

Copyright Royalties for Visual Artists: A Display-Based Alternative to the Droit de Suite

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**COPYRIGHT ROYALTIES FOR VISUAL ARTISTS:
A DISPLAY-BASED ALTERNATIVE TO THE
DROIT DE SUITE**

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ABSTRACT

The Copyright Act¹ grants certain exclusive rights to authors, composers, choreographers, and certain other artists. These rights may be used to bargain for royalty payments from those who make use of these artists' work. Were Congress to repeal section 109(c) of the Act,² visual artists would also have the opportunity to negotiate royalties. Virtually no additional legislation would need be drafted, for the Copyright Act already conceptualizes a right by which, but for section 109(c), visual artists might demand royalties for themselves. The "already conceptualized" right is the section 106(5)³ exclusive right of public display. Unqualified, this display right, like all other exclusive rights which now support royalties for artists (*e.g.*, the exclusive right to copy), would survive transfer of ownership of any material embodiment of an artist's work.

This Note advocates repeal of section 109(c), along with minor modifications of the current copyright notice procedures, in order to afford visual artists an exclusive right by which they might negotiate royalties. Others have advocated a royalty for visual artists, but to date all have modeled their proposals after the French *droit de suite*, the artist's inalienable right to a portion of the proceeds on the resale of her work. The event of resale might indeed fix a royalty for visual artists. This Note argues, however, that the better alternative is to grant visual artists what the current Copyright Act grants other artists (*e.g.*, authors and composers): exclusive but alienable rights, by which copyright holders might demand royalties for themselves.

Further, this Note explains how effectively the section 106(5) public display right serves as a right on which to base a royalty. The section 106(5) right is defined so as to apply only to "public" displays. Therefore, a private display within the home of the owner of an art object would not occasion a royalty. The Note cautions, however, against construing a "fair use" exemption from copyright in the uses museums make of visual art; for reasons the Note explicates, even not-for-profit museums should not qualify as noninfringing "fair" users of works of art.

Although a royalty for visual artists might be secured with relative statutory ease, the Note acknowledges that the idea has traditionally met resistance. This resistance may be attributed to the common understanding that works of visual art are one-of-a-kind, and that therefore their creators would not stand to benefit from a *copyright*. Indeed, the Note discerns that even those advocates of a

¹ 17 U.S.C. §§ 101-914 (1988) [hereinafter referred to in text as "the Copyright Act" or "the Act"].

² *Id.* § 109(c). For the text of section 109(c), see *infra* text accompanying note 60.

³ *Id.* § 106(5).

royalty for visual artists, the proponents of the *droit de suite*, have assumed that traditional copyright concepts are inapplicable to the visual arts.⁴ The Note attempts to persuade skeptics of a visual artists' royalty that works of visual art are not one-of-a-kind objects at all. Actually, "original works of art" are more akin to musical and dramatic performances, which already qualify for protection under the Copyright Act.

But the notion that works of visual art are "one of a kind" and hence not amenable to copyright protection is so pervasive that this Note must be structured to answer it. Part I begins, therefore, by laying out a theory which fully accounts for and justifies the traditional notion of copyright inapplicability to visual art. This is the theory of "authenticity," the idea that works of art are valuable not because they are physically or aesthetically unique or irreproducible, but rather because they represent a traceable, desirable history. The Note further explicates the theory of authenticity, to show how it also justifies copyright *protection* for the visual arts. That is, the very same theory which supports a definition of visual art that would preclude copyright applicability argues as well for a definition of visual art that would presume copyright applicability.

Having thus deconstructed the common justification for Copyright Act inhospitality toward the visual arts, Part I proceeds to show how the Copyright Act already attenuates the definition of "copy" so as to include many art forms which are hardly manifest in "copies" at all, but are manifest instead in performances or displays. Part I concludes by focusing on the particular sections of the Act relevant to a display-based royalty for visual artists. Understanding both that works of visual art need not be seen as "one of a kind" and that the Copyright Act is not in fact inapplicable to works that escape literal reproduction in copies, it should be easier to recognize that the Act in its present form very nearly accommodates a royalty for visual artists.

Part II lays out the alternative forms a royalty for visual artists might take. Given the discussion of Part I, however, the Note argues against the previously proposed alternative of the *droit de suite*. In addition to legitimating fundamentally flawed presumptions about the needs and desires of artists, the *droit de suite* suffers from the same misconceptions about works of visual art that inform arguments altogether hostile to a visual artists' royalty. Part II then turns to outlining the features and mechanics of a display-based royalty, which might be termed "the exhibition royalty." Such a royalty would comport with the features of the current Copyright Act expli-

⁴ This assumption further explains why the *droit de suite* is cast as an inalienable right.

cated in Part I. In short, Part II compares alternative models for a visual artists' royalty and concludes that the best model is the one latent in the Copyright Act. In other words, the best model is the one the Act already provides.

PART I: THE MEANING OF "COPY"

A. "One of a Kind" Need Not Apply

Works of visual art are commonly understood to be "one of a kind" and necessarily outside effective copyright protection. The same theory justifying this common understanding argues as well for the converse, that works of visual art are not "one of a kind" at all. The statement "One of a kind need not apply" stands, then, for two antithetical propositions. First, a one-of-a-kind work of visual art need not apply for copyright protection because such protection is designed only for copies. Second, the description "one of a kind" does not apply to an original work of art, and therefore copyright law may yet be amenable to works of visual art.

1. *The Common Understanding*

Writers and composers receive royalties; as a matter of course, painters and sculptors do not.⁵ Nevertheless, the Copyright Act protects the work of a painter or sculptor: "Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression *Works of authorship include . . . pictorial, graphic, and sculptural works . . .*"⁶ Other sections of the Copyright

⁵ Cf. Timothy M. Sheehan, *Why Don't Fine Artists Use Statutory Copyright?—An Empirical and Legal Survey*, 22 BULL. COPYRIGHT SOC'Y 242 (1975) (lack of education, the notice requirement, and the concept of limited publication account for fine artists' lack of use of statutory copyright).

⁶ 17 U.S.C. § 102(a) (1988) (emphasis added).

"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints, and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned

Id. § 101.

Paintings and sculpture have been within the scope of federal copyright protection for more than 100 years:

And be it further enacted, That any citizen of the United States, or resident therein, who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of modes or designs intended to be perfected as works of the fine arts, . . . shall, upon complying with the provisions of this act, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same

Copyright Act, ch. 230, § 86, 16 Stat. 198, 212 (1870) (emphasis in original).

Act, however, imply that such copyright protection applies only to an interest in a work's reproduction: "[T]he exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work in copies . . . includes the right to reproduce the work in or on any kind of article . . ." ⁷ Although not phrased to exclude other protections, this section does not enunciate further protections for copyrighted pictorial, graphic, or sculptural works.

If copyright protection requires in practice the making of reproductions,⁸ it follows that painters and sculptors whose work consists of one-of-a-kind objects do not stand to gain from the protection and thus do not receive royalties. This, indeed, is the common interpretation.⁹ One commentator has reasoned, "copyright is more effective for writers, for example, than for fine artists, because the work of an author is specifically produced for multiple use. . . . [W]ith the fine artist who creates one-of-a-kind pieces, the primary value is in the original work."¹⁰

2. *The Theory of Authenticity Informing the Common Understanding*

A sophisticated theory of "authenticity" explains and justifies the common understanding about the singular nature of works of

⁷ 17 U.S.C. § 113(a) (1988).

⁸ *But see infra* text accompanying notes 55-69 (17 U.S.C. § 106(5) grants graphic artists exclusive rights to display publicly, subject to limits of 17 U.S.C. § 109(c)).

⁹ See John B. Koegel, *VLA Perspectives: Memorandum of Support for S. 2796: Introduced in the 99th Congress by Senator Edward M. Kennedy (D. Massachusetts)*, 11 COLUM. J.L. & ARTS 347, 349 (1987). This Memorandum noted:

Unfortunately, the intrinsic nature of distribution for most pictorial, graphic, and sculptural works is different [from works of writers, composers, choreographers, performing artists and filmmakers]. Since, as a practical matter, reproductions are not significantly marketable, the visual artist must gain his entire return from the initial, onetime sale.

Id.; see also 2 MELVILLE B. NIMMER & DAVID NIMMER ON COPYRIGHT § 8.22[A] (1989):

Since economic exploitation of the written word is mainly realized through reproduction, the right to control the making of copies constitutes the writer's key to the economic fruits of his creative efforts. Not so with the artist. Reproductions of works of art have not in the past, and probably still do not to any great extent, represent a meaningful source of income for most artists. His prime source of income derives from the sale of the original tangible embodiment of his artistic efforts. The money an artist receives upon the sale of a painting (even if he has reserved reproduction rights) probably represents the only income which he will receive from that particular work.

Id. (footnote omitted); John E. McInerney III, *California Resale Royalties Act: Private Sector Enforcement*, 19 U.S.F. L. REV. 1, 17 (1984):

Artists who stand to benefit most from the copyright laws are those who work in multiple originals or whose works are reproduced for mass distribution. This is so because the primary interest protected by copyright is the right to control reproduction of a given work.

Id. (footnote omitted).

¹⁰ McInerney, *supra* note 9, at 17 (footnote omitted).

visual art and the consequent inapplicability of copyright to works of visual art. This theory of “authenticity,” as explicated chiefly by Walter Benjamin, appears to be accepted by buyers and sellers of works of visual art. Furthermore, as Walter Goodman has shown, the theory of authenticity has an aesthetic function which affirms the theory’s rationality.

a. *Benjamin’s Theory of Authenticity*

The previous deduction,¹¹ explaining the languid state of copyright affairs for most visual artists,¹² also quietly reinforces an important belief about the nature of a “work of art” (as the phrase is used in reference to painting or sculpture). The belief reinforced is that “works of art” are utterly unique objects. However conventional, this belief is not altogether plausible. Whether intended for multiple reproduction or not, there is nothing about the physical object that is a painting or a sculpture that prevents its material reproduction. As Walter Benjamin observed, “[i]n principle a work of art has always been reproducible.”¹³ An art object’s reproduction may be apparent as a reproduction, in the form of a photograph, a postcard, or a slide; or its reproduction may be more difficult to discern as a reproduction, as with a “forgery” using similar materials and following identical measurements and dimensions.¹⁴ But in either case, obvious reproduction or devious forgery, the copy of a “work of art” is generally understood to be less valuable than its original.

This fact means that the nature of a “work of art” inheres in something other than its material manifestation. Specifically, it means that when one says that original works of art “can’t be copied,” one means that any copy, however exact or precise an imitation, necessarily omits some intangible but most valuable aspect of its original. Benjamin called this unreproducible element “authen-

¹¹ See text accompanying note 10.

¹² The qualifier “most” is necessary because some visual artists will work in “multiple originals.” See McInerney quotation, *supra* note 9. Hereafter, this Note will use the term “visual artists” without qualification, to designate those artists whose work consists of one-of-a-kind, “original” objects.

¹³ WALTER BENJAMIN, *The Work of Art in the Age of Mechanical Reproduction*, in ILLUMINATIONS 217, 218 (Harry Zohn trans. 1968). Benjamin goes on to distinguish between manual reproduction and modern, technical means of reproduction. Manual reproduction reasserts the authenticity of the original, whereas technical reproduction breaks down the myth of authenticity and divorces art from ritual. See *id.* at 224.

¹⁴ See SCOTT HODES, WHAT EVERY ARTIST AND COLLECTOR SHOULD KNOW ABOUT THE LAW 116 (1974). Hodes observed: “Modern techniques often prevent the most conscientious sculptor from controlling the production of casts in excess of an authorized edition. ‘If you can make one, you can make a thousand,’ said one expert, who noted that a bronze can be reproduced to within one one-thousandth of an inch accuracy.” *Id.*

ticity,"¹⁵ and asserted that authenticity depended on "[t]he presence of the original."¹⁶ "Authenticity," for Benjamin, could never be copied. "The whole sphere of authenticity is outside technical—and, of course, not only technical—reproducibility."¹⁷

Strictly speaking, the proposition that a copy of a "work of art" is less valuable than its original is sometimes false. A forgery may be a better painting, aesthetically, than the authentic original. As Nelson Goodman observed, "a copy of a Lastman by Rembrandt may well be better than the original."¹⁸ This point in turn elicits the problem: given two physically identical paintings, the aesthetic differences of which cannot be seen by anyone, does it make sense to worry about which is "authentic" and which a "forgery"?¹⁹

To answer this concern, the approbative brand of "authenticity" must be something other than a seal of aesthetic quality. Benjamin explains:

Even the most perfect reproduction of a work of art is lacking in one element: its presence in time and space, its unique existence at the place where it happens to be. This unique existence of the work of art determined the history to which it was subject throughout the time of its existence. This includes the changes which it may have suffered in physical condition over the years as well as the various changes in its ownership. The traces of the first can be revealed only by chemical or physical analyses which it is impossible to perform on a reproduction; changes of ownership are subject to a tradition which must be traced from the situation of the original.²⁰

"Authenticity," which Benjamin has said is unreproducible from an original, would therefore appear to be not an aesthetic quality, but a tracing of a history and an assurance of a kind of pedigree.²¹ This understood, it becomes even easier to explain why Rembrandt's for-

¹⁵ W. BENJAMIN, *supra* note 13, at 220.

¹⁶ *Id.*

¹⁷ *Id.* As indicated in *supra* note 13, Benjamin developed a distinction between manual and technical reproduction. "Confronted with its manual reproduction, which was usually branded as a forgery, the original preserved all its authority; not so *vis a vis* technical reproduction." *Id.* Benjamin's thesis was that modern forms of art which accommodate technical reproducibility (film in particular) dispense with the need for the myth of authenticity.

¹⁸ Nelson Goodman, *Art and Authenticity*, in *ESTHETICS CONTEMPORARY* 132, 136 (Richard Kostelanetz ed. 1989).

¹⁹ Admittedly, the question may be rationally answered in the affirmative when the work of art is considered not aesthetically, but as an investment commodity. Also, the fact that one knows that one of two copies is historically authentic may bear on one's future ability to discern differences between them. See *infra* text accompanying notes 32-34.

²⁰ W. BENJAMIN, *supra* note 13, at 220.

²¹ See also Goodman, *supra* note 18, at 132 ("We know from a fully documented history that [a] painting . . . is the original").

gery of Lastman should be more valuable than the original: Rembrandt's Lastman may be not only aesthetically superior, but it may actually be the more "authentic" painting, in that it is traceable to a more desirable historical origin, the more valued painter, Rembrandt.

b. *The Pleadings of Buyers and Sellers*

Case law illustrates that art buyers and art sellers implicitly accept Benjamin's theory of authenticity and place value in something other than the physical qualities of the works of art they own. For example, in the famous case of *Weisz v. Parke Bernet Galleries, Inc.*,²² the buyer of a "forgery" sued an auction house for breach of a warranty of historical fact. The buyer purchased a painting which the seller had identified as a work of Raoul Dufy. After a state agency informed the buyer that the painting was counterfeit, the buyer sued, alleging that the seller's identification of the painting constituted a warranty of the fact of Dufy's authorship.²³

Art dealers also appear sensitive about appraisals of works they wish to sell. In one case, an art dealer sued the Metropolitan Museum of Art, alleging detrimental reliance on a negligent appraisal by one of the Museum's curators.²⁴ In purchasing a statue for the purpose of reselling it, the dealer claimed to have acted on the curator's allegedly negligent statements as to a statue's authenticity and value. In granting the Museum's motion for summary judgment, the court found that the dealer had not demonstrated that the curator knew or could have known the dealer would act in reliance on the curator's statements.²⁵ Moreover, the court found that no "special relationship" creating a duty of care existed between the dealer and the curator.²⁶

Perhaps finding the theories of warranty under the common law and general commercial statutes inadequate in the context of the art market,²⁷ New York and Michigan have passed art warranty stat-

²² 67 Misc. 2d 1077, 325 N.Y.S.2d 576 (N.Y. Civ. Ct. 1971), *rev'd*, 77 Misc. 2d 80, 351 N.Y.S.2d 911 (Sup. Ct. 1974).

²³ Although its decision for the buyer was overturned on appeal, *Weisz v. Parke Bernet Galleries, Inc.*, 77 Misc. 2d 80, 351 N.Y.S.2d 911 (Sup. Ct. 1974), the finding of the lower court in *Weisz*, that the stated history of a work may be a warranty of authenticity, has precedent in the common law. *See, e.g.*, *Pennell v. Woodburn*, 173 Eng. Rep. 52 (1835); *De Sewhanberg v. Buchanan*, 172 Eng. Rep. 1004 (1832); *Lomi v. Tucker*, 172 Eng. Rep. 586 (1829). For a discussion of these and related English cases, see Patty Gerstenblith, *Picture Imperfect: Attempted Regulation of the Art Market*, 29 WM. & MARY L. REV. 501, 504-07 (1988).

²⁴ *Struna v. Wolf*, 126 Misc. 2d 1031, 484 N.Y.S.2d 392 (Sup. Ct. 1985).

²⁵ *Id.* at 1036-37, 484 N.Y.S.2d at 396-97.

²⁶ *Id.*

²⁷ *See* Gerstenblith, *supra* note 23, at 511-14 (U.C.C. § 2-314's implied warranty of

utes.²⁸ New York's law mandates that a written statement about a work's authenticity creates an express warranty and becomes a presumptive part of the basis of the bargain.²⁹ Furthermore, New York sets clear standards for the validity of disclaimers of warranty.³⁰ For the purposes of this Note, however, it is incidental whether the law will or will not enforce warranties of authenticity or recognize disclaimers. What is important is what art buyers and sellers plead, and what that says about how they value works of art that they own. Art collectors do not plead claims having to do with the aesthetic merit of a purchased work. No one claims, for example, that his painting is not as beautiful as the seller had promised. Likewise, remedy-seeking buyers do not express disenchantment over misrepresentations that are literally material. No one complains, for example, that the stitched canvas he actually bought was warranted to be burlap.

c. *The Pedagogical Function of the Theory of Authenticity*

The plaintiffs in the above cases may or may not be aesthetically naive or untutored.³¹ However, it may remain rational to cling to a belief in the importance of authenticity, whether or not one can tell the difference between the original and a forgery. Nelson Goodman has pointed out that one's knowledge of a work's authenticity may be instrumental in training one's aesthetic sensitivity. To explain this point, Goodman first reasons that one cannot assume that one's aesthetic sensitivity will remain as it was on a particular viewing of two paintings.³² Second, Goodman notes that one need not idly

merchantability "is probably of limited application to the sale of art works," and U.C.C. § 2-315's warranty of fitness for a particular purpose "rarely applies to the sale of art works because the particular purpose must be more than simply the desire to own a particular work by a particular artist" (emphasis added) (footnotes omitted).

²⁸ See N.Y. ARTS & CULT. AFF. LAW §§ 13.01-.21 (McKinney 1984 & Supp. 1990); MICH. COMP. LAWS ANN. §§ 442.311-.325 (West 1989).

²⁹ N.Y. ARTS & CULT. AFF. LAW § 13.01(1) (McKinney Supp. 1990). Cf. MICH. COMP. LAWS ANN. § 442.322 (West 1989).

³⁰ N.Y. ARTS & CULT. AFF. LAW § 13.01(4)(b) (McKinney Supp. 1990) ("[N]egation or limitation [of warranty] shall be deemed unreasonable if: . . . not conspicuous," not in writing, or in "[w]ords of general disclaimer"; or the work is proved counterfeit; "or the information provided is proved to be . . . false, mistaken, or erroneous"). Michigan has an almost identical law. MICH. COMP. LAWS ANN. § 442.323 (West 1989).

³¹ Of course, these plaintiffs may also have no pretensions about collecting art for anything other than investment. Also, it remains possible that concern for economic value might lie quite apart from an aesthetic concern.

³² Goodman, *supra* note 18, at 134:

Although I see no difference now between . . . two pictures . . . , I may learn to see a difference between them. I cannot determine now by merely looking at them, or in any other way, that I *shall* be able to learn. But the information that they are very different, that the one is the original and the other the forgery, argues against any inference to the conclusion that I *shall not* be able to learn

hope that one's aesthetic faculties will improve magically or of their own accord. Rather, Goodman argues that the act of viewing, combined with the abstract knowledge that one of the two indistinguishable paintings is authentic, actively inculcates the ability to distinguish between them:

[T]o look at the pictures now with the knowledge that the left one is the original and the other the forgery may help develop the ability to tell which is which later by merely looking at them. Thus, with information not derived from the present or any past looking at the pictures, the present looking may have quite different bearing upon future lookings from what it would otherwise have.³³

Authenticity, then, may influence and shape one's aesthetic sensitivity. Goodman concludes, "[t]he way the pictures in fact differ constitutes an aesthetic difference between them for me now, because my knowledge of the way they differ bears upon the role of the present looking in training my perceptions to discriminate between these pictures, and between others."³⁴

3. *How the Theory of Authenticity Undermines the Common Understanding*

Ultimately, Benjamin and Goodman differ on what constitutes the most important role or function of authenticity.³⁵ When one considers, however, the implications that the theory of authenticity may have on the treatment of the visual arts in the Copyright Act, Benjamin's and Goodman's articulations have the same effects. In either philosopher's articulation, authenticity both: (a) legitimizes the law's refusal to protect the work of visual artists through the Copyright Act; and (b) suggests that the value of "original" works of art lies not in their scarcity as commodities, but in some "aura" or "demand" that the works impart to, or elicit from, an audience.

As discussed above, Benjamin maintains that authenticity cannot be copied. If this is true, then the common justification for the

Id. (emphasis in original).

³³ *Id.*

³⁴ *Id.*

³⁵ For Benjamin, authenticity is an historically recent concept. As Benjamin explains, until the 19th century it made no sense to speak of the "authenticity" of a painting of the Madonna; prior to that the religious significance of the painting clearly predominated. W. BENJAMIN, *supra* note 13, at 243 n.1. This recent concept functions as a revisionary device, by which a secularized authority maintains a distance and a sense of power. See *id.* at 222-23, 241, 253 n.5. For Goodman, authenticity may be valued for a pedagogical rather than an ideological function. Although aesthetic evaluations may be made in favor of acknowledged forgeries (see *supra* text accompanying note 18), the acknowledged fact of forgery may in other instances help shape the aesthetic sense (see *supra* text accompanying notes 32-34).

Copyright Act's inapplicability is borne out. Copyright protection would then properly be suited for those arts in which value inheres in copies. Similarly, if Goodman is correct that knowledge of authenticity remains instructive even where two paintings are visually indistinguishable, then even reproducible paintings are necessarily one-of-a-kind objects which cannot be copied. Again, the Copyright Act could not properly be expected to protect the value of singular originals.

For both Benjamin and Goodman, however, authenticity separates the value of a work of art from the work of art itself as an object. Authenticity can never be copied because, Benjamin continues, authenticity is a fact of history, a tracing of a journey which can be documented scientifically and legally.³⁶ Furthermore, as Benjamin suggests, that journey began with what may be referred to as a "performance." "[T]he unique value of the 'authentic' work of art has its basis in ritual, the location of its original use value."³⁷ Goodman stresses an interactive quality to this "performance"; the viewer may use the information of authenticity, which Goodman more nearly allows to be something other than an aesthetic quality,³⁸ to influence his own perception of future performances of the work of art. In Goodman's emphasis, it is as if we insist on authenticity because we want it to teach us more than we know.

"One of a kind need not apply," therefore, in two senses. As discussed earlier in section 1, the author of a one-of-a-kind art object need not secure copyright protection for her work; to do so would not benefit her in any way. As discussed in this section, however, the term "one of a kind" does not accurately apply to an original work of art; its uniqueness as an object only begins its performance as a "work of art." In other words, an authentic work of art must be not "one of a kind" but "many of a kind," in that it must elicit and then sustain a particular kind of attention over time. Furthermore, if a work of art will remain authentic and therefore valuable, the history of its performances must be traceable.

³⁶ See *supra* text accompanying notes 20-21.

³⁷ W. BENJAMIN, *supra* note 13, at 224.

³⁸ Benjamin and Goodman would both have difficulty in allowing that a work of art could reserve to itself an aesthetic realm that was not impinged by political and social forces. For Benjamin, the fact that authenticity was not so much a feature of the object as it was a feature of history did not necessarily allow the object itself to retain an inherent (or immutable, or transcendent) quality; Benjamin would see the entire endeavor of aestheticization in a decidedly political context. See *id.* at 241-42 (fascism aestheticizes politics; communism responds by politicizing art). Goodman, for his part, presumes the separateness of the aesthetic from the concern for authenticity, even while maintaining that the latter develops the former. Note, however, that Goodman dismisses as "common nonsense" the proposition that a work of art should be approached without any outside preconceptions. Goodman, *supra* note 18, at 137-38.

B. Attenuations of “Copy”

The previous section demonstrated that works of visual art are not necessarily one-of-a-kind original objects. Therefore, one should not readily presume that copyright law cannot effectively protect the visual arts. This subpart demonstrates that the Copyright Act already promulgates a very broad conception of “copy,” further indicating that works of visual art might be accommodated. Moreover, this subpart develops the idea that an original work of visual art might be best analogized, not with books and other forms which are literally reproduced, but with musical or dramatic performances. The subpart suggests that a work of art, in order to be recognized as an authentic work of art, must necessarily be “copied” by viewers; a work of art which never “performs” (or is never displayed) is not a work of art at all.

1. *The “Copies” Already in the Copyright Act*

Previous references to the Copyright Act may have implied that the Act explicitly reserves its protection to literal copies of an original. In fact, the Copyright Act explicitly protects many of the arts which simply cannot be copied in a literal fashion.³⁹ Originally conceived to encourage “learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies,”⁴⁰ copyright law has over the years expanded its scope,⁴¹ so that it now protects musical performances in jukeboxes,⁴² dramatic performances,⁴³ and choreography.⁴⁴ Such protected performances, of course, may be *thought of* as “copies,” if only in a figurative sense.

Indeed, the scope of the Copyright Act has become so broad that an event’s amenability to the “copy” metaphor is no longer a prerequisite for inclusion. Section 102 of the Act provides: “Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”⁴⁵ “Copy,” of course, remains a central term and theme in the Copyright Act. But even the Act’s definition of “copy” is less restrictive

³⁹ The Copyright Act also explicitly protects arts which *can* be copied in a literal fashion, but cannot be copied in an authentic fashion; that is, the Copyright Act explicitly protects “pictorial, graphic, and sculptural works.” 17 U.S.C. § 102(a)(5) (1988).

⁴⁰ Copyrights Act, ch. 15, 1 Stat. 124 (1790).

⁴¹ See generally Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987) (history of amendments to copyright law).

⁴² 17 U.S.C. § 116 (1988).

⁴³ *Id.* § 102(a)(3).

⁴⁴ *Id.* § 102(a)(4).

⁴⁵ *Id.* § 102(a).

than one might think: "The term 'copies' includes the material object . . . in which the work is first fixed."⁴⁶

2. *Viewing as Copying/Display as Performance*

With the scope of the Copyright Act in mind, and understanding that "copy" includes performances and even "the material object . . . in which the work is first fixed,"⁴⁷ note how paintings and sculptures are "copied" and "replayed" all of the time, and by more than the obvious reproductions. These most obvious reproductions really are not copies of paintings and sculptures at all, but are instead postcards, prints, posters, photographs, and slides—objects which may be copies of an original work of art, but are manifestly not copies of the *authentic* and therefore valuable original they represent. The authentic original cannot be copied in postcards, prints, posters, photographs, and slides.

However, it may be said that the authentic original, the singular object itself, is "copied" in a less obvious respect. An authentic work of art will likely withstand repeated exhibition, limited only by the physical properties of constituent materials and the care of handlers.⁴⁸ We may say a viewer "copies" an authentic work of art when he views it, and that the viewer will leave the work with an "impression" of it. This hypothetical viewer might not only recognize the work should he see it again, but might also later "refer" to it in memory.⁴⁹ Admittedly, authenticity cannot be transferred in

⁴⁶ *Id.* § 101; see also *infra* text accompanying notes 67-68.

⁴⁷ 17 U.S.C. § 101 (1988).

⁴⁸ Cf. EDMUND SPENSER, *THE FAERIE QUEENE, Mutabilitie, Canto VII* (Thomas Roche, Jr. ed. 1981):

When these were past, thus gan the *Titanesse*;
 Lo, mighty mother, now be iudge and say,
 Whether in all thy creatures more or lesse
 CHANGE doth not raign & beare the greatest sway:
 For, who sees not, that *Time* on all doth pray?
 But *Times* do change and moue continually.
 So nothing here long standeth in one stay:
 Wherefore, this lower world who can deny
 But to be subiect still to *Mutabilitie*?

Id. at 1051.

⁴⁹ Cf. JACQUES DERRIDA, *THE TRUTH IN PAINTING* (Geoff Bennington & Ian McLeod trans. 1987):

And then, if I must simplify shamelessly, it is as if there had been, for me, two paintings in painting. One, taking the breath away, a stranger to all discourse, doomed to the presumed mutism of 'the-thing-itself,' restores, in authoritarian silence, an order of presence. It motivates or deploys, then, while totally denying it, a poem or philosopheme whose code seems to me to be exhausted. The other, therefore the same, voluble, inexhaustible, reproduces virtually an old language, belated with respect to the thrusting point of a text which interests me.

Id. at 155-56.

this kind of “copy” either. But in another sense, the very authenticity of the work depends on the fact of being “copied” or viewed. In Goodman’s emphasis, “authenticity” is that which helps a viewer discriminate more precisely as a viewer; in Benjamin’s emphasis, authenticity as perpetration requires one on whom a perpetration may be made.⁵⁰

One may state in another way the dependence of an object’s status as a “work of art” on the fact of an appreciable audience. Benjamin would say that a work of art, never exhibited, would not yet actually be a “work of art” at all, although it might return to the status of a cult icon. Benjamin writes:

Certain statues of gods are accessible only to the priest in the cella; certain Madonnas remain covered nearly all year round; certain sculptures on medieval cathedrals are invisible to the spectator on ground level. With the emancipation of the various art practices from ritual go increasing opportunities for the exhibition of their products. It is easier to exhibit a portrait bust that can be sent here and there than to exhibit the statue of a divinity that has its fixed place in the interior of a temple. The same holds for the painting as against the mosaic or fresco that preceded it. And even though the public presentability of a mass originally may have been just as great as that of a symphony, the latter originated at the moment when its public presentability promised to surpass that of the mass.⁵¹

Therefore, following Benjamin, one might say that the “work of art” not only represents a secularization of cult ritual, but that when we recognize an object as a “work of art” we also say something about that object’s status with a “secularized” audience, an audience larger and accustomed to greater access than audiences for whom the same object might have cult status.

This audience, however “secularized,” nevertheless demands that the *authentic* work of art “perform.” Edward C. Banfield once asked whether museums should not exhibit reproductions rather than original works of art, in order to reduce the costs of security and conservation.⁵² John Henry Merryman and Albert E. Elsen, assessing the public desire for authenticity, summarized Banfield’s position and responded as follows:

Banfield sees reactions such as ours [against the legal making of exact reproductions of sculptures] as symptomatic of the art world’s desire, through a cult of the original and the economics of

⁵⁰ In other words, both philosophers restate the conundrum of the falling tree in the depopulated forest.

⁵¹ W. BENJAMIN, *supra* note 13, at 225.

⁵² Edward C. Banfield, *Art Versus Collectibles: Why Museums Should Be Filled with Fakes*, HARPER’S, Aug. 1982, at 29-30.

scarcity, to keep art prices high. He wants to see "mass duplication of masterpieces . . . at per unit prices within the reach not only of schools and libraries, but of average-income individuals." Banfield seems unaware that there have long been museums of copies in Paris, London, and Rome and that they are empty of visitors.⁵³

Merryman and Elsen concluded that "people value the actual work of art over any reproduction, just as they value truth and not its facsimile."⁵⁴

C. The Royalty Almost in Place

Appreciating the breadth of scope of the Copyright Act, and understanding that the nature of an original work of visual art is more akin to a performance than it is to any other kind of "copy," one may better comprehend that the current Copyright Act already circumvents the traditional notion of copyright inapplicability to the visual arts, insofar as it defines an exclusive right to public display of works of visual art. This right to public display is impeded, however, by another section in the Act which provides that the public display right—unlike the other exclusive rights provided to the copyright holder by the Act—does not survive transfers of ownership. To a lesser degree, current copyright notice procedures also impede effective functioning of the public display right.

1. *The Section 106(5) Public Display Right*

Reminded that copyright law protects musical performances, dramatic performances, and even choreography⁵⁵ ("copies" in a metaphorical sense), one is perhaps less surprised to discover that the Copyright Act also protects the public display of an original object. Section 106(5) dictates that a copyright owner has exclusive rights "to display . . . publicly" or "to authorize" public display of "pictorial, graphic, or sculptural works."⁵⁶ This right, left unqualified, would give the visual artist control over the public⁵⁷ display of her work, whether or not she remained the owner of her work.⁵⁸ But another section of the Copyright Act definitively qualifies this right.

⁵³ JOHN HENRY MERRYMAN & ALBERT E. ELSEN, 2 LAW, ETHICS, AND THE VISUAL ARTS 548 (2d ed. 1987) (quoting Banfield, *supra* note 52, at 29-30).

⁵⁴ *Id.*

⁵⁵ See *supra* notes 42-44 and accompanying text.

⁵⁶ 17 U.S.C. § 106(5) (1988).

⁵⁷ The qualifier, "public," should be emphasized. A right to public display would not include, for example, the right to control day-to-day display in an owner's private living room. See *infra* text accompanying note 145.

⁵⁸ See *infra* text accompanying notes 64-68.

2. *Impediments to the Section 106(5) Public Display Right*

a. *The Section 109(c) Limitation and the System It Unravels*

The rights enumerated in section 106(5), including the artist's exclusive right to public display, are subject to sections 107 through 118.⁵⁹ Section 109(c) reads:

Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.⁶⁰

The legislative history indicates that Congress wished "to preserve the traditional privilege of the owner of a copy to display it directly," and to place only "reasonable restrictions" on the owner's privilege when "the copyright owner's market for reproduction and distribution of copies would be affected."⁶¹ Congress saw the need for restrictions on the "traditional privilege" in order to protect "new communications media, notably television, cable, and optical transmission devices, and information storage and retrieval devices, [which replace] printed copies with visual images."⁶² The general principle that section 109(c) observes, however, according to the House Report, is that "the lawful owner of a copy of a work should be able to put his copy on public display without the consent of the copyright owner."⁶³

As Congress evidently understood, were it not for the express limitation of section 109(c), the artist's public display right would as

⁵⁹ 17 U.S.C. § 106 (1988).

⁶⁰ *Id.* § 109(c).

⁶¹ H.R. REP. NO. 1476, 94th Cong., 2d Sess. 80, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5694. Only ownership would suspend the 106(5) display right; "acquisition of an object embodying a copyrighted work by rental, lease, loan, or bailment carries with it no privilege . . . to display it publicly . . ." *Id.* at 80, 1976 U.S. CODE CONG. & ADMIN. NEWS at 5694.

⁶² *Id.* To distinguish the new communications media (which it wished to protect) from the owner's traditional display privilege (which it wished to preserve), Congress conceived of distinctions between "direct" and "indirect" display. "Direct" displays are authorized, even without the copyright owner's permission. "Indirect" displays are not authorized without the copyright owner's permission (unless those indirect displays involve "projection of no more than one image at a time," to viewers "present at the place where the copy is located"; *i.e.*, unless the indirect display seems more like a direct display and yet not the display of a motion picture). *Id.* at 80, 1976 U.S. CODE CONG. & ADMIN. NEWS at 5693-94.

The effect of these distinctions is to allow owners to display works of art (or slides or transparencies) without permission, but to prohibit owners from publicly "displaying" motion pictures or computer programs.

⁶³ *Id.* at 79, 1976 U.S. CODE CONG. & ADMIN. NEWS at 5693. Note that section 109(c) was then designated section 109(b); the redesignation was made by the Record Rental Amendment of 1984. PUB. L. NO. 98-450, § 2(1), 98 Stat. 1727 (1986).

a matter of course continue in her work, even after transfer of ownership. To thoroughly ground this reading, one need follow a few turns in other sections of the Act. Copyright "vests initially in the author or authors of the work."⁶⁴ Moreover, "[t]ransfer of ownership of any material object . . . does not of itself convey any rights in the copyrighted work embodied in the object."⁶⁵ An unqualified section 106(5) exclusive right of public display, therefore, would remain with the artist whether or not the work were sold; a secondary owner would not have the right to display the painting unless the "author" of the painting expressly assigned that right.

An objection may be raised to this reading. Citing the definition section, one might argue that "display" does not anticipate the showing of an original work of art. "To 'display' a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially."⁶⁶ But this argument fails. The definition section also provides that "[t]he term 'copies' includes the material object . . . in which the work is first fixed."⁶⁷ Moreover, the legislative history of section 106 supports the inclusion of the original within the meaning of "copies" meant to be protected:

The corresponding definition of "display" covers any showing of a "copy" of the work, "either directly or by means of a film, slide, television image, or any other device or process." Since "copies" are defined as including the material object "in which the work is first fixed," the right of public display applies to original works of art as well as to reproductions of them.⁶⁸

In short, Congress understood the implications of section 106(5), that it could grant artists an exclusive right of public display that could survive transfer, and *would* do so but for section 109(c).

An unqualified section 106(5) right would be powerful: artists

⁶⁴ 17 U.S.C. § 201(a) (1988).

⁶⁵ *Id.* § 202. The House Report reinforces the point as follows:

The principle restated in section 202 is a fundamental and important one: that copyright ownership and ownership of a material object in which the copyrighted work is embodied are entirely separate things. Thus, transfer of a material object does not of itself carry any rights under the copyright, and this includes transfer of the copy or phonorecord—the original manuscript, the photographic negative, the *unique painting or statue*, the master tape recording, etc.—in which the work was first fixed.

H.R. REP. NO. 1476, 94th Cong., 2d Sess. 124, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5739-40 (emphasis added).

⁶⁶ 17 U.S.C. § 101 (1988).

⁶⁷ *Id.*

⁶⁸ H.R. REP. NO. 1476, 94th Cong., 2d Sess. 64, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5677.

would then have the means by which to negotiate royalties. If, for instance, a purchaser of a work wanted the right to publicly display that work, he would have to either purchase the artist's entire copyright⁶⁹ or license the public display right from her. Given section 109(c), however, the public display right presently only applies when the artist remains the owner of her work. In other words, section 109(c) leaves the artist with no more of a public display right than that presumed to reside with any other owner. Section 109(c), therefore, denies the visual artist the bargaining position from which she might exact royalties.

b. *The Current Notice Procedure*

Were section 109(c) repealed, current notice procedures of the Copyright Act, as construed by the Copyright Office, might present unnecessary inconveniences to the effective use of the public display right.⁷⁰ Section 401 states that notice shall consist of three elements: (1) the word "copyright" or an abbreviation, or the copyright symbol of a "c" within a circle; (2) the year of first publication;⁷¹ and (3) the name of the copyright owner.⁷² The section requires the notice be affixed so "as to give reasonable notice of the claim of copyright," and directs the Register of Copyrights to "prescribe by regulation, as examples," methods and positions to satisfy

⁶⁹ That is, the buyer who wished to display the work might purchase the artist's whole bundle of exclusive rights, which would include the section 113 right of reproduction, *see supra* text accompanying note 7, as well as the section 106(5) public display right.

⁷⁰ The reader should understand that, strictly speaking, copyright notice is no longer a prerequisite to secure a valid copyright. This change, from the traditional notice requirement, is in compliance with the Berne Convention, which the United States has adopted as of 1988. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2855 (1988); *see* 17 U.S.C. § 104 (1988). However, as a practical matter, copyright holders should continue to follow the notice provisions of the Act, in order to secure certain enforcement advantages. These advantages include general preclusion of the defense of innocent infringement in a copyright infringement suit. *Id.* § 401(d).

Again in compliance with the Berne Convention, the Copyright Act no longer requires registration. As with the notice procedure, however, advantages accrue to the copyright owner who registers. For works originating in the United States, registration is necessary in order to bring an action for infringement of the copyright. *Id.* § 411(a). Moreover, one who registers will insure her entitlement to statutory damages and attorney fees. *Id.* § 412. Copyright registration is not discussed in the text because the procedure presents no undue imposition on the visual artist. In fact, the Copyright Office promulgates a special registration form for the visual arts (Form VA, available from the Copyright Office upon request, *see* 37 C.F.R. § 202.3(b)(2) (1990); this form is conveniently reprinted in WILLIAM R. GIGNILLIAT, III, *CONTRACTS FOR ARTISTS* 172-77 (1983)).

⁷¹ "Publication" is distribution of a work to the public by transfer of ownership or by lease, and includes the offer to distribute the work to a group for the purpose of further distribution or public display. Display (to show a copy or the original, directly or indirectly) does not of itself constitute publication. 17 U.S.C. § 101 (1988).

⁷² *Id.* § 401(b).

the requirement.⁷³

Such regulations have been prescribed. For two-dimensional pictorial, graphic, and sculptural works, the notice may be "affixed directly or by means of a label cemented, sewn, or otherwise attached durably . . . [on] the front or back . . . or to any backing, mounting, matting, framing, or other material . . . durably attached."⁷⁴ For three-dimensional pictorial, graphic, and sculptural works, notice may be affixed by the same means "to any visible portion of the work, or to any base, mounting, framing, or other material . . . durably attached."⁷⁵ If these methods are extremely impracticable, "a notice is acceptable if it appears on a tag . . . that is attached . . . [so] that it will remain with the copy while it is passing through its normal channels of commerce."⁷⁶

Although allowing affixation of notice on the back of two-dimensional works, the current regulations may not fully accommodate prevalent artistic convention. Some artists may resist the line the regulations implicitly draw between the pictorial, graphic, and sculptural work itself and the mundane or functional accoutrements of the work's display. For example, in the case of three-dimensional works, a sculptor might resist distinguishing a "base" or "mounting" from the object meant to be viewed and contemplated as the work of art. In such cases, the artist would not be able to comply with the methods of notice sanctioned by regulation.⁷⁷

Failure to satisfy the approved regulatory methods does not necessarily mean that the notice provision of section 401 has not been met: the statute states that "these [regulatory] specifications shall not be considered exhaustive."⁷⁸ Appropriate and carefully considered regulatory notice procedures, however, would better

⁷³ *Id.* § 401(c).

⁷⁴ 37 C.F.R. § 201.20(i)(1) (1990).

⁷⁵ *Id.* § 201.20(i)(2).

⁷⁶ *Id.* § 201.20(i)(3).

⁷⁷ Furthermore, the regulations seem designed to set notice standards for commercial reproductions. Each of the previously referenced sub-sections, *supra* notes 74-76, begins with some variation of the phrase, "where a work is reproduced in copies" (emphasis added). The word "reproduced" implies that the subsequent approved methods have been drawn primarily for purposes of commercial reproductions, and only secondarily for singular pictorial, graphic, or sculptural works. It should be remembered, however, that the Copyright Act defines "copies" to include the original object in which the work is first fixed. 17 U.S.C. § 101 (1988). The word "reproduced" should not be taken to preclude application of the approved methods to singular pictorial, graphic, and sculptural works. *Cf.* 37 C.F.R. § 202.10(a) (1990) ("The registrability of [a pictorial, graphic, or sculptural work] is not affected by the intention of the author as to the use of the work or the number of copies reproduced.").

⁷⁸ 17 U.S.C. § 401(c) (1988). The House Report to the 1976 amendments states: A notice placed or affixed in accordance with the regulations would clearly meet the requirements but, since the Register's specifications are not to "be considered exhaustive," a notice placed or affixed in some

support and protect an effective display right. Fully admitting the value of the notice provision and the functions it serves,⁷⁹ its purposes might well be satisfied in any number of ways not now contemplated by the regulations. In the context of exhibition, for example, the three required section 401 elements might be placed: within any caption alongside a work (in exhibition contexts, captions are already widely used to identify artists, materials, dimensions, and years of completion); within a general notice affixed to a sign titling the exhibition or announcing the exhibition's theme; or within a printed flier or guide distributed freely and as a matter of course upon admission to the exhibition. However reasonable such notice procedures seem, an artist might rely with more confidence on them were they explicitly delineated and sanctioned by regulation.⁸⁰

PART II: ALTERNATIVE ROYALTY EVENTS

Part I of this Note demonstrated that copyright protection is not nearly as inapplicable to the visual arts as has been assumed. As Part I argued, the Copyright Act itself contemplates rights that might provide visual artists with a basis for royalty rights. Once misconceptions have been rectified and a royalty for visual artists seems tenable, the particular form that a royalty might take becomes signif-

other way might also comply with the law if it were found to "give reasonable notice" of the copyright claim.

H.R. REP. NO. 1476, 94th Cong., 2d Sess. 144, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5760.

⁷⁹ See H.R. REP. NO. 1476, 94th Cong., 2d Sess. 144, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5759 (copyright notice serves four principal functions: it places in the public domain published material that no one wishes to copyright; it informs the public as to whether a work is copyrighted; it identifies the copyright owner; and it shows the publication date).

⁸⁰ A bill introduced by Senator Kennedy and Representative Markey, The Visual Artists Rights Act of 1987, would have solved the difficulties of the notice procedure by making section 401 inapplicable to pictorial, graphic, or sculptural works. S. 1619, 100th Cong., 1st Sess. § 5, 133 CONG. REC. S11,502 (1987); H.R. 3221, 100th Cong., 1st Sess. § 5, 133 CONG. REC. E3425 (1987). A later version of this bill does not explicitly address the notice procedures of section 401; however, major provisions of the later bill would apply only to works of "recognized stature," and it may be assumed that some equivalent of notice has been served if the works exempted have attained such status. The Visual Artists Rights Act of 1989, S. 1198, 101st Cong., 1st Sess. § 3, 135 CONG. REC. S6811-13 (1989); H.R. 2690, 101st Cong., 1st Sess. § 3, 135 CONG. REC. E2199-2201 (1989).

The approaches the Kennedy and Markey bills (in either version) take to the notice question can be reconciled with the policy of encouraging notice on the assumption that the public should presume that works of fine art as such are original and creative and not presumptively in the public domain. Some commentators would endorse this assumption. See, e.g., Donald M. Millinger, *Copyright and the Fine Artist*, 48 GEO. WASH. L. REV. 354, 374 (1980) (the copyright symbol is not needed in the case of the fine arts "because the mere physical existence of the piece should indicate copyright protection").

icant. This part examines alternative models: first, the *droit de suite*, the model on which all prior proposals for a visual artists' royalty have been based; and second, the "exhibition royalty," a model discerned here for the first time from a right already enunciated in the Copyright Act. The part concludes that the latter model is to be preferred.

A. Moral Resales

This subpart first outlines the history of proposals for a visual artists' royalty in the United States. The subpart then argues that all of these proposals, and the French model on which they are all based, presume inaccurately what visual artists need and what they desire. The subpart also suggests that proponents of a visual artists' royalty, to date, have all further presumed that conventional copyright structures cannot be applied to the visual arts.⁸¹

1. *The Droit de Suite in America*

As shown in Part I, the current Copyright Act already conceptualizes a right on which royalties for visual artists might be based. Another paradigm for such a royalty may be found outside the Act. This is the *droit de suite*, a French law for the benefit of painters and sculptors.⁸² It provides, in part, that "[a]uthors of graphic and plastic works shall have, regardless of transfer of the original work, an inalienable right to participate in the proceeds of any sale of their works by public auction or through a dealer."⁸³ The *droit de suite* is companion to the *droit moral*,⁸⁴ moral rights guaranteeing an artist the rights of divulgation, paternity, and integrity.⁸⁵ At least since

⁸¹ Part I demonstrated that this presumption is erroneous.

⁸² France, Law of March 11, 1957, tit. 2, art. 42, C. CIV. art. 543 (D.L. 1988). The particular provision defining the *droit de suite* is translated in J. MERRYMAN & A. ELSEEN, *supra* note 53, at 213.

⁸³ J. MERRYMAN & A. ELSEEN, *supra* note 53, at 213.

⁸⁴ France, Law of March 11, 1957, tit. 1, C. CIV. art. 543 (D.L. 1988). Selected sections of the *droit moral* are translated in GEORGE A. BERMAN, HENRY P. DE VRIES & NINA GALSTON, *FRENCH LAW: CONSTITUTION AND SELECTIVE LEGISLATION* 4-38 (1989).

⁸⁵ See Jane Engdahl, *Moral Rights in State Statutes: A Comparison of the California Art Preservation Act and the New York Artists' Authorship Rights Act*, 34 COPYRIGHT L. SYMP. (ASCAP) 203, 208 (1987). Engdahl explained:

The right of divulgation is the right of an artist to decide whether his work of art is finished and whether or not to display it in public. Paternity is the right of an artist to have his name associated with his work. The right of integrity is the artist's right to prevent distortion or other alteration of his work.

Id. The *droit moral* are perhaps more familiar to Americans than the *droit de suite*, as at least nine states now have statutes to recognize one or more of these moral rights. See CAL. CIV. CODE §§ 987, 989 (West 1982 & Supp. 1990); 1988 Conn. Acts 284 (Reg. Sess.); LA. REV. STAT. ANN. § 51:2151-:2156 (West 1987); ME. REV. STAT. ANN. tit. 27, § 303 (1988); MASS. GEN. LAWS ANN. ch. 231, § 85S (West 1988); N.J. STAT. ANN.

the 1960s, commentators have urged American adoption of the *droit de suite*.⁸⁶ In 1966, Diane Schulder offered a model "Art Proceeds Act" which proposed in part: "Whenever an original work of art shall be re-transferred at auction (or through a dealer) for a price of 300 dollars or above, the creator of the work . . . shall have an inalienable (non-transferable) right to a share in the gross proceeds of the sale."⁸⁷ Following the *droit de suite*, Schulder proposed fixing the artist's share in the proceeds at three percent.⁸⁸

Apparently due in part to Schulder's proposal,⁸⁹ the State of California passed the Resale Royalties Act, effective January 1, 1977.⁹⁰ This law provides that "[w]henever a work of fine art is sold and the seller resides in California or the sale takes place in California . . . , the seller . . . shall pay to the artist of such work of fine art . . . 5 percent of the amount of such sale."⁹¹ True to its French precedent, the right is tenacious: "The right of the artist to receive an amount equal to 5 percent of the amount of . . . sale may be waived only by a contract in writing providing for an amount in excess of 5 percent of the amount of such sale."⁹² The Act has been

§§ 2A:24A-1 to 2A:24A-8 (West 1987); N.Y. ARTS & CULT. AFF. LAW §§ 14.01-03 (McKinney Supp. 1990); PA. STAT. ANN. tit. 73, §§ 2101-2110 (Purdon Supp. 1989); R.I. GEN. LAWS §§ 5-62-1 to 5-62-6 (1987). For discussion of these statutes, see Thomas J. Davis, Jr., *Fine Art and Moral Rights: The Immoral Triumph of Emotionalism*, 17 HOFSTRA L. REV. 317 (1989); Note, *Protection of Art Work Through Artist's Rights: An Analysis of State Law and Proposal for Change*, 38 AM. U.L. REV. 855 (1989) (authored by Karen M. Corr).

The moral rights bill pending in the 101st Congress would expressly preempt the above state statutes to the extent that they grant rights equivalent to those of the federal bill. The Visual Artists Rights Act of 1989, S. 1198, 101st Cong., 1st Sess. § 5, 135 CONG. REC. S6811, 6812 (1989); H.R. 2690, 101st Cong., 1st Sess. § 5, 135 CONG. REC. E2199, 2200-01 (1989).

⁸⁶ See Rita E. Hauser, *The French Droit de Suite: The Problem of Protection for the Underprivileged Artist Under the Copyright Law*, 11 COPYRIGHT L. SYMP. (ASCAP) 1 (1962); Francois Hepp, *Royalties From Works of the Fine Arts: Origin of the Concept of Droit de Suite in Copyright Law*, 6 BULL. COPYRIGHT SOC'Y 91 (1959); Diane B. Schulder, *Art Proceeds Act: A Study of Droit de Suite and a Proposed Enactment for the United States*, 61 NW. U.L. REV. 19 (1966).

⁸⁷ Schulder, *supra* note 86, at 44. Although an inalienable royalty was unprecedented in common-law jurisdictions, see J. MERRYMAN & A. ELSÉN, *supra* note 53, at 213, it should be remembered that Schulder (and other early *droit de suite* proponents) would have found less in American copyright law of the time to suggest an alternative structure for a visual artists' royalty; the display right of 17 U.S.C. § 106(5) is a product of the 1976 amendments to the Copyright Act (Pub. L. No. 94-553, 90 Stat. 2546 (Oct. 19, 1976)).

⁸⁸ Schulder, *supra* note 86, at 44. The *droit de suite* provision is found in France, Law of March 11, 1957, tit. 2, art. 42, C. CIV. art. 543 (D.L. 1988).

⁸⁹ See STEPHEN E. WEIL, *BEAUTY AND THE BEASTS* 211 (1983) (Schulder's Art Proceeds Act was "one of the seminal documents [in the] . . . campaign for resale royalties").

⁹⁰ 1976 Cal. Stat. 5542 (codified as amended at CAL. CIV. CODE § 986 (West 1982 & Supp. 1990)).

⁹¹ *Id.*

⁹² *Id.*

amended⁹³ so that the right may now be assigned. The statute requires, however, that "assignment shall not have the effect of creating a waiver"⁹⁴

The California Act has been controversial.⁹⁵ The little evidence available indicates that the Act is ineffective and practically unenforceable.⁹⁶ "The law has . . . been generally ignored, or as one dealer is reported to have said, '[n]obody's paid, nobody's sued, everybody's avoiding it.'" ⁹⁷ Although the Court of Appeals for the Ninth Circuit has upheld the California Act against a federal preemption challenge,⁹⁸ some question the California Act's continuing validity after the 1976 amendments to the federal Copyright Act.⁹⁹ Nevertheless, the California Act remains in effect.

The most recent proposal inspired by the *droit de suite* is the Visual Artists Rights Act of 1987, introduced by Senator Kennedy and by Representative Markey in the 100th Congress.¹⁰⁰ This bill would have amended the Copyright Act to provide rights modeled after both the *droit moral* and the *droit de suite*. The "moral rights" recognized by the bill are rights of paternity¹⁰¹ and integrity.¹⁰² The re-

⁹³ 1982 Cal. Stat. 6432.

⁹⁴ CAL. CIV. CODE § 986 (West 1982 & Supp. 1990). The statute is admittedly ambiguous; it is not clear what assignments would have "the effect of a creating a [prohibited] waiver." Nimmer submits that "[i]f the waiver limitation is to be meaningful, . . . an assignment of the artist's royalty rights to either the buyer or the seller, or to any entity which either controls, should be held invalid." M. NIMMER & D. NIMMER, *supra* note 9, at § 8.22[A][6].

⁹⁵ See, e.g., Stephen S. Ashley, *Critical Comment on California's Droit de Suite*, *Civil Code Section 986*, 29 HASTINGS L.J. 249, 256 (1977) (criticizing the California Act).

⁹⁶ See S. WEIL, *supra* note 89, at 210-22 (nobody benefits from the California Resale Royalty Act).

⁹⁷ McInerney, *supra* note 9, at 13.

⁹⁸ *Morseburg v. Baylon*, 621 F.2d 972 (9th Cir.) (California Resale Royalties Act does not violate the preemption provision of federal copyright law), *cert. denied*, 449 U.S. 983 (1980).

⁹⁹ Compare Note, *Droit De Suite: Only Congress Can Grant Royalty Protection for Artists*, 9 PEPPERDINE L. REV. 111 (1981) (authored by Lynn K. Warren) (arguing that amendments to the Copyright Act since the *Morseburg* decision render the California statute invalid) with Note, *The California Resale Royalties Act As a Test Case for Preemption Under the 1976 Copyright Law*, 81 COLUM. L. REV. 1315 (1981) (authored by Jennifer R. Clarke) (no preemption under the amended Copyright Act).

¹⁰⁰ S. 1619, 100th Cong., 1st Sess., 133 CONG. REC. S11,502 (1987); H.R. 3221, 100th Cong., 1st Sess., 133 CONG. REC. E3425 (1987) (these bills are identical). Senator Kennedy introduced essentially the same bill in the 99th Congress. S. 2796, 99th Cong., 2d Sess., 132 CONG. REC. S12,184 (1986).

¹⁰¹ S. 1619, 100th Cong., 1st Sess., *supra* note 100, § 3:

[The artist] shall have the right during his life to claim authorship of any of his works which are publicly displayed or to disclaim authorship of any of his works which are publicly displayed because of any distortion, mutilation, or other alteration thereof.

¹⁰² *Id.* §§ 3-4. With qualified exceptions for those works permanently attached to a building, Kennedy's bill defines as a violation of the exclusive rights of the copyright owner the "significant or substantial distortion, mutilation, or other alteration to a picto-

sale royalty portion of the bill mandates a royalty of "7 percent of the difference between the seller's purchase price and the amount the seller receives in exchange for the work."¹⁰³ Again true to the *droit de suite*, the 1987 bill makes the proceed right inalienable: "The right of the author to receive this royalty may not be waived."¹⁰⁴

A *droit de suite*-modeled royalty is not currently before the Congress. Senator Kennedy and Representative Markey¹⁰⁵ have introduced the Visual Artists Rights Act of 1989 into the 101st Congress,¹⁰⁶ but unlike its predecessor, this bill does not include a resale royalty provision.¹⁰⁷ Instead, the bill proposes to direct the Register of Copyrights, in consultation with the Chair of the National Endowment for the Arts, to conduct a study on the feasibility of the resale royalty, and to report to Congress with recommendations.¹⁰⁸ Representative Kastenmeier has stated that the proposed study would also consider the possibility of a waiver provision.¹⁰⁹

2. Presumptions of the Droit de Suite

Although the *droit de suite* and the *droit moral* are conflated in both French law and in federal proposals, the first American proponents of the *droit de suite* insisted that the proceeds right is not strictly a moral right but an economic one.¹¹⁰ Rita Hauser wrote, "[i]t is an economic interest that the *droit de suite* ensures, and not a moral one The fact that the [*droit de suite*] . . . is inalienable does not

rial, graphic, or sculptural work, which is publicly displayed, caused by an intentional act or by gross negligence" *Id.* § 3. Furthermore, the integrity right is effectively inalienable. "Where the author is not the copyright owner, he shall still have the exclusive right during his lifetime, and the estate of such author have the exclusive right for up to 50 years after the death of such author, to assert infringement of the copyright [by distortion, mutilation, or other alteration]." *Id.* § 3.

¹⁰³ *Id.* § 3.

¹⁰⁴ *Id.*

¹⁰⁵ Along with Senator Kasten and Representative Kastenmeier, respectively. 135 CONG. REC. S6811 (1989); 135 CONG. REC. E2199 (1989).

¹⁰⁶ S. 1198, 101st Cong., 1st Sess., 135 CONG. REC. S6811 (1989); H.R. 2690, 101st Cong., 1st Sess., 135 CONG. REC. E2199 (1989). H.R. 2690 passed the House on June 5, 1990. *Highlights*, 40 PAT. TRADEMARK & COPYRIGHT J. (BNA), No. 984, at 127 (June 7, 1990). S. 1198 was approved by the Senate Subcommittee on Patents, Copyrights and Trademarks on June 28, 1990. *News & Comment: Legislation*, 40 PAT. TRADEMARK & COPYRIGHT J. (BNA), No. 988, at 225 (July 12, 1990).

¹⁰⁷ This bill essentially retains the moral rights proposals of Kennedy and Markey's previous bill, *see supra* notes 100-02 and accompanying text, and expressly calls for federal preemption of equivalent state moral rights law. *See supra* note 80.

¹⁰⁸ S. 1198, 101st Cong., 1st Sess., *supra* note 106, § 9.

¹⁰⁹ 135 CONG. REC. E2199 (1989).

¹¹⁰ More recent commentary advocating the *droit de suite* has acknowledged the *droit de suite*'s dependence on the *droit moral*. *See, e.g.*, Thomas M. Goetzl & Stuart A. Sutton, *Copyright and the Visual Artist's Display Right: A New Doctrinal Analysis*, 9 ART & L. 15, 19 (1984) (the *droit de suite* functions as an adjunct to artists' broader moral rights).

detract from its pecuniary quality"¹¹¹ Equally plain, however, is the converse: the fact that the *droit de suite* addresses a perceived economic need does not mitigate its moral demand.¹¹² For the *droit de suite* not only seeks to give the artist an economic right, but seeks to give an economic right in such a way that the artist may not refuse. The *droit de suite*, in short, presumes to know what is best for the artist, and insists that the artist accept its remedy in the form it prescribes.

a. *The Artistic Economy*

Several commentators have already argued that the California Resale Royalties Act will financially hurt the very artist it seeks to help, because it will both divert resources to the already wealthy artist¹¹³ and make the inevitably efficient art collector discount the initial price he would pay for a work.¹¹⁴ In addition to these weaknesses, there is a presumption informing the *droit de suite* that needs to be challenged. The *droit de suite*, in insisting that artists receive the coin of the realm, presumes that visual artists always operate within a commodity market. Many artistic economies, however, are predicated on an altogether different system of exchange.

As Lewis Hyde points out, scientific and literary communities often exchange works and ideas as "gifts."¹¹⁵ "Scientists," for example, "who give their ideas to the community receive recognition and status in return."¹¹⁶ In fact, in the context of these "gift" cen-

¹¹¹ Hauser, *supra* note 86, at 16 (footnote omitted); *see also* Schulder, *supra* note 86, at 22 ("Though like the moral right in that it is inalienable, the *droit de suite* is more closely allied with the reproduction right, in that it is a 'pecuniary' right and is part of the author's copyright.") (footnote omitted).

Earlier proponents may have believed such a separation to be strategic. This may no longer be the case; many states have now passed laws to protect the moral rights of artists. *See supra* note 85.

¹¹² *See generally* Neil F. Siegel, *The Resale Royalty Provisions of the Visual Artists Rights Act: Their History and Theory*, 93 DICK. L. REV. 1 (1988).

¹¹³ *See, e.g.*, Ralph F. Colin, *Statement on Behalf of the Art Dealers Association of America on the Subject of Artists Sharing in Profits of Resale*, reprinted in FRANKLIN FELDMAN, STEPHEN E. WEIL & SUSAN DUKE BIEDERMAN, 1 ART LAW 588, 589-90 (1986) (only a few, relatively successful artists will have a resale market from which to derive resale proceeds). *But see* Note, *A Proposal for National Uniform Art-Proceeds Legislation*, 53 IND. L.J. 129, 133 (1977) (authored by Ann Louise Straw) ("If a piece is never resold no one profits from the artist's original creativity; if the piece is resold, art-proceeds legislation justly reimburses the artist for the economic exploitation of his original creativity") (footnote omitted).

¹¹⁴ Ben W. Bolch, William W. Damon & C. Elton Hinshaw, *An Economic Analysis of the California Art Royalty Statute*, 10 CONN. L. REV. 689, 690-93 (1978); *cf.* Tom R. Camp, *Art Resale Rights and the Art Resale Market: An Empirical Study*, 28 BULL. COPYRIGHT SOC'Y 146, 158-59 (1980) (the resale right would have a deleterious effect with respect to those purchasers for whom price is an important factor).

¹¹⁵ LEWIS HYDE, *THE GIFT* 74-92 (1983).

¹¹⁶ *Id.* at 77.

tered communities, the exchange of work for money defines the work as somehow less worthy or less important.¹¹⁷ The *droit de suite* does not comprehend such non-monetary economies. Of course, if a work of art never entered the kind of commercial market the *droit de suite* controls, the *droit de suite* would present no problem. But once a work of art is sold or otherwise enters the commercial market, the inalienable *droit de suite* would insist that the work remain there. The *droit de suite* could not in principle allow that work to return to any noncommercial economy.¹¹⁸

Not that all artists will choose between “selling out” or living for the praise of peers.¹¹⁹ Commercial interjection may be necessary to the proper dissemination of art work; commercialization may also be thought of as a process of purification, through which an artistic work emerges transcendent.¹²⁰ Furthermore, an artist may

¹¹⁷ Referring to the work of the sociologist Warren Hagstrom, Hyde explains and illustrates:

[T]here is little recognition to be earned from writing a textbook for money. As one of the scientists in Hagstrom's study puts it, if someone “has written nothing at all but texts, they will have a null value or even a negative value.” Because such work brings no *group* reward, it makes sense that it would earn a different sort of remuneration, cash. “Unlike recognition, cash can be used outside the community of pure science,” Hagstrom points out. Cash is a medium of foreign exchange, as it were, because unlike a gift (and unlike status) it does not lose its value when it moves beyond the boundary of the community. By the same token, as Hagstrom comments elsewhere, “one reason why the publication of texts tends to be a despised form of scientific communication [is that] the textbook author appropriates community property for his personal profit.”

Id. (emphasis in original).

¹¹⁸ This is particularly true of the Visual Artists Rights Amendment of 1987. That bill at section 3(d)(1) called for the evaluation of fair market values of property received in exchange for a work of art. S. 2796, 99th Cong., 2d Sess., *supra* note 100.

¹¹⁹ Still others will choose to remain “communities” unto their individual selves. John Russell notes that the sculptor Brancusi “would as soon keep his work as sell it; pieces like the 90-inch-high *Caryatid* stood around in his studio, unremarked and unrecorded, for 40 years, . . . he was the epitome of anti-careerism.” JOHN RUSSELL, *THE MEANINGS OF MODERN ART* 259 (1981). This description of the artist who serves as his own audience is perhaps as romantic as the description which underlies the *droit de suite*; but it is an alternative description, calling into question the sufficiency of the *droit de suite*'s presumptions about an artist's needs.

¹²⁰ Cf. Milton Glasser, *I Listen to the Market*, in *ON SIGNS* 467, 473-74 (Marshall Blonsky ed. 1985):

There has to be some mitigating circumstance, or a series of events that make . . . [high art] accessible And part of the whole vulgarization—I use vulgarization in its best sense—is a process which comes through exploitation, through social manipulation, through replication, through counterfeit, through copying, and the breakdown of values that occurs as problematical works are attacked. And eventually, the best thing that can happen is that the original work (and its integrity) emerges unscathed by reasserting its value in some way, after you have seen all the counterfeits and vulgarizations.

engage the commercial economy with but only the most ulterior reservation. The poet A.R. Ammons explained this strategy as follows:

Nonimpositional liveliness comes from the so-called negative emotions. Societies in which the members are allowed to devise systems answering to greed, competition, fury, repression, egotism are generally fully energized. The agencies of money answer and enable the tendencies of "negative" feelings so as to provide transformative possibilities potentially and usually strengthening to the whole society, some imbalance and exploitation unavoidable, of course, but correctable. . . . These negative situations, truly and appropriately represented, alert our sympathies for and knowledge of misfortune and terrible isolation so that we can act individually toward real situations and real people, where the rhetoric of altruism is nearly mindless automatism.¹²¹

This fiercely stated acceptance of the principles of a competitive commercial market throws the *droit de suite* into a different relief than do the examples Hyde and Hagstrom provide. Not only may the *droit de suite* be comprehending the wrong economy; it may also be presuming the wrong problem in the economy it comprehends. An artist who willingly enters the commercial marketplace may not happily abide the protection of an inalienable economic right.¹²²

b. *The Droit de Suite's Necessary Stereotype of the Artist*

The simplest way to rid the *droit de suite* of its presumption and condescension is to eliminate its feature of inalienability. After all, copyrights are normally waivable or assignable.¹²³ Somewhat curiously, however, the proponents of a resale royalty have assumed that a waivable resale royalty is not useful.¹²⁴ Schulder reasoned, "[i]f the artist is in a poor bargaining position initially vis-à-vis sale of the canvas, presumably he will be in an equally poor position as regards payment of a lump sum for assignment of future interests. The right cannot be transferred and therefore cannot be attached by creditors."¹²⁵ Although careful to state the preceding proposition in the conditional (a waivable interest will not help the artist, she says, *if* he is in a poor bargaining position), Schulder seems to accept the notion that artists as a class are poor and impoverished and therefore necessarily in a poor bargaining position.¹²⁶ Such an esti-

¹²¹ A.R. Ammons, *Making Change*, 38 EPOCH 138 (1989).

¹²² Cf. Ashley, *supra* note 95, at 254-55 (an informed artist might reject the paternalistic, compulsory *droit de suite*).

¹²³ Most rights protected by the Copyright Act may be assigned; the Act only requires that the transfer be made explicitly and in writing. 17 U.S.C. § 204 (1988).

¹²⁴ See Goetzl & Sutton, *supra* note 110, at 53; Schulder, *supra* note 86, at 37-39.

¹²⁵ Schulder, *supra* note 86, at 39.

¹²⁶ *Id.* at 23-24. Schulder concludes that everyone but art dealers will react positively to her proposed art proceeds act; the artist will have a fair share, the collector will

mation of the visual artist's bargaining position may also be influenced by an all too ready acceptance of the standard belief that visual artists are devoted 'to the production of singular "originals."¹²⁷

In large measure, however, the proposition that visual artists are in poor bargaining positions, and that therefore a waivable proceeds right would not be useful, follows from the *droit de suite's* romantic stereotype of the impoverished artist. As Monroe Price noted skeptically in 1968, "[a]t [the *droit de suite's*] 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."¹²⁸ From such vision, or stereotype, follows both the urgent need for and the peculiar inalienable form of a right like the *droit de suite*.

Noting that too many assumptions about the workings of the art market and the financial plight of visual artists hamper the debate over resale royalties, Stephen Weil has written: "Rather than such assumptions, what is truly needed, and what we have never had, is a thorough study of the art market that could serve as a sound basis for determining some appropriate remedies."¹²⁹ Until such a comprehensive study is achieved,¹³⁰ it remains unclear whether artists in

be more certain of the authenticity of his work, and the public will find the amount of the proceeds reasonable. *Id.* at 43.

¹²⁷ See, e.g., *id.* at 24-25 (artist is harmed because in his medium the original must be sold); Hauser, *supra* note 86, at 2. Hauser noted:

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.

Id. (footnote omitted).

Note how Hauser lists three protected events (reproduction, performance, and exhibition) and then explicitly aligns only the first two events with the appropriate kind of artist (writer/reproduction, composer/performance). Understandably, Hauser resists the artist/exhibition correlation which her own grammatical structure suggests.

¹²⁸ Monroe E. Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite*, 77 YALE L.J. 1333, 1335 (1968). Price continued:

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 hargains which he will later turn into large amounts of cash. 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.

Id. (footnote omitted).

¹²⁹ S. WEIL, *supra* note 89, at 225.

¹³⁰ A limited study on the plight of artists has been made. See Randall K. Filer, *The*

general are more or less financially secure than the population as a whole. If such a study is undertaken, it might also resolve the question of whether visual artists (particularly those visual artists who might have their work resold) are so uniquely and especially impoverished that they need legal protection not afforded literary and musical artists. The proposition that visual artists merit some kind of copyright royalty is already tenable, out of a concern for the integrity and rationality of the Copyright Act. But before Congress mandates an inalienable royalty for visual artists, proponents should demonstrate the need for lack of an inviolable royalty and not simply for lack of a conventional one.

B. The Exhibition Royalty

Part I suggested that one might consider the act of viewing as a "copying,"¹³¹ and that the display of a work of art might be considered a "performance," insofar as the *work* maintains a presence.¹³² Part I also noted that the Copyright Act already construes "copy" broadly to include all manner of performances, and demonstrated that, but for section 109(c) of the Copyright Act, visual artists would already have the basic right from which they could base a royalty. As Part II already suggests, the event of resale remains an option for those who wish to fix a royalty for visual artists. In fact, resale is heretofore the only event on which royalties for visual artists have been proposed.¹³³ Resale will, and perhaps should, continue to be considered, but, as argued in previous sections of this Note, any resale-based royalty proposal should be relieved of the burden of inalienability.

There are reasons, however, why a royalty for visual artists would be better fixed on the event of display than on the event of resale. This subpart begins by explicating some of these reasons. The subpart then examines the definition of the display right in the Copyright Act, to consider the appropriateness of its scope and to consider further precise limitations on what events might trigger a royalty. The subpart also broaches the possibility of a "fair use" exemption for museums from the artist's public display right, but explains why museums should not merit such an exemption. The subpart then briefly describes how a display-based royalty might be

"Starving Artist"—Myth or Reality? *Earnings of Artists in the United States*, 94 J. POL. ECON. 56, 73 (1986) (1980 census and other data indicate artists do not "earn any less on average than they would in other jobs").

¹³¹ See *supra* text accompanying notes 48-51.

¹³² See *supra* text accompanying notes 52-54.

¹³³ See *supra* notes 86, 90, 100, and accompanying text, and note 110.

enforced privately, in a manner analogous to the enforcement of musical performing rights.

1. *Advantages of a Display-Based Right*

A royalty for visual artists would be better fixed on the event of display than on the event of resale. A display right would hardly disrupt the current form of the law, whereas the resale proceeds right would require substantial redrafting of the entire Copyright Act. The display right is already defined in the Act, at section 106(5). To make a display-based royalty possible, Congress need only repeal section 109(c), and perhaps modify notice procedures to make copyright protections more attractive to those artists who would resist placing the word "copyright" or the copyright symbol on their work.

A resale proceeds right, in contrast, would involve exhaustive amendment. The 1987 bill proposed by Senator Kennedy and Representative Markey is instructive on this point. Among other changes, the Visual Artists Rights Act of 1987 would have required: (1) several new definitions in section 101, so as to accommodate new concepts without precedent in the current Act;¹³⁴ (2) substantial new subsections within section 106, so as to define the proceed right and to carefully attenuate standard copyright terms (such as "copyright owner") in order to make the proceed right inalienable;¹³⁵ and (3) introduction of the need to determine fair market values for property received in exchange for a work of art, so that the proceed right might not be avoided by the structuring of non-cash transactions.¹³⁶

Among the required definitional changes, one is of particularly doubtful merit. In order to effectuate the proceeds royalty, both the California Act and the Visual Artists Rights Act of 1987 find it necessary to define a new category: the work of "fine art."¹³⁷ This cat-

¹³⁴ S. 1619, 100th Cong., 1st Sess., *supra* note 100, § 2; *see also infra* text accompanying notes 137-40.

¹³⁵ S. 1619, 100th Cong., 1st Sess., *supra* note 100, § 3.

¹³⁶ *Id.* ("Such royalty shall be equal to 7 percent of the difference between the seller's purchase price and the amount the seller receives in exchange for work."). *Cf.* CAL. CIV. CODE § 986(b)(5) (West 1982 & Supp. 1990) (exempting from the proceeds right those exchanges amounting to less than \$1000, including the "fair market value" of property exchanged).

¹³⁷ CAL. CIV. CODE § 986(c)(1) (West 1982 & Supp. 1990) ("'Fine art' means an original painting, sculpture, or drawing, or an original work of art in glass."); S. 1619, 100th Cong., 1st Sess. *supra* note 100, § 2.

Senator Kennedy and Representative Markey's current bill, the Visual Artists Rights Act of 1989, avoids the term "fine art" but in fact refines the definition of art worthy of protection to exclude arguably more than the 1987 bill would have. The new category is "work of visual art," and it includes paintings, drawings, prints, sculpture, "or still photographic image[s] produced for exhibition purposes only," and expressly excludes,

egory is more restrictive than the "pictorial, graphic, and sculptural works" category of the current Copyright Act. The Act's category is not discriminating enough for the proponents of a proceeds right,¹³⁸ who apparently do not wish to extend such a right to works which are not recognized as culturally important. Indeed, the definition of "work of fine art" in the 1987 bill would portend no little government involvement¹³⁹ in deciding what visual art is or is not worthy of protection. The bill provides:

A "work of fine art" is a pictorial, graphic or sculptural work of recognized stature. In determining whether a work is of recognized stature, a court or other trier of fact may take into account the opinions of artists, art dealers, collectors of fine art, curators of art museums, restorers and conservators of fine art, and other persons involved with the creation, appreciation, history, or marketing of fine art.¹⁴⁰

Obviously, any copyright protection must involve discriminating definitions, and those definitions will invariably require an evaluation of an object's character. Under the current act, for instance, a court may still have to determine whether an object represents a "sculptural work."¹⁴¹ A definition to support an effective proceeds right, however, seems more susceptible to the prejudices of an institutionalized art establishment. If the *droit de suite's* romantic artist yet exists, he might likely be an outsider to the world of art institu-

among other things, posters, maps, globes, charts, technical drawings, advertising, and packaging material. S. 1198, 101st Cong., 1st Sess., *supra* note 106, § 2. It should be remembered that these definitions would serve the purpose of restricting moral rights, as the Visual Artists Rights Act of 1989 has no resale royalty component. *See supra* text accompanying notes 105-09.

¹³⁸ Nor was the Act's definition meant to be so discriminating. The House Report to the 1976 amendments states:

[T]he definition of "pictorial, graphic, and sculptural works" carries with it no implied criterion of artistic taste, aesthetic value, or intrinsic quality. The term is intended to comprise not only "works of art" in the traditional sense but also works of graphic art and illustration, art reproductions, plans and drawings, photographs and reproductions of them, maps, charts, globes, and other cartographic works, works of these kinds intended for use in advertising and commerce, and works of "applied art."

H.R. REP. NO. 1476, 94th Cong., 2d Sess. 54, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5667.

¹³⁹ *See* Siegel, *supra* note 112, at 17 (resale royalties require governmental definition of "fine art").

¹⁴⁰ S. 1619, 100th Cong., 1st Sess., *supra* note 100, § 2. The Visual Artists Rights Amendment of 1989 retains essentially the same standard for determination of recognized stature, for the purposes of the integrity right. S. 1198, 101st Cong., 1st Sess., *supra* note 106, § 3.

¹⁴¹ *See, e.g.,* Mazer v. Stein, 347 U.S. 201, 217 (1954) (statues intended for use as lamps may be copyrighted as "works of art").

tions and curators.¹⁴² More to the point, his work might not count as “fine art” of “recognized stature” in instances where it yet might clearly be “pictorial, graphic, or sculptural work.” The latter phrase, somewhat less evaluative if ultimately also discriminating, is more compatible with a Copyright Act that does not ask, for instance, whether books to be copyrighted are of “recognized literary merit.”¹⁴³

This compatibility with the current Act is intertwined with another advantage of a display-based royalty: The legitimacy of the display right does not depend on the existence of an impoverished community of visual artists. The display right simply accords visual artists a right comparable to those already enjoyed by other artists. Unlike the inalienable *droit de suite*, if the display right seems of limited utility, the artist may assign or expressly waive it. The right simply allocates to the artist the same right it allocates to the composer or writer: the benefit of a presumption, which she may offer to the market.

2. *Framing the Display Right*

As noted in the previous subsection, Congress could base the “exhibition royalty” on a right already defined in the Copyright Act, the section 106(5) exclusive right to public display. This section examines the limitations imposed by the Copyright Act’s definition of the public display right and concludes that in its present form it may already restrict royalties to appropriate “performing” or display events. The section argues, however, against “fair use” encroachment of the public display right by nonprofit museums.

a. *The “Public” Limitation*

As demonstrated in Part 1, Congress could base a royalty for

¹⁴² Cf. HAL FOSTER, *Subversive Signs*, in RECODINGS: ART, SPECTACLE, CULTURAL POLITICS 101 (art is displaced by the institutions which supposedly support it).

¹⁴³ Cf. Justice Holmes’s famous majority opinion in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903):

It would be a dangerous undertaking for persons trained only to the law to constitute themselves as final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt.

visual artists on the current display right of section 106(5).¹⁴⁴ Arguably, the right of section 106(5) is too broad and may encompass displays that ought not occasion a royalty. Note, however, that the display right applies only to *public* displays of a work. Referencing the definitional section, one finds that to "display a work 'publicly' means . . . to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."¹⁴⁵ This definition could operate as an initial restriction on the display right.

Some may find additional restrictions on the display right desirable.¹⁴⁶ Further restrictions should distinguish between those events which would justify a royalty and those which would not. The precise lines of distinction are not obvious, but the following questions may serve as a guide. What sort of a public display constitutes a "performance" of the original, authentic "work of art?" For what kind of public displays do others advertise or charge admission?¹⁴⁷ If the restriction, "public," does not already accomplish it, we should attempt to arrive at a royalty based on those formal and relatively extraordinary events we might call "exhibition."¹⁴⁸ A further restricting principle might be stated as follows: We wish to protect the copyright owner's interest in those viewings of her work which render it a "copy" of itself, in the sense that by the particular display in question it serves another's purpose, one perhaps ascribable to a curator¹⁴⁹ or the motive of a promoter for profit.¹⁵⁰

¹⁴⁴ See *supra* text accompanying notes 55-58.

¹⁴⁵ 17 U.S.C. § 101 (1988).

¹⁴⁶ *But see* Goetzl & Sutton, *supra* note 110, at 50-51, who find the "public" qualification of the display right too restrictive:

While the *droit de suite* is phrased in terms of the resale of the material copy, it is, in actuality, the private display of the work to a new purchaser, his or her family, and social acquaintances that is the compensable event. The resale is merely a convenient measure of that event. . . . Unfortunately the measure (resale) has been confused with the compensable event (private display).

¹⁴⁷ The Copyright Act sanctions the "fair use" of a copyrighted work, including reproduction "for purposes such as criticism, comment, news reporting, teaching[,] . . . scholarship, or research." 17 U.S.C. § 107 (1988). Factors to be considered in determining whether a use is "fair" include "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." *Id.* § 107(1); see also *infra* text accompanying notes 151-52.

¹⁴⁸ Ironically, the event of resale, or at least those resales accomplished through the fanfare of auctions, might fall within the "exhibition" category.

¹⁴⁹ See ALMA S. WITTLIN, MUSEUMS: IN SEARCH OF A USABLE FUTURE 60-74 (1970). Exhibitors present objects in collections in the form of monologues or in the form of dialogues and discussion. *Id.* at 60. The latter form of presentation has been used "to convey messages to individuals and to groups of people . . ." *Id.* at 69.

¹⁵⁰ So stated, this principle correlates with the artist's power to refuse to assign the display right, or to selectively license the public display of her work. Accordingly, in

b. *Museums and Unfair Use*

The current Copyright Act contains other, specific limitations on a copyright owner's exclusive rights. For example, "performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a non-profit educational institution" cannot constitute copyright infringement under the Act.¹⁵¹ Another provision of the Act gives qualified approval to certain performances made "without any purpose of direct or indirect commercial advantage . . ." ¹⁵² While these and other limitations on exclusive Copyright Act rights are somewhat arbitrary, most of the sanctioned infringements (or, "uses" of another's copyrighted work) fall to the benefit of nonprofit charitable or educational users.

Discerning from these examples a pattern of Copyright Act sanction of nonprofit and educational infringements, one might limit the display right by presuming that the Act should exempt nonprofit museums¹⁵³ from the artist's exclusive right to display. Assuming that museums perform an educational function,¹⁵⁴ it could be argued that the Copyright Act should not inhibit that function when carried out on a nonprofit basis. Such an argument fails for several reasons. First and foremost, the Copyright Act does not in fact generally excuse infringement for the sake of worthy non-commercial activity.¹⁵⁵ Moreover, museums may not be primarily educational or otherwise charitable institutions worthy of subsidy. Lastly, even to the extent that museums may perform educational or charitable functions worthy of subsidy, the visual artists whose work the museums exhibit should not be forced to bear that subsidy's

addition to using the display right to negotiate royalties, the artist might also reserve the display right to herself to prevent any exhibition of her work which she might find objectionable.

¹⁵¹ 17 U.S.C. § 110(1) (1988); *cf. id.* § 110(3) (exempting displays "in the course of services at a place of worship or other religious assembly").

¹⁵² *Id.* § 110(4). The copyright owner may serve advance notice of objection, in which case the Act's sanction of the use no longer applies. *Id.* § 110(4)(B).

¹⁵³ The Director of the American Association of Museums has stated that more than two-thirds of the Association's member museums are private, nonprofit institutions. Lawrence L. Reger, *Museums for the 21st Century*, in *THE AMERICAN MUSEUM EXPERIENCE* 93, 96 (1986).

¹⁵⁴ See KENNETH HUDSON, *A SOCIAL HISTORY OF MUSEUMS: WHAT THE VISITORS THOUGHT* 48-73 (1975) (discussion of the thesis that museums are educational instruments); see also S. WEIL, *supra* note 89, at 34-35 (education is the most frequently cited public role of museums).

¹⁵⁵ See EDMUND W. KITCH & HARVEY S. PERLMAN, *LEGAL REGULATION OF THE COMPETITIVE PROCESS* 742 (4th ed. 1989):

Does the fact that infringement is undertaken in support of a particularly worthy or useful activity excuse the infringement? As a general matter, the answer is no. Sponsors of a charity benefit cannot make use of the popular songs of the day without paying a license fee simply because the fee will decrease the net amount raised.

cost.¹⁵⁶

The cause of education is often used to legitimize museum operations.¹⁵⁷ However, even granting that museums do perform an educational function, it should be admitted that museums also perform noneducational and noncharitable functions.¹⁵⁸ Museums serve the civic purpose of attracting tourists to a metropolitan area.¹⁵⁹ Museums furthermore cater to the needs of a status-conscious class of society.¹⁶⁰ Museums also support the livelihoods of many persons, including curators, conservators, critics, academics, and other supporting professionals, who are drawn to the art world for their own reasons and are not per se deserving of subsidy. Perhaps most significantly, museums offer entertainment, and not simply the sort of entertainment people might find at the movies. As Wittlin states succinctly, museums "are unique in offering to people immediate encounters with authenticity."¹⁶¹

The last reason against a museum exemption is an equitable one. Skeptical though he was of the *droit de suite*, Monroe Price found compelling the argument that, without any economic leverage, artists were effectively in the position of subsidizing their own exhibitions. For illustrative purposes, Price discussed a show, "Sculpture of the Sixties," at the Los Angeles County Museum of Art:

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 [an enclosed 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

¹⁵⁶ Of course, nothing should prevent the artist who wishes to contribute to the institution which exhibits her work from doing so by waiving her royalty right.

¹⁵⁷ See, e.g., J. Revell Carr, *Education Everywhere for Everyone at Mystic Seaport*, in *THE AMERICAN MUSEUM EXPERIENCE* 41 (1986); see also K. HUDSON, *supra* note 154, at 48-73.

¹⁵⁸ This fact is not lost on the Congress, if the Internal Revenue Code may be taken as an indication. See 26 U.S.C. §§ 511-513(a) (1989) (making taxable that income which charities or educational institutions derive from trade or business unrelated to the functions which make the institutions tax-exempt).

¹⁵⁹ See J. MERRYMAN & A. ELSÉN, *supra* note 53, at 645.

¹⁶⁰ See Max Kozloff, *The Contemporary Museum: Under the Corporate Wing*, reprinted in *MUSEUMS IN CRISIS* 145, 159 (Brian O'Doherty ed. 1972):

Regardless of whether there are any or enough artists worth being shown, regardless of a community's consciousness of or interest in art, regardless of a people's social priorities, museum buildings sprout up to adorn the pride of the colorless ruling classes. In that sense, they are no different from the moon shots, although requiring far less national expenditure.

Cf. A. WITTLIN, *supra* note 149, at 213-15 (museums risk their identity by conducting too many activities for the sake of an elite membership class).

¹⁶¹ A. WITTLIN, *supra* note 149, at 2; see *supra* text accompanying notes 52-54.

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.¹⁶²

It serves no answer to Price's point to say that the artist should be content with the financial rewards that will result from museum exposure of her work. As Price noted, many professionals furnish "free" services for promotional reasons, "[b]ut for artists and sculptors, the institutionalization of the process of uncompensated exhibition has deprived them of the choice of whether a show of his works should be income producing or not"¹⁶³ Museums already receive enormous subsidies from the federal government in the form of grants.¹⁶⁴ Other legislation also inures to the benefit of museums.¹⁶⁵ If museums are still wanting financially, they should perhaps look to their clientele (or unwitting pupils, as the case may be).¹⁶⁶ Artists should not be forced to subsidize museum operations.

3: *Enforcement Mechanisms*

As John E. McInerney has pointed out, the 1982 amendments to the California Resale Royalties Act now enable artists to enforce their rights under the Act through privately-run agencies, analogous to performing-right organizations such as the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI").¹⁶⁷ ASCAP and BMI operate by obtaining nonexclusive rights from copyright owners to license performances of the copyright owner's work. Purchasers of a license from a performing-right organization gain the right to perform the compositions

¹⁶² Price, *supra* note 128, at 1353.

¹⁶³ *Id.* at 1355 n.57.

¹⁶⁴ In one recent two-year period, federal grants to museums totalled \$115,582,367. INSTITUTE OF MUSEUM SERVICES ON BEHALF OF THE FEDERAL COUNCIL ON THE ARTS AND THE HUMANITIES, THE NATURE AND LEVEL OF FEDERAL SUPPORT FOR MUSEUMS IN FISCAL YEARS 1985 AND 1986, at cover letter (1988). Twenty-seven programs in five federal agencies provide the major portion of this federal assistance. *See id.* at 15.

¹⁶⁵ *See, e.g.*, The Art and Artifacts Indemnity Act of 1975, Pub. L. No. 94-158 (codified at 20 U.S.C. §§ 971-977 (1990)) (authorizing federal indemnification of art exhibits against loss or damage).

¹⁶⁶ *Cf.* A. WITTLIN, *supra* note 149, at 214:

There is no reason whatsoever to doubt the willingness of the public to pay for admission to museums; a visit would still be a bargain if compared with a ticket to a movie theater or to a concert. Visitors would, however, probably expect better evidence of the quality of a museum's offerings than they do now when few are aware of the indirect contribution they make to a tax-supported institution; a direct cash transaction tends to arouse alertness which in its turn may lead to a judiciously critical attitude which is now missing.

¹⁶⁷ McInerney, *supra* note 9, at 18-19.

owned by all the copyright owners the organization represents.¹⁶⁸ A visual artists' royalty organization could work similarly. Artists could grant the organization the nonexclusive¹⁶⁹ right to license exhibitions of their work, and the organization could collectively perform the functions of monitoring exhibitions and assessing and collecting royalties on behalf of the artists, or whomever might own the copyright of a particular work. Exhibitors would be licensees, purchasers of a temporary use of the exclusive display right.

Exhibitions, moreover, should prove easier to track than every resale, public and private, with which a resale royalty enforcement agency would have to contend. Indeed, the task of logging and assessing royalties for every public exhibition should be less daunting than the task the music performing rights organizations perform.¹⁷⁰ As a practical matter, ASCAP and BMI do not directly record each and every performance of each and every work in their catalogs;¹⁷¹ a visual artist's exhibition royalty organization, however, might better approximate actual figures for the display of particular works in particular museums and galleries.¹⁷²

¹⁶⁸ A somewhat fuller summary of the operations of ASCAP and BMI may be found in *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1, 5 (1979):

As ASCAP operates today, its 22,000 members grant it nonexclusive rights to license nondramatic performances of their works, and ASCAP issues licenses and distributes royalties to copyright owners in accordance with a schedule reflecting the nature and amount of the use of their music and other factors. BMI . . . operates in much the same manner as ASCAP. . . .

Both organizations operate primarily through blanket licenses, which give the licensees the right to perform any and all of the compositions owned by members or affiliates as often as the licensees desire for a stated term. Fees for blanket licenses are ordinarily a percentage of the total revenues or a flat dollar amount, and do not directly depend on the amount or type of music used. Radio and television broadcasters are the largest users of music, and almost all of them hold blanket licenses from both ASCAP and BMI.

For a more extended description, see SIDNEY SHELME & WILLIAM S. KRASILOVSKY, *THIS BUSINESS OF MUSIC* 162-78 (rev. ed. 1977).

¹⁶⁹ "Nonexclusive," meaning an artist might also directly license display of her work herself. ASCAP and BMI allow an individual member to grant licenses for his work on an individual basis. See *Broadcast Music*, 441 U.S. at 11.

¹⁷⁰ This assumes that more songs are played on radio and television than paintings and sculptures are exhibited in galleries and museums. The assumption may be false, or unduly based on the theory of authenticity informing the common belief that paintings are "one of a kind." That is, the assumption may rest on the following deduction: because works of art are unique they must necessarily be rare. As John Ashbery reminds us, however, "paintings are one thing we never seem to run out of." JOHN ASHBERY, *A WAVE* 16 (1984).

¹⁷¹ Statistical sampling and other methods are used to approximate numbers of performances. See S. SHELME & W. KRASILOVSKY, *supra* note 168, at 165-66.

¹⁷² An alternative to a private enforcement agency might be the Copyright Royalty Tribunal, established by Congress in the 1976 amendments to the Copyright Act for the purpose of establishing and collecting compulsory license fees for cable television, phonographic records, juke boxes, and public broadcasting. See 17 U.S.C. §§ 111-116

CONCLUSION: THE NEED FOR THE ROYALTY

On the question of the need for a royalty for visual artists, proponents of the *droit de suite* have misdirected our attention. One need not demonstrate the financial plight of writers to justify their royalties. The question is really one of horizontal equity. The Copyright Act broadly states that it protects pictorial, graphic, and sculptural work, and has since 1976 conceptualized a display right on which a royalty for visual artists might be based. In other provisions, however, the Act frustrates both its own general purpose and the conceptual breakthrough represented by the section 106(5) display right.

The House Report to the 1976 amendments of the Copyright Act stated that the Copyright Act has often expanded its scope so as to accommodate new forms of expression. But the report also acknowledged that the Act sometimes reached back to recognize older forms:

The historic expansion of copyright has also applied to forms of expression which, although in existence for generations or centuries, have only gradually come to be recognized as creative and worthy of protection. The first copyright statute in this country, enacted in 1790, designated only "maps, charts, and books"; major forms of expression such as music, drama, and works of art achieved specific statutory recognition only in later enactments.¹⁷³

But the report is misleading. Although Congress has conferred "statutory recognition" upon works of visual art since 1870,¹⁷⁴ it has yet to grant meaningful protection to the authors of visual art. With respect to no other art form has Congress so divorced protection of the form from the interests of the form's creators.

For their part, and although they obviously desire a royalty for visual artists, even the proponents of the *droit de suite* presume impediments in the Copyright Act.¹⁷⁵ These impediments are facile and are presumed for no better reason than want of adequate analysis. Authentic, one-of-a-kind art "objects" are "performing" and in that sense "copied" all the time and in ways analogous to other events the Copyright Act protects for the sake of other kinds of artists. It would do no violence to the Act to allow it to accommodate a

(1988). This Note does not favor this alternative, but rather prefers that visual artists be afforded the same negotiating opportunities traditionally afforded writers and composers.

¹⁷³ H.R. REP. NO. 1476, 94th Cong., 2d Sess. 51-52, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5664-65.

¹⁷⁴ See *supra* note 6.

¹⁷⁵ See *supra* note 127.

royalty for visual artists. On the contrary, such a royalty could make the Act more consistent: Congress could base the royalty on the Act's own conceptualization of a right of display, and could utilize the Act's own normative provisions on transfer of ownership. A royalty for visual artists is certainly not so radical an idea that it need follow the example of the *droit de suite*.

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