

Government Policy and Economic Security for Artists: The Case of the *Droit de Suite*

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In the law of art, as in art itself, we innocents often look abroad for tasteful instruction. That process is now taking place with respect to the *droit de suite*, an interesting addition to the copyright laws of France,¹ Italy,² and Germany,³ among other nations. Roughly translated as an "art proceeds right," the *droit de suite* is a technique originally designed to furnish artists and sculptors with some portion of the increase in the value of their works when they are resold.⁴ Sometimes, as in France, a flat fee is payable to the artist or his heirs on the public resale of all paintings, and the fee must be paid whether the painting rises in price or not. In Italy, on the other hand, the artist is entitled to a *droit de suite* only on the increase in value of the work of art. The techniques used differ with respect to the resales covered (auctions, dealer, or private sales), the percentage of the resale price the artist obtains (three per cent in France, one per cent in Germany), the

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This paper has benefited greatly from discussion with two wise experts, Professor Melville Nimmer, and a perceptive art historian, my wife, Aimée Brown Price. Research for this paper was assisted by the National Endowment on the Arts.

1. For the French legislation, see Law of May 20, 1920, amended, Law of March 11, 1957, art. 42, [1957] J.O. 2723, [1957] B.L.D. 197. While the new law extends the *droit de suite* to private sales, that aspect of the law has not been implemented. The royalty rate is applied only when the sale price is at least 100 francs.

2. The Italian version was passed April 22, 1942; Copyright Law No. 633, Art. 144-55. It is a complicated piece of machinery which now shows definite signs of rust and decay. Basically, there is a sliding scale of percentages for the author: the greater the plus value or inflation in price, the greater the artist's cut (up to 10 per cent on increases in excess of 175,000 lire). The tax applies only to paintings which sell for more than 5,000 lire and sculpture which sells for more than 10,000 lire. The law applies also to private sales, but only where the price of the work has quintupled.

3. In Germany, the *droit de suite* was enacted in 1965. Art. 26 URG. The German copyright act represents a compromise between the French and the Italian systems. Artists are only entitled to one per cent of the proceeds of any resale of work where the resale has occurred through a public facility (auction house or dealer). If the sale price is less than five hundred German marks, then no *droit de suite* will be collected. Art. 26, Copyright Act of 1965. While there is general agreement that a collection agency such as ASCAP is necessary to enforce the new right, no such agency has been formed and none is in the offing.

4. There are two English language discussions of the right: Schulder, *Art Proceeds Act: A Study of the Droit de Suite and a Proposed Enactment for the United States*, 61 NW. U.L. REV. 19 (1966); Hauser, *The French Droit de Suite: The Problem of Protection for the Underprivileged Artist under the Copyright Law*, 11 AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, COPYRIGHT LAW SYMPOSIUM 1 (1962). The leading foreign source is M. DUCHEMIN, *LE DROIT DE SUITE DES ARTISTES* (1948); see also H. DESBOIS, *LE DROIT D'AUTEUR* (1950).

minimum price the object must bring before the mechanism is brought into play at all, and the length of time during which the mechanism operates (in the American proposal life of the artist plus 50 years).⁵

The *droit de suite* springs from certain assumptions about the relationship between society and its artists, particularly painters and sculptors, and from a belief that the artist does not receive a fair price for his work. The current demand for an art proceeds right is buttressed by allegations that copyright schemes, including currently proposed revisions, do not provide just compensation for most painters and sculptors as compared with authors.⁶ If the assumptions on which the *droit de suite* is based apply to America, the art proceeds right may offer a method for remedying the plight of these artists by enabling them to realize a part of the appreciation in value of their work. This essay examines the assumptions underlying the *droit de suite*, tests their validity in the American context, and explores alternatives to an art proceeds right to determine if they better comport with the American temperament, the American art market, and the needs of the American artists.⁷

I. The Theology of the *Droit de Suite*

To appreciate the concept of the *droit de suite* and the fervor of those promoting it, the model of society and the artist within it upon which the art proceeds right is based must be understood. A survey of the literature on the *droit de suite* reveals a deep-seated romantic view of art and the artist that colors most discussion of the beneficial aspects of the statute.⁸ A French writer, R. Plaisant, has put it succinctly: "It

5. Proposed Copyright Revision Bill, S. 1006, 89th Cong., 1st Sess., § 302(a).

6. See p. 1342 *infra*.

7. There have been vigorous efforts to internationalize the right. For competitive reasons, the French are particularly anxious to see the right awarded at other major art centers. For example, in 1963 at a conference held under the auspices of the Minister of Cultural Affairs, it was acknowledged that "while [the Commissaires-Priseurs] continue to believe strongly in the maintenance of the *droit de suite*, it has become a heavy burden in the international market and therefore must be reformed." The Commissaires-Priseurs recommended that the tax on sales in excess of 20,000 francs be reduced from 3 per cent to 1 per cent and that no *droit de suite* be collected where the only recipient would be "collateral" heirs (as opposed to a wife or direct descendants). Such charges, it was felt, would yield "a simple formula, fair and reasonable; only with such a reform would there be a substantial chance to internationalize "this excellent institution created by the French. See Report, *infra* note 47; Hauser, *supra* note 4, at 21. The Berne Union Convention for the Protection of Literary and Artistic Works (1886, revised 1948) provides for reciprocity in treatment (Article 14-bis): "The protection provided . . . may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the degree permitted by the country where this protection is claimed." Reprinted in UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1956).

8. Duchemin, for example, cites such stories as the hungry wanderings of Millet's grand-

is a matter of fact that often artists sell their works for little money and that some years afterward, sometimes after their death, these works are resold for a very high price. To give a participation to the artists or their heirs on this high price is equitable."⁹ The *droit de suite* springs from a nostalgic recollection of the late nineteenth century. It is a case, not unusual, of legislation passed or posed to correct a situation that no longer exists with the intensity that provoked reform.

The *droit de suite* evolved from a particular conception of art, the artist, and the way art is sold. At its core is a vision of the starving artist, with his genius unappreciated, using his last pennies to purchase canvas and pigments which he turns into a misunderstood masterpiece. The painting is sold for a pittance, probably to buy medicine for a tubercular wife. The purchaser is a canny investor who travels about artists' hovels trying to pick up bargains which he will later turn into large amounts of cash.¹⁰ Thirty years later the artist is still without funds and his children are in rags; meanwhile his paintings, now the subject of a Museum of Modern Art retrospective and a Harry Abrams parlor-table book, fetch small fortunes at Park-Bernet and Christie's. The rhetoric of the *droit de suite* is built on this peculiar understanding of the artist and the art market. It is the product of a lovely wistfulness for the nineteenth century with the pure artist starving in his garret, unappreciated by a philistine audience and doomed to poverty because of the stupidity of the world at large. The *droit de suite* is *La bohème* and *Lust for Life* reduced to statutory form. It is an expression of the belief that (1) the sale of the artist's work at anything like its "true" value only comes late in his life or after his death; (2) the postponement in value is attributable to the lag in popular understanding and appreciation; (3) therefore the artist is subsidizing the public's education with his poverty; (4) this is an unfair state of affairs; (5) the artist should profit when he is finally discovered by the newly sophisticated market.

The accuracy of this conception aside, it is interesting that it is so strongly held and that it so strongly influences attitudes toward legislation. Despite the rewards our society provides those who rebel and innovate, the romantic image of the poor painter continues to dominate public thought. One reason for this fixation on the poor artist and his needs is suggested by Geraldine Pelles: "the artist's intense commit-

daughter while a painting by her grandfather was sold for 1,000 times the amount he originally received. See M. DUCHEMIN, *supra* note 4, at 18, 155.

9. R. Plaisant, *Analysis and Criticism of French Proceeds Law* (unpublished manuscript in UCLA Law Library), at 3-4.

10. See generally W. SCHACK, *ART AND ARGYROL* (1960).

ment to a precarious occupation seems a counterbalance to the leveling of aspirations in the society of the Organization Man; he is regarded as one of the few who uphold values that others profess but negate in their work. Despite economic embarrassment, the artist seems to wield unpurchasable power as he manipulates an environment in the world of his painting."¹¹ Moreover, the romantic idea is as important to artists as it is to the audience for art. Poverty or its semblance is a uniform which distinguishes the artist from his bourgeois audience. Lack of money is a celebration of sorts. Part of the burden of being a prophet in a philistine society is the burden of being misunderstood and neglected.¹²

It would not be a matter of great concern if this model of behavior and antagonism, of revolt and poverty, existed solely to reinforce opinions that the public had about itself and its worries about taste and judgment. Unfortunately, this perception of the artist can have perverse effects if it is the basis for public policy. The government then concentrates on a perceived but possibly unreal inequity—namely, the lag in market acceptance of artists' works which is thought to occur because artists are always ahead of their times. If this lag is unavoidable, society must do some penance for its thickheadedness; the artist should not support the entire maturing process. The *droit de suite* is exactly this kind of penance. It is a tax on the second generation for the stupidity of its forefathers. Or, more charitably, the *droit de suite* assumes that the current generation is as blind to the virtues of contemporary artists as the preceding generation was to its avant-garde. If each group post-pays, then some justice will ensue. Painters still may not get rich while they are painting—that is consonant with the romantic view of creation—but their retirement years will be more secure and their wives and children will have some profit.¹³

11. G. PELLE, *ART, ARTISTS AND SOCIETY*, 157 (1963):

Because of his archetypal sacred aspect, the hope of salvation is attached to him in a world that badly needs saving. His admirers place an unfair burden upon the artist by expecting him to accomplish through art the inner and outer metamorphoses that belong to other spheres of life. At the same time, the wider dissemination of the idea that every man is potentially an artist implies that every man can participate in these metamorphoses. The probable failure of such expectations may sow the seeds of disillusionment from which the artist himself and the idea of art must inevitably suffer.

See also *id.* 36-37.

12. See 3 A. HAUSER, *THE SOCIAL HISTORY OF ART*, 195 (1951).

13. The special virtue of the *droit de suite* is that with one thrust it preserves the struggling artist, starving in his garret, while it salves society's conscience by paying a token to him or his estate when it finally recognizes the quality of his work. A weakness of the *droit de suite* is the narrow time span over which it operates as compared with the time it takes artistic taste to mature. If it is penance society is doing, and it is paying the

II. The Droit de Suite in the Marketplace

The *droit de suite*, as developed in Europe, is based on a set of specific assumptions about the relationship between price and "value" and the kinds of commercial transactions which characterize the market for paintings and sculpture. Therefore, certain aspects of the production and distribution of these art forms in America must be examined to determine the relevance of the *droit de suite* model on our less romantic shores.¹⁴

penance within fifty years of the artist's death, then fashion must mature or begin to mature within that time. But it has not always been the case, even in this accelerated century, that the inflation in art values attaches to work painted in the twilight years of an artist's life or within fifty years after his death. If impressionism or post-impressionism is the rage in the 1920's and after, then the model works, if creakingly. But when the fashion in 1960 becomes pre-Columbian art, or the Ashcan school, or vorticism, the *droit de suite* has little of the desired effect. In other words, if living artists are recognized during their productive period, the *droit de suite* is unnecessary; if they become fashionable more than fifty years after their death, it is irrelevant. Thus the *droit de suite* model is confined to a special type of art market, one which is increasingly uncharacteristic of art purchasing habits by collectors and museums.

14. For a similar attempt in a more limited context, see C. GOODMAN, *THE ECONOMICS OF A LITHOGRAPHY WORKSHOP* (1964).

The problem of authentication presents special difficulties. In fact, if the painter is asked whether the painting is authentic, the *droit de suite* may provide an inducement for the artist to "authenticate" faked works. Of course, if acknowledging the painting as his would depreciate the artist's reputation, the painter would not authenticate. But most fakes presented to the artist for authentication would probably be quite good. If the work is an unauthorized cast from the artist's mold, or even an expert cast from an unauthorized mold, or if it is a good painting in the artist's style and worthy of his name, why should he not collect the *droit de suite* proceeds? In concentrating on the relationship between the law and the art market, certain sophisticated issues concerning the *droit de suite* which normally draw discussion will be omitted. For example, it would be possible to engage in the debate involving the nature of the artist's ownership of a work of art. An extensive exploration of the nature of this right may be found in E. DRONE, *THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS* 1-53 (1879). European commentators have frequently attempted to determine whether the *droit de suite* is part of an artist's "copyright" or whether it is in the nature of "alimony," whether it is a contract right or a property right. Some commentators think that if one can decide for certain what category of right the *droit de suite* represents, certain knotty problems will be solved, such as rights of inheritance, the application of international treaties, and the privilege of the artist to assign the right. See P. GRECE, *I DIRITTI SUI BENE IMMATERIALI*, (1948); H. DESBOIS, *LE DROIT D'AUTEUR*, §§ 290-93 (1950); Schulder, *supra* note 4, at 28. Some interesting examples of cases where artists' rights are involved may be found in MacNeil, *Some Pictures Come to Court*, *HARVARD LEGAL ESSAYS* 247 (1947). Whistler's exhortation after the case of *Whistler v. Eden*, Dalboz, *JURISPRUDENCE GÉNÉRALE*, 1900, pt. I, 497, discussed in MacNeil, *supra*, and from which the material discussed here is obtained, represents one view of the artist's right:

RESUMÉ

PRESTIGE OF THE WORK OF ART AND PRIVILEGE OF THE ARTIST—Established: The ABSOLUTE RIGHT of the Artist to control the destiny of his handiwork—and, at all times, and in all circumstances, to refuse its delivery into unseemly and ridiculous keeping—

The DIVINE RIGHT of the Artist to pay damages, and so rid himself cleanly of the carelessly incurred, and pertinaciously unbecoming company of this heretofore completely discovered, penetrating—persuading—planning—devising—Valentine designing—pestilential, and entirely matagrabolising personage!—

Who forwith empouches the gainings—unthinkingly, unblushingly, inevitably!—and once more unwittingly and prodigiously justifies the judgment!

MacNeil, *supra*, at 260.

A. *Style and Trend: Their Impact on A Droit de Suite*

The usefulness of a *droit de suite* depends, to a large extent, on the kind of art that is produced and the kind of product the government wants to encourage.¹⁵ Indeed, it is impossible to measure the relevance of so important a concept as the *droit de suite*, or any other techniques, for providing greater economic security for artists without a great deal of information about trends and movements in art. The extent to which an artist (and, when generalized, a whole school or generation of artists) will benefit from the *droit de suite* depends largely on the kind of work

There is also some merit in determining, in abstract fashion, what kind of "property rights" really exist in a work of art, in explicating how the relationship of creator to creation is different from the relationship of manufacturer to his product. Various theories for the *droit de suite* concept have been formulated. The French view is that it is a contract right compulsorily inserted; it is also possible to say that the right recognizes that "the intrinsic value" of the work of art is not wholly fulfilled by the purchase price, and that latent rights must be protected. See Opet, *Der Wertzuwachsanspruch des bildenden Künstlers*, 46 ANNALEN DES DEUTSCHEN REICHES, 368, cited in Hauser, *supra* note 4. In some contexts, there are practical virtues in examining what impact there is on the bundle of rights where a transfer of a work of art from artist to purchaser occurs.

For example, the implications of international treaties might be affected by characterization of the right. Under the Universal Copyright Convention, the signatories pledge themselves to equality of treatment under the copyright laws. Copyright rights available to nationals are available to foreigners. But is the *droit de suite* a copyright right? See A. BOGSCH, *THE LAW OF COPYRIGHT UNDER THE UNIVERSAL COPYRIGHT CONVENTION* 411-12 (1964). Article 14(bis) of the Berne Union Convention addresses itself to the reciprocal availability of art proceeds rights. For another example, descent and devolution might be determined by the characterization of the right which *droit de suite* represents. This has been a problem under the French law, particularly as to the class of heirs who should be protected.

The way the right is perceived will probably be a reflection of the way other rights in the bundle are treated. It is often said that the artist has certain moral rights which give him a continuing interest in the use and abuse of his works. Article 6(bis) of the Berne Convention encourages its signatories to provide such rights. See Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators*, 53 HARV. L. REV. 554 (1940). See also M. NIMMER, *COPYRIGHT* § 110.3, (1967). In France, the artist may protect the work from desecration; he may reclaim a mural to save the work when the building in which it stands is destroyed. See Roeder, *supra*. An American discussion of the moral right which is contrary to the French position may be found in *Crimi v. Rutgers Presbyterian Church*, 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. 1949).

The nexus between a painter and his *oeuvre* is never wholly severed. In a legal context where such moral rights are readily recognized, even celebrated, continuing economic rights do not seem an unusual extension. It is impossible, however, to look at property rights without considering the market place context. We may wish to provide a special status and an exalted economic position for American artists; but it would be a foolish and misleading shortcut to say that there is something inherent in the concept of art—wherever it is created and sold—which furnishes the artist with particular privileges. The relationship between the artist and his work is largely a product of the cultural ambience; and whether a work of art is at all valued is, in itself, a matter that varies from time to time and from society to society. A few of the many studies which discuss this problem are: T. MUNRO, *TOWARD SCIENCE IN AESTHETICS* 67-148 (1956); *AESTHETICS TODAY* (M. Philipson ed. 1961); LEHMANN-HAUPT, *ART UNDER A DICTATORSHIP* (1954).

15. It is impossible for the government to be wholly value-free in supporting or not supporting various schools of art. The proposed American act for an art proceeds right has a ring of neutrality to it; seemingly the market decides where the rewards will be. The state is a mere policeman. But this neutral pose betrays a false modesty. To the extent that the *droit de suite* is effective, it is an incentive to produce work that can and will be resold. It is designed for easel paintings and traditional sorts of sculpture.

he creates: whether it is monumental sculpture or easel painting, plastic or iron, auto-da-fé or laminated for preservation. It depends as well on the demand profile: the percentage of purchasers who are corporations, museums, young adults with limited incomes, or wealthy patrons (who, though limited in number, may support an entire movement). The usefulness of the *droit de suite* is also a function of how the artist produces his work, how many versions there are, how divorced the conception is from the execution.¹⁶ The value of a *droit de suite* is changed by shifts in government policy which affect the art market: general income tax increases, the existence of a war, more extensive public higher education. Changes of styles in architecture and landscaping, which create or destroy opportunities for the exhibition of works of art also significantly influence the market. The factors that affect the art market and thus the operation of a *droit de suite* are so many and so complex that a complete treatment is beyond the scope of this study. It will be useful, however, to look at several important trends in art marketing and to note their effects on an art proceeds mechanism.

16. The art proceeds right is particularly designed for works of art where the conception is embodied in one object and in that object only. Normally it must be an "original work of art" meaning, usually, "a work that is unique such as a painting, sculpture, drawing or illustrated manuscript." Schulder, *supra* note 4, at 44. The Registrar of Copyrights has recommended legislation that would provide a "Registry for Unique Art Objects," primarily to defend against art frauds and to facilitate authentication. The definition of the qualifying items in the proposed bill (not yet introduced in Congress) defines a work as a "unique art object" if:

- (1) the material object is that in which the work of art was first embodied in finished form; and
- (2) the work of art embodied in the object has not been lawfully reproduced in any other material object possessing substantially the same physical characteristics.

It is not unlikely that there will be an increasing divorce between the idea for a work of art and the actual execution which can or must be delegated to a machine or to workmen. Indeed, at a recent exhibition at the Chicago Museum of Contemporary Art, the divorce was flaunted. People were invited to order art objects by telephone, to be made according to request. Because this divorce means a greater likelihood of mass production or many versions, it will diminish the meaningfulness of the requirement of a "unique, one-of-a-kind" work of art. A similar problem already exists under the administration of the *droit de suite* in France. See R. Plaisant, French Law on Proceeds Right, §§ 26-32, 1967, (unpublished manuscript). For example, he notes that a copy of a painting can itself be a work of art (one thinks of Larry Rivers' rendition of Rembrandt); for sculpture, the *droit de suite* is assessed not only on the original work, but on bronze reproductions when they are signed and numbered (there seems to be a limitation based on some informal sense of the proper size of an edition). There is some indication that a *droit de suite* would not be paid on the sale of the mold. Similarly, an art proceeds right is forthcoming when engravings are produced in a limited signed edition. "It seems that the royalty is not to be paid on the sale of the plate itself, which is to be compared with a manuscript." R. Plaisant, *supra* note 9, at 30.

In terms of the problem posed in the text, the engraver's plates, like the sculptor's mold, the matrix for records, the architect's blueprint, and the author's manuscript are concrete aspects of the conception but not "work of art" in the technical *droit de suite* sense. If the author could claim an art proceeds right on his manuscript it would be a cunning turnabout on the first alleged discrimination. See p. 1334 *supra*. Yet, Article 14(bis) of the Berne Convention encourages such protection for manuscripts.

1. *Drawings, Studies and Versions*

One recent trend in the American art market which affects the relevance of a *droit de suite* for traditional easel painters and sculptors is the increasing popularity of *drawings, studies, and versions*. This growth in the sale of preliminary drawings has two implications for a *droit de suite*. First, it enables the struggling artist to have a more uniform income over the year by capitalizing on the market for works of art from \$10 to \$300. Second, it provides a technique for cashing in on the increase in value of the principal work or of early major works. Under the *droit de suite* model, government assistance for the artist is necessary because he is not able to enjoy the future increase in a painting's or sculpture's value. The sale of preliminary sketches and studies may fill this gap. For example, a sculptor like Reuben Nakian can withhold many drawings, preparatory clay models, and fragments of bas reliefs while his sculptures have jumped in value from \$500 to \$3,000. The drawings and models are now worth in excess of \$300 each. Because they were kept, they provide some method for Nakian to enjoy the increase in value in his early already sold sculpture. Finally, there is evidence that some painters render versions of successful paintings to gain a present financial reward for works that were once sold cheaply. De Chirico, for example, imitated his own early and more valuable style.

2. *Multiples*

The *droit de suite* is particularly designed to protect artists who produce unique works of art like painting and sculpture. It is possible, however, that the concept of an "original" work itself is misleading and that artists are currently moving away from such concrete and unique embodiments of their creative conception. If fewer and fewer artists rely on something that resembles a masterpiece in oil for their livelihood, then the *droit de suite* loses significance as a tool for economic reward.¹⁷ The extent of the problem was suggested by Charles Spencer in reviewing a set of "originals" that are capable of infinite reproduction:

Richard Smith's *Sphinx* series of five three-dimensional screen prints indicates the possible scope. They are simply printed aluminum sculptures, or forms, in editions of 50 Tilson, for Malborough, has also produced "multiples" in metal and pressed

17. Recent magazine articles are full of examples of such new products. An example is an article in the N.Y. Times, Oct. 11, 1967, at 49, col. 1, reported the marriage of art and technology in New York with R. Rauschenberg acting as clergyman. See Kaprow, *Death in the Museum*, ARTS MAGAZINE, Feb., 1967.

plastics The fact that casting ensures only a limited number of worthy copies is no philosophical argument against producing hundreds of perfect ones by new technical processes. Objections by artists and dealers that mass product will reduce their incomes have long been disproved.¹⁸

Although the possibility of infinite reproductions which have the integrity of "originals" was virtually unknown in the past,¹⁹ there are signs that such processes have now assumed some aesthetic importance in their own right. More important from the point of view of the *droit de suite* 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. Of course, the fact that an increasing number of artists may be producing multiple reproductions does not mean that the painter of a original oil should be stripped of art proceeds protection because his oil is not produced in numerous copies like a book. But the necessity for a *droit de suite* is less pressing if one considers painters and sculptors as a group rather than focusing on particular classes of artists.

3. *Scale*

Much of the recent work in both painting and sculpture has been of monumental scale. If the artists whom the government wants to foster are creating works several stories high or room size, then the *droit de suite*, with its assumption of periodic resale, may be inappropriate or irrelevant. Hilton Kramer recently commented on the "Scale as Content" show at the Corcoran Museum in Washington, D.C., calling the movement to create sculptures of immense size "one of the salient features of the current American art scene." One of the works in the exhibit, Richard Smith's "Smoke," was "an open-form structure of black-painted plywood that stands 22 feet high and reaches almost 50 feet in length, filling the two-story classical South Atrium of the Corcoran."²⁰ Indeed, there are indications that two of the strongest movements in art at the present time are towards work easily reproduc-

18. ART AND ARTISTS, March, 1967, at 52-54.

19. OF course, limited versions and copies, often made by a school, are an age-old practice.

20. See N.Y. Times, Oct. 7, 1967, at 24, col. 2.

ible on the one hand, and works of monumental scale on the other, categories for which a *droit de suite* is either unnecessary or unworkable.

4. *Distribution*

The distribution system for works of art is as important in determining the relevance of the *droit de suite* model to the American art market as are issues of style. However the *droit de suite* is applied and enforced, there must be transactions which are more or less public. In France, the *droit de suite* is only applicable to resale at auction.²¹ Such a rule in America would make an art proceeds benefit virtually useless since in this country auctions are a comparatively unimportant locus of sale and resale. The workability of the *droit de suite* would also be affected by what appears to be the declining role of galleries, at least in the traditional sense, in the representation of artists and the sale of works of art. Works of art are now apparently held by single owners for longer spans of time. And the increase in the number of museum and corporate purchasers, and in purchases by the government, means that a larger number of paintings will be held indefinitely by single purchasers making a *droit de suite* inapplicable. With the increasing participation of such institutional purchasers in the art market, the importance of the corner art gallery that exhibits and does some off-the-street business seems to be declining. In its place there is emerging a type of agent who avoids the overhead costs of a gallery and concentrates his selling talents on a selected list of purchasers, mainly corporations, governmental and private commissions, museums and large collectors. The tendency of artists to produce works of monumental scale reinforces these patterns of distribution; such an artist wilfully rejects a potential market by producing work that is too large or too expensive for the normal clientele of a gallery.²²

B. *The Law and the Market: Authors, Artists and the Copyright Law*

The Constitution and copyright laws evidence a public concern that individuals who produce works of art should be encouraged and protected in their efforts.²³ Unfortunately, many believe that the copyright statute was designed and written with authors, not painters or sculptors,

21. See French legislation cited *supra* note 1.

22. Ephemeral works present an analogous problem. If art objects are self-destructive, or made so that they deteriorate rapidly, the market for resale is diminished and the chance of an ephemeral work, in this sense, being resold and producing a *droit de suite* is nil.

23. U.S. CONST., art. I, § 8; 17 U.S.C. § 1, *et seq.* (1964).

in mind. The copyright statute permits the author to reap continuing benefits from the sale of his books so that his prosperity rides with the times: when his book is popular, he is enriched; when sales lag, he can wait. A painter or sculptor, it is commonly thought, has no such luxury. The sale of his painting or sculpture is a single, final event for him; the copyright mechanism offers him no technique for obtaining the comforts of a continuing financial stake in future sales of his art work.

If the benefits extended to artists under the copyright statute were in fact distributed discriminatorily, remedial legislation would be called for to correct the legislative oversight. As one Italian writer has said of his nation's major motive for the adoption of the art proceeds act: "The principle that the artist should follow the fortunes of his works has already been applied to the intellectual works which can be reproduced in copies or are subject to multiple utilizations (performing rights, copyrights, etc.)."²⁴ An American author summarized the discrimination as follows:

Copyright protection is given to a creator against any unauthorized reproduction, performance, or exhibition of his work; consequently, the writer or composer generally reserves some pecuniary benefits unto himself when he alienates these exclusive rights of reproduction and performance. In contrast, the artist sells an object, rather than intangible rights, much as if he alienated a suit of clothes he had tailored. There is nothing, practically speaking, that he can reserve unto himself, for the painting cannot be exploited in the broad sense of the word.²⁵

If these arguments are correct, the *droite de suite* concept is justified because copyright is not at present a useful tool for artists; and as a consequence, federal policy is not even-handed in the support of the creative arts; therefore, corrective action should be taken.

Unfortunately, it is impossible to ascertain with any precision the extent to which the copyright law itself provides "less" protection for artists than for authors. First, whatever protection does exist is drastically underutilized by artists. It is clear that very few artists copyright their works in accordance with the requirements of the Federal Copyright Act. Although lawyers and dealers have tried to persuade painters and sculptors to avail themselves of statutory protection,²⁶ the artists

24. De Sanctiis & Fabiani, *The Right on the Increase in Value of the Works of Fine Arts in the Italian Copyright Law*, 1967 (unpublished manuscript in UCLA Law Library).

25. Hauser, *supra* note 4, at 2.

26. J.B. CAHN, COPYRIGHT IN WORKS OF ART (1956) (Artists Equity Association); 2d *Hearings on Art Fraud Investigation*, Office of New York Attorney General, at 28-29.

themselves have been indifferent or hostile to the suggestion. A variety of reasons have been suggested to explain why artists refuse to put the circled C, the notice of copyright required by the Act, on their works. In many cases the reason is personal, a matter of the individual artist's taste; in some cases, however, the work itself would be marred or disfigured by the copyright notice, indeed, even by the artist's signature.²⁷ This is particularly true of contemporary abstract art; most artists of this genre deliberately refrain from signing their creations because a signature would be conspicuous and would detract from the total artistic effect of the work. Thus, frequently by choice and occasionally out of ignorance, contemporary artists rely on common-law copyright to protect their interests in their works.

Because painters and sculptors have not relied on copyright protection, litigation has been rare. As a result, the extent of protection which present law might give them cannot be accurately gauged. Some of the rights which may exist under the copyright law and which would benefit these artists have hardly been touched by them. A few are suggestive.

*The Right to Exhibit.*²⁸ As long as the artist retains ownership and possession of the work itself, he necessarily maintains control over its exhibition. Thus he can loan his work to others for exhibition to the public, and can, in certain cases, obtain compensation for this. The copyright law, particularly under the proposed revision,²⁹ may even provide protection against uncompensated exhibition by the purchaser of the work if the painter or sculptor has retained the copyright.³⁰ This right of the artist to forestall display, however, is in jeopardy. The recent Supplementary Report on the General Revision of the U.S. Copyright Law includes this declaration: "As a general principle, we believe that anyone who owns a copy of a work should be free to put that copy on public display without first obtaining authorization from the owner of copyright in that work."³¹ The new bill would support that view with important exceptions. Under present law, the extent to which an artist can control the display of a work, owned by another,

27. There is, however, some tolerance in the copyright law for avoiding the statutory notice where it will disfigure. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487 (2d Cir. 1960) (L. Hand, J.). The statute expresses the utmost tolerance for artistic needs. 17 U.S.C. § 19 (1964).

28. See generally HOUSE COMM. ON JUDICIARY, 89TH CONG., 1ST SESS., COPYRIGHT LAW REVISION, at 19-20 (Comm. print 1965).

29. S. 1006, 89th Cong., 1st Sess., § 106 (1965).

30. See *Pushman v. New York Graphic Society*, 287 N.Y. 302, 39 N.E.2d 249 (1942); N.Y. GENERAL BUSINESS LAW, Art. 12-E, § 224 (McKinney 1968).

31. COPYRIGHT LAW REVISION, pt. 6, *supra* note 28, at 30.

for which he holds the copyright is not clear, but exploitation of a right after sale could result in tangible benefits to the artist.³²

*The Right to Protect Against Imitators.*³³ Under French law, the painter or sculptor has the right to obtain compensation from a black-guard who copies his style or technique, such as the precise color studies of Josef Albers. Such a right is probably more extensive than that which is presently understood as the right against infringement. But the paucity of artists availing themselves of federal copyright protection means there is extremely little in the way of case law on infringement and imitation.³⁴

The Right Against Transformation and Destruction. Another potential but largely untested right of the artist relates to subsequent use of the work. Because the work of art is considered unique and because it is thought that the painter or sculptor must rely on the continued existence and integrity of the work to exploit his other rights, there may be an implicit right in the artist to enjoin the distortion or ruin of his painting or sculpture.³⁵ Although such a right is recognized in France,³⁶ there is again little case law to suggest whether it is also recognized in the United States. The existence of these unexplored rights does not mean, of course, that the copyright scheme does not discriminate. It may mean, however, that the federal bounty is at least potentially more even-handed than is generally thought.

Although these unexplored rights under the present copyright law may prove of some benefit to painters and sculptors, they can expect to receive much greater gains from the widely recognized copyright interest in reproductions of their works. The explosion in the sale of silk screen prints and posters, the new fashion of "multiples,"³⁷ and the improved techniques for distributing and selling reproductions³⁸ have

32. What constitutes publication is uncertain because of the paucity of litigation; the effect of displaying a work in a gallery or museum is still not settled. M. NIMMER, COPYRIGHT, § 54 (1963).

33. See Roeder, *supra* note 14.

34. *Fitzgerald v. Hopkins*, 144 U.S.P.Q. 771 (Wash. Sup. Ct. 1965).

35. M. NIMMER, COPYRIGHT, § 110.3 (1967); *contra*, *Crimi v. Rutgers Presbyterian Church*, 89 N.Y.S.2d 813 (Sup. Ct. 1949). Of course, it is difficult to assess the value of any or all of these rights to individual artists or to groups of artists. In terms of "real" discrimination, it is more helpful to compare, in terms of sales, the successful authors with the successful painters and sculptors.

36. See Roeder, *supra* note 14.

37. See p. 1340 *supra*.

38. Most college book stores now sell prints by the thousand. In the SATURDAY REVIEW, Nov. 25, 1967, at 6, Marlboro Books offered a "Culture Clearance" where the purchaser could buy a Modigliani "Head of a Young Woman" on "genuine artists' canvas" or on heavy stock, or 20 full color reproductions of Chagall, Picasso, Roualt and others for \$1. Posters Originals, Ltd. offers an Albers for \$10, a Lindner for \$5, a Warhol for \$5, a Pollock for \$10, and even poor Edward Hicks at \$10.

established a market for works of art which approximate the market for books printed in limited editions.³⁹ As art is popularized and as the mass market is nourished and exploited, the reproduction rights for works of art will increase substantially in value. If painters and sculptors, like authors, receive compensation from the proliferation of their work through reproductions, the apparent discrimination of the copyright law in favor of authors and against painters and sculptors will be minimized. To be sure, the expansion of the market does not necessarily mean that the painter or sculptor himself will obtain a significant share of the money spent on art. The copyright protection will be more easily available, but it will still be up to the artist to make use of it. Picasso, Chagall, and Degas are examples of the new market; their performance, in terms of copies of their work sold, may well compare favorably with the numbers of copies of books sold by Faulkner, Conrad, or Sinclair Lewis. The new Copyright Act, following the New York State example,⁴⁰ will widen the artist's opportunity to exploit the market for reproductions; in contrast to prior law, the artist will retain reproduction rights in unpublished works unless he specifically transfers such rights with the sale of the object itself.⁴¹

Other marketplace phenomena undercut the easy conclusion that the present copyright scheme discriminates between artists and authors. The author, after all, normally obtains all his income from the royalty on successive sales of "reproductions" from his manuscript. The artist, on the other hand, usually obtains a lump sum payment for what constitutes his manuscript—the painting or the sculpture. The different methods of payment may reduce the apparent discrimination. An author who sells 50,000 copies of a novel and who receives a royalty of thirty cents per copy obtains \$15,000 as the copyright reward for his work over the period during which the books are sold. An artist of the same class as an author selling 50,000 copies may not sell a major canvas for more than \$5,000, but the money is usually immediately available. Even though he does not have the right to a portion of the proceeds on resale unless he contracts for it, he can obtain interest on the price paid for the painting. Thus, a painter who sells a painting for \$5,000 today

39. See Spencer, Review, ART AND ARTISTS, March 1967, at 52-54; pp. 1340-41 *supra*.

40. See note 30 *supra*. In France, the rights of exploitation remain with the creator unless they are specifically waived. Law of April 9, 1910, modified by March 11, 1957, Art. 38. [1957] J.O. 2723, [1957] B.L.D. 197.

41. A proposed copyright bill, S.1006, 89th Cong., 1st Sess., § 202 (1965), removes the distinction between common law and federally protected rights as far as the presumption of transfer is concerned.

Security for Artists

is as well rewarded as an author who must take ten years to obtain twice that sum through royalties.⁴²

Finally, it is difficult to assess the real effect of discrimination by the federal copyright statute without determining the impact of other federal statutes on artists and authors. For example, the tax code may tend to favor painters and sculptors over authors. Painters and sculptors, with more recognizable objects to manipulate, may have greater power than authors to arrange expenses and charitable deductions to minimize their income taxes.⁴³

42. Of course, a major source of potential revenue for authors are such subsidiary rights as motion pictures and television. It is hard to envision an equivalent source for artists and sculptors.

There is another perspective for viewing the artist-author problem. Although neither the unsuccessful painter nor the unsuccessful author profit from the copyright system while they are unappreciated, an unsuccessful author can profit from the copyright protection if his work later becomes successful while an unsuccessful painter cannot, unless his painting is then reproduced. One cannot deny that this discrimination exists in the copyright statute. In terms of government policy, however, it is necessary to know whether the discrimination is important and what consequences it wreaks. One way of assessing the importance of the gap in coverage would be to look at the stock of paintings an artist keeps in comparison to the stock of manuscripts that an author hoards. To the extent that an artist warehouses his work, saving paintings, drawings, sculptures, and studies, he or his estate may be more capable of participating in the increase in value of his work than is the author, who may not store his writings because he generally has no reason to—the copyright protection preserves his future rights. However, although the author is able to garner a royalty on sales remote in time, the royalty rate is set by the original transaction involving the manuscript and may not be at a rate as high as that the author could obtain years later when his reputation was established.

43. An artist may obtain inexpensive deductions by contributing works to qualifying organizations under Section 170 of the Internal Revenue Code, and subtracting the fair market value of the work (up to 20 or 30 per cent of adjusted gross income) without realizing income. See Rev. Rul. 55-531, 1955-2 CUM. BULL. 520. The ability to deduct the fair market value of paintings furnished for promotional purposes under Section 162 is far less clear. A warehouse of art works may produce adverse tax consequences to the painter or sculptor if the IRS treats, say, a sculptor's accumulated work as "inventory." In that case expenses cannot be deducted currently but must be deferred until the work is sold. Where expenses are high and the chances of sale are slim, this could be disastrous.

The artist, like the author, is precluded from treating his work as a capital asset under Section 1221(2). One problem with valuing an artist's work for estate tax purposes was underscored by Ralph Colin in *2d Hearings on Art Fraud Investigations*, *supra* note 33, at 45-46:

Mr. Colin: . . . [T]he artists have taken this matter in hand, and have now, I think, succeeded in establishing, at least, where the New York branch of the Internal Revenue Service is involved, that an artist's studio must be appraised on his death, in a manner other than two thousand dollars for a painting times a hundred paintings, therefore, two hundred thousand dollars. We have pointed out, at least to them, that anyone buying the studio would take 10 to 15 years, or sometimes more, and the most desirable paintings would be sold first, and the others left to the end, and mathematical calculations is in no sense a reasonable method of approaching this problem. So much so, that in two pending cases, I think I better not mention the States,—two pending cases, of one recently deceased artist and one re-evaluation on the death of the artist's wife, of the remaining studio pictures, the Internal Revenue Service has come to us and we have said that we would undertake to appraise, for the Government and the estate, the entire studio, if they would permit us to do it on our system. They have agreed with adopting our system, and our system was: what would a dealer, familiar with the market; familiar with all the hazards of the market; all of the time it would take to sell off the hundred or two hundred pictures; all of the realizations that the best pictures would go first and

A better understanding of the problem of assessing the relative discriminatory effect of the federal copyright statute may be achieved by considering the statute as a taxing device which delegates authority to impose a private tax on the sale of various items that fall within the coverage of the law. Authors, like governors of a Roman province, are authorized to tax purchasers of books in the amount of the royalty that they exact from the publisher. Each purchaser-reader must pay a certain amount of tribute to the author. Those who have a rich province do well; those who do not, do poorly. It may be true that the Copyright Statute does not specifically authorize artists to engage in the same kind of taxing process, and it may be that the *droit de suite* would provide a technique for artists to obtain equivalent rewards, the same provincial spoils; but that is only the beginning of the inquiry. For example, assuming that a governmentally endorsed tax should be imposed upon purchaser-users of paintings and sculpture as well as buyers of books, it does not necessarily follow that the proceeds of the tax should go to the particular authors or artists who created the works. Moreover, if there is a need for tax, it is not at all clear that the best government policy is to tax the users, as if they were automobile owners paying for the construction of more freeways. Whether authors obtain "more" bounty from the government than artists and what sort of corrective action is needed require more subtle analysis.

C. *The Droit de Suite and the Problem of Resales*

Even if there is discrimination in the federal legislative scheme which sharply hurts artists and sculptors, it is still questionable whether the art proceeds right is the correct way of righting the injustice. As a technique for providing economic security for artists, the *droit de suite* suffers from a fatal dependence on the resale of works of art. The *droit de suite* model assumes that works of art change hands rapidly enough to benefit painters who are still living or have been dead for a period shorter than the copyright term. If works of art do not move with some

some of them may never be sold; all of the facts, that during the intervening 10 to 15 years, he would have his capital invested on which he was getting no return, except the sales of the pictures, as they went along. Bearing in mind all of these things, we said the only way to appraise that is, what would a dealer, familiar with the school of work pay for the whole studio, realizing the problems he is going to have, to liquidate them. In one case, we have already completed the appraisal, and submitted it on that basis. In the second case, we are standing by, ready to do so, if the Government and the estate will do it. Now, there is a second point, that Mr. Johnson might have in mind, about which, neither we or he, or anybody else except Congress can do anything, and that is to raise a question as to whether an artist's estate ought to be taxed at all. This I'm afraid I cannot do anything about. But we can, and are helping the artist put realistic evaluations on his estate, rather than just the multiple of a hundred times two thousand dollars.

frequency from owner to owner, then the art proceeds right would be a waste of legislative energy.

Unfortunately, little is known about the rate at which paintings change hands.⁴⁴ Apparently the likelihood that a painting or sculpture will change hands within the copyright period is relatively small. Moreover, if gift transactions and, as in Italy, non-profit sales are not counted for *droit de suite* purposes, the likelihood is even smaller. An attempt was made through the use of *Art Prices Annual* to determine what percentage of artists whose works were sold at major auction houses in the United States and Europe were living at the time of sale or had died within fifty years of the transaction.⁴⁵ It was assumed that all of the paintings sold at auction were resales and not original sales of the paintings. The data suggests that an art proceeds right would benefit no more than 34 per cent of the artists (or their heirs) whose works were sold in any year.⁴⁶ There are, of course, certain problems with this sample. Works sold at auction are not a particularly good guide to the rate of resale of the sorts of work that do not get moved into auction. Moreover, houses chosen by *Art Prices Annual* are the best houses and their sales record may not be typical of the general market.

It does appear, however, that in European art houses a substantial resale market exists for the works of living, or only recently deceased, artists so that an art proceeds right is not meaningless.⁴⁷ A better evalu-

44. For some statistics in the French experience, see Schulder, *supra* note 4, at 22-23.

45. The cut-off period was based on the copyright term which is most likely to be enacted in the proposed Copyright Revision Bill. The term will be life plus fifty years (except in limited circumstances).

46. The following table was generated:

	1963-1964	1964-1965	1965-1966
Total number of artists whose work was sold	1144	1261	1431
Number of artists living at the time of sale (percentage of all artists whose work was sold that year)	145 (13)	179 (14)	164 (12)
Artists dead less than 50 years before sale (percentage of all artists whose work was sold that year)	229 (20)	264 (21)	315 (22)

47. A recent report of the Commissaires-Priseurs (DOSSIER DE LA CHAMBRE NATIONALE DES COMMISSAIRES-PRISEURS SUR LE DROIT DE SUITE AUX ARTISTES (1964)) demonstrates that a substantial portion of the proceeds go to those few artists whose art sells for more than 20,000 francs per work. Averaging the sums for 1961-1963, the following conclusions can be drawn: For living artists, 25 per cent of the *droit de suite* proceeds (15,000 francs) went to 10 artists while the other 75 per cent went to 306 artists; among artists dead at the time of sale 40 men (whose work sold for more than 200,000 francs) obtained 135,000 francs while the remaining 174 artists obtained 165,000 francs.

ation of the gains accruing to artists under the French *droit de suite* would be obtained by determining the kinds of art sold at auctions and the value of those works produced by contemporary artists.⁴⁸

An attempt was made to correct the more outstanding deficiencies of the *Art Prices Annual* sample by obtaining information from American dealers and businesses selling contemporary paintings and sculpture predominantly by non-auction techniques. The information received suggests that the gallery resale market is limited for the works of contemporary American artists.⁴⁹ If the function of the art proceeds right

48. Figures in the report of the Commissaires-Priseurs, *infra* note 55, suggest that the proceeds in France are enough to cause worry about Paris' position as a locus for major art sales. The report states that the cost of selling a painting in Paris is 20 per cent of the sales price (all fees and taxes included) while in London the fee is only 15 per cent. The Commissaires-Priseurs conclude that the charge is especially damaging in diverting important paintings and that only the effort expended and the confidence inspired by Commissaires-Priseurs themselves permit Paris to continue to fight. However, the fight becomes more and more difficult as the weapons become unequal. The artists' associations admit the high cost of selling in Paris but contend that the fault lies with other government taxes.

49. Galleries in major cities throughout the United States were asked questions concerning the dollar volume which flowed from sales of work by living, or recently deceased, painters or sculptors. The galleries were also asked to estimate the percentage of sales which were not "first sales"—usually consignments from the artist to the gallery. The response from the galleries was not overwhelmingly enthusiastic, in part because the questionnaire asked questions calling for "confidential information," in part because many galleries did not feel like answering. Despite the weak response, enough of the questionnaires were returned by the galleries to provide some idea about the extent of resales in houses which are basically not auction establishments. The following table summarizes the information provided by five galleries. The galleries represented are in New York, Los Angeles, and San Francisco. Two of the galleries deal in extremely modern art and one does some auction business.

	Gallery A	Gallery B	Gallery C	Gallery D	Gallery E
Per cent of sales by living artists or artists who died during 20th century	100	100	15	40	80
Percentage of sales based on consignment	50	90	20	80	30
Percentage of sales which are resales:					
a. of works purchased outright from artists	30	2.5	0	10	20
b. of works consigned by or purchased from third parties	10	2.5	40	10	0
Total values of resales per year	N.A.	\$2,600	\$500,000	N.A.	N.A.
Percentage of resales:					
a. Sold for more than \$2,000	50	0	60	20	N.A.
b. Sold for more than \$5,000	10	0	40 (includes auction sales)	10	N.A.

is to compensate living and recently deceased American artists, then the slim resale market has to be cut again to determine the relevant dollar volume attributable to sales of their art works alone. In sum, the results of interviews and questionnaires suggest that the resale market is not a large one, that most purchasers do not buy predominantly for investment purposes, and that works of art pass by inheritance or from collections into museums. If they are sold, they are normally sold at the death of the owner after a rather long period of holding.⁵⁰

Thus there is good reason to believe that the assumptions underlying the *droit de suite*, based as they are on romantic nineteenth-century notions about the artist in society, are not valid in the United States. As a consequence, the charitable motive for an art proceeds right loses something of its emotional strength. This is not to say that young artists are prosperous, or that excellence is immediately appreciated, but that several factors have changed the relationship between the artist and society in a way which makes an art proceeds right less necessary. The "discovery" of the impressionists and post-impressionists in the early twentieth century has altered patterns of acquisition by individuals and museums.⁵¹ Partly as a result of the surge in values in the late nineteenth century non-academic work, collectors, galleries, and museums have hedged against the future by buying works of artists when they are less well-known and less expensive. This hedging operation has created a greater market for the lesser-known avant-garde artist thus leveling out the prices for his work over his lifetime. Further, we have learned that Blackstonian theory may be as misleading in art as in law. Value is as culturally determined as constitutional doctrine. The *droit de suite* pretends that true value is "discovered" rather than the partial result of fashion. At one time (perhaps in 1920) the *droit de suite* could have been viewed as a pension plan, welfare fund, and legacy for artists and their families, who, unlike the middle class, could not be counted on to set aside savings for a rainy day. The *droit de*

Although the figures are based on only a few galleries, they appear to represent the kind of art market found in America because they conform with the responses received in interviews with art dealers, museum curators, and collectors. Moreover, a high proportion of the market for the resale of art works represents paintings and sculpture of non-Americans, which suggests that American artists may expect to receive little benefit from an art proceeds right.

50. In the distributed questionnaire comments were elicited from dealers on the beneficial quality of the *droit de suite*. The answers were uniformly negative. A representative of the Leo Castelli Gallery said that an art proceeds right would produce "chaos and irreparable bitterness; the art community would become a battleground." One gallery representative noted, "I'd forget this nutty idea if I were you and chalk it up to good intentions." The *droit de suite* would "ruin the art market though doubtless be a boon to the legal profession by way of long involved suits."

51. This is made clear from a survey of auction annuals.

suite was a method of obtaining forced savings in the future. The artist's work would appreciate as the artist grew more in need of welfare: the *droit de suite* could be his salvation. In the United States, however, the sales of multiples, drawings, studies, and versions, and the increased acceptance of reproductions as art provide painters and sculptors with a means for profiting from the appreciation in value of their work that appears to be more effective than an art proceeds right. In addition, the poor resale market in American suggests that an art proceeds right would be of little benefit to the painter or sculptor. Only where the object created is subject to multiple transactions will the art proceeds right return a benefit to the artist. Even if the model were applicable to some portion of the American art market, its value is undercut by the probable insignificance of most of the proceeds and the problems of collection.

III. Some Guides for Alternatives

The basic goal of the art proceeds right is to provide greater economic security for painters and sculptors in an equitable manner; the *droit de suite* concept does not perform this function adequately. As a prominent French art critic (who wished to remain anonymous) has recently said, "The artists or artists' families who really need to be helped do not sell or sell at low prices and therefore do not receive any funds from the *droit de suite*." What is needed instead are some governmental policies more suited to the modern art market. The analysis and suggestions which follow are based on several personal but not excessively controversial assumptions which seem to me to be appropriate guides for developing legislative alternatives: (1) the working of the marketplace should be improved so that voluntary action rather than continuous government intervention will produce the desired results; (2) legislative policies are better if more rather than fewer citizens are benefited; (3) cost and administrative convenience are significant considerations; (4) legislation should disorder existing arrangements as little as possible.⁵² While an exhaustive exploration of these rough guides in the context of a federal policy designed to encourage painters and sculptors is outside the scope of this paper, it will be worthwhile to examine some aspects of the guidelines as applied to the relationships between artists and dealers and museums.

52. The *droit de suite* has been criticized on all these grounds. It is cumbersome and requires an expensive enforcement bureaucracy; it is perceived as an effect on the international art market; and it is not particularly rational in bestowing rewards.

A. *Subsidies for Artists*

Federal assistance for artists may be warranted because of the distribution of cost burdens in the art market.⁵³ If it turns out that artists are the biggest contributors to museums, that artists pay out of their own meager hides for the education of the public, that artists have to support dealers, and that artists subsidize catalogues and other books on art, some governmental action might be necessary to change the situation. Dealers, museums, book publishers and others spend a great deal of time emphasizing their self-sacrificing services. They suggest that a large share of their costs are attributable to the exhibitions they offer the public at little or no charge, and that if the public paid its way, a substantially higher entrance fee would have to be charged. Museums, like universities comparing tuition charged to actual cost of educating a student, make much of these "free" exhibitions they provide the public and artists.

In actual fact, a substantial part of the costs of the exhibition may be borne by the artist, not the dealer or the museum. When there is a one-man show at a gallery, the artist often absorbs the cost of publicity, framing, hanging, and opening night festivities; in fact, he may be charged a fee which includes an aliquot portion of the rent. The dealer contributes his space and other fixed costs.⁵⁴ The artist, of course, furnishes the art work. In the case of a museum exhibition, the costs which the artist absorbs are not so obvious. But a feature exhibition, such as the recent "Sculpture of the Sixties" show at the Los Angeles County Museum of Art, illustrates the point. About fifty living sculptors took part in the show, some absorbing the expense of creating an object precisely for the exhibition. The show, for the most part, was held in the enclosed Lytton Gallery with all viewers, except museum members, paying an extra fee to see the special exhibit. It was clear that the viewers were coming to see that particular show and were willing to pay a certain fee to see it. The proceeds went entirely to the museum. Similarly, the catalogue, which enjoyed a brisk sale, financially benefited only the museum in an immediate financial sense. Where the artist could bargain for a portion of the proceeds but does not, he is also making a contribution to the museum. If Jackson Pollock's family said that they would only allow his retrospective to appear at various museums if they received ten per cent of all proceeds, the

53. The ICC and regulation of railroad rates and rebates to shippers might serve as an example.

54. Most of the material in this section is based on my interviews with representatives of the art world.

museum directorate would probably accede. The price of admission would be raised, or the museum would be required to absorb the additional expense. In either case, the subsidizing quality of the artist's contribution would be shifted.⁵⁵

The significant point is that there are more costs involved in the process of distributing and exhibiting art than are immediately visible in terms of payments for paintings, museum admission fees, and budgets of galleries and museums. There is a substantial additional cost which is now absorbed, by and large, by the artist. The cost cannot evaporate; it must be borne by someone. To be sure, this extra cost varies from situation to situation. And where the exhibition is clearly an investment for the artist and the investment value is increased by encouraging more people to attend through a lower or nonexistent admission price, the artist, like the gallery, may jointly wish to suppress any fee. Sometimes the dealer or the museum will want a large turnout even though the artist does not: for example, the dealer may represent an artist whose works are offered for sufficiently high prices so that the admission fee is not a barrier to entry; but the dealer also has cheaper stock of other artists which he hopes to sell. Sometimes, where an aura of exclusivity is desired, both the artist and the museum or dealer may hike the entrance fee to exclude the masses.⁵⁶

The implications for government policy are several. First, there is the need to discover what the costs are and how they are distributed. If certain costs should not be borne by the artist, there must be some

55. During the interviews, one museum director said proudly that the catalogue for a new one-man show would feature a special lithograph, supervised by the artist, pasted to the cover. The lithograph itself is close to being "original" in terms of the requirements established by the Print Council. Only a limited edition will be made available. Yet, the museum is charging \$1.50 for the catalogue and predicting that there will be a substantial loss. It has not made any market study of what price the catalogue could command, what difference it would make if the artist initialed the lithographs that he had supervised, or what difference it would make if they paid the artist some royalty for the work he is doing. The museum considers this is a great piece of public charity on their part. It may well be. But the greatest donor is the artist.

56. The subsidy quality of the artist's financial arrangements are particularly apparent in the traditional commission and consignment arrangement artists have with dealers. In a particular show, or with a particular stable of painters, the dealer's investment is relatively small compared with the investment of the painter. Because the dealer's investment is small, his incentive to realize on the paintings is affected. That is not to say that it is affected a great deal, or that it is a calamitous structure; only that there is a somewhat lessened proclivity to advance the painter's sales and reputation. The Vincent Price Collection of Sears, Roebuck and Co. may be taken as an example of the merchandising of art where there has been a capital outlay by the merchandiser and a necessity to produce income from the investment. The artist's subsidy to the dealer reduces the dealer's necessity to do precisely what the artist expects him to do. It may be possible to study the difference in marketing techniques between dealers who purchase and resell and those dealers whose business is largely on a consignment basis. Promotional aspects, attempts to expand and sustain the market, and the development of various sorts of exploitation might be more characteristic of dealers who purchase rather than take on consignment.

technique for distributing them to others. This may in part be a matter of improved information and a better playing out of private forces. But it is quite unusual for an artist to seek a portion of the proceeds produced by a museum show, catalogue sale, or a gallery admission fee. A government could decide that it is undesirable for any of the participants directly involved to bear certain costs: it is bad for the museum because it already makes heavy demands on a narrow group of supporters; it is bad to rely on the viewing public because this will discourage visits to museums and galleries; and it is bad for the artist because he may be the participant least able to bear the cost. That leaves primarily the government. Perhaps it should bear the costs of museums or galleries which are now carried by artists. In the "Sculpture of the Sixties" show, for example, some system might have been worked out for compensating the participants in the exhibition while passing the expense to the viewers, to the members of the museum, to the county, to the state, or to the nation. At least the question should be clearly met: why are artists expected to finance such a glorious show when they should be paid for their troubles?⁵⁷

Of course, the *droit de suite* may be viewed, in part as a technique for reimbursing the artist for his prior subsidization of the art market.⁵⁸ To be sure, he must suffer early in his career, but that is only because he has chosen a *métier* that requires heavy, early investment. The additional investment is returned through the art proceeds right. Once the public "understands" in the sense that it is willing to pay for his work, it compensates him for the extra investment he was required to put into exhibitions, catalogues, and the free loan of his work. Unfortunately, the *droit de suite* so imperfectly compensates painters and sculptors that it does little to relieve most artists of the costs they must bear in exhibiting their work. Additionally, the rewards of an art proceeds right are not distributed to artists in proportion to their expenses. A *droit de suite* may discourage painters who should not be discouraged; while it benefits galleries and museums that do not need to be benefited.

Second, to the extent that the *droit de suite* is intended to compensate the artist for society's lack of vision at the time of the first trans-

57. Often, of course, the artist will benefit from the after effects of a museum exhibition, but that does not mean he should go uncompensated. Lawyers, architects, aerospace companies, all furnish some "free" services for promotional purposes. But for artists and sculptors, the institutionalization of the process of uncompensated exhibition has deprived them of the choice as to whether a show of his works should be income producing or not—and if so, the way in which he should modify his demand for payment.

58. This is another more palatable formulation of the Blackstonian view discussed at p. 1349 *supra*.

action, it would be better to spend money to improve society's insight. Indeed, this may be an educational function of the dealer or gallery which should be strengthened. Thus, if the government took a sum which is the equivalent of the aggregate *droit de suite* and invested it in an educational campaign or subsidized the efforts of dealers to promote artists, the gap in understanding which continues and lies at the basis of most notions of a *droit de suite* might be overcome.⁵⁹ Such education would not only benefit the artist by securing higher prices for his work earlier in his life, it would also benefit society by insuring earlier understanding and greater enjoyment of the art work involved. To be sure, the *droit de suite* sum might not be enough, but the fruits of such an enterprise would probably be greater than the fruits of a *droit de suite*.

B. *Private Bargaining*

In other areas of regulation where income distribution has been found inequitable, government policy has often aimed at strengthening bargaining power rather than intervening in specific transactions.⁶⁰ It may be that such an approach is totally out of the question in the art market, but it is certainly worth some scrutiny. Private bargaining does not require an elaborate rationale; if an artist arranges for additional future compensation by contract, he does not have to say it is "just" or "necessary" or "encourages the arts." Private contractual arrangements, indeed, are the normal method for fashioning patterns and levels of financial reward. It is perfectly justifiable for artists, like television personalities, to obtain residuals in their works. It is perfectly justifiable for artists, like motion picture producers, to tax each subsequent use of a print or a painting. But because symmetry is desirable it does

59. One possible model for such an enterprise is the French Caisse Nationale des Lettres which serves as a governmental foundation to subsidize and promote certain literary works. The funding for the CNL is derived from several sources: (1) an additional fifteen year copyright period for literary works with the proceeds going to the CNL; (2) a special tax on certain publishers; (3) a special tax on royalties from authors; (4) additional government appropriations. The fund is used for the following purposes: (1) to support and encourage literary activity of French writers through scholarships, purchases of works, and other subsidies; (2) to subsidize the publication of important works of scholarly or literary merit which would probably not be commercially published without such subsidy (dictionaries, correspondence of men of letters, scholarly works, etc.); (3) to grant relief to old and needy authors and their families; (4) to protect French literary works from ill use and desecration even after they are in the public domain. In 1967 the CNL had a budget of approximately \$600,000. Approximately \$50,000 went for scholarships and grants; about \$15,000 to literary magazines, \$200,000 in loans to publishers.

60. The most frequently cited, but not most relevant model, is the National Labor Relations Act. In the civil rights field as well, the government has often acted by providing covert support for representatives of bargaining groups, such as the Urban League and the NAACP.

not mean that the government should impose it. Government legislation might be directed at ways of improving the possibility that fair, voluntary bargaining takes place. This may be a matter of merely furnishing information; it may be a matter of less subtle techniques of intervention.

What is immediately clear from a survey of present arrangements in the United States is that extremely few artists have written contracts of sale or consignment;⁶¹ and it is not much of an exaggeration to say that no contract includes a specific art proceeds right term. While this may be the result of a legal incapacity, artists offer several other reasons. The first is the strong influence of custom or contractual arrangements in the sale of art. It is a business that in many ways tries not to be a business (at least so far as the artist-dealer relationship is concerned). There are negotiations about certain issues: what will be the amount of commission, whether the artist is paid a monthly advance or works on an output contract, who pays for framing, the dealer's publicity costs, opening costs, and hanging costs. There may even be loose consensus on the amount of the selling price, but the sort of purchaser and the terms of the contract of sale are normally outside the artist-dealer negotiations. The negotiations often do not relate at all to the most important aspects of the transactions. The artist has a vital interest in where his paintings are placed and what use is made of the work after it is sold, but these terms are rarely bargained over.

Because of the strong influence of custom in the contractual practices of the parties, very few artists have given consideration to fashioning different arrangements with their dealers or ultimate customers. The pervasive impact of existing practices gives rise to various theologies for the lack of change. First, although it is a popular pastime for artists to complain about their dealers, they do not normally conceive of the

61. See testimony of Ralph Colin, *Hearings before N.Y. Attorney-General*, *supra* note 26, at 52:

It might interest you also to know, in view of some of the comments made here, about the tough contracts that the dealers insist on—we happened to have had a meeting of our Board last Friday to deal with a special matter. There were eight members of our Board present. I didn't know that this question was going to come up at this meeting, obviously. But incidental to another question, I asked our members what forms of contracts they had. None of the eight members of our Board, present at that meeting, had a written contract with any artist. Their general attitude was, we work out the terms by mutual understanding orally; we fix prices orally, and any time an artist is unhappy and doesn't want to stay with the gallery, he may leave, because we are convinced that an unhappy artist is not an artist who is going to produce good work. Now, please understand that I am not suggesting that this is a uniform practice. I know that many galleries have written contracts with artists, for terms of one, two, three, five years, but I can tell you that many of the most responsible galleries in New York don't have contracts with their artists.

need for intermediaries between them and the dealers. An analogy from the motion picture industry is apt: a show business personality does not depend on his producer or exhibitor to look out for his or her best interests; he hires an agent who negotiates the contract for exhibition. The agent tests the market for flexibility in various aspects of the producer-personality arrangement, bargains for better billing, for a different form of compensation and for artistic control over the end product. He is able to force the producer to differentiate among the various performers he employs. For better or for worse, the art dealer performs the role of exhibitor and agent. He may have short or long range interests that are different from and even conflict with those of the artist; he may be less concerned than the artist would be with increasing the artist's control over the use and disposition of a work of art that has left the dealer through a sales transaction. For the dealer, enforcing the art proceeds right and coping with the sales resistance it creates only causes headaches. Similarly, any conditions imposed on the sale which lead to limitations on usage or requirements of display restrict the market.

A second theology relates to the "power" of artists. Many of the participants in the process think that artists and sculptors could not get changes in their arrangements even if they so desired. As a consequence, they give little thought to the form change might take. The prophecy of powerlessness is self-fulfilling. The various movements, dating from WPA and still lingering in the shape of the artists cooperative associations, have exceedingly little force in the marketplace. Indeed, the feeling of powerlessness extends to the point where even powerful individual artists do not exercise their strength, although it appears that they could exact such benefits as an art proceeds right, reproduction rights, exhibition rights and others.⁶² There seems to be no recorded instance of collective action which has changed the policies of a dealer, gallery, or local market. The attempts to exercise power have either been on an individual basis,⁶³ or on a mass basis, like the Artists Equity movement. Part of the reason is that a large number of artists, including artists that have a certain reputation and power in the market, have only a fragmented idea of the sorts of matters they could negotiate about with their dealers. And even if the art proceeds right

62. One major dealer of mass art in Los Angeles exacts an agreement from purchasers that he retains the right to reproduce. Often, after a painting is sold, it is recalled, photographed, and made the subject of thousands of "prints" for interior decorators. Neither the purchaser nor the artist participates in the proceeds.

63. Picasso's insistence on retaining almost all property rights in the Museum of Modern Art's "Guernica" is one example.

became a matter of negotiation, it would almost certainly be in the context of other sorts of contractual provisions which would furnish a spectrum of techniques for enhancing the economic security of the artist and the dealer.

The range of issues which are or could be subjects for negotiation is quite large. The most obvious is *reproduction* rights.⁶⁴ To the degree that the receipt of royalties makes a painter more like an author, such rights are a supplement to the *droit de suite*. Under American law, except in New York,⁶⁵ the sale of the object carries with it the sale of the common law copyright unless the copyright is expressly retained. That simple action, retaining the copyright, is taken by some artists and dealers, but extremely few. In some cases the dealer retains the copyright allowing him to make reproductions in the future without compensating the artist. There is some indication that museums would resist purchasing objects without purchasing copyrights, but such resistance would probably crumble in the face of demands by artists for their copyright rights. Indeed, museums have been known to embrace special conditions of a far more exotic nature when they are imposed by contributors. Much is made of the inconvenience that attends retained reproduction rights. One way out is the method employed by the American Society of Composers, Authors and Publishers (ASCAP)—policing public performances of music; however, this is extremely expensive and would be suitable for artists only when reproductions become widespread and policing worth the cost. Other methods are less burdensome.⁶⁶ For example, it is contended that retention of reproduction rights would create too much bother and confusion for people who wanted to reproduce the painting. But even now the reproducer must check with someone, normally the owner of the painting or the museum before he copies the work. Museums normally require that the reproducer establish a credit line as do collectors, although museums often waive any charge. An artist could require that the museum collect a certain fee for reproduction, perhaps geared to the size of the publication. At first, until it is clear how such a system would

64. The Association of Art Museum Directors recommends a fee schedule. REPORT ON COMMITTEE ON REPRODUCTIONS (1962). No fee would be charged for publication in "art magazines or other publications including art pages" such as in *Life*, *Time*, or *Look*. For reproductions in advertisements, "permission to reproduce works by living artists will be subject to written permission of the artist and to any reproduction rights he may have retained." In cases where such rights have been retained by artist, reproduction fees will be payable to him in such sums as he may stipulate. Where no such reservations have been made by the artist, a flat fee of \$250 will be payable to him by the advertiser. This will be in addition to the fees and charges payable to the museum.

65. See note 29 *supra*.

66. See Plaisant, *supra* note 9, and De Sanctiis & Fabiani, *supra* note 24.

work, the artist could relieve the private collector or the museum from liability for non-collection of the royalty, leaving the arrangement up to the bona fides of the owner of the painting.

Other subjects for bargaining include *dealer practices*.⁶⁷ The way in which the dealer deploys his budget has serious consequences for the artist. Changes in the advertising budget, the decision to keep a gallery open, the guarantee of exhibition, the turnover in shows—freedom in all these respects is permitted the dealer because he maintains his stock without strings. Few other dealers who have exclusive arrangements with suppliers can act with such immunity from supplier sanctions. When an artist agrees to be represented exclusively by a gallery he makes certain assumptions which might be articulated and made explicit in a contract for representation: for example, that there will

67. See testimony of Alvin Lane, *2d Hearings on Art Fraud Investigations*, *supra* note 26, at 69-70.

I would like to take up the question of the artist. The artist does have a problem with the gallery. I have written to the Attorney General and asked him to expand these hearings to take into account—perhaps not under the same subject, but maybe a corollary to it—the problem of the artist. For example, there should be uniform methods of accounting. An artist leaves his work at a gallery. Very often he is not told to whom it was sold nor does he know the price of the work. He puts a minimum price very often on his work. He said, "I am willing to take \$2000 for this." That doesn't mean he wouldn't be happy if he got \$3000. There are a lot of artists in the Association and out of the Association—that is who deal with all types of galleries who cannot get an accurate accounting of where their work is; who it was sold to; what it was sold for. I think just as a matter of pride, when a man creates something he should be able to trace the pedigree of it. He should be able to know who he sold it to. But, more, he should be able to check his accounting.

There are problems with some galleries as far as prompt payment to the artist. I have had instances where people have called me, where their work has been sold and they cannot get paid for long periods of time. I don't know whether this is true in other industries. I imagine it is. But it is prevalent in the art industry, and I think licensing can control that.

I also think that the galleries on the whole have not properly protected the proprietary interest of the artist. When they sell their work, for example, there is no reason why the galleries, who are really in a fiduciary relationship with the artist, shouldn't in the bill of sale or in the collateral agreement, reserve certain rights for the artist, such as prohibiting his work from being shown on television or displayed distastefully or whatever it is. This can be done contractually. It doesn't have to be by law. I have no objection to the law that is proposed. But I am not in favor of a lot of laws. I think the law should be kept to a minimum. I prefer something that is more flexible, and where you can regulate where regulation is needed and you can cease regulation as soon as it isn't needed.

Now, the galleries have failed, in my opinion, as a mass in protecting the interest of the artist. There is no professional group I know of who has treated their clients more shabbily. Now, I am not saying they didn't make a lot of money for their artist, and I am not saying that a lot of artists haven't treated the galleries shabbily. They have. Galleries have spent lots of money promoting an artist, and as soon as they reach a certain fame or price, they will shift off. And the man who has invested the time, effort and encouragement, loses a valuable asset, so to speak. It's a two-way street, and I am not going to say the galleries are all wrong and the artists are all right. I am trying to address myself to particular problems. The artist should know how much he made; he should be paid promptly; the gallery should publish with their bills certain reservations that the artist is entitled to. At least tell the artist what his rights are and let the artist make a decision whether he wants to retain them.

be a maintenance of the existing advertising budget or that it will increase at a certain percentage each year. Also, there could be a guarantee to certain artists who are represented that there will be one-man shows each 12 months and gallery group shows once a year. Two frequent complaints are that artists lose track of their work or fear that the gallery will be slow to pay them. Certain contractual techniques might alleviate these complaints. Artists could require that the gallery maintain, in an accessible place and at the gallery's expense, a registry of all work on hand by artists. This central file would be open to the artist for his inspection at set times. Artists could also require that a penalty clause be inserted which would add five per cent to the monies due for each three month delay in submitting payment.

The art proceeds right concentrates on the immediate financial interest an artist has in the fate of his work. But various non-financial controls may be more important to the artist's welfare. For example, an artist has a great stake in the manner his work is displayed by the dealer. At present, the dealer has complete discretion over the placement of paintings within the gallery. If the gallery does not have shows, or reserves a section of the gallery for selections from artists represented, some assurance can be built into the contract that there be regular display of each artist's work of art.⁶⁸ Furthermore, the artist may require the dealer to impose certain exhibition obligations on the purchaser, such as making the works available for display in museum shows. The artist might demand the right to limit the number of times a painting could be loaned and the duration of each loan. The artist might wish to exercise some censorship over the occasions on which his work is exhibited; there are related rights similar to the "moral rights" which exist in France and many other countries.⁶⁹ The artist may wish to exercise contractual control over modifications of the work of art, such as changing its colors so that it will be a better match for the owner's furniture and wallpaper. The artist may seek contractual assurance that the purchaser will not mutilate or destroy the painting or that the purchaser will adequately protect the work, periodically relining it, for example, or the artist may even demand that the work be destroyed in a certain number of years.

Clearly, one of the harshest blows for artists occurs when a gallery decides to close. The artist may wish to protect himself by obtaining

68. The artist may also bargain for billing in circulars and on-site promotional material.

69. See Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators*, 53 HARV. L. REV. 554 (1940). See also M. NIMMER, COPYRIGHT § 110.1 (1963).

some assurance in his contract with the dealer that the gallery will continue to operate. For the artist, the choice of dealer is extremely important; his tie to one agent forecloses other arrangements. He becomes closely identified with a certain market and certain purchasers. For him, the dealer's decision to close can be quite cruel. It may mean he has to find another dealer, which may be difficult, or fend for himself, which may be impossible.⁷⁰ What protection is there? First, there ought to be a notice requirement. A contract could provide that a dealer must give at least three months notice before he closes up shop. This would give the artists involved some opportunity to persuade the dealer to change his mind, to encourage some quick additional financing, or to make other arrangements. Second, the artists may have some interest in the liquidation of the gallery's assets. In a sense, the artists have become quasi-partners; their continuous subsidy and investments in frames, materials, etc., have been a substantial factor in the gallery's financing. The artists may have considerable interest in the mailing list of the gallery and other records that may permit them to continue the business. They certainly have an interest in their paintings and in the gallery's accounts receivable, at least to the extent that their commissions depend on the monthly installment payments by the purchasers of their paintings. In sum, the contract with the gallery can provide for rights on liquidation. Because of custom, lack of experience, and a feeling of powerlessness, private contractual techniques for future participation in the increase in value in a work of art has not yet been adequately tested.

The implications for government action of this absence of contractual arrangement are by no means clear. Were the art proceeds right felt to be significant and crucial to provide fair and just compensation, then the government might feel it necessary to intervene whatever the reasons for the failure of private bargaining. Government intervention would be more compelling if present contract law forbade artists from obtaining provisions that would improve their economic security. For example, certain provisions which bind future purchasers could be held to violate the rule against perpetuities, or could be characterized as "against public policy"; enforcement of certain provisions might vio-

70. The problem is analogous to bargaining issues which occur where there is a decision of a manufacturer to terminate his operations. Employees have increasingly been successful in arguing that an employer has a certain trust responsibility when he offers a position, changes an employee's training and skills, and shuts off alternative opportunities. See generally *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965). There was, of course, abundant testimony which pointed out that it would be simplistic to place all blame on the dealer. See note 16 *supra*, testimony of Ralph Collin.

late various antitrust laws. Finally, even if such contracts were valid, the government might be required to intervene because enforcement was impossible without outside assistance. It is difficult to believe that the ingenuity of lawyers cannot surmount the problems surrounding the drafting of a private art proceeds right. To be sure, there are the hobgoblins of restraints on alienation, but they should be spurs, not obstacles, to the lawyer's imagination. For example, the artist could make his sale partially conditional; \$20,000 cash with \$5,000 more to be paid if the buyer ever sells the painting for \$40,000 or more. Or the painter could sell the painting with a \$2,000 lien, with payment due at the time of the first resale. As to the first purchaser, the artist certainly has adequate privity to require an out-and-out *droit de suite*. The artist can include in the contract of sale a stipulation that he receive three per cent of the proceeds of any sale.⁷¹ Problems, such as lack of privity, arise primarily on subsequent sales.⁷² A continuing restraint on the sale may violate the rule against perpetuities and certainly would be difficult to enforce. There are methods for solving this problem, but they may be so difficult and unworkable that they are no solutions at all. For example, an artist may relinquish his painting in a lease rather than sale form. The lessee would have a continuing lease, but would not be able to sell the painting without the painter's permission. The lessee would be able to give the work to a museum without obligation to the artist, but as to any other transaction, the painting would have to be rerouted to its creator or his estate. Or the painter could have an option to repurchase: a cloud on the ownership of the work which could only be dispelled by paying him a sum which would be similar to the *droit de suite*. To make the arrangement more palatable the artist's lien could be set at 10 per cent of the increase in the painting's value, if the transaction involves more than \$2,000. Under these circumstances, the purchaser would probably not be deterred for fear of losing his original investment, since he reaps 90 per cent of all profits which he makes on his investment. The problem of policing is still a nagging one. Again, there must be an element of trust and self-enforcement. The contract could stipulate where the proceeds should be sent. If a purchaser fails to pay, the artist would have a lien on the painting for the amount of the art proceeds right. Where a gift to a museum was made, the artist could agree to take half the normal share due him or waive the proceeds entirely. Government intervention

71. *But cf.* Simpson v. Union Oil Co., 377 U.S. 13 (1964).

72. The likelihood of multiple transactions within the copyright term is unlikely. See p. 1349 *supra*.

to enforce the art proceeds right might be warranted if artists could negotiate clauses giving them such a right but had no way to collect the money when their work hit the Top Ten. Existing private models for enforcement, such as ASCAP, are probably too bulky and expensive for artists. Indeed, a close study of the French experience would probably indicate that the ASCAP-type agencies which were employed to enforce the artists' rights created a substantial drain on the income from the *droit de suite*.⁷³

IV. Conclusion

What do these changes in style and the marketing of art imply for government policy?⁷⁴ First and most important, there is a need for vast improvement in the operation of the marketplace. The artist, ignorant of his rights, saddled with the concept of powerlessness, has by no means explored the limits of his contractual arrangements with dealer and purchaser. The government can play a crucial role in eliminating this informational gap. Just as the Department of Agriculture and the Small Business Administration do in their areas, some governmental agency, perhaps the National Endowment on the Arts, should provide technical assistance to artists and sculptors. Such technical assistance would include information about the income tax—in particular allowable deductions—information about new materials and new processes, information about the great variety of bargaining relationships among artists and dealers, information about firms that would reproduce their art, and information about new markets for works of art. At present, most artists, whether they are trained at universities, colleges, or art schools, emerge with only the barest idea of any of these matters. They are saved from poverty by the general level of prosperity in the nation.

73. The authors' society retains approximately 30 per cent as a commission. Thus for a \$5000 painting, if the *droit de suite* were fixed at 3 per cent (the French rate), the tax would yield \$150, of which the artist would get \$105.

74. There is an important but subtle relationship between the kind of art produced, the demand profile, and the channels of distribution. No matter how persistent and self-sacrificing artists are, they are controlled to some extent by what embodiments of their creativity can be sold. There is a dwindling market for religious triptychs because there is a dwindling number of massive churches. If existing merchandisers of art were not sufficiently resilient to include the financing and sale of massive pieces of sculpture, then that style might be short-lived. If artists are not employed to design freeway approaches, if they are not consulted in the design of cities and public places, if they are eschewed by industry out of lack of information and knowledge, then restrictions imposed by the collector—individual, corporate, or government—will continue to be felt in the development of style. Economics and aesthetic experimentation should accompany each other, with governmental encouragement. Indeed, this is occurring at the present time in New York, Chicago, and Los Angeles. See THE ARTS IN CALIFORNIA, REPORT TO THE GOVERNOR 74 (1966).

An educational role may seem trivial to a government that is better organized to pass a statute than to implement a policy, but it could be extremely worthwhile. Second, the government should expand the market for works of art, particularly contemporary American paintings and sculpture. The government can do this by increasing its own purchases of art or increasing, by regulation, the investment in works of art by others. The program of purchasing American art for embassies abroad might be extended to federal offices in this country. The policy of requiring a small percentage of public construction funds to be spent on murals, paintings, and sculpture should be more rigorously fostered and administered. Greater federal encouragement, particularly through the State Commissions on the Arts, should yield increased buying of contemporary works by state and municipal governments. The National Endowment on the Arts can encourage more elaborate aesthetic zoning, more parks and public places with room for sculpture gardens, better tax breaks for office buildings which are exemplars of good, rather than horrid, taste. The government can also continue to increase the market for art by fostering public higher education, thus expanding the number of citizens who become potential buyers of contemporary art. Third, the National Endowment on the Arts should explore in great depth the way in which the private art market presently functions and how current trends may modify the income patterns of various schools of American artists. More information is necessary about who the new purchasers are; whether individual collectors, corporate collectors or museums predominate; what is the extent of the market for paintings at various price levels; and what is the capability of the dealers to ferret out new markets for the artists they represent. Fourth, the government should explore and develop new avenues of participation for artists in architecture and city planning so that novel forms of creative expression have compensating outlets. In part this may involve subsidizing production facilities which require extraordinary capital outlays.

The *droit de suite* cannot function as the cornerstone of federal planning. The fashioning of government policy in the area of the arts is difficult enough without the additional paralysis of reliance on outmoded ideas of the production and distribution of art. The rude intrusion of technology into the craft of the parlor and the rampant extension of the artistic imagination is rendering obsolete such notions as "paintings," "originals," "authentic." The shape of the demand profile is also changing. The practices of periodic resales and passing works of art from generation to generation are growing less significant as

institutional, government, and corporate buying begin to become a greater proportion of the market. The pervasive idea of distinguishing between books and paintings must fade somewhat as the market for reproductions doubles and redoubles. What is most clear is that the government cannot define its policy on the basis of a nineteenth century view—or any fixed view—of the art market at a time when standards, and styles, and methods of sale are so quickly changing. That is the plague of the *droit de suite*. True, it offers a small solution to the problems of some painters. Yet the administrative problems it produces would probably outweigh its benefits and the government could better direct its energy in channels calculated to improve the economic security of the artist. In terms of its articulated goals, the *droit de suite* rewards the wrong painters with probably inconsequential amounts of money at the wrong time in their lives.

The Yale Law Journal

Volume 77, Number 7, June 1968

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