalty on art trade by decreasing the royalty rate as the sale price increases. The tapering rate is intended to squelch relocation of higher end art trade.[113] This author believes that a cap does a more effective job at that than a degressive rate structure.

A degressive rate structure is inconsistent with the royalties theory justifying resale royalties. Conversations with experienced entertainment law lawyers failed to turn up any instance of a degressive royalty in the music business.[114]

If variable decreasing or variable increasing rates are chosen, an agency should be directed to adjust those rate brackets for inflation.[115]

C. Variable increasing[116]

A variable increasing rate raises the royalty rate on incremental portions of the sale price. Increasing rates encourage productivity of valuable art and provide greater benefit to established artists. There were variable increasing rates in the first two countries to enact resale royalty laws, France and Belgium, that were abandoned in the case of France by statute in the 1950s, and in the case of Belgium to comply with the European Union Directive.[117]

It is not unusual in the music business to have royalty rates that increase as the base sales increase. This is because the production of music invariably involves fixed expenses as well as variable expenses. When sufficient sales have occurred to amortize the fixed expenses, the record companies profit on each additional sales is increased. The profit may also increase as a result of economies of scale in production. For whatever reason, composers and performers are sometimes successful in gaining an increase in the rate of royalties as sales increase, thereby sharing the increased profits of the record companies.[118]

D. Royalty cap

Some jurisdictions cap the amount of royalty payment.[119] A cap applies to each individual resale; it does not apply to collective payments to an artist from multiple sales. The European Directive caps each resale royalty amount at 12,500 euros,[120] currently around $15,000.

A cap may relieve the impact of a royalty rate on the market. Specifically, the normal

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[112] Directive 2001/84, *supra* note 47, art. 4(1).

[113] Press Release, Brussels European Council, Comm'n welcomes adoption of the Directive on resale rights for the benefit of the authors of original works of art (July 19, 2001).

[114]My informants were Professors Jay Dougherty of Loyola Los Angeles and Lionel Sobel, Editor-in-chief of the Entertainment Law Reporter.

[115]See text *supra* at note 49.

[116] To my knowledge, there are no systems implementing a true variable increasing rate. *But cf.* Law No. 822, Apr. 23, 1996, EL PERUANO [E.P.] art. 82 (Peru) (demanding a 3% rate but allowing parties to agree on a different rate).

[117]LILIANE DE PIERREDON-FAWCETT, THE DROIT DE SUITE IN LITERARY AND ARTISTIC PROPERTY: A COMPARATIVE LAW STUDY 116-118 (1991).

[118]For an example calling for an increase in the rate from 14% to 14.5% to 15%, see Form 159-1, contract clause 7 in LIONEL SOBEL, ENTERTAINMENT INDUSTRY CONTRACTS, online at advance.lexis.com.

[119]COPYRIGHT REP 3, 77 recommends a cap on the royalty.

[120]Directive 2001/84, *supra* note 47, art. 4.

fear is that imposing a resale royalty will cause sellers to move the sale of their art to another jurisdiction that does not impose a resale royalty, or to a jurisdiction that imposes the royalty at a lower rate. When a person contemplates selling art, her prime consideration should be to sell it in the place that will attract the highest sales price. Ordinarily, it is not worthwhile to move a sale from one geographic location to another because professional art moving is expensive,[121] and often requires additional insurance premiums.[122] One would only contemplate such a move if the anticipated sales price is much higher in the target jurisdiction, or the anticipated cost of sale much lower. The European Directive cap of $15,000 seems effective in preventing the movement of art sales to the nearest country that does not impose a resale royalty, Switzerland. A United States cap of $20,000-$25,000 should be sufficient to prevent the movement of sales from the United States to the most likely competitor that imposes a resale royalty, Great Britain, or to the most likely competitors who do not exact resale royalties, Switzerland, Japan or the People's Republic of China.[123]

A second result of a cap is more difficult to measure. The United States would like as much art sold in the United States as possible to help boost its economy. It is possible that artwork is currently being shipped to New York for sale from outside the United States that would be directed elsewhere for sale if resale royalties were added to the current costs of selling the work in the United States. (It is unlikely that much very high value art is shipped to the United States for sale because most foreign countries restrict the export of national treasures.[124])

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[121] A cost of $10,000 for a one-way move of a single work of art within the United States would not be unusual. The cost of an international move is likely to be greater. If the work is large, as are many works by contemporary artists, the costs will rise, as it may be necessary to charter a plane. Typical costs may include constructing the packaging, packing, climate-controlled transport, courier, and unpacking. International shipments of unusual art might also incur customs duties. See, e.g., EU Commission Regulation No 731/2010 of 11 August 2010 concerning the classification of certain goods in the Combined Nomenclature, 2010 OJ L 214 (holding that video and light sculptures are to be classified according to their components as video and electronic equipment, not as artwork). Even if no import tax is due, the art mover will need to clear the work through customs, which has a cost.

[122] I am told that the extra insurance might cost more than 1% of the amount insured.

[123] *See* KATHRYN GRADDY, NOAH HOROWITZ & STEFAN SZYMANSKI, A STUDY INTO THE EFFECT ON THE UK ART MARKET OF THE INTRODUCTION OF THE ARTIST'S RESALE RIGHT 2,17 (2008) *available at* http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/study-droitdesuite.pdf, last visited June 22, 2015. ("There is no evidence that ARR [art resale right] has diverted business away from the UK, where the size of the art market has grown as fast, if not faster, than the art market in jurisdictions where ARR is not currently payable. There is no evidence that ARR has reduced prices, as prices have appreciated substantially for art eligible for ARR, and faster than in markets where ARR is not currently payable").

[124] Compare the type of restriction in Beyeler v. Italy, 33 E.H.R.R. 52 (2000) and Jeanneret v. Vichey, 693 F.2d 259 (2d Cir. 1982) with the less draconian, but sometimes effective, English rule permitting the government to delay the issue of an export license if a museum wishes to try to raise enough money to exercise what is in effect a right of first refusal and purchase the work. Export Control Act 2002, §9; Export of Objects of Cultural Interest (Control) Order 2003, S.I. 2003/2759, and UK Department for Culture, Media and Sport, EXPORT CONTROLS ON OBJECTS OF CULTURAL INTEREST: STATUTORY GUIDANCE ON THE CRITERIA TO BE TAKEN INTO CONSIDERATION WHEN MAKING A DECISION ABOUT WHETHER OR NOT TO GRANT AN EXPORT LICENCE (11/2005), :

A cap would certainly minimize the extra expense of resale royalties. It is impossible to predict the level of cap that would retain the current level of sales in the United States of art located abroad because that would require balancing the higher prices expected in the United States against the addition of the resale royalties to other expenses of selling the work in the United States.

Also, the role of a cap in keeping payments low may encourage more compliance with the law than higher payments would,[125] though experience teaches that people are just as eager to avoid small taxes as they are to escape higher taxes.

Another result of a cap is that if artists are permitted to opt out of using a collecting society, artists with the largest resale royalties are the artists most likely to opt out, believing that they can collect their royalties more economically than the society can. A cap will lower individual royalty payments, making artists less likely to opt out of using collecting societies.

Some jurisdictions have dispensed with a cap.[126]

There is no theoretical justification for a royalty cap. Under the royalties theory, there would be no reason to impose a cap because the user of the work continues to profit from it, and I have found no agreements in the music royalty business with such a cap.[127] In a joint venture, it would be hard to imagine why the profits of one joint venturer would stop even though the total profits of the venture continue to rise.

Any cap, if imposed, should be adjusted for inflation.[128]

VII. Who benefits and for how long?

A. Beneficiaries

1. Artist and heirs

The principal intended beneficiary of resale royalties is the artist. Whether the royalties theory or the joint venture theory is pursued, it is the artist creating the work who will be the beneficiary. All known resale royalty laws benefit the artist for her entire life.

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http://www.artscouncil.org.uk/what-we-do/supporting-museums/cultural-property/export-controls/.

[125] COPYRIGHT REP at 77.

[126] *See* RESALE ROYALTY, http://www.resaleroyalty.org.au/ (last updated July 31, 2014). From June 2010 through July 2014, Australia, which has a fixed royalty rate of 5% with a $1,000 AUD (about US$820) threshold, and no cap, disbursed more than $2.55 million AUD to over 910 artists. Most payments fell between $50-500 AUD (about $40-400) with $55,000 AUD (about $44,500) being the highest payment and $50 AUD the lowest.

[127] There is one case about a cap on annual payments. It was not a cap on compensation to the artist. Billy Wyler agreed to direct "Ben Hur" for a substantial fixed amount plus a percentage of the gross, with the agreement that MGM would pay him no more than $50,000 per year. When the contract was signed, the maximum marginal rate of the income tax was 91%, so it made sense to try to keep Wyler's current tax payments down and to spread them into the future. Also, people in the entertainment industry have notoriously inconsistent incomes from year to year, so it made economic sense to try to even out his compensation over a number of years. No one predicted at the time that Ben Hur would be the kind of success that it was, and no one predicted the substantial decrease in the maximum marginal rate of income tax that occurred before the full amount was paid. Wyler Summit Partnership v. Turner Broadcasting Co., 235 F.3d 1184 (9th Cir. 2000). Tip of the hat to Lionel Sobel, former editor-in-chief of the Entertainment Law Reporter and now retired Professor of Law at Southwestern for directing me to this case.

[128] See text *supra* note 49.

Though their art may be immortal, artists are not. They die. The question then becomes whether resale royalties stop with the artist's death, or whether they continue. In most jurisdictions, they continue.[129] As economic rights, they are subject to disposition on death in the same way as other economic rights,[130] or special restrictions may be imposed.[131] While the Register of Copyrights has recommended that resale royalties stop on the artist's death,[132] her only justification for this is the desire to wait until the British have sufficient experience to see how extending the benefit after the artist's death works. Any such limit imposes differential economics on the artist's spouse and heirs depending on the timing of the artist's death, and is inconsistent with both the royalties and joint venture theories. It is also inconsistent with the laws of our major art trading partners,[133] and may result in reducing or eliminating royalties to U.S. artists from sales in those countries because of insufficient reciprocity.[134]

2. Citizenship and residency requirements

The general pattern of resale royalty laws is to benefit the jurisdiction's artists and their families.[135] In some cases the benefits depend on the artists being nationals; in others they may extend to persons who are long-time residents. In order to extend benefits to their own artists whose work is resold outside the jurisdiction, the United Kingdom also extends benefits to nationals of "a state the legislation of which permits resale right protection for authors from EEA states and their successors in title".[136] While the Register of Copyrights recommends that the

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[129]Though not all jurisdictions gave benefits to survivors on the initial enactment. E.g., CALIF. CIV. CODE §986(a)(7); UK 10(b); Australia 12(2).

[130]This means that in civil law countries where a person's testamentary rights are limited, a similar limitation should apply to resale royalties. Where a decedent leaves a surviving spouse and children, national law may permit alienation by will of only one quarter of decedent's property. The same limitation applies to resale royalties. In most common law countries, testamentary disposition is relatively unlimited except for the right of the widow to take against the will.

[131]England limits testamentary disposition to natural persons and "qualifying bodies", essentially charitable organizations. Neither need be English. UK §7(4). Other countries permit disposition only to family members. STOKES 51. The European Court of Justice has confirmed the right of appropriate countries to apply their general succession laws, some of which limit resale rights to family members or heirs. Fundaciòn Gala-Salvador Dali c. ADAGP, 2010 ECJ EUR-LEXIS 160 (3d Ch C-518/08, 15 April 2010. (Dali, a Spanish national, left his intellectual property to a foundation to the exclusion of his five heirs. A French court could, if French law was the appropriate choice of law, order the resale rights for those of Dali's work that are sold in France paid to the heirs, as French law prohibits disinheriting them.)

[132]COPYRIGHT REP 77.

[133]E.g. UK §9(2), (3).

[134]See text *infra* at notes 137-139.

[135]CALIF. CIV. CODE §986(c)(1) confines benefits to a person "... who, at the time of resale, is a citizen of the United States, or a resident of the state [of California] who has resided in the state for a minimum of two years." Note that neither this law nor the Internal Revenue Code of 1986 requires that the person be a legal resident; they need only be a resident. UK §10 begins by according benefits if the artist is an EEA [European Union or Norway, Iceland or Liechtenstein] national or, if deceased, was an EEA national at the time of death. It does not appear that a longtime resident of London would qualify unless she were an EEA national or the benefit of reciprocity.

[136]UK §10(a)(ii).

United States take advantage of the reciprocity extended by the European Union,[137] clearly no reciprocity will be available with the United Kingdom unless United States benefits are available to the artist's "successors in title".[138]

To the extent that the benefit of resale royalties is limited to citizens or residents and available to spouses or heirs, the question arises whether the status of citizen or resident is determined definitively by the status of the artist, or whether each claimant must satisfy that status. California law determines eligibility as citizen or resident by the nationality or residence of the artist, regardless of where her spouse or heirs reside or hold citizenship.[139] By contrast Australian law requires both that the artist satisfied the residency requirement immediately before her death, and that any spouse or heir also satisfy the residency test at the time of the resale.[140]

It should be noted that the time for determining eligibility seems to be the moment of resale. Thus, a California resident artist who creates an artwork while a United States citizen does not receive California resale royalties if the resale occurs after the artist moves his permanent residence to London and renounces his United States citizenship.[141]

B. Duration

Another determination required is the duration of the obligation to pay a resale royalty. A variety of terms are possible with different policies supporting each,

The potentially shortest duration is a term of years. For an artist who dates his work, the dating provides notice to everyone who sees the work of the expiration date of the resale royalty if the term of years runs from the date on the work. One might alternatively start the term of years at the date of first sale, which would induce the artist to delay dating the work until the sale is assured. One might even condition the resale royalty on placing a date on the artwork, then provide that the royalty expires at the end of the specified term of years following the date. While this has the advantage of simplicity and notice, it seems inconsistent with both the royalties and joint venture theories because neither royalties nor profits are normally limited to a term of years that is less than the length of the underlying property. No country has adopted a term of years as the duration of its resale royalty.

The term might be for the life of the artist. Recommended by the Register of Copyright, the rationale must be that the creativity is so personal to the artist that, like certain aspects of the right of privacy, it expires when the artist shuffles off his mortal coils.[142] This life estate is clearly inconsistent with both the royalties and the joint venture theories of resale royalties; it expires at

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[137]COPYRIGHT REP. 79.

[138]The history of the reciprocity provision found in the Berne Convention, art. 14bis, including the German mistranslation, is found at LILIANE DE PIERREDON-FAWCETT, THE DROIT DE SUITE IN LITERARY AND ARTISTIC PROPERTY: A COMPARATIVE LAW STUDY 84-101 (1991).

[139]CALIF. CIV. CODE §986(c)(1). There is no reference to citizenship or residency in the provision extending resale royalties *post mortem auctoris*. CALIF. CIV. CODE §986(a)(7). British law likewise determines eligibility by the status of the artist rather than the spouse or heir. UK §10.

[140]Australia §12(2).

[141]One might note that a person who is neither a citizen nor a resident of the United States may not be taxed on the royalty unless the individual satisfies the provisions on expatriation to avoid tax. INT. REV. CODE OF 1986 §877. See text infra at notes 162-168 for a discussion of the income tax consequences of paying and receiving a resale royalty.

[142]WILLIAM SHAKESPEARE, HAMLET, act 3 scene 1 (1602).

a randomized date unrelated to either the period of productivity of the asset or the joint venture of which it is a part. A similar solution might extend the right throughout the lives of the survivor of the artist and the artist's spouse, emulating one of the options in many retirement annuities. The main advantage of both these life estate solutions is that it takes care of the artist (or the artist and the artist's spouse).

Another possibility is the California solution. The royalties continue for the artist's life and for a reasonable period after the death of the artist, in the California Statute, twenty years.[143] This provision is probably designed to assure support for the artist's spouse for a reasonable number of years, and to assure that the artist's children have reached an age at which they can support themselves.

The European solution is to extend resale royalties for the life of the copyright.[144] This solution most aligns with the royalties theory, as royalties do not normally continue past the expiration of the copyright.[145]

It is also possible to extend the term of resale royalties forever. This would be the solution most consistent with the joint venture theory of resale royalties. Unlimited time would be inconsistent with the royalties theory, as the constitution provides that authors are entitled to exclusive rights "for limited times".[146]

VIII. Miscellaneous

A. Waiver of resale royalty

Normally, resale royalties cannot be waived.[147] Because of unequal bargaining power between artists and those who initially purchase their work, the theory is that if the royalties were waivable, they would be routinely waived by boilerplate in the initial sales contract. Non-waivability is inconsistent with both the royalties and joint venture theories, but is probably necessary given the economics of the art world.

California appears to provide an exception, but that exception is illusory. "The right of the artist to receive an amount equal to 5 percent of the amount of such sale may be waived only by a contract in writing providing for an amount in excess of 5 percent of the amount of such

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[143]CALIF. CIV. CODE §986(a)(7).

[144]UK §3(2).

[145]There is even a case holding that parties to a patent licensing agreement cannot extend royalty payments by contract past the expiration date of the patent. Brulotte v. Thys Co., 379 U.S. 29 (1964). The Supreme Court was invited to overrule it in Kimble v. Marvel Ent., Inc., 135 S.Ct. 2401 (2015), but declined to do so. The court explains that the vice lies not in extending the payments past the patent's expiration, but in measuring the payments by activities that occur after the expiration of the patent. Id. At 2408. It is unclear whether a similar rule applies to copyright. In Davidson & Assocs. v. Jung, 422 F.3d 630 (8th Cir. 2005), the court without any policy discussion ruled that a party could waive in advance by a clickwrap contract his right to assert a fair use defense to copyright infringement, thereby effectively enlarging (but not extending in time) the power of his copyright. The implication for resale royalties is that if Congress wishes to base such royalties on events that occur after the expiration of the copyright, such as a sale after the expiration of the copyright, Congress must so provide expressly.

[146]U.S. Const., art. 1 §8, cl. 8. While an extension of the term of copyright by twenty years fell within the meaning of "within a limited time", Eldred v. Ashcroft, 537 U.S. 186 (2003), it seems clear that an indefinite extension would not.

[147]UK §8(1).

sale."[148] This is not a waiver, but a substitution. It is unclear how such a substitution would work. Would the substitute arrangement prevail over the resale royalty as long as it produced a payment in excess of 5% of the sale price, but remit the parties to the resale royalty at any individual time that it fell short? Or must the substitute arrangement be a facial guarantee that in all cases the payment will exceed 5%?

B. Transfer of resale royalty

It is not usually possible to assign the resale royalty. This is inconsistent with both the royalties or joint venture theory. Both the right to royalties and to profits from a joint venture can normally be assigned. It is not clear why an assignment made after the initial sale of the work and not part of the sales agreement cannot be made. The argument that the artist's bargaining power is so weak when trying to make an initial sale disappears. Whether to permit assignment depends on whether it is likely that the artist will receive adequate compensation for the right. Determining the amount of compensation that would be adequate might be difficult in most cases because it requires resolution of two unknowns. It is unknown whether the work will be resold, given that the decision to sell the work is now in the hands of the third party purchaser. The eventual sale price of the work is also unknown.

One might have a different view of resale royalty assignment for an individual work from a blanket assignment of resale royalties for an artist's entire body of work, especially if it includes work yet to be sold (or produced).

It is important that an assignment not turn into a waiver; the California law is specific on that point.[149] It is again unclear how this would operate, because the law seems to characterize as a waiver that is invalid any agreement that results in less than 5% of the sales price.

The United Kingdom takes a different tack, prohibiting all assignments, sharing agreements, or charges, except that the right can be assigned to a collection society.[150]

A prohibition on assignment might be limited to assignments for consideration, or it might prevent inter vivos gifts of the resale royalty. One might have a different view about making the royalty a gift to a recipient the natural object of the artist's bounty than about assigning the royalty in a commercial transaction. Different countries have followed different paths.[151]

A subsidiary question is whether the artist must share the resale royalty with his gallery. This first becomes a matter of contract interpretation. Does the contract between the artist and the gallery, which typically calls for the gallery to receive a percentage of the sales price, entitle the gallery to the same percentage of any resale royalty?[152] One might think not if the clause does not

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[148]CALIF. CIV. CODE §986(a).

[149]CALIF. CIV. CODE §986(a).

[150]UK §§7, 8. §9 makes it clear that there are not significant restraints on transmission at the death of the artist, or by those to whom the right is transmitted at death. Australia §34 also seems to prohibit waiver and transfer, though the provision is unclear.

It makes sense that the ability to assign to a collection society would be limited to assignment for collection. If the artist cannot assign the right to a third party for current cash, it would be inappropriate to give a collection society a monopoly on buying the artist's resale rights.

[151]LILIANE DE PIERREDON-FAWCETT, THE DROIT DE SUITE IN LITERARY AND ARTISTIC PROPERTY: A COMPARATIVE LAW STUDY 39-40 (1991).

[152]If the representation agreement between the artist and the gallery is oral, as many are, the

specifically refer to a resale royalty. Also, the gallery performs all its duties in closing the first sale, and no services in creating the resale. (This may not be true if the same gallery that originally sold the work continues to represent the artist.) If courts hold that a general clause does not include gallery participation in resale royalties, one can expect subsequent contracts between artists and galleries (normally drafted by the gallery if a written contract exists) to specify that the gallery will participate in resale royalties. While this is not precisely the waiver of resale royalties, it is a redirection of them at a pre-sale time when the artist is in a weak bargaining position. If the law bans waivers, it should also ban art professionals from sharing the resale royalties in a contract that is tied to the initial sale of the work.

C. Pre-emption

There is very little in the way of state or local resale royalties law to pre-empt. Only California has such legislation, but other states may enact resale royalties. The question is whether that legislation should be pre-empted and, if so, how much should be pre-empted.

One approach would be not to pre-empt state law, thereby giving the artist the benefit of either state law or federal law, whichever is most favorable to him.

An intermediate approach would emulate the pre-emption clause of the Visual Artists Rights Act, which pre-empts only laws applying to the same items for the same time period.[153] Such an approach would not pre-empt state law that includes works not entitled to resale royalties under federal law, or resale royalties for a period after the expiration of the federal royalties.

A third approach would pre-empt all resale royalties laws. This approach might be adopted if it is believed that uniform resale royalties are necessary to help create a homogenous national art market.

D. Duplicate obligations

It is possible that more than one jurisdiction's resale royalties law would apply to the same transaction. For example, if the United States resale royalty law applies to any artwork sold by a United States resident, the United Kingdom resale royalty law applies to any artwork resold in the United Kingdom, and the French resale royalty law applies to the resale of any work by a French resident artist, a United States resident who sells a Picasso painting in London might be

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answer is easy. Contracts for sale where the price exceeds $500 are unenforceable unless signed by the party to be charged. UCC §2-201(a). Also, because the resale royalty part of the contract cannot be performed within twelve months of the date the contract is concluded, the artist's obligation under the contract is unenforceable unless it complies with the Statute of Frauds. CALIF. CIV. CODE §1624(a). One of the exceptions to the Statute of Frauds might apply.

[153] 17 U.S.C. §301(f)(1) provides: "[A]ll legal or equitable rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual art to which the rights conferred by section 106A apply are governed exclusively by section 106A and section 113(d) and the provisions of this title relating to such sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State." To be certain, there follows an enumeration in paragraph (2) of what is not pre-empted: " (A) any cause of action from undertakings commenced before the effective date.... (B) activities violating legal or equitable rights that are not equivalent to any of the rights conferred by section 106A with respect to works of visual art; or (C) activities violating legal or equitable rights which extend beyond the life of the author." The latter is inserted because VARA provides no remedies for actions occurring after the artist's death.

subject to the resale royaltylaws of the United States, the United Kingdom and France. The lawmaker should consider whether all laws should apply, or only one. If only one law applies, which one?[154]

A court should first look to the text of each law to see whether it is intended to apply to the specific case. Some laws clearly indicate their field of applicability;[155] others do not.[156] Where more than one law would impose resale royalties by their terms, all applicable laws should apply.

It is probably not the intent of the respective legislatures to cumulate resale royalties. If the United Kingdom rate is 4% and the United States rate is 5%, neither legislature likely intended that the person who is resident in one country and sells in the other should pay the artist 9% of the sales price. Nor is there any reason to believe that the place of sale would take priority over the state of residence or citizenship of either the seller or the artist. The likely intended result is that the higher of the two rates should prevail.

In addition, there may be different exemptions, different calculations of the base, or different enforcement procedures. Where the laws of more than one jurisdiction provide for resale royalties, there is no reason to suppose that either legislature intended to permit either the artist or the reseller to pick and choose its preferred provisions from the two laws. An artist might be able to pick the more favorable of the two laws, but should take all the provisions of that law. The analogy is to the double tax relief provided by the United States foreign tax credit, under which the taxpayer ends up paying tax at the rate determined under the foreign system or the United States system, whichever is greater.[157] Under United States tax treaties, taxpayer may choose to be taxed either under domestic law or under the treaty, but cannot mix treaty and domestic law provisions.

When the intention of the respective legislatures is unclear, a body of law known as Conflicts of Laws chooses which country's law should be applied to the transaction. Exactly how the choice of law would work in this case is uncertain.

In Europe, the appropriate category might be the infringement of intellectual property, since Europe conceives of the resale royalty as a copyright royalty.[158] The choice of law rule for such infringement is the place of infringement, which would be the place in which the copyright is used without permission. That may not be the appropriate choice of law rule for a resale royalty because there is no infringement. The resale is perfectly legal. There is language in the preamble to the regulation that the same choice of law rule applies to "related rights", but that

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[154]Curiously enough, the EU Directive, with an underlying purpose to harmonize laws, contains no provision on choice of law, and provides countries with many options. One commentator (I think with tongue firmly planted in cheek) suggested that the EU Directive might well be *ultra vires* because of its failure to provide guidance in this area, since it is based on a provision of European law, now article 114 of the Treaty on the Functioning of the European Union, calling for harmonization of laws. Matthias Weller, *Choice-of-Law Rules for Droit de Suite: The German Model*, 15 ART ANTIQUITY & LAW 75, 76-78 (2010).

[155]CALIF. CIV. CODE §986(a) "... the seller resides in California or the sale takes place in California,....".

[156]E.g., UK.

[157]INT. REV. CODE OF 1986 §§901-905.

[158]Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), J.O. 31 July 2007 L199, art. 8.

may apply to moral rights, where there is infringement, rather than to resale royalties, where there is not.[159] If that is the appropriate choice of law, it is not waivable.[160]

If the choice of law is not determined by infringement of intellectual property, it is likely to be determined as if the action proceeded from the original contract to sell the artwork. The European rule for contracts choice of law is that the parties can choose their own law, but in the absence of such a choice, the law chosen is the law of the seller's habitual residence, the seller being the artist, unless some other jurisdiction has a closer connection to the contract.[161]

E. Tax consequences

One should also consider the federal tax consequences of paying and receiving resale royalties.

When a person dies, the value of all assets left by the deceased must be included to determine how much estate tax is owed. The right to future resale royalties is an included asset if the right to resale royalties survives the artist. Valuation will be difficult because of the contingent nature of the right. In addition to not knowing the amount of future sales, whether any resale royalty will be paid and when depends on decisions by persons other than the artist's heirs. Resale royalties are usually insufficiently regular to be estimated.[162] Authors', composers' and performers' royalties tend to be much more predictable.

Similar problems occur if the artist gives the right to a resale royalty to an individual during his lifetime, in which case the royalty must be valued for gift tax purposes.

Turning to the income tax, the reseller who pays a resale royalty should be able to offset the payment against the sales price in order to determine the amount realized in computing the amount of the seller's gain.[163]

The artist who receives a resale royalty will have gross income. It will be classified as ordinary income, rather than capital gains, either because the artist makes no sale or exchange which is required for long term capital gains treatment,[164] or because the property is not a capital asset. The property could fail to be a capital asset either because it is property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business[165], because it is a copyright or artistic composition held by a taxpayer whose personal efforts created the

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[159] *Id.* at preamble recital (26).

[160] *Id.* art. 8(3).

[161] Council Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), J.O. 4 July 2008 L177, arts. 3(1), 4(1)(a), 4(3).

[162] A more complete statement of the problems of determining fair market value of art fpr estate tax purposes, its discounts and its discontents, is beyond the scope of this paper. *See* HERBERT LAZEROW, MASTERING ART LAW 184-89 (2015).

[163] It is curiously difficult to find statutory or regulations authority for this simple proposition. The best I could find is the Example in column 3 in I.R.S. Publ'n 544, *Sales and Other Dispositions of Assets*, p. 3 (2014).

[164] INT. REV. CODE OF 1986 §1001(a). The term actually used is "sale or other disposition, commonly referred to as "sale or exchange."

[165] INT. REV. CODE OF 1986 §1221(1).

property,[166] or because it is analogous to a copyright royalty.[167]

To rebut the sale or exchange lack, one might argue that when the artist originally sold the painting there was a sale or exchange by the artist; when the collector resells the painting, there is a sale or exchange by the collector; and either the original sale should be imputed to the second sale as though this were an installment sale,[168] or the sale by the collector should be imputed to the artist on an agency theory.

To rebut the characterization as not a capital asset, one should argue that the appropriate time to characterize the asset is not at the time of initial sale, but at the time of resale. At that point, the work is not property held by the artist primarily for sale to customers in the ordinary course of his trade or business because it is not property held by the artist at all. The personal efforts disqualification should be terminated on the sale of the item the first time; any further transaction by the artist should be as though he had bought the property as an investment.

This tax treatment is perfectly consistent with the royalties theory. It sits poorly with the joint venture theory if the venture is the holding of the artwork by a single person. If the venture is conceived as a series of dispositions over the life of the artwork, it would fit better with the joint venture theory.

IX. Enforcement[169]

Designing appropriate enforcement rules is perhaps the most difficult aspect of resale royalties. Problems abound on the side of the artist and the reseller. In most cases, the artist has no way to know that his work has been resold absent a report by the reseller or his agent.[170] On the other side, the reseller may be unable to locate the artist or her heirs to make payment.

A. Obligation to pay imposed on sellers

The obligation to make payment is generally imposed on the reseller. This is appropriate,

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[166] INT. REV. CODE OF 1986 §1221(3)(a). The regulations make it clear that "artistic composition or similar property" is to be broadly interpreted. Treas. Reg. §1.1221-1(c)(1).

[167] It differs from a copyright royalty in that with a copyright royalty, the recipient has not terminated his interest in the property. In the resale royalty, the recipient has terminated his interest in the property except for his moral rights and resale rights. For analogies, see Hort v. Comm'r, 313 U.S. 28 (1941) (lease cancellation payment is a substitute for rent); United States v. Midland-Ross Corp., 381 U.S. 54 (1965) (original issue discount is a substitute for interest); Comm'r v. P. G. Lake, Inc., 356 U.S. 260 (1958) (relief of a debt in exchange for an oil production payment is a substitute for future ordinary income),

[168] INT. REV. CODE OF 1986 §453.

[169] A significant criticism of resale royalties laws is that absent collecting societies, they go unenforced. E.g., John E. McInerney III, *California Resale Royalties Act: Private Sector Enforcement*, 19 U.S.F. L. REV. 1, 3 (1984). Katherine L. Boe, *The Droit de Suite Has Arrived: Can it Thrive in California as it did in Calais?*, 11 Creighton L. Rev. 529, 536 n. 46 (1977) states that no jurisdiction has had a successful resale royalties program without a registration system. That may have been true when written, as France had a collecting society which also collectively bargained for artists, and had both an artist registration system and a system for the registry of art sold at auction. The current success of other European resale royalties systems where there is no registration system indicates that resale royalties can succeed without registration.

[170] A point repeatedly made in the literature. E.g., Stephen S. Ashley, *A Critical Comment on California's Droit de Suite, Civil Code Section 986*, 29 HAST. L.J. 249, 258 (1977).

whether the operative theory is based on royalties or joint venture. In the case of royalties, it is the seller who is using the artwork, so the seller should compensate the artist for it. If this is conceived as a joint venture, it is a joint venture where the seller is making the crucial decisions, both about the care of the artwork and the time at which to sell it. The seller is like the managing partner, so it is appropriate to impose management responsibilities on the seller.

B. Obligation to withhold

Some laws impose an obligation to withhold and pay over to the artist the amount of the resale royalty. It is usually imposed on the art world professional, either auctioneer or dealer, who is the seller's agent in concluding the sale.[171] Where there is no seller's agent, United Kingdom law obliges the buyer's agent to withhold. In the absence of an agent for either party, the obligation to withhold is imposed on the buyer if the buyer is acting in the course of a business of dealing in works of art.[172]

What is the effect of the withholding on the obligation of the seller? California law is silent on this question. In the United Kingdom, withholding does not release the seller from liability to the artist; the seller and the person obligated to withhold are "jointly and severally liable."[173] This should motivate the seller to assure that the withholding agent actually makes the payment to the artist by contacting the artist or her collecting society himself to report the sale.

C. Obligation if artist cannot be located

The number of cases in which the artist cannot be located after a diligent search should be small, given how much information is available on the internet in the United States at minimal cost. If the resale royalty is extended to the artist's heirs and assignees, there is likely to be increased difficulty in determining the person entitled to the resale royalty. Even without such an extension, the size of the unclaimed property list in most states is daunting (though it is clear from the many people on the unclaimed property rosters who have never moved and have phone numbers listed in published phone books that no effort is made by either the custodian of the property or the state unclaimed property administrator to locate the claimant). A provision should be made for disposition of the funds when the artist cannot be located after diligent search.

California provides that if the seller or withholding agent is unable to locate and pay the artist within 90 days, presumably of the sale, the amount shall be paid to the Arts Council, which is obligated to try to locate the artist. If the Arts Council is unable to locate the artist and the artist does not file a claim within seven years of the date of sale, the artist's right to the amount withheld terminates and the money is used to acquire fine art.[174] Presumably, the Arts Council has an obligation to post the fact of the sale on its website, though the law, passed pre-internet, does not so specify.

The law in the United Kingdom makes no mention of the case where a person entitled to a resale royalty cannot be located. In part that may be because the resale royalty in the United Kingdom can only be exercised through a collecting society.[175] This means that the seller or withholding agent need not (and indeed should not) deal directly with the artist; all dealings must

[171] CALIF. CIV. CODE §986(a)(1); UK §§12(2), 13.
[172] UK §13(2).
[173] UK §13(1).
[174] Cal. Civ. Code §986(a)(2),(5).
[175] UK §14(1).

be with the collecting society. If United Kingdom law designated only a single collecting society, that would simplify the problem of the seller and withholding agent in locating the payee. There could be only one. However, the law clearly contemplates that there might be more than one collecting society.[176] It is unclear what devices are available to tell the seller or withholding agent which collecting society represents which artist, but a simple inquiry (or look at the collecting society's website) might provide an answer.

If the United Kingdom collecting society cannot locate the person to whom the resale royalty should be paid, one assumes that the general law for unclaimed property applies. One assumes incorrectly. In fact, it is the written policy of one collecting society to return the resale royalty to the seller (less a 15% administrative fee) if the person entitled to the royalty cannot be located within six years.[177] It is hard to imagine a reason for returning the resale royalty to the seller rather than treating it like any other unclaimed property of the artist.

D. Timing of obligation to pay

When must the seller or withholding agent pay the resale royalty to the artist?

A properly drafted royalties agreement would specify when royalties are to be paid. A joint venture agreement might call for the periodic division of profits. Likewise, a resale royalty statute should specify when the resale royalty is to be paid.

California law is unclear about when payment is due. It begins "[w]henever a work of fine art is sold ... the seller or the seller's agent shall pay to the artist...", implying that the payment is due at the moment of sale.[178] That is unrealistic. The provision on withholding provides that the withholding agent must "locate the artist and pay the artist". This implies that if the withholding agent does not know the location of the artist, payment may be delayed for the time that it might reasonably be required to locate the artist.[179] If the seller or withholding agent is unable to locate and pay the artist within 90 days (presumably of the date of sale), the seller or withholding agent must pay the resale royalty to the Arts Council.[180] This provision implies that the payment may not be due until three months after the sale.

United Kingdom law is more specific. "Liability shall arise on the completion of the sale...."; but payment need not be made until the payee provides evidence of entitlement.[181] The person whose name appears on the work is presumed to be the artist,[182] but the inquiry continues because collection must be made by a collecting society. In addition to proving who created the artwork (or taking advantage of the presumption of a signature), the collecting society must prove either that the holder of the resale right has transferred management of it to the collecting society, or that the society has the right to collect as a matter of law.[183] There is no further mention of

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[176]UK§14(3).

[177]Design and Artists Copyright Soc'y, *Artist's Resale Right Distribution Policy* § 4.1, http://www.dacs.org.uk/about-us/distribution-policies/artists-resale-right-distribution-policy (last updated Sept. 2013). DACS charges a 15% administrative fee. *Id.* at § 1.1.

[178]CALIF. CIV. CODE §986(a).

[179]CALIF. CIV. CODE §986(a)(1).

[180]CALIF. CIV. CODE §986(a)(2).

[181]UK §13(3).

[182]UK §6(1).

[183]UK §14(2), (3) provide that where the holder of the rights has not transferred management to a collecting society, "the collecting society which manages copyright on behalf of artists shall be deemed

time when the payment is due.

Some foreign nations mention payment within 8 or 15 days.[184]

A United States small employer files an information return reporting amounts withheld from his employees quarterly at the end of the month following the last day of the quarter, but makes deposits of the withheld amounts monthly in the case of a taxpayer who withholds $50,000 or less per year, or semi-weekly if the amount exceeds $50,000.[185]

The time when payment is due should be specified, whether it is the end of the month or the end of the quarter in which the sale occurred. While no reason justifies granting the seller or withholding agent an interest-free loan, withholding has costs. Failure to charge interest on the amount withheld for part of a month, or perhaps even part of a quarter, might be a rough compensation for the fact that the withholding agent is not entitled to impose a withholding fee. On the other hand, withholding agents in art transactions always have a financial interest in the transaction, either as seller's agent, buyer's agent or buyer. That financial stake may be sufficient to compensate the withholding agent for the small costs of withholding, indicating that interest should be paid to the artist or the collecting society on any amounts counting from the date of sale.

E. Remedies for failure to pay on time

The normal remedy for failure to pay money when it is due is interest. Most jurisdictions have fixed rates of interest that courts add to overdue obligations. Whether this sufficiently discourages delayed payment or not depends on the relationship between the legal rate of interest and the rate at which the obligor can borrow. If the rate is similar to or below the rate at which the obligor can borrow, the obligor will often help himself to an easy, application-free "loan" of the amount of the resale royalty. If interest is imposed at a significantly higher rate than the one at which the obligor can borrow, the temptation to delay payment will be reduced. The problem is that there cannot be individualized rules on interest rates; one is remitted to a standard rate, which is probably the legal rate in the jurisdiction. That raises the question of whether an additional payment should be imposed for delayed payment.

Where amounts to be collected are small, such as would be the case if a cap comparable to the European Union cap of 12,000 euros (roughly $13,000 at the current exchange rate of $1.08=1 euro), it is common to provide that the loser pays the winner's attorneys fees. California law provides such a remedy, as does United States copyright law.[186]

Statutory damages are provided for violation of the copyright law.[187] Statutory damages

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to be mandated". The possibility that there are a multitude of collecting societies gives the holder of the right the ability to choose between them, but the law does not specify which of several collecting societies can manage the right in the absence of choice.

[184] LILIANE DE PIERREDON-FAWCETT, THE DROIT DE SUITE IN LITERARY AND ARTISTIC PROPERTY: A COMPARATIVE LAW STUDY 126-127 (1991).

[185] Int. Rev. Serv. Instructions for Form 941 4, 5-6 (Rev. 1-2015).

[186] CALIF. CIV. CODE §986(a)(3); 17 U.S.C. §505. One would not expect to find such an attorney's fees provision in the law of most countries, as the general rule in most countries is that the loser pays the winner's attorney's fees. Such a provision might be less necessary in a jurisdiction where the use of collecting societies is obligatory, as the collecting society can spread the cost of litigation over the royalties received by all of its artists.

[187] 17 U.S.C. §504. Statutory damages have been suggested for resale royalties defaults. Elisa D.

are useful when the amount of damages is difficult to prove. That is not the case with resale royalties where the base for application of the royalty rate is certain. Statutory damages seem inappropriate in this situation.

The resale royalty situation is unusual because all information about the resale is peculiarly within the control of the seller and the intermediary, neither of whom has much incentive to report it or withhold. It might be appropriate to provide triple damages for failure to pay within a specified time after the sale.

Another remedy might regard a federal obligation on art professionals to withhold and pay the resale royalties as analogous to a tort law duty. An art law professional who intentionally fails to pay the royalties might be exposed by statute to the obligation to pay punitive damages. This would encourage the prompt communication of information and prompt payment of the resale royalties, but it is inconsistent with both the royalties and joint venture theories, which operate in contract, rather than tort, law.

F. Obligation to notify

Perhaps the most serious problem in the enforcement of resale royalties is lack of knowledge. The art world operates in an opaque manner.[188] Many participants are unwilling to disclose the fact that they have either bought or sold a work.[189] Many art world participants do not even wish to have it known that a work has been sold because there may be too many people in the art world who know who owns the work. Sale of a work may indicate financial distress, sometimes caused by personal problems like marital disharmony or illness that the owner does not want publicized. For that reason, it is often not possible to know who has purchased or sold at auction, the bidding being mostly by agents, or whether there has in fact been a sale. In a sale from a gallery show, the general public knows that the work is for sale, but does not know whether it was sold or withdrawn from sale, and certainly does not know the sale price. Where an artwork is being privately sold, only those to whom the work has been offered are likely to know it is for sale or what the asking price might be, and no one but the seller, intermediary or the buyer would know that the sale has been made and the sales price.

It is possible to have a system of information reporting that names neither the buyer nor the seller. To calculate the resale royalty (at least where the basis for the royalty is the resale sales price),[190] only the fact of the sale need be disclosed and the sales price. Technically, the identity of the work need not be disclosed, but then the artist probably has insufficient information to

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Doll, *The Equity for Visual Artists Act of 2011 (EVAA): Crafting an Effective Resale Royalty Scheme for the United States through Comparative Meditation*, 24 IND. INT'L & COMP. L. REV. 461, 500 (2014).

[188]Stephanie B. Turner, *The Artist's Resale Royalty Right: Overcoming the Information Problem*, 19 UCLA ENT. L. REV. 329, 350-356 (2012).

[189]Faggionato v. Lerner, 500 F.Supp.2d 237 (S.D.N.Y. 2007), is an extreme case illustrating this point. The agent thought she had brokered a deal for the sale of a Monet by her undisclosed principal for $13 million. Apparently, the seller was unwilling to either sue or have his name revealed. To proceed with the suit, the agent needed to prove that she was an agent; otherwise she had no interest in the suit and no standing. This was impossible because the principal was unwilling to be publicly named. In Marvin Inc. v. Albstein, 386 F.Supp.2d 247 (S.D.N.Y. 2005), neither the work, nor the artist, nor the seller is mentioned; it is simply a superior work from a highly desired period of a well- known artist.

[190]See text *supra* at notes 107-108 on why the identity of the seller must be disclosed if the royalty is based on net profit or is conditioned on there being a profit on the transaction.

approximate whether the sales price reported is likely to be truthful. The name of the work should be disclosed to the artist, or a sufficient description to enable the artist to identify it.

It is thus very difficult for the artist to discover that her work has been resold. To simplify the process of collecting the resale royalty, laws tend to require art world professionals such as auctioneers, galleries, dealers and agents, to withhold the amount of the resale royalty and pay it to the artist.[191]

Most laws only require withholding; they do not specify what information must be transmitted along with the payment. Australia does not require withholding, but requires the Australian seller (or his agent) to give written notice to the collecting society within ninety days of the resale in sufficient detail to permit the collecting society to determine whether a resale royalty is payable, its amount, and the persons liable to pay it.[192]

If there is an obligation to notify, one must specify who should be notified. Making collecting societies the exclusive means for enforcing a resale royalty simplifies notification. A seller of art or his agent should notify the collecting society. The seller or agent could notify all sales and amounts, leaving it to the collecting society to figure out the sales on which there is a royalty, but both seller and agent are likely to prefer notifying only those sales subject to the resale royalty.

If there are no collecting societies, if there are more than one, or if the artist may choose to be represented by a collecting society or not, the problem for the seller or agent is knowing whom to notify. One might establish a presumption that an artist listed on a collecting society website calls for notification of that collecting society. A national list might be established for artists who wish to represent themselves, and the seller should make reasonable efforts to locate any artist not represented by a collecting society. It goes without saying that part of the obligation of a collecting society representing an artist is to notify that artist when one of her works is sold.

G. Timing of obligation to notify

As in the discussion of the obligation to pay, a resale royalty law should specify when a person with an obligation to provide information about a sale should do so. Setting a notification date requires consideration of several practicalities. Withholding agents who are art professionals like dealers, agents or auctioneers should be obliged to notify. Deadlines should be established that could be made a routine part of their businesses.

The identity of persons who are to be notified may affect this decision. If there were a single collecting society to be notified about all art sales, notification is simpler. If each artist needs to be notified, there must be an easy way to notify those artists. Perhaps a website might be established where the artist can keep her mailing address current or where the withholding agent can send an e-mail. Where there are several collecting societies it might be expected that each

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[191] CALIF. CIV. CODE §986(a)(1); UK §13; Australian law does not require withholding, but makes the art professional intermediary jointly and severally liable for the resale royalty. Under those circumstances, it is unlikely that an art world professional will fail to withhold the resale royalty. Australia §20.

[192] Australia §28. While the law does not mention that the notice must name the artist, which is indispensable to enable the collecting society to pay the proper person, the artist's name can be demanded by the collecting society because it is essential to determine whether a resale royalty is payable. Such royalties are due only to certain artists.

society would maintain an online list of the artists it represents.[193]

H. Remedies for failure to notify on time

All of the discussion of failure to pay on time are applicable to failure to notify on time.[194]

In Australia, the failure to notify a collecting society within ninety days of a covered resale results in a civil penalty payable to the government.[195]

I. Status of unpaid royalty: debt, trust or spendthrift trust

Normally, an obligation creates the relation of debtor and creditor between the obligor and the person owed the sum. The debtor has no right in any specific asset of the creditor. The unsatisfied creditor may obtain a judgment against the debtor and execute it on whatever asset of debtor he can find. More frequently, the debtor who does not pay one creditor cannot pay most of them, and goes into bankruptcy. The creditor becomes an unsecured creditor in the bankruptcy proceeding, and usually receives very little, if anything.

Without any further provision, that would be the result if the seller went bankrupt, not having paid the artist his resale royalty. The artist would be a general creditor and would likely receive very little unless she could look to a withholding agent for payment.

Taking another situation, if the withholding agent went bankrupt after withholding the resale royalty, the artist would be in the same position. True, if the seller and the withholding agent were jointly and severally liable, the artist could collect the resale royalty from the seller. Having already had the resale royalty withheld from his proceeds, the seller would then end up paying the resale royalty twice.[196]

Under Australian law, the resale royalty is a debt, so the above consequences would apply.[197]

Some laws involving the relationship between artists and their dealers provide that any work consigned by an artist to a dealer, and any proceeds received by the dealer on the sale of the work, are held in trust.[198] California law does not declare the resale royalty to be a trust, but does exempt it from enforcement of a money judgment by creditors of the seller or withholding agent.[199] It is unlikely that the provision makes the artist who is owed a resale royalty anything

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[193]See, for example, http://www.dacs.org.uk/for-art-market-professionals/artist-search, where I searched for Frank Stella, and was told that no royalty was due because of his nationality. Other categories are "payment is necessary", where DACS represents the artist either directly or through a sister collection society in another country and knows that the artist is eligible for payments. "Payments may be necessary" or "payments may not be necessary" are both categories where the artist is represented by a sister society or there is no information about representation, and DACS is unsure of the artist's entitlement to resale royalties because it has not confirmed the artist's nationality.

[194]See text *supra* at notes 178-186.

[195]Australia §§28(1), 39-43. It seems redundant, but there is also a civil penalty for failure to respond to a request for information within ninety days. Australia §29. It is also unclear why the civil penalty should be paid to the government, rather than to the artist whose collection of the amount due has been delayed by the person's failure to notify.

[196]Quaere whether the sales price on which the resale royalty is computed should be reduced by the amount of the withheld resale royalty in this case.

[197]Australia §19.

[198]E.g., CALIF. CIV. CODE §§1738.6(b), (d), 1738.7.

[199]CALIF. CIV. CODE §986 (a)(6).

other than a general creditor in bankruptcy.

One might also want to consider the position of the artist in financial difficulty. If the resale royalty has been paid, it is part of the artist's assets and may be subject to attachment or to bankruptcy proceedings. If the resale royalty is a debt that has accrued, but has not been paid, this too is an asset of the artist that can probably be reached by ordinary legal processes. What about the artist's right to royalties from future resales? If the analogy is to salary for work to be done in the future, it would not be an asset included in bankruptcy. If the analogy is to a contingent remainder that is not vested at the time of bankruptcy, it would probably be an asset of the bankrupt estate.

If the resale royalty constitutes a trust until it is paid, whether the artist's creditors or trustee in bankruptcy may take it depends on whether the resale royalty is more analogous to an ordinary trust or to a spendthrift trust. If the artist cannot transfer his interest, it seems more analogous to a spendthrift trust. Where the artist cannot realize the value of future payments in the present, the resale royalty right should not be included in the bankrupt estate. If the artist can make an anticipatory assignment, the trustee in bankruptcy should be able to do so to help satisfy the artist's debts.

J. Role of collecting societies

Collecting societies play varied roles in resale royalty laws. In some jurisdictions, they are mandatory.[200] In others they are optional.[201] They may or may not be practically indispensable, depending on the circumstances.

Collecting societies are normally companies whose business is collecting royalties for artists. The most widely known United States collecting societies are ASCAP and BMI, which collect royalties for music for songwriters and performing artists.[202]

Collecting societies are a response to real economic problems. For an individual creator, there would be a very high cost in ascertaining when your creation is being used. A collecting society allows economies of scale to reduce this cost to the individual creator. To take an example, a person can scan an auction catalogue looking for the works of ten artists in about the same time required to seek the works of a single artist. Another example is that a collecting society can establish a system of billing, collection and disbursement for a number of artists at a fraction of the per artist cost that would be incurred if each artist tried to individually set up these business systems.

Another advantage of a collecting society is that it might be willing to incur litigation costs to establish its reputation as a serious collector that would not be cost-effective for an individual artist. That is especially true if there is a cap on the resale royalties from any single

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[200]UK §14(1).

[201]Australia §23. Collecting societies that are nominally optional may in fact become obligatory if the services they provide satisfy demands of important actors. John E. McInerney III, *California Resale Royalties Act: Private Sector Enforcement*, 19 U.S.F. L. REV. 1, 19-24 (1984) postulates a single collecting society for the jurisdiction that also maintains a registry of art ownership and authenticity that insurance companies might find so useful that they would require a certificate from the collecting society for the new owner to secure insurance. Such a system was originally proposed in France in 1904, but never enacted. LILIANE DE PIERREDON-FAWCETT, THE DROIT DE SUITE IN LITERARY AND ARTISTIC PROPERTY: A COMPARATIVE LAW STUDY 87 (1991).

[202]It does not appear that collecting societies for music collect art royalties, or vice versa.

sale, and if no provision is made for a winning plaintiff to recover attorneys' fees in addition to the resale royalty. This problem is more acute in the United States than in other countries because of customarily higher attorney's fees and because there is no fee-shifting absent statutory authority.

These advantages come with a price. Collecting societies have either a monopoly or an oligopoly position with both the artists they represent and with the persons from whom they collect royalties.[203] Congress must decide what degree of supervision is appropriate for those societies. In a country prizing negotiated deals in the free market, establishing such entities is problematic. It almost necessitates fixing the amount collectable from the user, which every resale royalty law does. It also requires that some check be applied to the market power of the collecting society as opposed to that of the artist for whom it is collecting so that the resale royalty is not consumed by excess expenses of the collecting society or profits for its owners.[204] In the United States, the normal check on monopoly power is the application of the antitrust laws, which have long been modified for royalties collecting companies.[205]

The most likely result is what happened in Britain. Companies that were already collecting royalties added resale royalties to their portfolios.[206] Their accumulated expertise in collections gives them a big know-how advantage over start-ups, and it may be doubted that the volume of resale royalties, at least at the outset, will be large enough to support a company solely dedicated to resale royalties.

Typically, such companies enter into reciprocal agreements with companies in other countries. The resale royalties business is still divided along national lines, probably because the details of resale royalty law differ from country to country. Thus, a British collecting society will

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[203] In 2004 when DACS was the only British collecting society, its administrative fee was 25% of collections. When ACS opened in 2006, it set its administrative fee at 18%, which DACS immediately met, then cut it to 15% in 2011, which ACS met. Stokes 37. It has been reported that collection costs in Denmark may be as high as 40%, perhaps because its small population does not support a major art market, so sales are few and prices restrained. The French society took 20%. Victor Ginsburgh, The Economic Consequences of Droit de Suite in the European Union 5 (2006), available at http:// www.ecare.personal/ginsburgh/papers/143.consequences.pdf, last visited 6/29/2015.

Limitations on the administrative fees of no more than 23% of amounts collecting have been floated in previous unsuccessful United States resale royalty proposals. Elisa D. Doll, *The Equity for Visual Artists Act of 2011 (EVAA): Crafting an Effective Resale Royalty Scheme for the United States through Comparative Meditation*, 24 IND. INT'L & COMP. L. REV. 461, 481 (2014).

[204] UK §14(5) places only two restrictions on a collecting society: it must have as one of its main objectives the administration of rights on behalf of more than one artist, and it collects the royalty in return for either a fixed fee or a percentage of the royalty. By contrast, Australia §26 prohibits the collecting society's administrative fee from becoming a tax, and authorizes the government to limit the administrative fee.

[205] Two generations ago, ASCAP and BAM entered into consent decrees with the Justice Department governing their operation. The Justice Department sought input on ways in which those consent decrees should be modified. http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html, last visited June 22, 2015. Input was due August 6, 2014.

[206] The principal resale rights collecting societies are DACS, The Design and Artist's Copyright Society, and ACS, Artist's Collecting Society, is affiliated with Bridgeman Art Library, a reproduction and copyright collecting society.

collect royalties for the artists that it represents for sales in the United Kingdom, and will also collect royalties for sales in England by foreign artists represented by foreign collecting societies with which the British collecting society has a contract.

Congress must decide whether to allow collecting societies and if, so whether their use will be optional or mandatory for artists in collecting resale royalties. If collecting societies are to be optional, Congress should decide whether artists must opt out of their use, or opt in. Also, would Congress envisage a single collecting society, or competing societies.

If using a collecting society is optional, the artists most likely to opt out would be those who anticipate the largest resale royalties because those artists might be able to afford their own collection mechanism which they think will cost them less than using a collecting society.

K. Role of government agencies

It is possible to envision roles for government agencies in the implementation of resale royalty schemes.

Without any change in current law, one can envision oversight of collecting societies under the antitrust law by the Justice Department and the Federal Trade Commission. If Congress does not believe that the current antitrust law applications to collecting societies are appropriate for resale royalty collecting societies, it might make special rules.

Most resales will, in addition to generating resale royalties, also create income tax consequences. The seller would have either a gain or a loss, depending on the numbers.[207] IRS has the authority to require all intermediaries to file information returns about sales that they process,[208] but regulations have limited that reporting to securities, commodities and real estate.[209] Currently, all payors of royalties must file Form 1099MISC for those payments. While resale royalties probably fall within the literal definition of royalties as "... payments with respect to the right to exploit natural resources, such as oil, gas, coal, timber, sand, gravel, and other mineral interests, as well as royalty payments for the right to exploit intangible property, such as copyrights, trade names, trademarks, books and other literary compositions",[210] many of those are normally earned on a periodic basis,[211] while resale royalties are not. The fact that an information return must be made to I.R.S. reduces the cost to the art world intermediary of making an information report to the seller or her collecting society.[212] Congress could require that a copy of

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[207]That gain or loss might be either capital or ordinary, depending on the status of the asset in the seller's hands, long-term or short-term depending on the holding period, and any gain would be taxed at the special 28% rate for collectibles. INT. REV. CODE OF 1986 §§1(h)(4)-(5), 1001, 1221-23.

[208]INT. REV. CODE OF 1986 §6045(a) reads: "Every person doing business as a broker shall, when required by the Secretary, make a return... showing the name and address of each customer... with such details regarding gross proceeds, and such other information as the Secretary shall... require...."

[209]By contrast to the Code, Treas. Reg. §1.6045-1(a)(1) reads: "[B]roker means any person... that, in the ordinary course of a trade or business during the calendar year, stands ready to effect sales to be made by others." Then subparagraph (9) says, "The term sale means any disposition of securities, commodities, options, regulated futures contracts, securities futures contracts, or forward contracts,...." Richard Malamud, *How the IRS Can Close the Online Auction Tax Gap*, 106 TAX NOTES 110, 113 (2005).

[210]H.R. Conf. Rep. No. 99-841, 99th Cong. 2d Sess. II-789(1986), 1986-3 (vol. 4) Cum. Bull. 789.

[211]Though not clearcutting timber.

[212]There will be some cost, as it is unlikely that the law will permit the seller to delay reporting

the Form 1099MISC be sent to the artist or the artist's collecting society.

The Register of Copyrights is the government official charged with the administration of the copyright law. Copyright law is the closest analogy to resale royalties. If Congress is not disposed to resolve the interpretive questions posed by this law, it might delegate rulemaking authority to the Register of Copyrights.[213]

L. Statute of limitations

1. Length

Congress needs to decide how long the artist or his collecting society has to collect resale royalty payments, and whether the same period of limitations will apply to attempts by sellers to recoup resale royalties incorrectly paid.[214] In the absence of a special statute of limitations, there will be arguments about which general statute of limitations should apply to this situation.[215]

2. When the cause of action accrues

The date at which the statute accrues is as important as the length of the statute of limitations. Statutes of limitations for outstanding payments generally begin to run on the date payment is due. That may be impractical in the case of resale royalties because the artist-creditor in many cases will have no way to know that payment is due; he will be unaware that his art has been resold. There is an exception to the general rule that the statute begins to run when payment is due: the doctrine of fraudulent concealment. Where one person holds the property of another, the statute of limitations does not begin to run during the period in which the holder fraudulently conceals the property. A case where the artist-creditor does not know that money is owed and the debtor does not present facts that would permit the creditor to find out might be analogized to fraudulent concealment.

One alternative would be to adopt New York's demand-and-refusal rule. Under that rule, the statute of limitations does not begin to run until the creditor demands the money and the

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the sale to the artist until the end of January of the following year. Also, what is reported is likely to be different. The seller's name and tax identifying number need not go to the artist, and the description of the item sold might be more detailed in the report to the artist than in the 1099.

[213]I make this suggestion with some hesitation because I am unaware of significant rulemaking activity by the Register of Copyrights in those areas of copyright law that involve the relationships between private parties, as opposed to the rules related to the registration of copyrights.

[214]There is the case where a painting that was sold in 2005 was discovered in 2011 to be a forgery. The seller Feigen Gallery refunded the purchase price, took back the painting, and sought a refund of the sales tax paid to New York. In a similar case involving resale royalties, the seller might argue that there was no sale because of the forgery. If that argument failed, the seller could argue that the named artist is not entitled to the royalty because he did not in fact create the artwork. In re Richard L. Feigen & Co., Inc., NY Div. of Tax App. Determination 824996 of July 10, 2014, the seller lost because the three year statute of limitations for sales tax recoveries had long passed.

[215]I have found no specific statutes of limitations in the California, United Kingdom or Australian laws. The latter provides that a request for information about a resale that occurred more than six years previously need not be answered. Australia §29(2)(b). The period in English law is three years. UK §15(2)(b). One might read an implied statute of limitations from those time limits on requesting information, on the grounds that the reason the information must be requested within those time limits is tht there would be no purpose to providing the information thereafter because the statute of limitations had expired.

debtor refuses to pay it.[216]

Yet another possibility is the discovery rule. In a case where the creditor has been diligent, she may take advantage of the discovery rule, under which the statute of limitations does not begin to run until the creditor discovers, or should have discovered, the debt.[217]

There is also the rule for federal taxes. The statute of limitations normally lasts three years, but that period does not begin to run until taxpayer files a return.[218] The analogy to resale royalties is that the statute of limitations would not begin to run until the seller provided information about the sale to the artist or her collecting society. This seems to be the best rule because of the analogy between taxes and resale royalties: all the appropriate information rests with the person who is obligated to pay, either the taxpayer or the seller.

M. Securing effective enforcement

Effective enforcement will only be achieved with the voluntary cooperation of auction houses, dealers and gallery owners. Voluntary cooperation is more likely if there is an effective enforcement mechanism in place. A collecting society is indispensable. So are significant damages for failure to report or to pay in a timely fashion. A statute of limitations that does not encourage delay would also be helpful.

Informal conversations would then be important. Executives at the major auction houses should be approached and asked to announce publicly a policy of withholding and paying resale royalties. A second group whose cooperation would be important would be associations of galleries.[219] Persuading those groups to insert in their standards that normal practice is to collect a resale royalty when due would help. Finally, there are organizations of private dealers that should be approached.[220] This is a responsibility that might be entrusted to whatever government agency is to oversee the program.

X. Conclusion

Leaving many questions about a new law unanswered is not good policy. While Congress can never anticipate all the questions that will arise, it is important to resolve the major questions, and to lodge responsibility for interpreting the law with an administrative agency for other matters.

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[216]Menzel v. List, 267 N.Y.S.2d 804 (Sup. Ct. NY County 1966); Kunstsammlungen zu Weimar v. Elicofon, 678 F.2d 1150 (2d Cir 1982).

[217]O'Keeffe v. Snyder, 416 A.2d 862 (NJ 1980).

[218]INT. REV. CODE OF 1986, §6501.

[219]The Art Dealers Association of America (ADAA) is a national organization. Large cities have organizations of their own, and there are associations devoted to various types of art.

[220]The Private Art Dealers Association is a group whose members do not work from a public space.