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Christopher G. Bradley*

Modern business entities, such as LLCs, are increasingly created and deployed to accomplish customized transactions and evade legal restrictions. Rather than acting as traditional business enterprises, entities serve as tools to facilitate complex commercial transactions and surmount limitations presented by existing bodies of law. One limitation constrains the ways that private parties can agree to divide property rights—a doctrinal limitation sometimes referred to as numerus clausus. This Article shows that such limitations on the customizing of property rights by private agreement now can be surmounted by virtue of modern business entity law. After describing the key features of modern business entities, this Article provides a preliminary assessment of their logic and limits.

Modern business law permits an asset or set of assets to be placed into separate business entities with carefully tailored structural and governance features. It allows parties to customize their property rights in the asset(s) however they wish, with surprisingly few limits. Entities can be formed and maintained cheaply with virtually no meaningful public disclosure required. Participants in the operation of the entity need undertake very few duties toward each other or the entity itself. The advent of flexible, powerful, and cheap entities under this body of business law renders limitations on the division of property rights increasingly obsolete. Large, complicated businesses already use webs of entities to divide rights in their assets and subsidiaries for financial, operational, and other reasons (such as regulatory arbitrage). Costs and convenience are now so low as to open the door to smaller scale participants in commerce.

As a concrete example of these developments, this Article focuses on the “Artist’s Contract,” a 1971 project in which artists sought to retain rights in artworks they sold—to obtain a percentage of future appreciation in value, to exhibit works upon request, and so on. As noted in prior scholarship, the transaction contemplated by the Artist’s Contract could not have been accomplished in regular contract form due to numerus clausus and related limitations. But this no longer remains true. This Article describes an “Art LLC” solution to the “problem” of the Artist’s Contract. By structuring the sale of art as the sale of a membership interest in a carefully crafted business entity that actually holds title to the art, the

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goals of the Artist's Contract can be achieved at relatively little expense or inconvenience. In other words, modern business entity law provides convenient, reliable tools to "solve" the legal problems of the Artist's Contract, and to allow for the bespoke, divided property rights sought by the originators of the Contract.

This Article then assesses the proposed Art LLC solution and the broader trend it exemplifies in business law. This Article surveys the various bodies of law that limit the effectiveness of this type of legal maneuver and that protect against its abuse, and it identifies some advantages of novel, business entity-based solutions over more traditional approaches to the division of property rights. This Article concludes by discussing the need for further research into the logic and limits of evolving uses of business entities for transactional purposes.

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I. INTRODUCTION

The last few decades have seen a startling growth in the variety of business entities as well as in their number. Hundreds of thousands of

new entities are formed each year in the United States—over 200,000 in Delaware alone in 2018.¹ Some of these are small businesses started by entrepreneurs pursuing the American Dream. Some are subsidiaries formed by existing companies to spin off part of their existing business or embark on a new venture. But many of these business entities in fact do no business. Many are formed for other purposes, such as holding an asset, obscuring the identity of the real party behind a transaction, or serving as a way station for money as it is moved from one place to another.

The mandatory requirements and standardized business forms of the past have been supplanted by highly flexible arrangements. Customized entities have been used to attract financing by allocating business risks in a more finely calibrated way, to facilitate novel acquisition and management arrangements, to avoid taxes, and for myriad other purposes. Commonly, entities are created merely to facilitate a transaction that would otherwise be impermissible due to barriers presented by contract, property, bankruptcy, copyright, and other bodies of law.

Aggressive use of legal entities is hardly novel. No small part of the success of John D. Rockefeller's Standard Oil derived from its aggressive and "creative" business planning practices.² The innovative use of trusts for financing, for asset preservation, and for other reasons dates back centuries before Rockefeller.³ But business law has become much more lenient and flexible in recent decades, costs of organization and operation have declined, and technology has eased the administration of business entities. As a result, business entities are ever more pervasively and ingeniously deployed.

One problem that commercial parties sometimes face is the legal restriction on their ability to divide property rights by private agreement, a doctrinal limitation sometimes referred to as *numerus clausus*. This Article considers how modern business entities can be used to surmount this limitation and divide property rights, as they want, by private agreement and at minimal expense. Business law now permits an asset or set of assets to be placed into a separate business entity with carefully tailored structural and governance features. It allows parties to customize their property rights in the asset(s) however

1. *Annual Report Statistics*, DELAWARE.GOV, <https://corp.delaware.gov/stats/> (last visited Dec. 5, 2019).

2. See *infra* notes 180-181 and accompanying text.

3. See *infra* notes 180-181 and accompanying text.

they wish, with surprisingly few limits. Modern business entities can be formed and maintained cheaply and with virtually no meaningful public disclosure; they can be governed pursuant to tailored private agreement; and participants in the operation of the entity need undertake very few duties toward each other or the entity itself. The advent of flexible, powerful, and cheap entities under modern business law renders limitations on the division of property rights increasingly obsolete.

Webs of entities are used already by large, complicated businesses to divide rights in their assets and subsidiaries, for financial, operational, and other reasons (such as regulatory arbitrage). Costs and convenience are now so low as to open the door to smaller scale participants in commerce. What could have been done only with considerable expense and uncertainty can now be accomplished with much less expense and more reliability. The tools of business entity law are now available on a wider scale to serve the goals of a wider range of actors.

To furnish a concrete example of these developments, this Article focuses on the “Artist’s Contract,” a product of early 1970s art-world idealism. The Artist’s Contract was intended to be a vehicle for artists to retain rights in their art after its sale. The so-called “resale royalty right” is the most prominent provision; it would have entitled artists to obtain 15% of the appreciation in value of any work sold under the Artist’s Contract.⁴ The contract also included so-called “moral rights” such as the right to veto a potential exhibition and the right to consultation before attempting repairs on the art.⁵

Existing law, however, renders such a contract unenforceable under many common circumstances. Property law is generally hostile to encumbrances on personal property such as those enshrined in the Artist’s Contract. Also, the requirement of privity will likely prevent the contract from being enforceable against any new owner of the art who has not actually agreed to its terms. Finally, copyright law’s first sale doctrine restricts the ability of artists to prevent collectors from

4. SETH SIEGELAUB & ROBERT PROJANSKY, THE ARTIST’S RESERVED RIGHTS TRANSFER AND SALE AGREEMENT art. 2(b) (1971) [hereinafter ARTIST’S CONTRACT], <http://www.primaryinformation.org/files/english.pdf>. The pages are not consecutively numbered through both sections of the document. References to the introductory material will be by page number (*Artist’s Contract* at [page]) and references to the contract will be to the article number (*Artist’s Contract* art. [number]).

5. ARTIST’S CONTRACT, *supra* note 4, at 2; *id.* arts. 7, 10.

exhibiting or reselling art.⁶ These are all significant doctrinal problems with the Artist's Contract as conceived and initially drafted.

But all is not lost. There is a solution to the problem presented by the Artist's Contract. Part II lays out a simple but powerful approach to the problem. The approach entails replacing the Artist's Contract with another, much more potent contract—a limited liability company (LLC) operating agreement.

The LLC is the paradigmatic modern business entity.⁷ In the 1990s, due to a confluence of liberalizing Internal Revenue Service (IRS) taxation policies, increasingly flexible state business laws, and computer technology that eases recordkeeping and administrative burdens, the LLC rose to a dominant position among business entities.⁸ In 2018, 157,142 LLCs were formed under Delaware law alone, more than 72% of the total number of entities formed in Delaware that year.⁹ Among other remarkable features, Delaware permits the members of its LLCs to dispense with traditional duties aside from the minimal “implied contractual covenant of good faith and fair dealing.”¹⁰ It permits LLCs to be formed with no public disclosure of their purposes or the assets or parties involved, and with low fees (for Delaware, a few hundred dollars total; some states are much lower).¹¹ Entities then can operate throughout the United States with little restriction.¹²

The Artist's Contract furnishes a case study of the power and flexibility of business entities. By using an LLC, an artist can evade

6. 17 U.S.C. § 109 (2018) (codifying the first sale doctrine); see Brian L. Frye, *Equitable Resale Royalties*, 24 J. INTELL. PROP. L. 237, 247 (2017) [hereinafter Frye, *Equitable Resale Royalties*].

7. SHAWN J. BAYERN, *CLOSELY HELD ORGANIZATIONS* 243 (2014) [hereinafter BAYERN, *CLOSELY HELD ORGANIZATIONS*] (“[U]nder modern law the answer to the question ‘Which entity should our new business use?’ is almost always an LLC.”); *id.* (noting choice of other entities tends to be motivated merely by “convention”).

8. LARRY E. RIBSTEIN, *THE RISE OF THE UNINCORPORATION* 119-36 (2010) (describing origins and factors that led to ascendance of LLCs and similar associative forms); Susan Pace Hamill, *The Story of the Limited Liability Company: Combining the Best Features of a Flawed Business Tax Structure*, in *BUSINESS TAX STORIES* 295 (Steven A. Bank & Kirk J. Stark eds., 2005).

9. *Annual Report Statistics*, *supra* note 1.

10. The duty requires little beyond obedience to whatever contractual duties the members have agreed upon. DEL. CODE ANN. tit. 6, § 18-1101(c) (2019).

11. See *infra* notes 91-98 and accompanying text.

12. States can add requirements of registration and notice that impede some of the freedoms given to business entities, but generally internal firm matters (such as duties among members) are for the state of origination only. See generally *Kamen v. Kemper Fin. Serv.*, 500 U.S. 90, 98 (1991) (declining to displace State law that allocates governing powers within the corporation); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 91 (1987) (discussing the State's role in creating and regulating corporations and defining their rights).

doctrinal restrictions and accomplish the goals of the Artist's Contract. The artist simply places the artwork into an "Art LLC." Then instead of selling the object to the collector-buyer, she sells an ownership interest (or "membership interest" in LLC parlance) in that entity. She retains a membership interest of her own, with whatever limited rights she wishes to preserve—such as the right to receive resale royalties or to veto exhibitions. Because the Art LLC—not the collector—legally owns the art, the artist's protections should survive the hurdles that beset the original Artist's Contract.

Parts III and IV assess the Art LLC as a normative matter and as an example of an important, broader theme—the use of business entities to sculpt property rights by private agreement.

Part III explores the logic and limits of the Art LLC under current law. First, it argues that the Art LLC is more reasonable an arrangement than it might initially seem. It is a way of giving legal form to an ongoing relationship between artist, collector, and art. Contrary to the conventional image of art sales as discrete, one-off transactions, the parties' interests are often intertwined beyond the time of sale. Artwork remains connected to the reputation and other work of the artist who created it and the subsequent activities of both buyer and seller can affect the value of the art that is sold as well as of the artist's other works. From this perspective, it begins to look sensible (if novel) to allow parties to art transactions to structure their future relations by means of a business entity. The traditional "moral rights" that artists maintain in their handiwork, even after it is sold, actually respond to the same concerns as the Art LLC. The Art LLC approach might provide not only more rights as a substantive matter but also more ability to customize the relevant package of rights, honoring chosen arrangements over legislative fiat.

Second, this Part identifies important limits in current law that protect against abuses of this legal tool. It discusses the ramifications of various other bodies of law on the Art LLC arrangement—including agency, securities, and bankruptcy law. It emphasizes that while the Art LLC is novel in that it uses business entities to sculpt rights in individual items, sculpting property rights by private agreement is already commonplace among sophisticated legal actors such as large corporate groups, where corporate "webs" carve out creditors' rights and claims to various assets and subsidiaries. Modern business law is now becoming democratized to an extent not yet recognized by scholars and policymakers. The Art LLC example usefully illustrates

potential new uses (and abuses) of the business entity form abound and shows they deserve renewed attention.

Part IV discusses how some of the benefits of the business entity approach could be obtained by other existing legal tools—including trusts, leases, bailments, and security interests. Alternatively, it notes that lawmakers could protect agreements to divide property rights (such as the original Artist’s Contract), by ordering that reservations of rights clearly noted on works of art would be legally binding, or by creating a central registry where potential buyers could investigate claims on particular artworks. The comparison of the business entity scheme with these other legal approaches illustrates the virtues and vices of using business entities as transactional tools. It places business entities alongside numerous legal tools that can be made to serve similar functions. Part IV identifies some advantages of novel business entity-based solutions over more traditional alternatives for division of personal property rights, and it stresses some of the significant risks this new trend brings.

Part V concludes by calling for energetic scrutiny of both the benefits and dangers of the proliferation of business entities as transactional tools.

II. THE ARTIST’S CONTRACT PROBLEM—AND A BUSINESS ENTITY SOLUTION

A. *The Contract*

The Artist’s Reserved Rights Transfer and Sale Agreement, known as the “Artist’s Contract,” was the brainchild of an impresario, gallerist, and dealer named Seth Siegelaub, who worked with a lawyer, Bob Projansky, to draft and promulgate the agreement in 1971.¹³ The Artist’s Contract was a customizable form contract for artists to use when selling their work. The poster on which the contract was

13. See ARTIST’S CONTRACT, *supra* note 4. The authoritative book on the Artist’s Contract is MARIA EICHORN, THE ARTIST’S CONTRACT (Gerti Fietzek ed., 2009). See also Christopher G. Bradley & Brian L. Frye, *Art in the Age of Contractual Negotiation*, 107 KY. L.J. 547 (2018) (providing an analysis of the Artist’s Contract and its social, market, and legal context); Lauren van Haften-Schick, *Conceptualizing Artists’ Rights: Circulations of the Siegelaub-Projansky Agreement Through Art and Law*, OXFORD HANDBOOKS ONLINE (2018) (providing a nuanced and deeply considered discussion of the themes, purposes, and context of the Artist’s Contract). On Siegelaub and his milieu, see ALEXANDER ALBERRO, CONCEPTUAL ART AND THE POLITICS OF PUBLICITY (2003).

originally printed exhorted artists to “POST, REPRODUCE and USE” it.¹⁴ It has been reprinted often.¹⁵

Under the contract, the collector agrees not only to pay the initial purchase price, but also, if the collector sells the art, to pay the artist 15% of any profits on the sale.¹⁶ The collector can sell only if the new buyer agrees to abide by the contract and the collector files a small “transfer” form included in the agreement with the artist, so that the artist can keep track of the work and its ownership.¹⁷ The collector agrees to notify the artist of any proposed exhibitions during the artist’s lifetime and to comply with any of the artist’s “advice or requests” regarding an exhibition, including the artist’s decision to withhold the work from an exhibition altogether.¹⁸ The collector agrees that the “Collector will not intentionally destroy, damage, alter, modify or change the Work in any way whatsoever.”¹⁹

The artist agrees to convey the artwork to the collector, maintain a record of the work, and provide certification of authenticity if requested.²⁰ The artist retains the right to reproduce the art.²¹ During the artist’s life, the artist may obtain and exhibit the work for up to sixty days over any five-year period.²² Aside from copyright licensing, the artist’s rights cannot be assigned.²³

The contract instructs the artist to cut out the notice portion and attach it to the art, or if it cannot readily be attached due to the nature of the art, to attach it to the documentation or certification used to represent that work in passing ownership.²⁴ The contract states that future transferees of the art will be bound by the terms of the

14. ARTIST’S CONTRACT, *supra* note 4, at 4.

15. *See id.* at 2; van Haften-Schick, *supra* note 13, at 14, 55 n.108.

16. ARTIST’S CONTRACT, *supra* note 4, arts. 1, 2. Here and throughout this Article, I use the term “collector” as is common in the art world, and as the Artist’s Contract does, to describe what we might otherwise describe as the “buyer” of art. *Id.* at 2.

17. *Id.* art. 2.

18. ARTIST’S CONTRACT, *supra* note 4, arts. 7, 16. In his introduction, Siegelau identifies this as a provision many collectors will not accept. *Id.* at 2.

19. *Id.* art. 9. Should the work need repairs during the artist’s lifetime, the collector agrees to consult the artist to make “any required repairs or restoration.” *Id.* arts. 10, 16.

20. *Id.* arts. 1, 6.

21. *Id.* art. 12. However, the artist agrees that she “shall not unreasonably refuse permission to reproduce the Work in catalogues and the like incidental to public exhibition.” *Id.*

22. *Id.* arts. 8, 16.

23. *Id.* art. 13.

24. *Id.* art. 14.

agreement.²⁵ Most of the agreement remains in force for twenty-one years after the later of the death of the artist or the artist's spouse.²⁶

Context is crucial to understanding the Artist's Contract. The late sixties and early seventies were of course a time of great social, cultural, and political turmoil in the United States, and this turmoil riled the art world even as the art market grew rapidly. In an infamous 1969 incident, after the Museum of Modern Art in New York City refused to display an artwork per one artist's specifications, he entered the museum, grabbed his work, and walked out with it.²⁷ This defiant act catalyzed the organization of an activist group called the Art Worker's Coalition, with which Siegelau became involved.²⁸ The Artist's Contract can be seen as an outgrowth of this movement,²⁹ as part of an effort to organize and leverage artists' power in the public square and in the marketplace.³⁰ Artists wanted to maintain control over their art—and to capture more of the gains of rapidly rising art values.

Siegelau was a significant player in the "Conceptual Art" scene, although he departed it soon after promulgating the Artist's Contract.³¹ Enthralled by a rising group of boundary-pushing artists, he experimented with innovative promotional methods, using unconventional means to publicize the work of his unconventional friends and associates.³² Consistent with this, the Artist's Contract served not just as a useful template but also as a bold and innovative statement. The artist Maria Eichhorn suggested that the contract serves

25. *Id.* art. 15.

26. *Id.* art. 16. For exceptions, see *supra* notes 18, 19, 22 and accompanying text.

27. See van Haaften-Schick, *supra* note 13, at 10, 52 n.84.

28. *Id.*

29. See EICHORN, *supra* note 13, at 262.

30. ALBERRO, *supra* note 13, at 164 ("[T]he Agreement was a political project that provided the groundwork for substantive artist empowerment.").

31. ALBERRO, *supra* note 13, at 3-5. He apparently left for Paris, where he later developed keen interests in "Marxist media theory and the history of handwoven textiles." Bradley & Frye, *supra* note 13, at 587.

32. An example of the "conceptual art" Siegelau promoted: "[Ian Wilson's] work involved oral communication. People would pay for him to talk. I remember we sold works by Robert Barry which consisted of inert gas released into the atmosphere in Los Angeles . . ." EICHORN, *supra* note 13, at 50. One of Siegelau's shows was titled *January 1-31 1969: 0 Objects, 0 Painters, 0 Sculptors, 4 Artists . . . 32 Works, 1 Exhibition, 2000 Catalogues*. RICHARD J. WILLIAMS, *AFTER MODERN SCULPTURE: ART IN THE UNITED STATES AND EUROPE 1965-70*, at 83 (2000). Among the non-"object" artistic works that were exhibited were radio waves generated by a hidden transmitter and the radiation from a small amount of barium-133. *Id.* Consistent with the art he promoted, Siegelau's "gallery shows" and "catalogues" undermined traditional notions. For instance, he would organize shows in non-gallery spaces such as abandoned office buildings or produce catalogues memorializing exhibitions that never actually occurred.

as “an expression of the 1960s critique of social conditions applied to the example of art and the art trade.”³³ Another artist, Jenny Holzer, who has been involved in artists’ rights advocacy, goes even further: “I think it is very good as a practical document, and I also believe it is good Conceptual art.”³⁴ The practicality for artists in their actual dealings was vital to the project, but enforceability was not the only consideration.³⁵ In its social context, the contract was one of a number of means by which artists sought individual and collective empowerment.³⁶ Conceptual artists often sold their art to like-minded friends and collectors sympathetic to the activist goals of the project, who were willing to accept forward-looking forms of conveyance for avant-garde artworks.³⁷ The contract was one of numerous attempts to delimit and maintain the boundaries of this community—while also, of course, profiting from the broader market expansion.

From the perspective of the artists, the U.S. art market was thriving but was leaving artists behind. In many other countries, artists enjoy a panoply of what are referred to as moral rights (*droit moral*) in their artwork, as well as resale royalty rights (*droit de suite*).³⁸ These rights are largely lacking in the United States. Resale royalty rights entitle the artist to a percentage cut of a later sale of the art (either of the profits on such sale or of the gross sales revenue). Notably, the state of California, the artist-friendly country of France, and numerous other countries have included such provisions in their laws.³⁹ Moral rights

33. EICHHORN, *supra* note 13, at 15. To her, the contract encourages a critique of the facts “that art is practiced in a field determined by social, economic, and political forces, by mechanisms of inclusion and exclusion, and that art is entangled in manifold ways in the mechanisms of the market and of political representation.” *Id.* at 11.

34. *Id.* at 119, 125 (interview with Jenny Holzer).

35. *Id.* at 261-77 (noting that Siegelau insisted on the intended practical purposes of the contract and describing the process used to reach the initial published form).

36. The various related efforts are recounted in Bradley & Frye, *supra* note 13.

37. EICHHORN, *supra* note 13, at 261-77.

38. van Haaften-Schick, *supra* note 13, at 61 n.162.

39. 1 LEONARD D. DUBOFF ET AL., ART LAW DESKBOOK: ARTISTS’ RIGHTS IN INTELLECTUAL PROPERTY, MORAL RIGHTS, AND FREEDOM OF EXPRESSION 4-69 to 4-76 (3d ed. 2016) (discussing general principles of resale royalty rights); *id.* at 4-76 to 4-80 (California Resale Royalty Statute); Henry Hansmann & Marina Santilli, *Royalties for Artists Versus Royalties for Authors and Composers*, 25 J. CULTURAL ECON. 259, 259-61 (2001) [hereinafter Hansmann & Santilli, *Royalties*] (summarizing laws); Guy A. Rub, *Stronger than Kryptonite? Inalienable Profit-Sharing Schemes in Copyright Law*, 27 HARV. J.L. & TECH. 49, 65-66 (2013) [hereinafter Rub, *Stronger than Kryptonite?*]. The California statute has been held unenforceable on preemption grounds. *Close v. Sotheby’s, Inc.*, 894 F.3d 1061, 1072 (9th Cir. 2018).

protect certain rights in the artist's work even after a sale. Although they vary greatly in application, these rights include:

[T]he right of *integrity*, under which the artist can prevent alterations in his work; the right of *attribution* or *paternity*, under which the artist can insist that his work be distributed or displayed only if his name is connected with it; the right of *disclosure*, under which the artist can refuse to expose his work to the public before he feels it is satisfactory; and the right of *retraction* or *withdrawal*, under which the artist can withdraw his work even after it has left his hands.⁴⁰

Many countries protect such rights,⁴¹ but the protection of moral rights remains relatively weak in the United States.⁴²

Moral rights and resale royalty rights can be seen as ways to recognize, legally, that the fates of artists and their art remain intertwined beyond the time of original sale. The display of a defaced work of art could damage an artist's reputation; moral rights prevent this. An artist might work hard to enhance her reputation, thus raising the value of a previously sold work of art with no effort from the collector; the resale royalty right compensates for this.⁴³ The Artist's Contract emerged from a context in which artists considered themselves to be getting an unfair shake due to inadequate recognition

40. Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 95-96 (1997) [hereinafter Hansmann & Santilli, *Authors' and Artists'*].

41. See, e.g., Berne Convention for the Protection of Literary and Artistic Works art. 6 bis, Sept. 9, 1886, S. Treaty Doc. 99-27, 99th Cong., 828 U.N.T.S. 221 (not adopted by the United States until 1989), Bradley & Frye *supra* note 13, at 553; Hansmann & Santilli, *Authors' and Artists'*, *supra* note 40, at 96-97, 141-42 (discussing reasons for the U.S. government's actions).

42. See, e.g., Rub, *Stronger than Kryptonite*, *supra* note 39, at 57 n.22 (discussing the United States' reluctance to adopt laws protecting moral rights).

43. Resale royalty rights became a flash point in the red-hot art market of the 1960s and 1970s. Some successful artists felt aggrieved when their art appreciated greatly, giving what they perceived to be a windfall to their collectors. One (in)famous example: Robert Rauschenberg was incensed when, among other things, a collector sold an object—a painting entitled *Thaw*, which Rauschenberg had sold to him for \$900 in 1958—at auction in 1973 for \$85,000. See Frye, *Equitable Resale Royalties*, *supra* note 6, at 237, 239 n.2 (describing and providing various sources for the details of the alleged interaction). Rauschenberg fiercely, but ultimately unsuccessfully, advocated that federal policymakers provide a *droit de suite* to American artists. See Amy Whitaker, *Artist as Owner Not Guarantor: The Art Market from the Artist's Point of View*, 34 VISUAL RES. 48, 52-53 (2018) [hereinafter Whitaker, *Artist as Owner*].

While the economics of the artists' argument are not convincing, Professor Frye and I have argued elsewhere that the advocacy for resale royalty rights can be understood as part of a broader attempt to catalyze a social movement empowering artists in an increasingly impersonal marketplace that they felt alienated them from the values they were seeking to espouse and nurture in their art. See Bradley & Frye, *supra* note 13.

of these post-sale connections. The “art workers” sought to rearrange the norms of the art market in which they participated and legal reform was one of their tools. They pursued statutory reforms, as in the California law, and explored novel private arrangements, as in the Artist’s Contract.

Scholars and policymakers have studied moral rights and resale royalty rights extensively. Moral rights, such as the rights of integrity and attribution, have generally fared better with commentators and analysts.⁴⁴ Many moral rights preserve the value of assets from arbitrary damage and bring benefits to the art market by allowing artists to build and maintain a reputation based on their endeavors over time; particularly when artists have the power to waive them if they so choose, such rules are at least defensible.

Resale royalty rights are another matter. Mandatory (i.e., nonwaivable) resale royalty rights have been sharply criticized. First, they are difficult to administer consistently and easy to evade.⁴⁵ Second, they bring perverse distributive effects. Mandatory resale royalty rights lower prices for all art that is sold by the cost of the retained upside value of the resale royalty right.⁴⁶ But most works of art never increase in value; the art market is highly risky and stratified. The royalty will only pay out for artists whose work later increases in value.⁴⁷ These very artists are usually able to produce new works to sell at now-higher prices, thus reaping plenty of benefits from their enhanced status on the

44. See, e.g., Hansmann & Santilli, *Authors’ and Artists’*, *supra* note 40, at 142 (“[S]ervitudes [such as those imposed by some moral rights] can potentially serve a useful role in the field of fine arts, particularly in controlling reputational externalities.”). *But see* Amy M. Adler, *Against Moral Rights*, 97 CAL. L. REV. 263, 265 (2009) (providing an argument that seeks “to undermine the foundations of moral rights scholarship, law, and theory”).

45. John Henry Merryman, *The Wrath of Robert Rauschenberg*, 40 J. COPYRIGHT SOC’Y U.S.A. 241, 253-54 (1992) (discussing evidence for claim that resale royalty rights are too difficult to administer). Due to the portability of art and the lack of transparency in art transactions, such laws are difficult to enforce and encourage regulatory arbitrage (i.e., structuring transactions so as to evade the scope of such laws or jurisdiction of the courts enforcing the laws).

46. Concededly, “[i]n practice, the risk discount on the primary art market is so large that a resale royalty right would probably have little effect on prices. Only a tiny fraction of works retain any value on the secondary market.” Bradley & Frye, *supra* note 13, at 558. Still, one expects an effect at the margin, and the distributive effect, overall, hardly seems desirable.

47. See, e.g., Guy A. Rub, *The Unconvincing Case for Resale Royalties*, 124 YALE L.J. F. 1, 2 (2014) [hereinafter Rub, *Unconvincing Case*] (“[T]here is no convincing justification to enact resale royalty rights and to force society to incur their significant costs.”); *id.* at 2 n.6, 3 n.8 (collecting prior literature).

market.⁴⁸ To put it bluntly, resale royalty payments look like a windfall for them at the direct expense of their less-successful peers.⁴⁹ Resale royalty rights resemble lottery tickets that every artist is forced to “buy” at each sale of their art, with little likelihood of “winning.”⁵⁰

Consensually agreed-upon resale royalty rights are less troubling. Although the overall societal effect of honoring such agreements is questionable,⁵¹ and although there are legal and practical barriers to enforceability, the voluntary nature of such transactions renders them less concerning.⁵²

This Article takes its cue from the notion, shared by the promulgators of the Artist’s Contract, that *some* artists would like to agree with *some* collectors to retain *some* rights, similar to existing moral and resale royalty rights. Assuming that to be the case, can such a transaction be structured to succeed, at reasonable costs, and with likelihood of success?

48. Merryman states that this was true even for Robert Rauschenberg, whose complaints about the lack of a royalty sparked discussion of the issue in the United States in the early 1970s. See Merryman, *supra* note 45, at 249.

49. See *id.* at 254 (“Knowledgeable artists oppose the right because they believe that it works to their disadvantage.”). For discussion of the risk preferences and tolerances of early-career artists, late-career artists, and collectors, in a related context, see Rub, *Stronger than Kryptonite?*, *supra* note 39, at 98-101.

50. For this reason, there have been numerous proposals over time to collect resale royalties and distribute them in some way to the broader artist community. See, e.g., Frye, *Equitable Resale Royalties*, *supra* note 6, at 266-67 (discussing this issue and using, among other things, a lottery metaphor); John Henry Merryman, Comment, *The Wrath of Robert Rauschenberg*, 41 AM. J. COMP. L. 103, 122 (1993) (“[I]f there were to be a charge on art resale transactions it might better be collected and administered for the benefit of needy artists. Instead of an artists’ *droit de suite* there would be a charge on resale transactions paid into an artists’ welfare fund.”).

51. Whitaker, *Artist as Owner*, *supra* note 43, at 54-55, articulates some of the arguments for and against the artists’ position in the course of proposing her own novel approach to this issue. For a full-throated articulation of the skeptical view, see Rub, *Stronger than Kryptonite?*, *supra* note 39, at 78-95, 107-08, 132-33 (summarizing existing analyses and presenting models in support of the conclusion that *droit de suite* and related policies are on balance welfare-decreasing for both society and artists). Professor Rub argues that, if anything, *restricting* the ability to contract for resale royalties would help artists more: “[A]s explained above, if creators are overly optimistic, then from a policy perspective, society needs to be concerned with artists’ decisions to make *too much* of their financial return contingent on commercial success.” *Id.* at 110.

52. The distributive effects are still problematic and somewhat undermine the idea that the Artist’s Contract was a blow in favor of otherwise-starving artists. Voluntary terms are more easily agreed to by those who already have the market power to convince collectors to agree to such terms, or the prosperity to accept the lower price that collectors will pay for receiving lesser rights in the art they purchase. If markets are depressed overall due to the use of contract terms by some artists, all artists will be affected.

I argue the answer is yes—though the original Artist’s Contract is not the right tool. This Article develops a way to make provisions such as those in the Artist’s Contract binding and enforceable not just against the initial buyer of art but also later collector-purchasers of an artwork. This proposed approach to the Artist’s Contract problem serves as an illustration—a proof of concept—of how business entities can be deployed to sculpt property rights by private agreement.

In the subpart below, I explain the problems with the Artist’s Contract itself, which boil down to the fact that it attempts to divide property rights in ways that our law doesn’t recognize. Then I turn to my solution, which involves the creation of a business entity to house the art and share rights in it between the artist and the collector as they please.

B. The Problem

There are serious reasons to doubt the enforceability of the original Artist’s Contract.⁵³ As this subpart shows, it fails the requirement of contractual “privity,” it introduces an unenforceable form of servitude on chattels, and it runs afoul of copyright law’s first sale doctrine.⁵⁴ These defects render the contract unenforceable as to “downstream” collectors of the art (i.e., purchasers who acquire the art after the initial transaction) in many common circumstances.

1. Contractual Privity and Servitudes on Chattels

Much of the Artist’s Contract would be enforceable as a binding contract between the artist and the initial collector. For instance, the collector could owe a resale royalty payment to the artist at the contractual rate, 15% of the profit received in any future sale.⁵⁵

But what if the initial collector breaches the contract and, without informing the artist of the sale and paying the royalty, sells to a new collector who is unaware of the contract? The new collector might then

53. See generally JOHN HENRY MERRYMAN & ALBERT E. ELSEN, 1 LAW, ETHICS AND THE VISUAL ARTS: CASES AND MATERIALS 4-141 to 4-143 (1st ed. 1979) (summarizing the difficulties with enforceability of the artist’s contract).

54. To be clear, as acknowledged above, these problems are with the strict, legal enforceability of the contract. It is of course the case that parties might nonetheless comply with the contract, whether out of fear of litigation or out of a sense of the moral rightness of compliance.

55. See ARTIST’S CONTRACT, *supra* note 4, arts. 2(b), 4 (granting artist entitlement to 15% of “Appreciated Value” reflected in any “Future Transfers”).

sell to another collector, who might sell to yet another collector—all of whom might lack awareness of the initial contract.⁵⁶

Of course, the artist would have a right to bring a claim for damages against the initial collector.⁵⁷ But in many instances, a claim against the original collector alone would be cold comfort. By the time the artist found out about such a breach, it might be too late to collect any damages. For example, the initial collector might have died, become judgment proof, or moved to a jurisdiction where the claim would be prohibitively difficult to pursue.

56. There might not even be a remedy against the new buyer even if he *were* aware of the contract. One applicable remedy might be for “Intentional Interference with Performance of Contract.” See RESTATEMENT (SECOND) OF TORTS § 766 (AM. LAW INST. 1977). This remedy would be uncertain at best, however, not to mention expensive to litigate. See *id.* cmts. h, j, n (providing discussion and examples that support application of this tort to the fact situation discussed here would be uncertain at best).

57. To help the artist do so, the contract could be modified to provide for “liquidated damages” for breaches of the various provisions. This would relieve the artist of the otherwise difficult task of proving damages as a result, for instance, of having a work shown without their permission. Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. S373, S389 (2002) [hereinafter Hansmann & Kraakman, *Property, Contract, and Verification*] (“The incentive of each subsequent owner of the work to honor the restriction on resale might be enhanced by a provision for substantial liquidated damages (for example, 50 percent of the sale price) in case of breach.”). As noted *infra* note 197, such clauses are not always enforceable, particularly where the damages are disproportionate to any reasonable estimate of the harm suffered. On the other hand, courts are more friendly to such clauses in situations such as this, where the harm would otherwise be nearly impossible to prove with any degree of precision.

I leave aside any discussion of Hansmann and Kraakman’s other suggestion for practical enforceability of such an agreement, which is essentially one that involves coordinated control of marketplaces: “An artist—or a group of artists or an artists’ association—might also obtain contractual commitments from galleries and auction houses that deal in their work not to broker resales of the work in which the purchaser does not make the requisite contractual commitment to the artist.” Hansmann & Kraakman, *Property, Contract, and Verification, supra*, at S389. Of course, this strategy requires the not-insignificant additional steps of organizing the artists and convincing the galleries and auction houses, and it would only work if the cooperating parties exercised sufficient market control. But it is an idea that interestingly spans the distinction between purely private agreements and more public, community-type efforts.

The promulgators and supporters of the Artist’s Contract believed that enforcement would be greatly aided by the threat of social sanction or ostracization. As Hans Haacke, an artist known to regularly and consistently use the agreement, stated in an interview: “Practically speaking, a kind of gentleman’s agreement is formalized by the Contract” EICHHORN, *supra* note 13, at 68. They believed that the relatively small, geographically concentrated market of art buyers would pressure parties to honor the agreement for fear, if not of legal enforceability, then of reputational and social sanctions. I have explored the contract’s meaning within its original social context and the community from which it emerged in other work. See generally Bradley & Frye, *supra* note 13 (exploring the origins of the Artist’s Contract and its influence on the art marketplace).

The contract purports to bind all future collectors for up to twenty-one years after the artist's death.⁵⁸ But a breach of contract claim against subsequent collectors would likely fail. The doctrine of privity of contract teaches that only a party who has agreed to a contract is bound by its terms.⁵⁹ For this reason, the artist is unlikely to be able to enforce the contract against a new collector, who paid a reasonable sum for the art in good faith and without knowledge of the restrictions.

The contract purports to encumber the work itself with these restrictions.⁶⁰ It provides for the artist to retain a highly customized sort of property interest in the work, regardless of whether the current owner of the work signed or even saw the contract.⁶¹ The trouble is that, traditionally, private parties do not have the unbounded power to burden an item of personal property (such as a work of art) with such restrictions, which can be referred to as "covenants in personal property" or "servitudes in chattels."⁶² Historically, restrictions of this sort have been recognized only reluctantly,⁶³ in particular identified

58. See *supra* notes 16-26 and accompanying text (noting some limitations to this).

59. *Privity*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The doctrine of privity means that a person cannot acquire rights or be subject to liabilities *arising under* a contract to which he is not a party." (quoting G.H. TREITEL, *THE LAW OF CONTRACT* 538 (8th ed. 1991)). The doctrine has certain exceptions not applicable here. See, e.g., *Sav. Bank v. Ward*, 100 U.S. 195, 200 (1879) (holding that there is no privity of contract where an attorney provided information to a client in response to a casual inquiry); *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1054-55 (N.Y. 1916) (holding that a manufacturer of automobiles did owe a duty of care to subsequent buyers and was responsible for automobiles placed in the market).

60. ARTIST'S CONTRACT, *supra* note 4, art. 15 ("In the event the Work shall hereafter be transferred or otherwise alienated from Collector or Collector's estate in any manner whatsoever, any transferee taking the Work with notice of this Agreement shall in every respect be bound and liable to perform and fulfill each and every covenant herein . . ."); *id.* art. 16 ("[T]he Collector's covenants do attach and run with the Work . . .").

61. The key distinction is that if the artist has a property interest, it attaches to the property, running along with it, as contrasted with a liability claim, which is usually personal to the originally transacting party. The *locus classicus* on the crucial distinction between liability and property interests is Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). The Artist's Contract problem sketched in the main text aptly illustrates the reason the distinction is so important. If artists have only claims against the original collector, that set of rights is far less powerful than if they have claims on the property itself.

62. See Hansmann & Santilli, *Authors' and Artists'*, *supra* note 40, at 101; see also, e.g., Hansmann & Santilli, *Royalties*, *supra* note 39, at 260 (citations omitted) (noting, as to ongoing rights running with the art past the initial collector, that "[i]n general, all legal systems make it extremely difficult—indeed, for all practical purposes, nearly impossible—to create and enforce such rights unless the law makes explicit provision for them, as it already does nearly everywhere for copyrights and patents").

63. See, e.g., Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885, 887 (2008) ("Anglo-American common law has long been ambivalent about servitudes . . ."); see also Chad J. Pomeroy, *A Theoretical Case for Standardized Vesting Documents*, 38 OHIO

forms, and with significant formal requirements, even on real property. With respect to tangible personal property, there are few recognized forms of encumbrance permitted to “run with property,”⁶⁴ the most prominent being security interests under the Uniform Commercial Code (U.C.C.) Article 9.⁶⁵ Traditionally recognized encumbrances do not include those contained in the Artist’s Contract. In civil jurisdictions, this limitation is traditionally referred to as the doctrine of *numerus clausus*, which teaches that only a recognized number of forms of property interest will be enforced by the courts. The common law’s legal rules generally approximate *numerus clausus* as well.⁶⁶

The *numerus clausus* reluctance to recognize fine-grained, bespoke divisions of property rights makes considerable sense. Several overlapping justifications have been identified.⁶⁷ Encumbrances on property run afoul of the common law’s general preference in favor of

N.U. L. REV. 957, 975-86 (2012) (discussing the details and costs of the *numerus clausus* theory).

64. See Hansmann & Kraakman, *Property, Contract, and Verification*, *supra* note 57, at S379 (discussing the limited ability that owners have to retain rights in their assets and bind subsequent owners).

65. See *infra* Part IV.A.3.

66. This doctrine has received considerable attention in legal scholarship. See, e.g., Hansmann & Santilli, *Authors’ and Artists’*, *supra* note 40, at 100-02 (discussing the law’s rationale in differentiating between encumbrances on real property and on personal property); Hansmann, *Property, Contract, and Verification*, *supra* note 57 (discussing the feasibility of property rights verification rules and alternative property rights regimes); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 4 (2000) (applying the civil law doctrine of *numerus clausus* to analyze common law property rights); Christina Mulligan, *A Numerus Clausus Principle for Intellectual Property*, 80 TENN. L. REV. 235, 240-42 (2013) (discussing the applicability of tangible property law principles to intangible products); Van Houweling, *supra* note 63 (discussing the applicability of tangible property law principles to intangible products). *Numerus clausus* and related doctrines play a role in several ongoing, important debates. Most prominently, in intellectual property and technology law, scholarship has sought to evaluate the practice of sellers imposing “licenses” on buyers, effectively encumbering their property rights (often by adhesion contract), sometimes in service of anticompetitive and other questionable goals. JOSHUA A. T. FAIRFIELD, OWNED: PROPERTY, PRIVACY, AND THE NEW DIGITAL SERFDOM 151-53 (2017); Mulligan, *supra*; Van Houweling, *supra* note 63.

67. See, e.g., Mulligan, *supra* note 66, at 242 (“There are three primary benefits that have been advanced as justifications for the numerus clausus principle: maintaining the alienability of property, minimizing information costs to third parties (as opposed to the transferor and transferee) encountering property, and facilitating verification of ownership rights. In other words, if the numerus clausus principle were eliminated, property rights would be substantially more difficult to discover, comprehend, and convey.” (internal footnotes omitted)); Van Houweling, *supra* note 63, at 887-907, 890 (“[A]rticulat[ing] a new three-part typology of servitude concerns: those related to notice and information costs, those related to dead-hand control and other aspects of the ‘problem of the future,’ and those related to harmful externalities.”).

the free alienability of property.⁶⁸ They add risk and expense to transactions and may force buyers into extensive investigation prior to transacting. If enforced, these divisions of property rights may work inequity on parties who lack notice of them. These dangers are more acute with respect to personal property, as opposed to real property. Because items of personal property are more easily hidden, moved, or manipulated, obtaining notice of restrictions on them is more difficult and unreliable.⁶⁹ The transaction costs of forcing each potential purchaser to discover and take into account such dangers before purchase may overshadow the benefits of honoring such restrictions.⁷⁰

If clear notice of the agreed-upon restrictions is attached to the artwork, these concerns diminish somewhat because information costs are lowered.⁷¹ It is even possible that under governing law, if notice were provided and given the “special” type of purchase a work of art might be thought to represent,⁷² a court might apply principles of equity and find a way to enforce some of the restrictions.⁷³ But that is far from certain. Even with a relatively clear notice affixed to a work, courts

68. The Supreme Court has referred to the centuries-old roots of “the common law’s refusal to permit restraints on the alienation of chattels,” quoting Lord Coke to the effect that such restraints are “against Trade and Traffi[c], and bargaining and contracting betwee[n] man and man.” *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 538 (2013) (quoting EDWARD COKE, *FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND* § 360, at 223 (London, Societe of Stationers 1628)).

69. You might be skeptical if someone offered to sell you the Brooklyn Bridge, and investigating their claim of ownership (which would include the right to sell you the bridge) would be relatively easy. But what if you walk past a street vendor offering to sell you a painting of the Brooklyn Bridge? Investigating the title to the work would be difficult at best.

Notably, and perhaps surprisingly from a policy perspective, courts have enforced some forms of encumbrance including life estates. *See Gruen v. Gruen*, 496 N.E.2d 869, 875 (N.Y. 1986) (upholding *inter vivos* gift of painting from father to son with father retaining life estate, and actual possession, of the painting). But such cases are rare.

70. *See Hansmann & Kraakman, Property, Contract, and Verification*, *supra* note 57; Van Houweling, *supra* note 63, at 924 (articulating some different aspects of these potential costs and benefits).

71. Hansmann and Kraakman, *Property, Contract, and Verification*, *supra* note 57, at S389 (“To add further to the viability of this approach, the artist might (in the case of a painting, for instance) attach a notice to the back of the work stating the terms of the initial contract.”).

72. Particularly if the artist is living. For some factors that do arguably separate art purchases from those of other forms of personal property, see *infra* Part III.A.

73. Hansmann & Kraakman suggest that it is possible that if a court were to find that a burden of having provided sufficient notice were carried, it might honor a novel “right”—in their example, to weekday use of an “heirloom watch.” Hansmann & Kraakman, *Property, Contract, and Verification*, *supra* note 57, at S416; *see also* Van Houweling, *supra* note 63, at 932 (“[I]t is often possible physically to attach some form of written notice to an object of personal property [communicating an encumbrance]. Courts and commentators differ in their assessment of the effectiveness of such labels.”).

would recognize that commerce could be considerably inhibited by the inclusion of unusual encumbrances. For instance, a buyer might struggle to understand the terms and contours of the various divisions of rights, or might reasonably question the authenticity of the notice itself, or might even assume that the notice was merely a grab for legal rights that are in fact not binding. All sorts of scenarios could arise in which the validity and priority of competing claims to property rights would be unclear under governing law.⁷⁴ For these reasons, courts following traditional doctrinal approaches would likely hesitate to enforce the purported encumbrance on the artwork.

This Article explores, below, the ways in which existing law can be used to divide property rights in artworks⁷⁵ and ways in which the law could be changed to implement a system allowing for such divisions to be more easily accomplished.⁷⁶ But the Artist's Contract itself would likely be unenforceable as to "strangers" to the original deal.

2. Copyright

In addition to the problems with contractual privity and the reluctance to recognize encumbrances on personal property, the Artist's Contract likely runs afoul of copyright law. To see why, it is necessary to understand how copyright law affects what is bought and sold in a typical art transaction.

Fine art fits awkwardly within copyright law.⁷⁷ Generally, copyright law protects "original works of authorship fixed in any tangible medium of expression," including "pictorial, graphic, and sculptural works."⁷⁸ But even a unique artwork (e.g., Van Gogh's *The Starry Night*, 1889) is not *itself* considered an "original work[] of authorship."⁷⁹ The painting is considered only a particular instantiation,

74. For instance, does such a claim survive a bankruptcy filing? Can a creditor levy on the property? If so, after the sheriff's sale, does the new owner own the property free and clear of the restriction? The possible issues are manifold.

75. See *infra* Part IV.A.

76. See *infra* Part IV.B.

77. For convenience, this discussion employs a conventional notion of art and artworks. Conceptual art, for instance, which can consist of words or actions performed in some way by the artist, would have to be analyzed differently. "Ownership" of such "immaterial" art is often conveyed merely through a certificate or letter, sometimes signed and numbered by the artist.

78. See 17 U.S.C. § 102(a)(5) (2018).

79. *Id.* § 102(a); see Krista L. Witanowski, *Do Tiger Woods, Dustin Hoffman, and Other Celebrities Own Information About Themselves?*, 20 COMM. LAW. 18, 21 (2002);

a “particular copy,” of the “original work” as conceived by the artist.⁸⁰ Even after selling that “particular copy” (maybe the only one in existence), artists retain the rights to reproduce their “original work,” either in the same media (e.g., on a canvas) or in other media (e.g., on a refrigerator magnet).⁸¹

Collectors of most artworks receive rights similar to those of purchasers of a book from a bookstore. They have no right to copy it further, but pursuant to the first sale doctrine, they may display or resell the object as they wish.⁸² Courts are divided on the degree to which they will honor a collector’s contractual waiver of these rights, but even if a contractual waiver is binding on an initial buyer, it will not bind a downstream buyer due to the first sale doctrine.⁸³ The rationale of this doctrine largely tracks the rationale of the *numerus clausus* reluctance to recognize other attempted encumbrances on property after it has been sold.⁸⁴

Several important provisions of the Artist’s Contract run afoul of the first sale doctrine. Among other things, the first sale doctrine would likely invalidate the artist’s right to obtain the art for exhibition for up to sixty days every five years and the requirement that the collector obtain the artist’s advice and consent before publicly exhibiting the art.⁸⁵ The Artist’s Contract has an enforcement problem as a result of these obstacles in copyright law in addition to the barriers presented by general property and contract law.

Richard Thomson, *Vincent Van Gogh The Starry Night* (2008), https://www.moma.org/moma.org/shared/pdfs/docs/learn/courses/Thomson_Van_Gogh_The_Starry_Night.pdf. The work is in the collection of the Museum of Modern Art in New York City.

80. 17 U.S.C. § 109.

81. See *id.* § 106. They can, of course, license such rights to others specializing in such efforts. The text describes my understanding of current U.S. law. Several provisions were different at the time of the original Artist’s Contract, although not in any ways that affect the analysis herein. See, e.g., Hansmann & Santilli, *Authors’ and Artists’*, *supra* note 40, at 115 (discussing default rules regarding transfer of copyright prior to 1976); van Haften-Schick, *supra* note 13, at 42 n.2 (summarizing law prior to 1976).

82. 17 U.S.C. § 109(a) (sale); *id.* § 109(c) (display); see Frye, *Equitable Resale Royalties*, *supra* note 6, at 246-49 (explaining doctrine and collecting further sources).

83. On the enforceability of waivers of the “first sale” rights, see Guy A. Rub, *Contracting Around Copyright: The Uneasy Case for Unbundling of Rights in Creative Works*, 78 U. CHI. L. REV. 257, 258-59 (2011) [hereinafter Rub, *Contracting Around Copyright*]; Guy A. Rub, *Rebalancing Copyright Exhaustion*, 64 EMORY L.J. 741, 809 (2015).

84. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 538-39 (2013). The Supreme Court has held that a similar rationale holds in the context of patents. See *Impression Prods., Inc. v. Lexmark Int’l Inc.*, 137 S. Ct. 1523, 1529 (2017). I am grateful to David O. Taylor for help on these points.

85. ARTIST’S CONTRACT, *supra* note 4, arts. 7, 8.

C. *The Solution*

The preceding subpart outlined obstacles to the Artist's Contract as an enforceable legal document. It is merely one example of a common problem. One can easily imagine situations where parties aside from artists might run into related problems as they seek to customize their ongoing rights and responsibilities with respect to a given item of property.

This subpart lays out a proposed solution to such problems using a business entity. And just as it is easy to see how many commercial actors could share a version of the Artist's Contract problem, this solution, too, could be generalized to many other scenarios.

Consider the sale of a work of art, such as the painting below by artist Wayne Adams, *Church* (2006), depicted in **Figure 1**. If Adams wanted to sell the painting while retaining protections such as those contained in the Artist's Contract, he could of course have his dealer present the collector with that contract for signature. If the collector wants the art, she will sign the contract. But the enforceability will be uncertain at best, particularly as time passes and the art changes hands.

Figure 1: Wayne Adams' *Church* (2006)⁸⁶



86. Oil on Canvas, 48" x 60". Used by permission of the artist. Photograph by the artist.

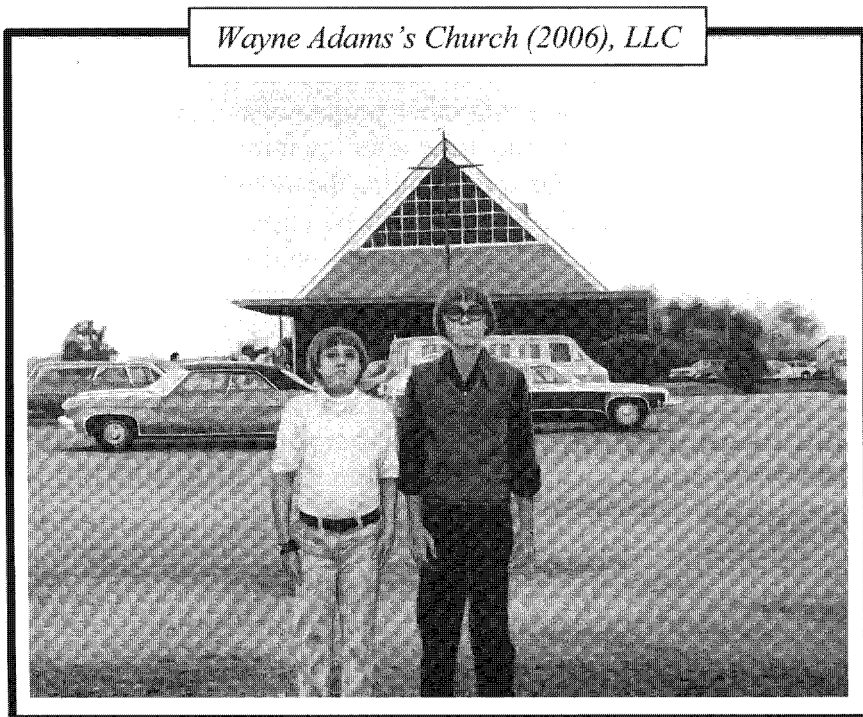
There is an alternative. As **Figure 2** illustrates, Adams might instead place the object into a business entity, such as an LLC—call it *Wayne Adams's Church (2006), LLC*—that will own the art. He would sell the collector an ownership interest in the *entity*, a “membership interest” in LLC parlance. The membership interest would come with specified rights: It would permit the collector to do anything that she can normally do with art, with the exception of whatever restrictions to which she and the artist have agreed. The collector could sell to a new collector at any future point—but again, what would actually be sold would be the membership interest, not the art itself.

Adams himself would retain a membership interest. His interest would reflect whatever he and the collector have agreed for him to retain: if they follow the Artist's Contract's terms, his interest would include the resale royalty right, the right to veto exhibitions, and the right to borrow the artwork for exhibition.⁸⁷ To protect the arrangement, any sale of the actual art would require the consent of both members of the LLC.

The governing documents of the entity—called the “operating agreement” in the LLC context—would spell out all of this. Adams could repeat this process with each work of art that he sells. Ultimately, a form agreement could be produced, as with the original Artist's Contract. Artists and collectors could familiarize themselves with the standard terms and customize the agreement at will.

87. Upon the death of the artist, the operating agreement could follow the lead of the original Artist's Contract and provide that the artist's heirs or successors would receive the membership interest for some amount of time, potentially with some of the rights (e.g., veto rights over exhibiting the art) no longer valid.

Figure 2:



Due to the liberality of modern business law, neither party would have responsibilities or duties to each other, or to the LLC, beyond what the operating agreement specifies. Delaware makes clear its deference to a well-drafted agreement between the parties: “It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.”⁸⁸ Even if fiduciary duties usually would apply between members of an LLC, modern business law permits the parties to disclaim such duties, leaving only the “implied contractual covenant of good faith and fair dealing.”⁸⁹ The burden imposed by this duty is light and would constrain neither artist nor collector from their other artistic activities or business dealings.⁹⁰

88. DEL. CODE ANN. tit. 6, § 18-1101(b) (2019). Many other states’ statutes share this language.

89. *Id.* § 18-1101(c).

90. *See Nemeec v. Shrader*, 991 A.2d 1120, 1128 (Del. 2010) (describing remedies for its breach as “limited and extraordinary”). It amounts to a duty not to “act[] arbitrarily or unreasonably, thereby frustrating the fruits of the bargain” that the parties have struck. *Id.* at 1126. It does not supplement a contract with duties from outside that agreement itself.

The costs of the formation and operation of a Delaware LLC are extremely minimal. Formation costs less than one hundred dollars and annual state taxes are only a couple of hundred dollars, regardless of the size of the LLC's assets; some states are even cheaper.⁹¹ The artist would require legal advice and other professional services, but only minimal advice would be necessary after the initial setup costs. Most of a lawyer's time would be spent drafting the terms of a basic Art LLC operating agreement, which could then be customized easily as the parties desire. The Artist's Contract itself could furnish much of the content of the contract with simple terms added regarding LLC structure and governance. Transaction costs could diminish further with standardization. If the idea were to take off, art industry groups or nonattorney legal service providers (e.g., websites providing sample forms) might enter the field, or Delaware or another state might develop particular templates or protections for Art LLCs, in order to garner a larger share of the Art LLC market.

Delaware's required disclosures are almost comically minimal. Indeed, they are so minimal that in part for this reason, Delaware is sometimes classified as a "tax haven" alongside jurisdictions such as the Cayman Islands.⁹² Information about the transaction itself could be kept almost entirely private. The parties to the contract—i.e., the members of the LLC—appear on no public record, and no annual

91. See *Annual Report and Tax Instructions*, DELAWARE.GOV, <https://corp.delaware.gov/paytaxes/> (last visited Nov. 25, 2019) (annual tax of \$300 and no requirement to file an annual report); DEL. DEP'T OF STATE, DIV. OF CORPS, FEE SCHEDULE (2018), <https://corpfiles.delaware.gov/Augustfee2018.pdf> (stating \$90 initial filing fee for LLC).

As far as other states being cheaper, see, for example, KY. REV. STAT. ANN. § 141.0401(2)(a) (2019), <https://codes.findlaw.com/ky/title-xi-revenue-and-taxation/ky-rev-st-sect-141-0401.html> (stating minimum annual LLC tax of \$175); WYO. SEC'Y OF STATE, BUS. DIV., FEE SCHEDULE (2018), <https://soswy.state.wy.us/Business/docs/BusinessFees.pdf> (quoting initial filing fee of \$100 and annual tax of the greater of \$50 or \$0.0002 per dollar of assets held in Wyoming); KY. SEC'Y OF STATE, FEES (2012), <https://www.sos.ky.gov/bus/business-filings/Pages/Fees.aspx> (stating initial LLC Articles of Organization fee of \$40).

It is possible that federal tax returns would be generated, and there would be additional tax consequences in the (rather unlikely) event the art were to generate income. These are matters that would require some professional advice. But the consequences are likely to be fairly minimal in the usual case.

92. Leslie Wayne, *How Delaware Thrives as a Corporate Tax Haven*, N.Y. TIMES (June 30, 2012), <https://www.nytimes.com/2012/07/01/business/how-delaware-thrives-as-a-corporate-tax-haven.html> ("Delaware is the state that requires the least amount of information, . . . Basically, it requires none. Delaware has the most secret companies in the world and the easiest to form." (quoting a chief executive of a registration agent in Delaware)). I singled out Delaware because it remains the dominant state for business entities to choose as their domicile, but other states—Nevada, Montana, and South Dakota, among plenty of others—are not qualitatively different from Delaware in degree of disclosure required.

reports are required.⁹³ The statute permits information about the LLC's membership to be hidden deep within several nested layers of secrecy. In specific: To form and maintain an LLC, only a "registered agent" of the LLC need be identified. This agent need have nothing to do with the company. There are businesses that serve as registered agents for thousands of LLCs.⁹⁴ In fact, the "registered agent" need not know anything about the company. The agent must only have the contact information of *one* "natural person who is a member, manager, officer, employee or designated agent" of the LLC.⁹⁵ Even that "designated agent" need not have any real information about the LLC, until need arises: Only when a designated agent contacts the LLC and requests such information need the LLC provide the contact information for "a natural person who has access to" the name and contact information of members of the LLC.⁹⁶ In other words, an outside party's demand for such rudimentary information as a list of the LLC members has to proceed to the "registered agent" (the only publicly disclosed name), and then to the "designated agent," and then to a "natural person who has access to" the names and contact information for LLC members.⁹⁷ The statute provides *no* express procedure for obtaining the operating agreement itself and lays out no requirements for who must have access to it. Yet compliance with these extremely minimal disclosure requirements is enough to permit the entity to operate throughout the United States.⁹⁸

93. *Annual Report and Tax Instructions, supra* note 91; Rick Bell, *Delaware LLC Privacy: What's on Public Record?*, DELAWAREINC.COM (July 2, 2019), <https://www.delawareinc.com/blog/what-is-on-public-records-delaware/>. Of course, some legal attention will have to be paid to the structure of the initial sale, which might well require disclosure of aspects of the transaction to taxing authorities. But given that these disclosures, under the proposed Art LLC structure, are unlikely to be any more onerous than under a usual sales contract, I leave these factors aside.

94. *See, e.g.*, C.T. CORP., REGISTERED AGENT SERVICES, <https://ct.wolterskluwer.com/registered-agent-services> (last visited Dec. 5, 2019) ("Trusted by . . . more than 300,000 businesses since 1892."). A registered agent can be procured for as low as \$50. Suzanne Barlyn, *Special Report: How Delaware Kept America Safe for Corporate Secrecy*, REUTERS (Aug. 24, 2016), <https://www.reuters.com/article/us-usa-delaware-bullock-specialreport/special-report-how-delaware-kept-america-safe-for-corporate-secrecy-idUSKCN10Z10H>. Approximately 200 agents apparently serve Delaware's 1.2 million existing entities. *Id.*

95. DEL. CODE ANN. tit. 6, § 18-104(g) (2019) (emphasis added).

96. *Id.*; *id.* tit. 6, § 18-305(h) (emphasis added).

97. *Id.* tit. 6, § 18-104(g). Of course, the member could be another LLC, thus interposing yet more layers of secrecy before the discovery of the natural persons involved in the actual transactions.

98. *See supra* note 12. Delaware law will govern most aspects of the entity's structure and governance. *Id.* This is not to say that states can't impose requirements on companies doing business within their borders. *See, e.g.*, *Lidow v. Superior Court*, 141 Cal. Rptr. 3d 729, 736-

Through this Art LLC, the relationship between Wayne Adams and his collector is virtually indistinguishable from that imagined in the Artist's Contract—but is legally enforceable.⁹⁹ The identified problems with the Artist's Contract disappear. Privity exists because a subsequent collector acquires not the art but the membership interest in the LLC; in purchasing that interest, the collector agrees to be bound by the operating agreement. The *numerus clausus* problem also disappears because no matter how many times *possession* of the art changes, its *ownership* remains with the LLC. Likewise, the first sale doctrine does not apply because the only “sale” would be the initial one from the artist to the business entity.¹⁰⁰ The Art LLC approach imposes little additional burden at the time of sale, or afterwards, thanks to Delaware's low costs, minimal disclosure requirements, and openness to the removal of traditional fiduciary duties.

Thus, the Art LLC appears to be a viable solution to the Artist's Contract problem. Not *the* solution: As discussed below, other solutions could be imagined too, both under existing law and through new legislation.¹⁰¹ And this approach raises some new risks, also explored below. But the Art LLC serves as an apt example of the power and ease of modern business entity law, providing a strikingly simple solution to an otherwise difficult problem.

III. THE LOGIC AND LIMITS OF SCULPTING PROPERTY RIGHTS BY PRIVATE AGREEMENT

A. *The Logic of the Art LLC*

It has long been recognized that business firms can be analyzed as a nexus of a number of interlocking contracts and that many business goals can be accomplished either through contracts (e.g., with a supplier or an independent contractor) or through organization as a firm (e.g., through vertical integration with the supplier or the creation of an

37 (Cal. Ct. App. 2012) (applying California law to alleged dismissal in violation of public policy of the CEO of a Delaware corporation based in California).

99. As noted elsewhere, there are uncertainties raised by this novel approach that I am not intending to deny or minimize (and while this Article provides a rough sketch of a workable scheme, it does not provide the particularized blueprint necessary to implement it).

100. It is possible that for legal reasons, the artist could actually create the art *for* the business entity, for instance as a “work for hire,” and thus the art might not ever be sold to the entity but would belong to the entity from the start. These types of details are beyond the scope of this Article but illustrate that there are ample other ways in which the legal arrangements could be tweaked to address whatever preferences or problems might arise.

101. See *infra* Part IV.A.3.

employment relationship).¹⁰² It is increasingly clear that the corollary is also the case: Many goals traditionally conceived of as “merely” transactional in nature can be accomplished best through the forms of business organization. This fact has gained particular importance because of the liberality of modern business entity law and the capacities of recordkeeping and communication that have made possible the creation, organization, and maintenance of virtually innumerable entities.

The Art LLC exemplifies this trend. The Art LLC is a business entity used to accomplish a particular transaction that might not be possible otherwise. Its operating agreement is a sort of super-contract, able to accomplish what other contracts cannot, while adding no duties and relatively minimal expense.¹⁰³

Business law itself provides few limitations on how entities can be created and used. Traditional limitations on the structures or range of uses of business entities have eroded almost entirely. Parties are able to organize themselves any way they want and for nearly any purpose. Even a single individual can create and act through a “corporate” entity. In an age of very low disclosures, even the requirement that businesses only be organized to engage in “lawful” activity doesn’t seem particularly meaningful; regulators find it hard to determine, for instance, general compliance with tax laws. The frontiers continue to expand. Highly insightful and creative scholars have been addressing how to create “zero member” entities, which are controlled by artificial intelligence.¹⁰⁴

102. See, e.g., Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976) (“[I]t makes little or no sense to try to distinguish those things which are ‘inside’ the firm . . . from those things that are ‘outside’ of it. There is in a very real sense only a multitude of complex relationships (i.e., contracts) between the legal fiction (the firm) and the owners of labor, material and capital inputs and the consumers of output.”); *id.* at 311 (“The private corporation or firm is simply one form of *legal fiction which serves as a nexus for contracting relationships . . .*”).

103. See *supra* Part II.C.

104. See, e.g., Shawn Bayern, *The Implications of Modern Business-Entity Law for the Regulation of Autonomous Systems*, 19 STAN. TECH. L. REV. 93, 96 (2015) (proposing that autonomous systems may be able to operate like legal persons under current laws governing LLCs); Shawn Bayern, *Of Bitcoins, Independently Wealthy Software, and the Zero-Member LLC*, 108 NW. U. L. REV. 1485, 1486 (2014) (discussing the possibilities of software conducting business on its own); Carla L. Reyes, *If Rockefeller Were a Coder*, 87 GEO. WASH. L. REV. 373 (2019) (proposing a resurrection of the business trust model for smart-contract based organizations).

Viewing an art sale as a business entity seems unusual at first—a strange artifice foisted upon what should be a simple transaction. Upon reflection, however, and in light of the expanding conception of business enterprises embedded in modern business law and practice, one's perspective might change. It starts to seem obvious, even inescapable, that the relationship of artwork, artist, and collector forms a sort of ongoing joint enterprise.¹⁰⁵ Artists and their art are never really separate; the success or failure of one affects the other. The “brand” of the artist depends on the artwork in all sorts of ways, both obvious (is it good?) and nonobvious (is it thought to be good by people who are currently influential in the art market?). And of course, the artwork's value depends profoundly on the artist's reputation or “brand.” Because the artist and the collector often share ongoing interests, the ability to make several binding, interrelated agreements concerning such interests might add value. Of course, the artist and collector are not co-venturers in the heightened and duty-freighted sense that Cardozo expressed, but thoroughly arm's-length (not to say sharp-elbowed) participants in commerce.¹⁰⁶ With them, the goal is to establish rights that require minimal trust in the counterparty and that will be binding against third parties, even if that counterparty defects from the duties they have undertaken. Modern business entities suit this task well. Art LLCs might begin to look less like a clever work-around and more like an accurate expression of the ongoing—but still loose—connection of the artist to the work after it leaves the artist's hands. Instead of “why a business entity?” one might come to ask, “why *not* a business entity?”

Traditional moral rights can be seen as a way of recognizing the business-venture-type relationship between artists and collectors.¹⁰⁷ They provide a means for artists to maintain some control over their reputation and to benefit from their work over time. They also ensure that collectors receive something more than the mere physical object in their possession—the right to connect, intangibly, that object with the reputation and career of its creator. Of course, when mandated by law

105. And not just in this context: As familiarity increases, expectations change and the use of cheap, disposable business entities for everyday transactions over a given amount might become a default.

106. See, e.g., *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (“Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. . . . Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.”).

107. Hansmann & Santilli, *Authors' and Artists'*, *supra* note 40, at 142 (“[S]ervitudes [such as those imposed by some moral rights] can potentially serve a useful role in the field of fine arts, particularly in controlling reputational externalities.”).

and un-waivable, moral rights may provide an inefficient amount of ongoing connection. But such rights can be seen as emerging from an accurate impulse to recognize an ongoing connection. The Art LLC arrangement may be an improvement over traditional moral and resale royalty rights if it allows parties greater control over their own relationships, to bargain over what particular rights are valuable to them.¹⁰⁸

More recent ideas for allowing parties to create and maintain such connections without legislative intervention have arisen. In 2018, art market expert Amy Whitaker advanced a proposal that artists keep an “equity interest” in their art (she uses 10% as her example).¹⁰⁹ She proposes these “shares” be alienable by the artist at any point, such that the artist could reap some profits from rising values even aside from times when collectors actually decide to engage in secondary sales of their art.¹¹⁰ Professor Whitaker emphasizes “the ways that shared ownership can create meaningful support and patronage for artists at an early stage of their careers” and calls for more exploration of market mechanisms to spread risk and support artists.¹¹¹ Without taking a view as to her particular proposals, the resurgence of several of the motivating ideas behind the Artist’s Contract in the guise of modern financial thinking suggests that the Art LLC may be an idea whose time has come.

It could be objected that the policies allegedly behind the doctrinal limitation have been lost. This Article presents the argument that the Art LLC would permit the parties to divide property rights in the art, and that the limitations would run with the art. By transforming the Artist’s Contract into an operating agreement, traditional limits on the parties’ ability to divide property rights are lost, with very little

108. A potential objection might be that there is a societal interest in moral rights even beyond those that an artist might choose: Society itself benefits when work is attributed correctly, left undestroyed, etc. But as Professor Adler has pointed out, existing moral rights laws effectively leave individual artists as the only protectors of such rights, so this theory draws little support from experience. *See* Adler, *supra* note 44, at 272.

109. Whitaker, *Artist as Owner*, *supra* note 43, at 55.

110. *See id.* at 55-56. She focuses on more future-looking legal approaches to the problem, such as blockchain-based registers of the proposed art ownership interests; thus, her idea is of limited help in addressing the central issues in this Article. But it is intriguing on its merits, and she fascinatingly articulates the rationales that might motivate such an arrangement. *See id.* at 56, 58-59. Of course, the Art LLC as proposed here would provide a good vehicle for this type of reservation of equity interests, and the operating agreement of an Art LLC could be drafted as to make interests alienable in the way Whitaker proposes.

111. Amy Whitaker, *Ownership for Artists*, in *THE SOCIAL LIFE OF ARTISTIC PROPERTY* 70, 71, 85-86, 88-90 (Pablo Helguera et al. eds., 2014).

additional cost to the parties. Artists could impose all sorts of restrictions that might tie up art markets long after the initial transaction.¹¹² An LLC could give perpetual life to encumbrances, haunting future sales with the threat of a “dead hand” from the past reaching into the present. The concerns that motivated *numerus clausus*-type restrictions in the first place would arise, and art markets could be left to struggle with problems akin to those currently faced in the copyright arena, where “orphaned works” of uncertain copyright status are left underutilized.¹¹³

Even if this is considered a regrettable outcome, there is little likelihood of a remedy emerging from business law. The line-drawing between “real” and “shell” business entities would be difficult and costly, and neither federal nor state lawmakers have shown appetite for it. In a world where ownership of property can be cloaked easily within various webs of business entities, or transferred among them, the Art LLC hardly seems anomalous. The use of affiliated entities as “mere” conduits or repositories for property used mostly or entirely by other entities is common in the world of sophisticated business and finance.¹¹⁴ The Art LLC is merely one apt example of the ongoing democratization of these practices.

Raising the costs of establishing entities might deter these sorts of work-arounds, of course. This doesn’t seem like the right outcome given that the Art LLC seems at least as analytically supportable a use of business entities as many of the uses to which they are put by more sophisticated actors. Perhaps there is a lower limit to how easy it should be to create and maintain LLCs; some transactions really should remain merely one-off transactions and nothing more.¹¹⁵ Still, the Art LLC demonstrates that at least with respect to items intended to endure

112. Professor Adler has written eloquently in opposition to moral rights on the basis that they can give artists too much control over their works after creation. *See, e.g.* Adler, *supra* note 44, at 274 (providing the example of an artist using moral rights arguments to resist the public’s interest in removing a work of art from a public area).

113. *See, e.g.*, Jennifer M. Urban, *How Fair Use Can Help Solve the Orphan Works Problem*, 27 BERKELEY TECH. L.J. 1379, 1380-87 (2012).

114. Anthony J. Casey, *The New Corporate Web: Tailored Entity Partitions and Creditors’ Selective Enforcement*, 124 YALE L.J. 2680, 2704 (2015).

115. The purchase of a donut comes to mind. *Cf. Mitch Hedberg: Comedy Central Special (1999)—Full Transcript*, SCRAP FROM LOFT (July 6, 2017), <https://scrapsfromtheloft.com/2017/07/06/mitch-hedberg-comedy-central-special1999-full-transcript/> (“I bought a donut. And they gave me a receipt for the donut. I don’t need a receipt for a donut. I’ll just give you the money. You give me the donut. End of transaction. We don’t need to bring ink and paper into this.”).

beyond a short horizon, the tools used by sophisticated multinational businesses could be useful for everyday transactions as well.

But merely because business law has not provided—and may not ever provide—meaningful restrictions on the use of business entities for transactional purposes such as those exemplified by the Art LLC arrangement does not mean that parties can simply run amok. Numerous other bodies of law impact the uses of business entities for purposes such as the Art LLC and some are discussed in the following subpart.

B. The Limits of the Art LLC

As this subpart shows, there *are* limits to how entities can be used. It is just that these are largely imposed by other bodies of law. And, going forward, if there are concerns about the effect that the democratization of business entity law might have on commercially unsophisticated parties, then there are remedies within reach: agency, tort, consumer, or other related bodies of law could be tightened to prevent abuse. The limits explored below are presented by way of estimating the current baseline of laws impacting Art LLCs and of encouraging further research into ways such restrictions could be modified as new uses of business entities continue to emerge.

This subpart surveys five major bodies of law that constrain the use and effectiveness of Art LLCs. First, agency law provides guidance on the degree to which the proposed Art LLC can successfully restrict the ability of collectors to sell art that is by all appearances owned by themselves and not by any business entity. Second, U.S. securities laws determine when the sale of membership interests in an Art LLC would be required to meet the higher diligence and registration standards prescribed for securities offerings. Third, laws generally prohibiting fraud and abuse under criminal, commercial, and consumer laws deter certain misuses of the Art LLC. Fourth, if the artist, collector, or the Art LLC itself were to encounter financial distress, bankruptcy law would determine the fate of the different stakeholders in the entity and its assets. Finally, the disclosure rules of existing business law apply to the Art LLC. While, as already noted, they are minimal, they nonetheless might disturb the secrecy norms of the art world and so represent a check on the Art LLC.

Overall, while there is ample room for debate about ideal outcomes, the effects of these various bodies of law already provide a reasonably coherent set of constraints, and more importantly, they are

plausible policy levers for tightening or loosening constraints on business entities that may be used to sculpt property rights by private agreement.

1. Agency Law

The Art LLC limits the ability of the collector to sell the work of art because the collector doesn't own the art outright. The collector owns a membership interest in the LLC, which owns the art. The individual has the right to sell his interest in the Art LLC—but not to sell the art itself. The proposed operating agreement would provide that the art itself cannot be sold without the consent of both members.¹¹⁶ This restriction on the sale of the art is a central benefit of the Art LLC scheme.

But what if the collector tries to circumvent this arrangement and purports to “sell” the art anyway? He could thereby victimize an innocent third party who had no idea that the person she was dealing with—who actually had the art in his possession—didn't have the right to sell the art. The dispute would then be as to whether the LLC still had title to the art or whether title had passed validly to the new collector.

Both this new (purported) collector, and the artist, would have claims against the original collector for breach of contract and, likely, fraud.¹¹⁷ But if, by the time the truth came out, the original collector was judgment proof, or had died, or was beyond the jurisdiction of any reasonably accessible court, then the battle becomes one that pits the artist against the new collector. Either the artist or the new collector would be left injured without much recompense.

The basic legal rule is that someone who lacks title to an item of property cannot pass good title to someone else—even to a purchaser in good faith.¹¹⁸ An exception would be in the case where the original collector is “in the business of selling goods of that kind,” for instance,

116. The parties might agree for the operating agreement to provide that at the artist's death, or some time thereafter, the property will become fully the property of the collector and the LLC will dissolve.

117. Would a fraud claim lie against not just the original collector but also the entity itself? It is conceivable but seems unlikely, because the entity was also harmed by the fraud.

118. *See, e.g.*, U.C.C. § 2-403 (AM. LAW INST. & UNIF. LAW COMM'N 2017) (specifying basic rule that a purchaser can acquire the rights of a transferor and laying out exceptions not relevant here).

a professional art dealer.¹¹⁹ But let us assume the original collector was not a professional art dealer (after all, if they were, that would presumably make this sort of fraud unlikely, due to reputational constraints). The issue boils down to a question of agency law. Can the original collector, as a member of the LLC, validly sell its art, even contrary to its operating agreement?

Members of an LLC routinely act as its agents.¹²⁰ But here, the original collector's authority as agent was limited by the operating agreement, and the purported sale of the art exceeded that authority. So, individual members have no *actual* authority to sell the art.¹²¹ The purported new collector would have to argue that there was *apparent* authority to sell the art or that the LLC is *estopped* from arguing that authority was lacking.¹²² If there was authority, then the sale might be valid despite its having not been authorized in the Art LLC's operating agreement.

As far as apparent authority, the question would turn on whether the Art LLC had made "manifestations" leading the new collector to reasonably believe that the original collector had the authority to sell the art.¹²³ But in our hypothetical, the new collector wasn't aware of the existence of the LLC; and if she had been, she would likely have been on at least inquiry notice concerning whether the collector had the right to dispose of the LLC's (sole!) item of property.¹²⁴ Ultimately, this seems a tough argument to sustain.

119. U.C.C. § 1-201(b)(9) (defining buyer in the ordinary course); *see also id.* §§ 2-403(2), 9-320(a) (protecting buyers in the ordinary course from some security interests).

120. *See generally* BAYERN, CLOSELY HELD ORGANIZATIONS, *supra* note 7, at 244-50 (providing some sources and discussion of the relationship between LLC law and background agency law).

121. *See* RESTATEMENT (THIRD) OF AGENCY § 2.01 (AM. LAW INST. 2006).

122. *Id.* §§ 2.03, 2.05, 2.06. This analysis uses the terminology and approach in the Restatement (Third) of Agency Law. The exact contours of the resolution of the dispute would turn on the governing state law.

123. *Id.* § 3.03.

124. What if the original collector mentioned the LLC but stated that he had authority from the LLC to sell the art? The argument here might be that the LLC "manifested" the authority to sell the painting by giving the original collector possession of the object, to be kept in her home or storage facility. The question here would likely turn on whether the "manifestation" of possession was sufficient to support the apparent authority. The examples of manifestations in the Restatement and in the case law are typically more direct—business cards, email addresses, offices, titles, etc.—even where they are held to be insufficient to support a grant of apparent authority. *See, e.g.,* CSX Transp., Inc. v. Recovery Express, Inc., 415 F. Supp. 2d 6, 11 (D. Mass. 2006) (collecting cases and finding on the facts before it that assigning the purported agent an email address was not sufficient to support apparent agency).

A better argument is that either under principles of estoppel or as an “undisclosed principal,” the Art LLC is liable for the harm suffered by the buyer. This could be either because the Art LLC “intentionally or carelessly caused such belief” or because the buyer was “justifiably induced to make a detrimental change in position” by the collector’s conduct, and that the principal, “having notice . . . that it might induce others to change their positions, did not take reasonable steps to notify them” that possession of the artwork didn’t include the right to sell it.¹²⁵

Note that while technically it is the LLC whose conduct would be questioned, in reality the question is more whether the artist, as the only other member of the LLC, failed to cause the LLC to take steps to protect her interest. If she did, she thereby lost her chance to recover the art, on behalf of the LLC, but in fact for her own benefit, since under our hypothetical the original collector presumably has left the scene and functionally has no more interest in the dispute.

Has the artist (and thereby the LLC) acted “intentionally or carelessly” merely by letting the collector possess the art?¹²⁶ Or did the mere fact of possession (without a hint of a pending sale) amount to “notice” that others might be “induce[d]” to enter into a false transaction? Those seem doubtful. After all, other bodies of law do not hesitate to place burdens on buyers of goods from other private individuals. Persons regularly have objects in their home that they don’t own outright. Art can be borrowed or rented.¹²⁷ Or it can be owned by some sort of business entity (perhaps for purposes of obtaining financing, or some other sort of divided property right, as is the case here). Or it could also be subject to a security interest in favor of a lender.¹²⁸ For instance, with respect to the risk of security interests, the Uniform Commercial Code has no mercy in such matters:

125. RESTATEMENT (THIRD) OF AGENCY §§ 2.05-2.06. The Restatement summarizes the rationale for the estoppel rule as follows: “Estoppel’s perspective is . . . whether it is unjust, in particular circumstances, to permit a principal who has chosen to deal through an agent but to remain undisclosed to have the benefit of restrictions on the agent’s authority.” *Id.* § 2.06, cmt. c. The Restatement also gives the relevant example of a cohabitating couple, one of whom actually owns a property, but the other of whom purports to sell that property to a buyer, without authorization of the owner. The owner is not liable for the mistake unless the owner is aware of the erroneous understanding, in which case the owner is liable unless he fulfilled his duty to correct the buyer’s misunderstanding. *Id.* § 2.06, illus. 5.

126. *Id.* § 2.05.

127. Laura Randall, *Really Like That Painting? Why Not Take It Home!*, N.Y. TIMES (Mar. 30, 2005), <https://www.nytimes.com/2005/03/30/arts/artsspecial/really-like-that-painting-why-not-take-it-home.html>.

128. Nonpurchase money security interests in household goods are prohibited in the United States pursuant to federal regulation. 16 C.F.R. § 444.2 (2015). But the definition of

[C]ollateral may be owned by a person other than the debtor against whom the financing statement was filed. . . . [T]he secured party remains perfected even if it does not correct the public record. For this reason, *any person seeking to determine whether a debtor owns collateral free of security interests must inquire as to the debtor's source of title and, if circumstances seem to require it, search in the name of a former owner.*¹²⁹

Also, contact between artists (or their representatives) and the collectors who purchase their art is not uncommon; collectors can request information about the art's authenticity or provenance from artists or their representatives.¹³⁰ The new collector could protect herself by attempting to reach out to the artist or by taking other steps to research the art's true ownership.¹³¹ In our hypothetical, such contact by the new collector, before or shortly after the time of transaction, would render it less likely that the original collector's scam would work.

For all of these reasons, a would-be collector who does not investigate title already bears risks, originating in other areas of law, even if no Art LLC is involved.¹³² The new collector is likely to lose in the Art LLC context as well. On these simple facts, the doctrine of *caveat emptor* would probably apply.¹³³ Although this outcome could be challenged as a normative matter, it is less perverse than it might seem at first glance. The possibility of the art actually being property of an Art LLC is an additional risk to the collector but adds little burden: It requires investigation along the lines of that required by several other risks. Given the law's acceptance of these risks with respect to other forms of divided property interests, it is hard to see why it should *disfavor* interests held through a business entity such as an Art LLC.

"household goods" expressly excludes "works of art." *Id.* § 444.1(i)(1). Even an artwork in a residence could be subject to either a purchase money or a nonpurchase money security interest.

129. U.C.C. § 9-507 cmt.3 (AM. LAW INST. & UNIF. LAW COMM'N 2017) (emphasis added).

130. Clearly, any artist interested in an Artist's Contract-type of arrangement would welcome such contact, since many terms of the agreement rely on it.

131. Of course, it is possible that the artist could be unreachable or, depending on how the documents are drafted, that the artist could transfer his interest to someone else whom the new collector could not readily identify. A well-drafted operating agreement would need to provide for such contingencies.

132. On the other hand, if the new collector is purchasing from an art dealer, then she would be much more likely to prevail. *See supra* note 117 and accompanying text.

133. *Caveat*, BLACK'S LAW DICTIONARY (10th ed. 2014).

All of this said, the hypothetical facts can be shifted to put the artist's position in more jeopardy. If the artist had any hint or notice of the sale and didn't take immediate steps to put the buyer on notice of the LLC's ownership of the art, a court might be reluctant to side with the artist. If the buyer sought to contact the artist or her representative through reasonable channels but could not do so, that could also speak against the artist's claims. Or if considerable time has passed after the purported sale, it is conceivable that the court would seek equitable grounds (such as laches) for finding that the LLC (through the artist) should be deemed to have forsaken its claim by failing to keep track of its purported property at reasonable intervals.¹³⁴

To guard against these contingencies, the artist could take steps to protect herself. She could respond to inquiries from those investigating her works and correct misimpressions concerning ownership and authority to sell, and she could occasionally touch base with collectors and confirm the location of her works as well. What is more, with little trouble she could provide an online registry of her works, easily found with an Internet search, indicating the contours of the arrangements under which they are actually owned. She could also take the practical step included in the original Artist's Contract: put a notice on the artwork itself where possible (or on a certificate of authenticity or other document where not). These aren't foolproof steps, but they are relatively easy, and they would bolster the artist's claim that reasonable steps were taken to put inquiring parties on notice of the Art LLC arrangement.

Arguments could be made for and against the outcomes I predict above. One could imagine shifting the burden entirely to one side or the other. For instance, to place the burden on the artist, a legal rule could *require* a visible notice either on or near an artwork in order for the claim of an Art LLC to be valid, which would require the artist to monitor the artwork closely.¹³⁵ As I will discuss in the following Part to this Article, one could also imagine legal regimes that would supplant the Art LLC, such as a central art registry where notice of the artist's

134. See, e.g., RESTATEMENT (THIRD) OF AGENCY § 2.05 (AM. LAW INST. 2006) (assuming that this qualifies as an intentional or careless action equivalent to denying the existence of any agency relationship).

135. Although I don't think this extreme a rule particularly advisable, it is not completely infeasible. The development of the "Internet of Things" has made the remote monitoring of physical objects much easier. See generally Christopher G. Bradley, *Disrupting Secured Transactions*, 56 HOUS. L. REV. 965 (2019) (discussing improvements in the ability to inexpensively and remotely monitor items with technology).

claims could be recorded.¹³⁶ Arguably, however, current agency law reaches at least a reasonable balance, honoring the essential form of the Art LLC while leaving room for reallocation of liability where facts support such an outcome. Importantly, too, there are ways in which both participants in any art transaction can protect themselves without incurring any great expense. This body of law, applied to the Art LLC, incentivizes parties to take reasonable steps to protect themselves, although it undermines the market facilitation concerns thought to motivate the standard *numerus clausus* doctrine.

2. Securities

Now I turn to the ways in which, although the basic arrangement as described above would likely survive scrutiny under U.S. securities laws, the laws impose limits on how Art LLCs could be operated. Membership interests in LLCs sometimes constitute “securities,” which are subject to stringent disclosure and sale requirements.¹³⁷ The sale of interests by artists to collectors might constitute an offering of securities with applicable securities law requirements concerning registration and public disclosure.¹³⁸ Compliance with these requirements would add considerable transaction costs and likely cause parties to abandon the deal.¹³⁹ Liability for offerors or sellers of securities who don’t comply is strict. Artists and auction houses likely would not want to become securities dealers. This is a federal law question because securities law preempts state business entity law so that even if Delaware law indicated that LLC interests are not securities, federal securities law would ultimately decide the issue.

Ultimately, federal securities law is unlikely to apply to most uses of the Art LLC structure. But it would constrain schemes to use Art LLCs to draw investors to “art sales” that are in fact structured or marketed as “investment opportunities” requiring little involvement by

136. See *infra* Part IV.B.

137. *United States v. Leonard*, 529 F.3d 83, 89 (2d Cir. 2008) (“[B]ecause of the sheer diversity of LLCs, membership interests therein resist categorical classification.”).

138. See 15 U.S.C. § 77e (2018) (section 5 of the Securities Act of 1933). “Congress’ purpose in enacting the securities laws was to regulate *investments*, in whatever form they are made and by whatever name they are called” and it therefore “enacted a definition of ‘security’ sufficiently broad to encompass virtually any instrument that might be sold as an investment.” *Reves v. Ernst & Young*, 494 U.S. 56, 61 (1990).

139. Sales to so-called “accredited”—i.e., wealthy or financially sophisticated—investors can be immune from some requirements, but the exception would be difficult to meet in the case of a public auction or gallery sale.

the investor and designed to provide returns solely from the efforts of the artist or her agents. This restriction is a sensible one.

The point of securities laws is to protect investors in an enterprise from which they expect to receive a return. “The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others.”¹⁴⁰ The analysis of whether membership interests count as securities has several elements, as laid out in the *Howey* test for an investment contract: “The three-prong test for evaluating whether a particular transaction involves an investment contract for securities is ‘whether the scheme involves an [1] investment of money in a [2] common enterprise with [3] profits to come solely from the efforts of others.’”¹⁴¹

Most relevant for the Art LLC is the third prong, which is only met if “the efforts made by those other than the investor are *the undeniably significant ones*.”¹⁴² In the basic Art LLC structure described above, this element is likely unmet. Undoubtedly, art can increase in value based upon the artist’s future efforts. Future artworks, interviews, exhibits, and other work can boost the artist’s reputation. But it seems unlikely that the artist’s post-sale efforts are “the undeniably significant ones” with respect to the value of art acquired by a collector.¹⁴³ After all, an artwork’s value will be “significant[ly]” determined by various other factors as well: (1) its intrinsic qualities (the skill and creativity it evidences); (2) the vagaries of art market trends (mostly beyond the control of any individual artist); and (3) the collector’s own efforts in preserving, exhibiting, and marketing the object.¹⁴⁴ An artist might die or retire from creation shortly after the sale without breaching any obligation, and without any clear or certain effect on the value of the art. Indeed, at least in legend, the death of an artist can spark eternal fame and higher prices.¹⁴⁵ In light of these

140. *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 852 (1975).

141. *Rocky Aspen Mgmt. 204 LLC v. Hanford Holdings LLC*, 230 F. Supp. 3d 159, 164-65 (S.D.N.Y. 2017) (quoting *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946)).

142. *Crowley v. Montgomery Ward & Co.*, 570 F.2d 875, 877 (10th Cir. 1975) (emphasis added) (quoting *SEC v. Glenn W. Turner Enters., Inc.*, 474 F.2d 476, 482 (9th Cir. 1973)).

143. *Id.*

144. *Cf. Merryman*, *supra* note 45, at 247, 249-50 (discussing factors determining value of art and noting lack of conclusive analysis of their relative importance).

145. A canonical expression of this belief is Mark Twain’s marvelous story, in which the author is told of a successful hoax that boosted the reputation and the earnings of a “dead” artist and his coconspirators. See MARK TWAIN, *Is He Living or Is He Dead?*, reprinted in

factors, it seems unlikely that in the usual instance, an Art LLC membership interest sold to a collector would qualify as an investment in securities under governing law.

The Art LLC might fail the second prong as well, the requirement of a “common enterprise.” For that analysis, most courts look to whether there is either “horizontal commonality,” meaning a pooling of resources among investors with a similarly shared distribution of returns, or “vertical commonality,” meaning a linking of the fates and fortunes of the “investor” (the collector) and the “promoter” (the artist).¹⁴⁶ Either element suffices to meet this prong of the *Howey* test.

If the parties omitted a resale royalty right, it is unlikely that either form of commonality would be present because the interests of the artist and collector are distant and do not involve the sharing of profits from future appreciation in the value of the artwork. Even with a 15% resale royalty on any profitable sales within the term of the contract (twenty-one years after the earlier of the death of the artist or her spouse), the Art LLC might not meet this element given the artist’s lack of risk of loss and the limited financial interest she retains.¹⁴⁷ As mentioned, artworks are commonly held not just for investment but also for consumption value; and artworks that increase in value might often be held by collectors for longer than the term of the resale royalty right under the Artist’s Contract arrangement, for instance for tax reasons, so that the artist (or her heirs) might never see any share of profits even when a valuable and significantly appreciating work is involved.¹⁴⁸ But this would be a question of fact concerning the degree to which the artist’s overall expected value from the sale of the art remains dependent on the future success of the “enterprise.”

An Artist’s Contract-like scheme could, however, become an investment contract relatively easily, even if my analysis is correct that the basic scheme I have presented wouldn’t meet the *Howey* test. For instance, the membership interest might be considered a security if the scheme were marketed, or structured, so as to compel the artist to work

MARK TWAIN: COLLECTED TALES, SKETCHES, SPEECHES, & ESSAYS 1891-1910 (Louis J. Budd ed., 1992).

146. *Rocky Aspen Mgmt.*, 230 F. Supp. 3d at 165.

147. *Cf. In re Gas Reclamation, Inc. Sec. Litig.*, 659 F. Supp. 493, 502 (S.D.N.Y. 1987) (finding vertical commonality and noting that “[a] contract where the promoter’s and buyer’s fortunes are forever linked by profit-sharing, even when losses are not shared, can be an investment contract and hence a security”).

148. Wealthy collectors might not want to sell the art out of concern for capital gains tax, which they could more easily avoid if the art simply passed to their heirs upon their death via the stepped-up basis.

in specific ways to increase the value of the specific work sold; or if the artwork were marketed primarily based on the past “returns” on prior works of the artist; or if the collector were obliged to sell the art in the future at the direction of the artist or her agent; or if the interest that was sold failed to identify a specific, existing work of art, but merely tied future returns to the general, future work of the artist. All of the conceivable modifications would shift, in meaningful ways, the type of transaction toward one that is more purely in the nature of an investment under governing law. Each modification would likely require the seller or promoter of the scheme to comply with federal securities law. Thus, federal securities law provides a limit to the uses to which Art LLCs could be put.

Notably, the test of whether an investment is a “security” is supposed to be one of substance, not form.¹⁴⁹ Accordingly, there is an interesting question lurking here, which is whether even without the separate LLC, the transaction under the *original* Artist’s Contract could count as a securities transaction. After all, the point of the Art LLC is simply to give the parties the same essential rights as they would have under the Artist’s Contract in a more reliably enforceable form. Is an *artwork* sold under the Artist’s Contract a security? The question isn’t frivolous, and the answer isn’t obvious.¹⁵⁰ Art, of course, has a consumption value—value deriving from the pleasure of aesthetic contemplation as well as from its role as a status symbol. The Supreme Court has held that “when a purchaser is motivated by a desire to use or consume the item purchased . . . the securities laws do not apply.”¹⁵¹ For investors as to whom this is the predominant purpose, the issue is likely settled.¹⁵² But many other collectors acquire art for speculative or investment reasons.¹⁵³ For acquisitions of that sort, the *Howey* test

149. See, e.g., *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 848 (1975) (“[F]orm should be disregarded for substance and the emphasis should be on economic reality.” (quoting *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967))).

150. Syndicated interests in horses, for instance, can be securities. See generally Rutheford B. Campbell, Jr., *Stallion Syndicates as Securities*, 70 KY. L.J. 1131 (1982) (discussing the construction and operation of syndicates as strategies to avoid the creation of securities).

151. *Forman*, 421 U.S. at 852-53.

152. See, e.g., *Frederiksen v. Poloway*, 637 F.2d 1147, 1150 (7th Cir. 1981) (“[T]he key to defining the scope of the securities laws is whether the transaction is primarily for commercial (i.e., motivated by a desire to use, consume, occupy or develop), or for investment purposes.”).

153. Notably, in *United Housing Foundation, Inc. v. Forman*, “investors were attracted solely by the prospect of acquiring a place to live, and not by financial returns on their

sketched above might apply. The outcome again would depend on the degree to which the agreement between artist and collector is marketed or structured as one in which the value of the artwork depends on the future efforts of the artist, and the degree to which the artist and investor share a common fate based on the profits or losses associated with the work of art. Under the standard Artist's Contract arrangement, the art sale is unlikely to be a transaction in securities under federal law, but again, meaningful modifications to that basic agreement might well trigger securities law.

3. Fraud, Abuse, and Equity

Laws prohibiting commercial fraud or consumer abuse apply to the Art LLC and constrain the parties involved. To see why this is a risk, recall the context of this discussion. The Artist's Contract is mostly or entirely binding as between the artist and the initial collector. The problems begin to arise when that collector, or a subsequent one, does not abide by these contractual obligations—for instance, by selling the art and then disappearing. The resulting conflict lies between the artist, on the one hand, who believes the contract terms should have applied to the sale and that they bound the new possessor, and the new collector, on the other hand, who naturally thinks differently. The initial collector committed fraud, potentially as to both the artist and the new collector, and is susceptible to civil (and perhaps criminal) liability as a result. But we assume that the fraudster is no longer available to make the injured parties whole.

I have argued that the Art LLC eradicates a number of enforcement problems presented by the original Artist's Contract. That said, the arrangement might look inequitable as to the defrauded new collector who has been taken in by the lies of the fraudster. Such a subsequent collector will not react well when the artist seeks to recover the art, claiming that it remains LLC property. While the discussion of agency law above showed that the LLC might prevail in a dispute, other bodies of law might protect deceived and defrauded collectors.

Limited liability companies are creatures of state law. There can be consequences if the LLC form is being used as a tool of fraud or inequity, contrary to state law. Such an allegation might follow two possible lines of attack: (1) The LLC's operating agreement could be

investments." 421 U.S. at 853 (emphasis added). The Court acknowledged but did not resolve the issue of what would happen in the "more difficult" case of mixed motives. *Id.* at 853 n.17.

deemed void as contrary to public policy, or (2) the aggrieved party could seek to “pierce the corporate veil” and hold the artist liable for the harm done by the other member of the LLC.

As for the first line of attack: Upon motion of the Delaware Attorney General, a Delaware court can cancel the certificate of formation of an LLC “for abuse or misuse” of the LLC’s “powers, privileges[,] or existence.”¹⁵⁴ But the statute doesn’t define what would constitute such abuse and generally provides that “[a] limited liability company may *carry on any lawful business, purpose[,] or activity*, whether or not for profit, with the exception of the business of banking.”¹⁵⁵ Perhaps an argument could be made that the Art LLC isn’t “*carry[ing] on . . . business*” of any sort and thus falls outside of the statute’s protection, because it’s really just a vehicle of ownership, a glorified sales contract, and not any sort of recognizable business. But this runs afoul of existing realities. Many thousands of Delaware LLCs exist, and many do about the same amount of “business” as the Art LLC (or less). There are inactive subsidiaries, passive tools for holding assets, and so on. It seems unlikely that Delaware authorities will undertake the difficult and possibly quixotic task of distinguishing between “real” business entities and “business entities in name only,” particularly if the effort would weed out many thousands of tax-paying entities from the corporate books.

A related argument could be that the Art LLC’s attempt to “end-run” around other bodies of law in order to divide property rights by private agreement amounts to an “abuse or misuse” of statutory rights. This again seems overbroad, potentially sweeping in too many current business entities and practices to succeed as a practical matter. Conceptually, too, this claim cannot succeed absent an appeal to some sort of independent standard of what is “abuse or misuse.” Business entity law clearly permits the use of entities to evade certain bodies of law that, hypothetically, would apply if the firm were organized differently or were a sole proprietorship. Limited liability itself prevents certain tort claims from being brought against owners of a corporation, contrary to what would happen without a corporate entity being in place. Yet taking advantage of the LLC form in order to limit liability is well accepted in practice.

The second line of attack would be through veil piercing. The defrauded collector whose rights are attacked could seek to pierce the

154. DEL. CODE ANN. tit. 6, § 18-112(a) (2019).

155. *Id.* § 18-106(a) (emphasis added).

veil of the LLC. Presumably this would mean asking a court to disregard the LLC form and hold that the operating agreement is, in reality, a contract between only the artist and the original collector, binding only those parties. This would render the agreement inapplicable to the new collector, who now would own the art without restriction.¹⁵⁶

In general, Delaware law permits a court to pierce the veil of a business entity only (1) “where there is fraud,” or (2) “where [the entity] is in fact a mere instrumentality or alter ego of its owner”¹⁵⁷ and “an overall element of injustice or unfairness is present.”¹⁵⁸ The test fits awkwardly with the imagined circumstances here. After all, the LLC is in a sense *also an injured party*. The original collector—one of its two members—sold the LLC’s property without authorization and without complying with the terms of the operating agreement. The artist, the remaining member of the LLC, is merely seeking to recover property that the LLC’s faithless other member converted.

Although the original collector may well have committed fraud vis-à-vis the new collector by misrepresenting himself as the actual owner of the art, it is hard to see how the LLC or artist could be said to have committed this fraud, since they were also injured by it. This assumes a lack of any involvement by the artist, and/or proper authorization under the LLC’s operating agreement, as seems plausible: The very mention of the LLC’s or artist’s ongoing involvement with the art would likely have put the new collector on sufficient notice to investigate, and ultimately scuttle, the fraudulent transaction. If the artist were involved in, or even aware of, the fraudulent transaction ahead of time and failed to prevent it, the answer might be different; neither she nor the LLC would likely be able to evade shared responsibility for the injury. But if the original collector were the only bad actor, his fraud should not be attributed to the LLC.

156. Other versions of this basic line of attack are possible. For instance, the aggrieved later collector could argue that the artist should be liable for any fraud or other tortious behavior engaged in by the original collector. The analysis and the results would likely be similar in any case.

157. *NetJets Aviation, Inc. v. LHC Commc’ns, LLC*, 537 F.3d 168, 176 (2d Cir. 2008) (quoting *Geyer v. Ingersoll Publ’ns Co.*, 621 A.2d 784, 793 (Del. Ch. 1992)). As the court instructs in *NetJets Aviation, Inc. v. LHC Communications*, courts have largely adopted the analysis for piercing the corporate veil in standard corporations to the LLC context. *Id.* For some aspects of LLCs, such as abiding by corporate formalities, the traditional tests do not fit particularly well.

158. *Trevino v. Merscorp, Inc.*, 583 F. Supp. 2d 521, 528 (D. Del. 2008).

The alter-ego theory fits even more poorly. The LLC seems unlikely considered a “mere instrumentality” of its two members. The extensive terms of the operating agreement would outline distinct interests of the two members, which the LLC was established to protect. It was not intended to be a “mere instrumentality” of either of them. Even if it were, is an “overall element of injustice or unfairness . . . present,” such that the extraordinary remedy of veil piercing might be available?¹⁵⁹ It is difficult to pin down exactly where the injustice or unfairness lies because the fraudster has also victimized the artist and LLC itself. Again, factors weighing against the artist’s claim to recover the art and protect her interests might include an artist sitting on her alleged rights for a long period of time, or missing opportunities to correct the new collector’s misunderstanding, and thus passively abetting the fraud. Alternatively, a clear notice attached to the artwork might be a strong factor in the artist’s favor. In the end, absent unusual circumstances, piercing the veil seems unlikely.

Finally, there is the possibility of remedies based on consumer protection laws. Federal and state laws generally prohibit “unfair or deceptive acts or practices in or affecting commerce.”¹⁶⁰ The scope of prohibited conduct under these so-called UDAP laws, and the remedies available, vary greatly. On the whole, the statutes are much less pro-consumer or anti-fraud than they might seem. Many causes of action are available only to public authorities such as the Federal Trade Commission or state attorneys general. Some statutes offer private rights of action but limit claims in various ways, such as permitting plaintiffs only to pursue the initial party with whom they contracted (which might prevent a claim here).

All of that said, an aggrieved new collector might try to make out a claim under these laws, as a victim of an unfair or deceptive practice at the hands of not just the initial collector (which seems obvious) but also the LLC and artist. The best argument is perhaps that given the usual way in which property is transferred and property interests are divided, this unusual use of an LLC operates as a deceptive device deployed against those who later have dealings with the collector. Because the collector possesses the art—the argument runs—anyone dealing with him will assume he owns it, and the Art LLC is a

159. *Id.*

160. 15 U.S.C. § 45(a)(1) (2012); see Prentiss Cox et al., *Strategies of Public UDAP Enforcement*, 55 HARV. J. ON LEGIS. 37, 41-47, 44 n.35 (2018) (quoting 15 U.S.C. § 45(a)(1)) (describing range of laws and scope of enforcement).

conscious and intentional attempt, on the part of the artist, to undermine the laws (of a *numerus clausus*-type) that protect those longstanding and well-grounded expectations.

This argument has some force. But for reasons already surveyed, it might be difficult to support. As mentioned, even under “longstanding” restrictions on the division of property rights, an object in a personal art collection might not be owned outright by that individual. It might be loaned or borrowed. It might be subject to a security interest in favor of a creditor. Or, as in a well-known New York case, art in the possession of a collector already might have been “given” to his son with the reservation of a “life estate” in favor of the father, who wishes to continue to enjoy the painting.¹⁶¹ It seems strained, therefore, to argue that merely permitting the collector to have possession of the work is furthering a deception, without more.

Additionally, rather than intending to deceive a third party, the artist can credibly argue that she has no other readily available legal means of protecting her agreed-upon, retained rights; to ascribe her participation in this arrangement as a deceptive contrivance seems uncharitable given the legitimate, nondeceptive purposes the arrangement serves. Of course, the artist will also point to her lack of participation in the deception (indeed, to her having been harmed in the deception), assuming there are no facts suggesting actual complicity. Again, particular factual circumstances, such as whether notice was attached to the art (even if later removed), and whether the artist pursued her rights promptly, might be relevant to the claim. But without additional damning facts of some sort, the Art LLC as described seems likely to survive such challenges.

Based on the foregoing, it seems unlikely that in the main run of cases, the Art LLC will be thwarted by claims arising in fraud, under alter-ego theories, or through consumer protection laws. Most likely, if the initial collector “sells” the art without authorization, the artist will be able to recover the art from the defrauded, would-be new collector.

It is worth noting that if the art is recovered, the new collector likely *would* be entitled to equitable remedies, such as a claim for unjust enrichment, against the artist. In other words, the result is not likely to be a pure windfall for the artist. Practically, the new collector likely would be entitled to step into the shoes of the original collector, perhaps after paying the artist whatever resale royalties she should have been

161. Gruen v. Gruen, 496 N.E.2d 869, 871 (N.Y. 1986).

paid in the first place. Such an “equitable” outcome might not be welcome to the defrauded collector, who thought she already paid full price and anticipated full ownership of the art, but it would certainly be better than if the collector ended up losing both the putative purchase price and the art.

4. Financial Distress

The idealized Art LLC configuration assumes that the art remains valuable and both parties can abide by their responsibilities under the contract, financially. But that might not always hold true. Other bodies of law would be implicated in sorting out which obligations continue after distress is encountered.

Bankruptcy law is the main consideration. Like securities law, federal bankruptcy law preempts inconsistent state law, including state business entity law. Where bankruptcy law so dictates, the rights and responsibilities of LLC members as expressed in an operating agreement and other documents can be adjusted by the bankruptcy court.¹⁶² The LLC structure likely would provide some additional protection for the parties to the deal as compared with the risks under the original Artist’s Contract, although it also presents some potential complications. This subpart briefly analyzes likely outcomes in bankruptcy under the original Artist’s Contract and under the Art LLC regime.

Under the original Artist’s Contract, the artist would bear significant risks if the collector were to file bankruptcy. If the art remained valuable, the trustee would try to sell the art “free and clear” of the Artist’s Contract restrictions.¹⁶³ Because, as noted, current law does not usually recognize property-type interests in personal property, the artist’s ongoing interest might lead only to a claim for damages, to be paid along with other general unsecured claims.¹⁶⁴ The trustee’s

162. For instance, under some circumstances, federal bankruptcy law may prohibit a provision in an operating agreement, or even in a business entity statute, that purports to dissolve an LLC upon a member’s bankruptcy filing. *See Sheehan v. Warner (In re Warner)*, 480 B.R. 641, 656 (Bankr. N.D. W. Va. 2012) (operating agreement provision); *Duncan v. Dixie Mgmt. & Inv., Ltd. Partners (In re Dixie Mgmt. & Inv., Ltd. Partners)*, 474 B.R. 698, 701 (Bankr. W.D. Ark. 2011) (state statutory provision).

163. *See* 11 U.S.C. § 363(b), (f) (2018).

164. *Id.* § 363(f)(1), (5). If the court believes the artist would likely have the ability to specifically enforce the particular contract terms under state law, then such rights might be considered encumbrances that remain with the property unless, in essence, they are either complied with or paid in full. The exhibition rights and so on might survive; the resale royalty right looks like a fairly straightforward right to payment (or even an unperfected security

effort to sell the property free of restriction might well succeed. In any case, there is a serious risk that upon the bankruptcy of the collector, an artist might lose any further rights to or control of the art, with precious little compensation.

The filing of bankruptcy by the artist would provoke less concern. Again, it would be the bankruptcy trustee's responsibility to monetize the assets of the artist including rights retained under the Artist's Contract. The contract states the artist's rights are not assignable (aside from rights to copy or reproduce the art, to which the artist is already entitled under copyright law). This anti-assignment clause is likely to be honored, at least as to the provisions of the contract that involve the artist's *personal* approval of exhibitions and so on; the collector will thus be protected from a rogue buyer seeking to extort the collector by wielding those contract rights. The anti-assignment clause is less likely to be honored as to resale royalties, which are merely rights to payment. But the right to royalties being sold by the trustee and assigned to a third party matters little; it merely changes the recipient of any royalty check that the collector must write.¹⁶⁵ The artist likely would not be relieved of the obligation to provide authentication of the work, although the outcome would depend on the court's analysis of the situation on state law equitable principles.¹⁶⁶ If the collector makes a claim for damages as a result of the breach of such obligation, the claim would be paid only in "bankruptcy dollars." But aside from this one relatively minor potential harm, the collector's rights are unlikely to be significantly impacted by such a bankruptcy.

The entity approach probably provides better outcomes in the case of financial distress. If the Art LLC is used instead of the original Artist's Contract, the potential effects of bankruptcy, particularly as to the artist, are somewhat mitigated.

interest) and might therefore be more easily extinguishable in bankruptcy. Particularly in light of the Supreme Court's recent decision in *Mission Product Holdings, Inc. v. Tempnology, LLC*, which emphasizes the importance of state law in assessing parties' rights and responsibilities in bankruptcy, the issue will turn on state law. No. 17-1657, slip op. at 1 (May 20, 2019). In a somewhat analogous context of attempted rejection of an executory contract, courts have permitted, for instance, a nondebtor lessor to receive back a liquor license after the debtor lessee's rejection—a decision that seems well supported now by *Tempnology, Id.*; *Abboud v. The Ground Round, Inc. (In re The Ground Round, Inc.)*, 482 F.3d 15 (1st Cir. 2007).

165. See, e.g., 11 U.S.C. § 365(f) (permitting executory contract or unexpired lease assignment).

166. See, e.g., *Top Rank, Inc. v. Ortiz (In re Ortiz)*, 400 B.R. 755, 765-66 (C.D. Cal. 2009) (noting that equitable remedies may survive rejection based on state law).

If either the artist or the collector filed for bankruptcy, the rights of the bankrupt party under the LLC operating agreement would become property of the bankruptcy estate, in the hands of the trustee.¹⁶⁷ The most concerning outcome for either party would be the trustee seeking to sell and assign the rights in the agreement to a third party.

The artist's filing likely would cause little concern along these lines. As mentioned, the anti-assignment clauses giving the artist alone the right to veto exhibitions and so on would likely be honored in bankruptcy, meaning that only the artist could exercise such rights, leaving the collector unmoved. Only the financial rights are likely to be monetized in order to put money into the bankruptcy estate; as mentioned, this is a matter of little concern to the collector—all she might have to do is send the royalty check to a different addressee. Therefore, the collector is unlikely to be particularly prejudiced by this outcome.

If the collector files for bankruptcy, fewer concerns arise under the Art LLC scheme than under the original Artist's Contract. The collector's Art LLC membership interest includes both rights (daily control of the artwork, etc.) and responsibilities (make resale royalty payments, consult the artist about exhibitions, etc.). The bankruptcy trustee cannot monetize the Art LLC membership interest—i.e., sell it—without leaving these existing rights and responsibilities intact. Thus, the LLC is likely to continue to protect the artist in the case of the investor's bankruptcy. If the membership interest is not worth anything given the terms of the agreement and the value of the art, then the trustee will seek to abandon the membership interests ("reject" the contract, in bankruptcy terms). The likely result would be the artist receiving the art back. A reasonable operating agreement provision would be that if the interests have no value or are abandoned in bankruptcy, the artist obtains the artwork in fee simple and dissolves

167. The discussion above assumes the operating agreement would be considered "executory," which seems the most likely outcome under governing law. Whether an LLC operating agreement is an executory contract would have to be determined in particular cases. As Professor Heminway has pointed out, it is not clear that in every case that a contract analysis makes sense in the context of an operating agreement. See Joan MacLeod Heminway, *The Ties That Bind: LLC Operating Agreements as Binding Commitments*, 68 SMU L. REV. 811, 812 (2015) ("If an operating agreement is not a contract, LLC constituents may not be able to successfully make arguments grounded in contract law in seeking judicial interpretation or enforcement of an operating agreement."). Nonetheless, bankruptcy courts typically address operating agreements using an executory contract analysis.

the LLC.¹⁶⁸ If she or her estate does not wish to have the artwork, it could be donated or destroyed.

There is also the possibility, although unlikely, that the LLC itself could file for bankruptcy.¹⁶⁹ This might happen, for instance, if the art has little value and is expensive to maintain. This could present complicated issues, but a well-drafted LLC agreement could probably protect both the artist's and collector's interests in most respects in such a situation. For instance, a well-drafted operating agreement could include an auction mechanism to determine whether the collector should buy out the uneconomical maintenance obligations by a lump-sum payment to the artist or the artist buy out the residual value of the work from the collector.

These are the most important bankruptcy issues that might arise in the course of an Art LLC's life. With respect to each of these issues, the proposed Art LLC provides advantages over the original Artist's Contract in that it more simply preserves the outcomes that would be desired, and expected, by the parties to the transaction, without injuring third parties.

5. Secrecy, Disclosure, and Regulation

The boundaries of current business law also affect the use of Art LLCs with respect to secrecy and disclosure. As with the prior subparts, so here, too, their governing law provides some limits, on the one hand, but also remains subject to controversy, as some argue that it does not provide enough protection against abuse.

The Art LLC's operating agreement likely would entitle the artist to information about the location of the art and the current possessors of it, as did the original Artist's Contract.¹⁷⁰ Even this minimal requirement might represent a significant shifting of norms in the "notoriously opaque" art market and offend art world sensibilities more than an outsider to that world might expect.¹⁷¹ Nevertheless, users of

168. 11 U.S.C. § 554.

169. An operating agreement can set up hurdles against such a filing but cannot outright restrict a filing. Unanimous consent, for instance, although the artist might prefer it, might be too high a requirement.

170. Formally speaking, the agreement would probably provide that all members of the LLC should be kept apprised of the location of the art and should be kept abreast of the membership of the LLC. Thus, if John dies and Nelson inherits his membership interest, the artist would be so informed.

171. Brian L. Frye, *New Art for the People: Art Funds & Financial Technology*, 93 CHI.-KENT L. REV. 113, 113 (2018).

the original Artist's Contract would have faced the same problem, and the parties to the deal could of course make more restrictive agreements, as they wish, concerning information about the persons involved. The more difficult issue is the degree to which access to information about Art LLCs should be publicly available to others outside the deal, and whether business law provides an appropriate balance of disclosure and confidentiality.

The Art LLC would face very low disclosure requirements under current law, as discussed above.¹⁷² Regulators, and the public at large, would have little to no information about the parties transacting in the art owned by the Art LLC, or the agreements they have made, thanks to Delaware's highly secretive disclosure rules (and despite the fact that it is a state-registered and state-regulated business entity). That said, the mere fact of having the art "owned" by an entity subject to public registration and potential regulatory oversight might be resisted by some art collectors; even the limited disclosure of the LLC's name and the possibility of discovery of the LLC's membership—albeit through several layers of secrecy—might be considered too much of a risk for some.

There are several overlapping reasons for the hyper-secretive status quo in the art market, particularly in its upper reaches. One is that art can be a useful asset in money laundering and tax evasion.¹⁷³ Often, art is easy to transport yet difficult for authorities to track. In addition, its value can be manipulated depending on the tax avoidance or other financial "needs" of a collector.

172. See *supra* notes 92-98 and accompanying text.

173. See, e.g., Graham Bowley & William K. Rashbaum, *Has the Art Market Become an Unwitting Partner in Crime?*, N.Y. TIMES (Feb. 19, 2017), <https://www.nytimes.com/2017/02/19/arts/design/has-the-art-market-become-an-unwitting-partner-in-crime.html> ("Artworks are particularly suitable vehicles for money launderers, experts said, because they transfer easily and store quietly, perhaps in a basement or in an offshore tax haven. . . . [And] values in art can be suddenly boosted by intangibles such as fads and personal taste."); *Financial Integrity Institute Co-Hosts "The Art Market and Money Laundering: A Symposium" in NYC*, CASE WESTERN RES. U. SCH. L. (Oct. 28, 2018), <https://case.edu/law/our-school/news/financial-integrity-institute-co-hosts-art-market-and-money-laundering-symposium-nyc> ("Dirty money, disguised as capital gains on the sale of sale of [sic] one or more assets, is laundered by undervaluing art at purchase or overvaluing it at sale, making it difficult for financial institutions or law enforcement to find out. Transferring the value of the criminal proceeds is then implemented by simply transferring ownership of the asset."). As the Artist's Contract's progenitor, Siegelau, commented in an interview: "Buying and selling art has always been and still is a very private business. There is a lot of money in collections and many people invest their money in art, for example, for tax reasons." EICHHORN, *supra* note 13, at 42.

Anonymity also provides security. Expensive artworks are easy to transport, but also to steal and may attract unwanted attention to wealth. While ostentatious consumption of art has, for millennia, been a habit of the well-to-do, the well-to-do often want to be selective about the audiences of their ostentation. This concern is especially prevalent among the extremely wealthy who in recent decades have dominated much of the art market.

Of course, many art collectors are neither wildly wealthy nor possessed of ill intent; they simply want to own art, for enjoyment or speculation or both. But the concerns of the unsavory and the moneyed appear to have led to the development of art market norms that include thorough confidentiality. While the Art LLC preserves a remarkable amount of secrecy, it may not satisfy the desires of art collectors for secrecy.

Collectors might seek to add additional layers of business entities as protection and/or write more protections for their identity into the operating agreement. Perhaps an artist would agree to an operating agreement that would be sufficiently limited in disclosure obligations, or high in confidentiality requirements, so as to please collectors; one could imagine an artist agreeing to a nondisclosure agreement with a significant liquidated damages clause, or to making the nominal “member of the LLC” an attorney or other intermediary to further protect the identity of the actual party in interest.¹⁷⁴ There would remain a risk that the collector’s identity and actions could be tracked and discovered. While business law interposes numerous layers of secrecy, determined regulators have the tools to pierce them. Particularly if illicit activities are under consideration, the use of the Art LLC might bring risks, to the collector-buyer and possibly to the artist-seller. Ironically, it is conceivable that willingness of a collector to agree to use the Art LLC might actually become an indicator that the collector is transacting above-board. From this perspective, regulators such as taxing authorities might benefit from widespread use of Art LLCs as compared with the Artist’s Contract (or most other art transactions).

None of this is to suggest that the Art LLC would provide an ideal degree of secrecy. There are powerful arguments that modern business law makes secrecy too easy to maintain, erecting barriers against even

174. Of course, even if the operating agreement includes strict confidentiality requirements and liquidated damages, etc., for breaches, the enforcement of such clauses can itself cause unpleasant and public disclosures, even if the disagreements are subject to arbitration. Artists also may or may not be judgment proof.

legitimate investigations, for instance, those of taxing authorities. But from a regulatory perspective, routing art transactions through Art LLCs might be an improvement over the status quo and could ultimately be a basis for reining in some of the worst abuses of the art market. For the same reason, practically speaking, the desire for secrecy might be the biggest barrier to using the Art LLC. Thus, regulators might be expected to support the proposed use of business entities such as Art LLCs, and such uses might be worth incentivizing further, if they might serve other social goals such as increasing tax compliance.

* * *

Other bodies of law could of course mitigate the effectiveness and desirability of the proposed Art LLC arrangement, but these issues seem to be ones that would be most pressing and that help to delineate the limits of what the business entity structure can and cannot do.¹⁷⁵ Of course, this is but one case study. Modern business entity law has become increasingly flexible and can be fitted to all sorts of purposes. Different uses of business entities may face different potential impediments, which will have to be addressed creatively—whether by business lawyers seeking to deploy them or by courts and policy makers seeking to assess their normative value and restrain them as needed. But it seems likely that it will be from these different areas of law that regulation of the using of transactional business entities must be drawn, and not from state business law. And as seen in the preceding discussion, these limits are already meaningful and could be further tailored as uses of entities continue to evolve.

The next Part compares the business entity approach to the problem of the Artist's Contract with other approaches, some that could be implemented by parties structuring their relationships differently, some that lawmakers could choose to impose.

IV. ALTERNATIVES TO THE ART LLC

This Part of the Article outlines alternative legal approaches to permit parties to accomplish similar goals to those attained by the Art LLC. First, it lays out alternative approaches to the Art LLC problem under existing law. Some of the benefits of the Art LLC could be

175. There are, of course, other potential limits on the scheme, such as the cross-border enforceability of the arrangement, as well as domestic and cross-border tax issues, that could arise. At a minimum, these challenges seem likely not to be *worsened* by the LLC arrangement as compared with the simple contract, and they are not discussed here as a matter of practicality.

obtained by other legal tools—including trusts, leases, bailments, and security interests—and each offers some advantages and some disadvantages as compared with a business entity approach. Second, it sketches out new legal regimes that lawmakers could put in place to enable artists and collectors to divide property rights as imagined in the Artist’s Contract. Lawmakers could provide for reservation of rights agreements, for instance, by passing laws ordering that reservations of rights clearly noted on works of art would be legally binding, and/or by awarding more expansive moral rights and resale royalty rights to artists, and/or by creating a central registry where potential buyers could investigate claims on particular artworks. Taken together, these alternative regimes help illustrate the virtues and vices of using business entities to sculpt property rights and give an idea of the tradeoffs presented by different legal approaches to facilitating commercial transactions.

A. *Alternatives Under Current Law*

1. Informal Tools

One approach would be to rely less on law and more on social organization.¹⁷⁶ Lawyers tend to overestimate the need for law to handle social problems. Thus, one plausible solution to the Artist’s Contract’s enforceability problem might be to rely on social pressure and collective action. Much as Siegelau and his collaborators sought to spark the development of new social norms, artists today could band together and seek agreement on new norms. They could seek to obtain the agreement of key collectors and dealers that they would not transact in art in violation of existing agreements and would not sell except to parties who agreed to any existing conditions imposed by an Artist’s Contract-like agreement with respect to a given work of art.¹⁷⁷ The success of such a plan would depend largely on whether “cheating” on the agreed-upon norms could be detected and sanctioned, which might depend in turn on the size and cohesiveness of the community.

176. See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 10 (1991) (exploring informally developed conflict resolution methods).

177. Although the emphasis is on the contractual side of the agreement, my suggestion aligns with one of Hansmann and Kraakman’s proposed approaches: “An artist—or a group of artists or an artists’ association—might . . . obtain contractual commitments from galleries and auction houses that deal in their work not to broker resales of the work in which the purchaser does not make the requisite contractual commitment to the artist.” Hansmann & Kraakman, *Property, Contract, and Verification*, *supra* note 57, at S389.

Although it stretches around the globe, much of the power in the art world remains concentrated in a relatively small group of major artists, collectors, tastemakers, and dealers. Therefore, it is conceivable this sort of arrangement could work. On the other hand, given the profound privacy norms that govern most art sales, as well as the shadowy brokerage and storage arrangements that seem to pervade certain corners of the art market, violations might be difficult to detect and/or punish. If the “new norms” were to come to be seen as illegitimate due to a lack of enforceability (even if informal), their effectiveness would decline.

A helpful adjunct to these new norms would be a public art registry, where artworks could be indexed and restrictions recorded. Scholars have suggested, and some companies are pursuing, forms of registration of art works that could provide the basis for such a system, including by use of novel technologies.¹⁷⁸ While proposals for a government-administered system are discussed below, a private system might be more nimble and responsive than a state-run system and might more easily obtain the buy-in of the art market.¹⁷⁹ Such a system doesn’t solve enforceability difficulties on its own, but it would support the new norms by making reliable information about restrictions easy to obtain.

2. Trusts, Statutory Trusts, and Other Business Forms

There are numerous forms of corporate entities that could serve in place of an LLC. Common-law trusts are most obvious. For centuries, and still in many instances today, trusts were and are the primary vehicle for dividing property interests, including the separation of present possessory rights from future or other contingent rights.¹⁸⁰

178. See Hansmann & Santilli, *Authors’ and Artists’*, *supra* note 40, at 120 (noting that the development of an industry-wide system for art, including registration and notice system, could be successful); Whitaker, *Artist as Owner*, *supra* note 43, at 56-59. Professor Whitaker notes that such a registration system, in addition to clarifying property rights, bears other information-related benefits: “Over time, the system protects artists’ exposure to the upside that their own work creates, while also building a catalogue raisonné and an investment portfolio for the artist and collector alike.” Whitaker, *Artist as Owner*, *supra* at 59. Professor Whitaker points among other things to the platform of Xipsy. XIPSY, <http://www.xipsy.com/> (last visited Dec. 5, 2019); Whitaker, *Artist as Owner* *supra* note 43, at 53, 56-68.

179. See *infra* Part IV.B.

180.

The reality is that virtually anyone who wants to create complicated future interests in personal property, including of course stocks, bonds, and shares in mutual funds—the largest source of wealth in today’s society—does so through a trust. The trustee

Particularly in the days before business law as such took its modern turn toward leniency and flexibility, trust law was where “creative” business, commercial, and financing lawyers looked for their tools. The paradigmatic early example of a complex business enterprise, Rockefeller’s Standard Oil, involved the extensive use of trusts (one of the reasons our anti-monopoly laws are referred to as “antitrust” laws).¹⁸¹

The artist and collector could serve as the co-trustees, and the beneficiaries, of the trust, which would own the painting. The trust could be formed by agreement with no need for public filing of any documents, and with no registration expenses or annual fees.¹⁸² The trust instrument could specify the parties’ various rights and responsibilities, along the lines of what has been described for the Art LLC. Such an agreement might well be honored by many state courts.

That said, this type of use of a trust is unusual and might evoke suspicion or hostility from some courts, who might well believe an LLC or other registered corporate entity is more appropriate for this type of arrangement (essentially a type of joint venture of two arm’s-length commercial actors).¹⁸³ There is some increased risk of breach-of-duty disputes with the common-law trust by contrast with LLC statutes that more clearly permit the disavowal of all duties (aside from the minimal implied contractual covenant of good faith and fair dealing). Because of the total secrecy of common-law trusts, courts may be more reluctant to honor the “corporate fiction” with respect to the crucial issue of ownership of the art, if, for instance, as posited above, the collector illicitly were to try to pass title in violation of the

holds title to the personal property in fee simple, and the beneficiaries hold life estates and remainders, or sometimes more unusual interests, described using the building blocks of the common-law estates in land. In effect, the trust combines a highly simplified title in the underlying assets with a significant degree of flexibility in designating the beneficial uses of those assets.

Merrill & Smith, *supra* note 66, at 18 (internal footnote omitted) (collecting sources); John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145, 2146 (2016).

181. See, e.g., Reyes, *supra* note 104, at 373, 375-77 (stating the history and rationale behind the development of the Standard Oil Trust).

182. I leave aside, as I did above, the tax consequences of the initial sale, and any later sale, which might well require disclosure of some aspects of the transaction to taxing authorities. It is of course possible that there would be ongoing tax issues, particularly if the art were to generate income. In the common case where no such income was generated, there would not likely be any federal tax consequences until the time of sale.

183. See, e.g., Robert H. Sitkoff, *Trust as “Uncorporation”*: A Research Agenda, 2005 U. ILL. L. REV. 31, 33 (2005) (“[P]roblems of limited liability and spotty judicial recognition . . . have cast a pall over the use of the common-law business trust.”).

agreement. Finally, if a dispute were to end up in a state court aside from where the trust was settled, a court might not apply the law of the state of settlement as to all matters, so it might be harder to predict outcomes with the common-law trust approach as opposed to the LLC approach, where the “internal affairs” doctrine would provide reliable protection.¹⁸⁴ The upshot is that there would probably be significantly more risk with a common-law trust as compared with an LLC. The secrecy gains might make this approach worth it to some market participants. The loss of reliability seems likely to rule it out for others.

A “statutory” or “business” trust might be a likely alternative candidate. Under some state laws, it could be structured to work very similarly to the LLC discussed above. The (minimal) administrative costs are similar to those of an LLC; most trust laws require (minimal) disclosures similar to those of an LLC.¹⁸⁵ The statutory trust (or statutory business trust) has been described as “the final step in the historical evolution of commercial entities” because it “effectively represents the minimum required of law in creating a strong entity . . . and leaves the rest to be determined by contract.”¹⁸⁶ Statutory trusts are used extensively in some industries; many mutual funds commonly take the form of statutory trusts, as do special purpose vehicles and other entities used in securitization transactions.¹⁸⁷

That said, as compared with the LLC, statutory trusts remain unfamiliar to most practitioners and judges (not to say to academics, even those who specialize in business law or trusts and estates law).¹⁸⁸

184. This risk has diminished somewhat due to the increasing adoption of the Uniform Trust Code (UTC). However, even in UTC states there may be nonuniform application of the law to a rather unusual nature of the proposed use of a trust.

185. See Reyes, *supra* note 104, at 410 nn.216-18 and accompanying text (collecting and describing state laws).

186. Hansmann et al., *Law and the Rise of the Firm*, 119 HARV. L. REV. 1335, 1397 (2006) (footnote omitted). Like the LLC Act, the text of the Statutory Trust Act makes its allegiance clear: “It is the policy of this subchapter to give maximum effect to the principle of freedom of contract and to the enforceability of governing instruments.” DEL. CODE ANN. tit. 12, § 3825(b) (2019).

187. As for common uses of such trusts, see, for example, Thomas E. Rutledge & Ellisa O. Habbart, *The Uniform Statutory Trust Entity Act: A Review*, 65 BUS. LAW. 1055, 1057 (2010) (“[T]he business trust has come to be utilized for asset securitization and the organization of real estate investment trusts.”).

188. Sitkoff, *supra* note 183, at 34 (“[T]he business trust is something of an orphan in the domestic legal academy.”). More than twenty years ago, Professor Langbein also noted that although it is not reflected in the work of legal academics teaching and researching in this area, “most of the wealth that is held in trust in the United States is placed there incident to business deals.” John H. Langbein, *Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 166 (1997) (emphasis omitted).

Only 1762 statutory trusts were formed in Delaware in 2018, as compared with 157,142 LLCs and 44,669 corporations.¹⁸⁹ The more familiar tool of the LLC seems sufficiently fit for the task, and the statutory trust offers few advantages over it.¹⁹⁰ Thus, while a statutory trust is a perfectly plausible tool, the LLC is probably the form most likely to be adopted for this purpose by a critical mass of artists and their legal advisors.

That said, even if the LLC is the most likely business entity, there is ample room for creativity in how it is structured; the Art LLC proposal here is only one possible approach. Consider this: Rather than a new LLC for each artwork, at the beginning of her career, the artist could create *one* LLC to hold all of her art. The single operating agreement for this LLC could specify that, if she chooses, she can add each new creation to the LLC and then sell membership interests to collectors giving them possession (and the other associated rights) with respect to (only) the piece of art they “buy.” Each collector could sell the membership interest with rights in that particular object as they wished (after paying royalties and complying with the other agreed-upon requirements), but no more. This approach, like the primary approach I have outlined, would bear some advantages and some disadvantages.¹⁹¹ In any case, though, it illustrates that there is room for different structures to be tried.

3. Security Interests

The obligations imposed in the Artist’s Contract could be structured as a security interest under Article 9 of the Uniform

189. *Annual Report Statistics*, *supra* note 1. Informal conversations suggest that a major reason for reluctance is lack of experience with the act, among practitioners and courts. Practitioners may have concerns that they will accidentally trip up or that a court will go astray in the absence of case law and bodies of practice experience in the broad business law community. See generally Rutledge & Habbart, *supra* note 187 (discussing the Uniform Statutory Trust Act and identifying some areas of concern and ambiguity).

190. This illustrates a potential snowball effect: As comfort with business entities grows among lawyers and others, use will grow—which may in turn induce more comfort. This cycle may continue until a major “shock” is encountered.

191. This proposal could provide an interesting mechanism for addressing another issue raised by Hansmann and Santilli: They suggest that the artist’s credible commitment not to waive the moral right to integrity in another artwork at a future time might raise prices for the artist’s work. See Hansmann & Santilli, *Authors’ and Artists’*, *supra* note 40, at 128. Such a commitment might rather easily be made in the arrangement imagined in the text above; any collector could assert the “right of integrity” against any other fellow members of the LLC seeking to degrade another work by the artist owned by the LLC. *Id.*

Commercial Code.¹⁹² Under this structure, the artwork would be sold to the collector, but the artist would retain a security interest in it. The rights retained by the artist would be encumbrances that remain in place until the art is sold under the required conditions and then would be reimposed each time as obligations of each new buyer of the art.¹⁹³ Usually, the obligations secured by the security interest would persist on a given piece of collateral (the artwork) as well as the proceeds of its sale,¹⁹⁴ which could help the artist ensure successful collection of resale royalties and obedience to the other requirements of the contract.¹⁹⁵ Security interests are established by simple agreement and perfection of them requires only a filing in the state of the debtor's—here the collector's—residence.¹⁹⁶ A simple and inexpensive filing every five years would maintain the security interest under most circumstances.¹⁹⁷ Many lawyers (and courts) remain familiar with Article 9 and could help keep costs of this arrangement relatively low. Security interests do not usually include such a wide variety of conditions and restrictions without a primary payment obligation, but there does not appear to be any hindrance to this type of condition forming the basis of a security interest under Article 9.¹⁹⁸

Nevertheless, even if Article 9 permits the creation of a security interest to secure any sort of obligation—including nonmonetary ones such as those included in the Artist's Contract—the remedy for default under Article 9 is not entirely obvious. While Article 9 may be permissive in terms of obligations that can be secured, it doesn't have

192. The basics of security interests, and their many analogies to a shared ownership arrangement (analogous to the Art LLC), are discussed by Danielle D'Onfro, *Limited Liability Property*, 39 CARDOZO L. REV. 1365, 1375-91 (2018).

193. See Rub, *Stronger than Kryptonite?*, *supra* note 39, at 74 n.108.

194. U.C.C. §§ 9-315, 9-507 (AM. LAW INST. & UNIF. LAW COMM'N 2017).

195. Of course, under the Artist's Contract, the artist owes obligations too, such as verifying the art upon the request of the collector. These obligations could either be left as merely contractual obligations, or they could be incorporated into the security agreement, such that the violation of those obligations would in turn oblige the artist to release her security interest in the artwork.

196. U.C.C. §§ 9-307(e), 9-310(a).

197. *Id.* § 9-515; *UCC Filing & Expedited Fees*, DELAWARE.GOV, <https://corp.delaware.gov/uccfeesSept09/> (last visited Dec. 5, 2019).

198. See, e.g., John F. Duffy & Richard Hynes, *Statutory Domain and the Commercial Law of Intellectual Property*, 102 VA. L. REV. 1, 60-61 (2016) (citing, *inter alia*, U.C.C. §§ 1-201(b)(35), 9-102(a)(59), 9-204 cmt. 5, all of which indicate performance of obligations aside from mere monetary payment can serve as the bases for security interests) (“Although security interests are usually employed to secure an obligation to repay a debt, they can secure performance of a much broader class of obligations. The text of the UCC makes this abundantly clear.”).

that capacious an idea of remedies. The remedy for default under Article 9 is to foreclose and sell collateral that is encumbered by the security interest to fulfill the obligation. Then, if the sale yields more than is owed, the “creditor” pays the surplus to the “debtor” (Article 9’s terminology for the collector in the art scenario).¹⁹⁹ There is no obvious way to incorporate nonmonetary remedies. One could try to meet this challenge by including liquidated damages clauses for each type of violation, but this is at best an awkward solution, and perhaps an incomplete or unenforceable one.²⁰⁰ Many of the Artist’s Contract obligations seem difficult to put any reasonable price on. State laws vary considerably in the degree to which they enforce liquidated damages clauses.²⁰¹ Perhaps Article 9’s notion of remedies should match the breadth of its notion of obligations that can be secured, but the current law leaves some uncertainty.

Another concern is that security interests might not protect against even simple contrivances intended to undermine the Artist’s Contract obligations. For instance, if the collector were to change states of residence, the artist would have only a limited time to detect that change and file a new financing statement to maintain her secured status with respect to the art.²⁰² If the collector were to transfer the artwork to someone in another state, the artist would have only a year to detect the transfer and file a new financing statement before losing her secured status.²⁰³ These are only the most common worries, but there are other traps for the unwary that might cause artists to lose out under the rules of Article 9.²⁰⁴ Article 9, in fact, requires considerable effort at monitoring for security interests to remain, so to speak, secure. As mentioned above, however, the fact is that any approach to the Artist’s Contract remains imperfect without significant effort at

199. See generally U.C.C. §§ 9-601, 9-608, 9-609, 9-610, 9-615, 9-616 (referring to multiple situations in which a creditor has rights over a debtor).

200. This is how Duffy and Hynes suggest solving the analogous problem with respect to their suggested use of Article 9 to secure intellectual property-related nonmonetary obligations. Duffy & Hynes, *supra* note 198, at 61 n.244.

201. RESTATEMENT (SECOND) OF CONTRACTS § 356 (AM. LAW INST. 1981) (noting that liquidated damages must be fixed in an “amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss”).

202. See U.C.C. § 9-316.

203. See *id.* § 9-316(a)(3).

204. For instance, certain forms of exchange can cause a security interest to be stripped from collateral. See, e.g., *id.* § 9-315(d)(3) (“A perfected security interest in proceeds becomes unperfected on the 21st day after the security interest attaches to the proceeds unless . . . the security interest in the proceeds is perfected . . . when the security interest attaches to the proceeds or within 20 days thereafter.”).

monitoring, so Article 9 might not be much worse than the Art LLC, practically speaking.

Despite the need for vigilance, and despite the somewhat unusual fit of the Artist's Contract obligations to the remedies provided in Article 9, it remains a realistic alternative for maintaining the artist's interests in the piece after the initial sale.

4. Bailments and Leases

A bailment is when an item of property is entrusted to another with ownership remaining with the bailor even though the bailee has most of the traditional indicia of ownership, most notably possession.²⁰⁵ The contract between bailor (artist) and bailee (collector) could specify the terms of the bailment, which could largely follow the terms of the Artist's Contract. Treating an art sale as a bailment would allow the artist to retain the ultimate right to possession of the art should the parties' agreement not be honored. Thus, as with the Art LLC, the artist would argue that an attempted transfer by the bailee to a new party would be invalid because the bailee couldn't pass on any better title than he had in the first place.

The troubling aspect of this approach, however, is that bailments are judged not on form, but on substance.²⁰⁶ Courts look to whether the actual transaction most resembles a bailment, a sale, or a consignment.²⁰⁷ Such determinations are often difficult to make and subject the parties involved to considerable risk.²⁰⁸ The Artist's Contract arguably describes a situation more like a sale than a bailment; aside from temporary display rights, there isn't any contemplation of the art being returned ultimately to the artist.

205. "[A] bailment is an agreement, either express or implied, that one person will entrust personal property to another for a specific purpose and that when the purpose is accomplished the bailee will return the property to the bailor." *Milbank Ins. Co. v. Ind. Ins. Co.*, 56 N.E.3d 1222, 1231 (Ind. Ct. App. 2016) (quoting *Pitman v. Pitman*, 717 N.E.2d 627, 631 (Ind. Ct. App. 1999)). Bailments are governed by U.C.C. § 2-403(3).

206. *Teneha Oil Co. v. Blount*, 368 S.W.2d 655, 657 (Tex. Civ. App. 1963) (quoting *In re Wells*, 140 F. 752, 752 (M.D. Pa. 1905)) ("The question is what was the inherent character of the transaction, which depends upon the purpose of it.").

207. If the goods are deemed to have been entrusted "for sale," U.C.C. § 9-102(a)(20), the bailment could be treated as a "consignment," which would then be governed by U.C.C. sections 9-317(a), 9-324.

208. See, e.g., *In re Sitkin Smelting & Refining, Inc.*, 639 F.2d 1213, 1214, 1218 (5th Cir. 1981) (finding, over a dissent, that the bankruptcy judge's initial decision should be reversed on the issue of whether an entrustment of film for processing was a bailment).

The contract could be modified to make it more like a bailment, in effect allowing the collector to have the art in the form of a long-term loan. But this would change the economics of the transaction considerably because the collector would presumably be missing much more of the potential investment value of the art. The artist would have to be prepared for the potential return of large numbers of works as they reached the end of their rental periods, thus shifting much more of the risk of the market back onto artists. Aside from certain narrow situations, the bailment would probably be an inadequate approach to the problem.

Structuring the transaction as a lease bears similar risks.²⁰⁹ The theory of a lease would be that, as with a bailment, title to the art remains with the artist and not the collector, and thus the collector could not dispose of the art. But courts commonly reframe transactions described by the parties as “leases” as actual sales, or sales with a reservation of a security interest.²¹⁰ These characterizations might well be applied to a transaction between artist and collector. The determination is based upon factors such as whether the length of the “lease” is likely to consume all of the meaningful economic life of the object and whether the lessee has an option to return the item without paying further fees (or with a partial refund if the lease was prepaid).²¹¹ As with bailments, then, the lease would likely only be respected by courts if the artist was willing to shoulder much more of the risk of the transaction than contemplated in the Artist’s Contract, effectively renting instead of selling the art, and if the collector was willing to forego much or all of the investment value of the art. Some artists and some collectors may be willing to do so, but it would be a meaningful shift.

* * *

The above discussion canvases some of the ways in which an Artist’s-Contract-like arrangement might be contrived under existing law without using an Art LLC. In addition to current legal options, there

209. Hansmann and Santilli have pointed out that some aspects of an Artist’s Contract-type relationship could be created by lease, although, as they note, there are potential practical and legal impediments to this arrangement. *See* Hansmann & Santilli, *Authors’ and Artists’*, *supra* note 40, at 120-21.

210. *See* U.C.C. § 1-203(a) (“Whether a transaction in the form of a lease creates a lease or security interest is determined by the facts of each case.”). In the latter case, as described in the preceding subpart, the artist’s rights could be protected, but only if the arrangement complies with the requirements of Article 9.

211. *See id.* § 1-203(b).

are also approaches to the problem that could be enacted by policymakers. Those alternatives are the focus of the next subpart.

B. *Potential Legal Reforms*

Policymakers who wish to provide options for artists and collectors could enact laws to do so. Several potential statutory approaches illustrate the range of options for lawmakers. From a normative perspective, these approaches provide a palette of options from which policy makers could choose if they wish to provide, or require, the use of tools other than business entity law by artists and collectors seeking to customize their rights.

One approach would be to introduce stronger *droit moral* and *droit de suite*; in other words, to put the rights contained in the Artist's Contract into law, on a mandatory basis, on a default basis, or on an "opt-in" basis.²¹² Laws protecting moral rights and resale royalty rights typically specify the contents of the rights themselves. They also provide for the degree to which the rights are mandatory or not; on one extreme, rights can be inalienable and non-waivable, or, on the other, be mere default rules, waivable or alienable at will. Where mandatory and non-waivable by artists—as is the case in many countries—such regimes have been subject to significant critique.²¹³ Granting the rights but allowing artists to control them seems like a better possibility; a purely opt-in regime would be the one that would most resemble the Artist's Contract itself.²¹⁴ Even so, policymakers would need to consider how easy or difficult to make the decision to waive rights. There would likely be a loss of autonomy for the parties even in this arrangement, since the rights themselves would come from a limited "menu" of moral rights or resale royalty rights. In addition, there are costs associated with the parties to transactions having to learn a particular body of law, which may in some cases be more costly than merely informing themselves about the details of an agreement they draft or negotiate among themselves.

Lawmakers would need also to consider whether to establish particular procedures by which the rights could be claimed or

212. See *supra* note 38 and accompanying text.

213. See *supra* notes 38-43 and accompanying text (on these rights).

214. Not that this approach is free from critique focusing on the overall market effects of such restrictions, even when engaged in voluntarily. See, e.g., Merryman, *supra* note 45, at 262 (discussing the practical difficulties of a waivable form of *droite de suite*). I don't find these critiques particularly convincing but leave this argument for another day.

transferred. These procedures are largely implemented for the protection of third parties. For instance, some jurisdictions have established public administrative structures to register the covered works and artists or to track sales and direct royalty payments. There is a trade-off between the benefits associated with such procedures and structures, such as enforceability, convenience, and provision of notice, and their costs, including not only the direct costs of salaries and infrastructure but also the ossification and lack of responsiveness or effectiveness that can come to characterize established bureaucracies over time. Though its costs shouldn't be underestimated, an administrative structure could be effective in providing a relatively "off the rack" way for rights to be claimed and maintained, protecting party autonomy as well as third parties.

A second approach would be for lawmakers to provide (or courts to hold) that agreements concerning divisions of property rights in art will be honored. The law might also provide that subsequent collectors must receive notice of the restrictions in order to be bound by them. Under this approach, an agreed-upon encumbrance would run with the work and bind future collectors so long as the subsequent collectors received notice of the restrictions. Courts or legislature would have to develop a workable definition of "adequate notice."²¹⁵ Adequate notice could potentially include constructive or inquiry notice. This approach would require no dedicated infrastructure but might introduce *ex post* expenses in the form of litigation contesting "adequacy." Adoption of this approach might have been an implicit goal of the original Artist's Contract; if artists had adopted it *en masse* as Seth Siegelau hoped, perhaps courts would have begun to find an opening for this type of approach.

Conceivably, this second approach joins a registration system akin to the U.C.C. The idea would be to institute a central registration system, like the U.C.C. Article 9 system (and many others²¹⁶), for artists to provide notice of any restrictions they claim with respect to a given work of art and for future collectors to know where to look for reliable information concerning such restrictions. Artworks could be indexed by the name of the artist and title or description. Even if the details of the restrictions were not publicly disclosed, the system could put any

215. Rub, *Stronger than Kryptonite?*, *supra* note 39, at 74-78, 132.

216. The most colorful example of a registry is clown egg registry in Wokey Hole, England, which provides "a means of protecting clowns' property in their personae." David Fagundes & Aaron Perzanowski, *Clown Eggs*, 94 NOTRE DAME L. REV. 1313, 1313 (2019).

buyers on inquiry notice prior to transacting in the artwork. This approach would require new infrastructure investments in the form of a filing system and the development of law concerning the adequacy of notice. This is not impossible; there are similar recording systems for real property, airplane parts, and some forms of intellectual property, so there are models on which to base a system.²¹⁷ The efficiency of these existing systems has often been called into question, but it is also possible that technology could help ease the introduction of a new system.²¹⁸

As these examples show, similar substantive results can be attained through an array of tools including business entities. All approaches involve trade-offs. These alternative approaches provide essentially the same benefits as the Art LLC approach, but do not require a detour through business entity law. They might provide more uniform access to desired solutions at a lower cost to the individuals involved in the transactions, although at a higher cost to the parties in the form of loss of autonomy and to society in the form of bureaucratic and legal infrastructure. The availability of these various tools calls for policy analysis regarding which tools should be preferred and which resisted.

An underlying question is whether the detour through business entity law serves some sort of valuable purpose in itself. Perhaps, for instance, there is a benefit in some of the process required by business entity law. Perhaps these forms are actually useful for a wider range of joint endeavors than was traditionally recognized. But in current commercial and business scholarship, there remains a disconnect between what is still considered the heartland of business entity law and the uses of that law to accomplish purposes rather far afield. We can't expect a conceptually pure understanding of when a relationship or transaction is or isn't "inherently" one that merits creation of a separate entity, but we can and should explore when parties should be given (or forced into) various policy avenues, including the use of trusts or business associations.

The main advantage of business entity law appears to be its flexibility—the freedom and creativity that it grants to parties to a

217. See, e.g., Van Houweling, *supra* note 63, at 907 ("There is no comprehensive recording system for personal property, a shortcoming that may help to explain the uncertain status of personal property servitudes.").

218. See, e.g., Whitaker, *Artist as Owner*, *supra* note 43, at 55-57 (discussing how the blockchain system may streamline standalone marketplaces by making banking or financial institutions unnecessary).

transaction or relationship. On the other hand, in some cases there are reasons to prefer dedicated statutory options such as those discussed above, to both lower transaction costs and provide wider access without requiring detours through business entity laws. Weighing the advantages and disadvantages of these different approaches in various legal contexts is a task that remains largely undone—but of utmost importance.

V. CONCLUSION

This Article has argued that what the Artist's Contract on its own couldn't accomplish, an Art LLC can. The parties to a transaction can divide property rights in the artwork in a dependable and enduring fashion by means of modern business law. Without minimizing the administrative and financial costs of the arrangement, there is a strong argument to be made that this solution to the problems of the original Artist's Contract is feasible under current law. What is more, I suggest that it may be defensible as a normative matter. First, allowing artists to customize and select their desired slate of "artist's rights" through privately organized entities might make more sense than imposing rights by legislative fiat or administering them through central bureaucracy. Second, as thinkers before and after the Artist's Contract have pointed out, the sale of the art of a living artist is rarely a true "one-off" transaction. What is bought remains connected to the seller; the future activities of both buyer and seller affect the value of the art that is sold as well as of the other works created by the artist. While the relationship between buyer and seller looks nothing like a traditional corporation or a common-law partnership, modern business law gives the parties a way of expressing their ongoing relationship to a particular piece of property—their mutual expectations, their agreed-upon rights and responsibilities—by embodying the agreement in a business entity. While the Art LLC little resembles a traditional business enterprise, its use makes considerable sense. Likely, similar justifications could be offered for many other "creative" uses of business forms. Regulating novel uses away simply because of their unfamiliarity would be a mistake.

That said, business-driven creativity can and should have its limits. Shrouding an asset or transaction in an entity should not (and does not currently) remove it from the field of regulation. As this Article has shown, there are, and should be, limits to how business entities can be used; numerous bodies of law impact and circumscribe

the powers and uses of Art LLCs and similar “transactional entities.” But they do not adequately address the policy trade-offs raised by the increasingly pervasive use of business entities as commercial and transactional tools. Lawmakers should not hesitate to take on the important task of weighing the normative goals driving other areas of law and regulation against the interests of parties deploying business entities in their commercial relationships.

Thus, this Article is not the end of a conversation. The Art LLC is one discrete use of business entities for everyday commerce, but it is not the only one. Sculpting property rights by private agreement is one task that can be accomplished by the use of skillfully constructed business entities, but it is not the only one. As the ever-expanding uses of “corporate webs” in sophisticated business and financial contexts show, there is ample room for creativity, and boundary-pushing, among participants in business activities and the lawyers who facilitate their activities. Among lawmakers and legal scholars, these boundary-pushing efforts should be scrutinized energetically, both for what they add to our understanding of effective commercial practices and for the new or renewed regulatory limits they should evoke.