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Art in the Age of Contractual Negotiation

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Art in the Age of Contractual Negotiation

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ART IN THE AGE OF CONTRACTUAL NEGOTIATION

Christopher G. Bradley^I & Brian L. Frye^{II}

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*Being good in business is the most fascinating kind of art.*³

INTRODUCTION

Artists have always loved to hate the art market. It degrades the ineffable “aura” of their work by relinquishing it to commerce. Still they hunger for its approval. The art market reifies art by reducing it to a price, but also promises artists untold fame, fortune, and freedom. While it cannot give artists what they want, it can give them what they need, if they are lucky enough to catch its fancy. The alternative is irrelevance. So artists accept the art market out of necessity. The only question is how they engage with it.

In theory, the art market is just where artists go to sell their work—to *alienate* it by transferring ownership to a collector. But the alienation of a work of art is not as simple as the sale of typical goods or services. Artwork is not just a commodity and is never fully alienated. When artists sell their work, they retain a connection to it. The artist’s name and reputation will always be attached to the work, and just as the work may help build the artist’s name and reputation if acquired by a well-known collector or a fancy museum or lauded by an influential critic, so the artist’s later activities may affect the value of their work after the fact.

As a consequence, artists have always claimed certain “moral rights” in their works, with varying degrees of success. Usually, property owners can use their property in any way they like. If you own a t-shirt and get tired of it, you can use it as a rag or throw it away. Or if you own a pair of jeans, you can cut off the legs and make shorts. But moral rights may prevent the owner of an artwork from changing or destroying it. For example, the moral right of integrity may prevent the owner of an artwork from damaging it. Notably, these moral rights may apply long after an artwork is purchased, and even if the buyer didn’t agree to them. Different countries recognize different moral rights, and the United States recognizes only limited moral rights, but the very existence of moral rights suggests that artwork is “special” in some way, normatively distinct from other forms of property.

Unsurprisingly, artists like moral rights, and want more. Among other things, they want money. Specifically, they want a bigger cut of the art market. Initially, artists just wanted their patrons to pay more for art. But when a sophisticated secondary art market first emerged in the late 19th century, and when it exploded in the mid-to-late-20th century, artists began to demand a percentage of the resale price of their works. As the resale prices of the most desirable works skyrocketed, in part due to the “appreciation” in the name and reputation of their creators, the artists clamored ever more vigorously for a share of the secondary market for their works.

In response, many countries created resale royalty rights, which enable artists to claim a percentage of the resale price of their artwork. The United States has not. While Congress has considered many bills proposing the creation of a federal resale royalty right, it has rejected all of them. And while California created a state resale

³ ANDY WARHOL, THE PHILOSOPHY OF ANDY WARHOL (FROM A TO B AND BACK AGAIN) 92 (1975).

royalty right in 1976, the Ninth Circuit recently held that it is preempted by the Copyright Act.⁴

The normative case for statutory resale royalty rights is weak.⁵ But mandatory legislation may not be the only way for artists to claim resale royalties and other “moral rights” of various sorts. Perhaps they could negotiate the rights and royalties via contract. Artists typically sell their works to collectors on the primary market. While artists usually sell their works outright, in theory, nothing prevents them from retaining a residual interest in their works. Indeed, some artists have sold works pursuant to contracts that entitle them to “moral rights” and to a percentage of the resale price of the works and that require future buyers to agree to the same terms. This Article focuses on the best-known example, the “Artist’s Contract” developed by Seth Siegelau and Robert Projansky in 1971.⁶ This contract was promulgated as a tool for artists to use in selling their works, retaining numerous rights in their art, including resale royalty rights and numerous expansive moral rights, extending beyond the artist’s lifetime.

Legal doctrines currently stand in the way of contracts such as the Artist’s Contract. While such contracts may be enforceable against the original buyer, who is a party to the contract, they are not enforceable against subsequent buyers, who are not. The artist may be able to recover damages from the original buyer but cannot compel subsequent buyers to agree to pay royalties and respect rights. Similarly, property law generally prohibits servitudes on personal property, and contractual resale royalties and additional “moral rights” amount to servitudes on artwork. Typically, servitudes on personal property are inefficient, because the transaction costs exceed the benefits. But sometimes they could make sense. In theory, resale royalties are just futures contracts that artists can use to hedge against success, and the market price of a work will be discounted to reflect the current value of the resale royalty. There is a good argument that the law should honor such contracts. Artists and collectors have different risk preferences, so perhaps they should be able to contract for whatever terms they like.⁷

⁴ CAL. CIV. CODE § 986 (West 1976), *invalidated by* *Close v. Sotheby’s, Inc.*, 894 F.3d 1061, 1076 (9th Cir. 2018).

⁵ See generally Brian L. Frye, *Equitable Resale Royalties*, 24 J. INTELL. PROP. L. 237 (2017) (discussing the justifications for a statutory resale right).

⁶ SETH SIEGELAUB & ROBERT PROJANSKY, *THE ARTIST’S RESERVED RIGHTS TRANSFER AND SALE AGREEMENT 1* (1971) [hereinafter *ARTIST’S CONTRACT*], <http://primaryinformation.org/files/english.pdf> [<https://perma.cc/KD7Y-5EE4>].

⁷ There are a number of trenchant legal and economic analyses of moral rights, resale royalties, and related issues. See, e.g., Guy A. Rub, *The Unconvincing Case for Resale Royalties*, 124 YALE L.J. FORUM 1, (2014); Henry Hansmann & Marina Santilli, *Royalties for Artists versus Royalties for Authors and Composers*, 25 J. CULTURAL ECON. 259 (2001); Henry Hansmann & Marina Santilli, *Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis*, 95 J. LEGAL STUD. 95, 95–96 (1997). As one of us has shown, the enforceability “problem” of the artist’s contract can actually be “solved” through modern business entity law, although administrative and legal obstacles may remain. See Christopher G. Bradley, *Art LLCs: Sculpting Property Rights Through Private Agreement*, TULANE L. REV. (forthcoming 2019), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3337211 [<https://perma.cc/KYD7-4FLJ>].

But enforceability was never central to the Artist's Contract. Indeed, actually using the Artist's Contract was almost beside the point. After all, as Stewart Macaulay famously observed, even when breached, contracts are rarely enforced in court.⁸ While contractual agreements often reflect a mutual understanding, even sophisticated parties rarely haggle over every term, or litigate when their expectations are frustrated.⁹ Business dealings in practice tend to be more relational, informal, and ad hoc than traditional legal doctrine suggests.

The primary purpose of the Artist's Contract was to use legal rhetoric to make an ideological point and to promote particular forms of social change. By "legalizing" the relationship between an artist and a collector, the Artist's Contract expressed the expectations of the artists who insisted on it; it obtained the collector's statement of assent to the artist's preferred re-framing of the post-sale relationship of artist, collector, and artwork; and it bolstered artists' status and solidarity as a class of market actors. As one leading scholar of the contract and its milieu puts it, the Artist's Contract deploys a "rhetoric of collectivity [that] can be viewed as a radical appropriation of private law in an effort to establish more equitable art industry norms."¹⁰

We note that that this phenomenon is far from unusual. Socio-legal scholars have long noted that legal language and legal tools are often deployed in service of goals other than establishing or enforcing existing legal rights. The law can be seen as a tool, and a reflection, of a particular form of "legal consciousness."¹¹ As scholars of legal consciousness have shown, sometimes the tools of law are deployed to demonstrate the injustice of the law, or of a particular social context; to signal seriousness, a shift from a personal or informal, negotiable relationship to one mediated by more objective, predetermined rules; or to catalyze political change by inspiring a particular community to claim hitherto-unrecognized rights or status. The Artist's Contract serves as an apt illustration of the use of legal terms and tools (viz.,

⁸ See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 60–62 (1963).

⁹ See *id.* at 61.

¹⁰ Lauren van Haaften-Schick, *Conceptualizing Artists' Rights: Circulations of the Siegelau-Projansky Agreement through Art and Law*, OXFORD HANDBOOKS ONLINE 1 (2018) (citing *NAWC to Issue New Contract*, ART WORKERS NEWSLETTER (Nat'l Art Workers Cmty., New York, N.Y.), May 1971), <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935352.001.0001/oxfordhb-9780199935352-e-27?print=pdf> [<https://perma.cc/AT62-3ECX>].

¹¹ See generally PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* 3–54 (1998) (providing an influential framework of analysis of "legal consciousness"); SALLY MERRY, *GETTING JUSTICE OR GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* 37–63 (1990) (discussing legal consciousness); David Nelken, *Using the Concept of Legal Culture*, 29 AUSTRAL. J. LEGAL PHILOSOPHY 1 (2004); Susan Silbey, *After Legal Consciousness*, 1 ANN. REV. L. & SOCIAL SCI. 323 (2005) (providing historically contextualized, critical survey of the field). Stated most generally, "[t]he study of legal consciousness is the search for the forms of participation and interpretation through which actors construct, sustain, reproduce, or amend the circulating (contested or hegemonic) structures of meanings concerning law." *Id.* at 334.

contracts) to bring social change, to intervene in the social and economic arrangements reflected in the art market.¹²

Accordingly, this paper focuses on the rhetoric of the Artist's Contract, rather than its substance. While the Artist's Contract was always largely unenforceable as a matter of law, the available evidence suggests that some artists used it, and some collectors still observed its terms. It impacted the way these artists and collectors perceived their relationship to each other. While by any account its impact fell short of its originators' hopes, it might have fulfilled more of those hopes than a traditional legal analysis would suggest. At any rate its failure (if it should be called that) was less as a legal document than as an attempt to catalyze social change.

This paper explores the function and purpose of the Artist's Contract as a legal document—but not from the perspective of legal enforceability, which is how legal effectiveness is traditionally measured. Rather this paper tells the story of a document that relies upon hallmarks of law (legal language, formality, specificity, and so on) in order to express and attempt to consolidate particular views on artists, artworks, the collectors to whom they sell, and the markets in which they sell. This powerful connection inevitably continues past the moment of sale, and the Artist's Contract can be read as an attempt to rearrange this connection, to intervene and alter it, to adjust the perspectives of all those participating in it or observing it—all by means of a particular, peculiar legal document. By our account, the goal of the document was to rearrange relationships of creators and buyers of art not just in particular transactions but on a much broader scale: to reshape norms of the marketplace and conceptions of the relevant rights and responsibilities of market participants. It is in the context of these complex social, cultural, and economic webs that the legal document in question can be best understood.

I. AN ARTIST'S RIGHTS IN WORKS OF ART

Artists typically have an assortment of different rights in the works they create. Like all other authors, artists own a copyright when they create an original work of authorship.¹³ But artists may also have certain moral rights.¹⁴ In many countries, those moral rights may include a resale royalty right.¹⁵

A. Copyright in Works of Art

Artists typically own a copyright in the works of art they create. The Berne Convention requires its signatories to extend copyright protection to all authors,

¹² van Haften-Schick aptly terms these aspects the “social life of contracts.” van Haften-Schick, *supra* note 10, at 21–24.

¹³ 17 U.S.C. § 102(a)(5) (2012); 17 U.S.C. § 201 (2012).

¹⁴ 17 U.S.C. § 106A(a) (2012).

¹⁵ See Frye, *supra* note 5, at 241–46.

including artists.¹⁶ Most non-Berne countries still provide copyright protection in some form.¹⁷

In the United States, the Copyright Act grants authors certain exclusive rights in the “original works of authorship” they create.¹⁸ Accordingly, if an artist creates an original work of authorship, then copyright in the work initially vests in the artist.¹⁹ The exclusive rights granted by the Copyright Act may vary depending on the category of the work of authorship.²⁰ Typically, artists create “pictorial, graphic, and sculptural works,”²¹ but contemporary artists may create works that fall into another category, or no category.

Copyright, however, may not protect all works of art. For example, artists may create works that copyright cannot protect because they are not “original” as defined by the Copyright Act.²² Minimalist and conceptual art often fails to satisfy the originality requirement.²³ In addition, copyright may not protect works that fall outside of the enumerated categories of works of authorship.²⁴

Notably, copyright only protects intangible “works of authorship,” not tangible “copies” of those works. Accordingly, when an artist creates a unique painting, drawing, or sculpture, copyright protects the intangible work of authorship it embodies, not the object itself, which is merely a unique “copy” of the work.²⁵ And when the artist sells that copy to a collector, the artist retains the copyright in the work.²⁶ Of course, the artist may license the copyright in the work to the collector or anyone else, and many uses of the work are non-infringing, including public exhibition of the copy and reproduction permitted by fair use.²⁷

Yet, for many artists, copyright is essentially irrelevant. Copyright enables authors to internalize some of the positive externalities created by their work of authorship by giving them the exclusive right to reproduce and distribute their work. But most artists don’t sell copies, they sell originals. The art market is not a commodity market, but a scarcity market.

¹⁶ See generally Berne Convention for the Protection of Literary and Artistic Works art. 1, Sept. 9, 1886, S. TREATY DOC. NO. 99-27 (1986) [hereinafter Berne Convention].

¹⁷ Currently, Eritrea, Ethiopia, Iran, Iraq, and San Marino are among the few countries that are not signatories to the Berne Convention. U.S. COPYRIGHT OFFICE, CIRCULAR 38A: INTERNATIONAL COPYRIGHT RELATIONS OF THE UNITED STATES 4–13 (2019), <https://www.copyright.gov/circs/circ38a.pdf> [<https://perma.cc/B2TV-GSYG>].

¹⁸ 17 U.S.C. § 102(a) (2012).

¹⁹ *Id.* § 201(a).

²⁰ See *id.* § 102(a).

²¹ See *id.* § 102(a)(5).

²² See H.R. REP. NO. 94-1476, pt. 1, at 1039 (1976).

²³ Lori Petruzzelli, Comment, *Copyright Problems in Post-Modern Art*, 5 DEPAUL J. ART & ENT. L. 115, 121–23 (1995) (discussing the lack of originality in minimalist and conceptual forms of art).

²⁴ See, e.g., *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 346–51 (1991) (holding that while factual compilations may receive copyright protection if they “feature[] an original selection or arrangement of facts,” the facts themselves do not).

²⁵ See 17 U.S.C. § 202 (2012).

²⁶ *Id.*

²⁷ See, e.g., *id.* § 107.

B. Moral Rights in Works of Art

Artists may also have moral rights in the works of art they create. The Berne Convention requires its signatories to give authors certain non-waivable moral rights of attribution and integrity,²⁸ among other things, and many countries have complied with that requirement.²⁹ The right of attribution typically empowers authors to compel the attribution of works they created and disavow works they did not.³⁰ The right of integrity typically empowers authors to prevent the mutilation or destruction of works they created, and to disavow damaged works.³¹

When the United States joined the Berne Convention in 1989, it did not immediately create any new moral rights.³² The Visual Artists Rights Act of 1990 soon gave limited moral rights to some authors.³³ Essentially, VARA gives the authors of “works of visual art” limited rights of attribution and integrity.³⁴ It defines “works of visual art” as pictorial, graphic, or sculptural works that exist either “in a single copy” or “in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author,” and it only extends VARA rights to original works of authorship that can be protected by copyright.³⁵ Moreover, the VARA rights of attribution and integrity are limited by fair use and the other statutory exceptions to the exclusive rights of copyright owners, which are waivable by the author and expire at the death of the author.³⁶ As a consequence, VARA rights are considerably narrower than the moral rights required by the Berne Convention.

C. Resale Royalties on Works of Art

In many countries, artists also have a resale royalty right in the works of art they create.³⁷ The Berne Convention requires its signatories to give authors a resale royalty right.³⁸ But it implicitly recognizes that not all of them will comply, providing that authors can claim resale royalties only if their country of origin grants a resale

²⁸ Berne Convention, *supra* note 16, art. 6*bis*.

²⁹ Elizabeth Schéré, *Where is the Morality? Moral Rights in International Intellectual Property and Trade Law*, 41 *FORDHAM INT'L L.J.* 773, 783 (2018) (“[M]ost Berne-signatories have incorporated the minimum standard for moral rights into their national legislation.”).

³⁰ 17 U.S.C. § 106A(a) (2012).

³¹ *Id.*

³² Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

³³ Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (1990) (codified in scattered sections of 17 U.S.C.).

³⁴ 17 U.S.C. § 106A(a) (2012).

³⁵ *Id.* § 101.

³⁶ *Id.* § 106A.

³⁷ Frye, *supra* note 5, at 244–46.

³⁸ Berne Convention, *supra* note 16, at art. 14*ter* (“The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.”).

royalty right.³⁹ While many Berne countries have created a resale royalty right, many others have not, and the scope of the right varies considerably among countries.⁴⁰ Specifically, the United States has not created a resale royalty right,⁴¹ and the Ninth Circuit recently held that the Copyright Act preempts state resale royalty rights such as those California sought to impose.⁴²

II. THE RE SALE ROYALTY RIGHT

A *droit de suite*, or “resale royalty right,” is a legal right to claim a percentage of the resale price of a copy of a work of authorship.⁴³ Typically, the resale royalty right only applies to “unique copies” of a work, which may include “limited editions,” but not mass-produced copies.

In theory, copyright gives authors the right to claim a percentage of the sale price of every copy of their works of authorship. Of course, in practice, most authors license their works to a publisher and receive their percentage only indirectly, if at all. But in any case, their compensation depends on the reproduction and sale of copies of their works.

Unfortunately, copyright can’t help most visual artists, because they don’t sell reproductions of their work, they sell originals. The copyright market is a commodity market that depends on volume, but the art market is a luxury market that depends on scarcity. Authors in a commodity market want every fan to buy a copy, but artists in a luxury market want every fan to fight over one copy. The exclusive right to make copies is worthless if you don’t intend to make any. What artists want is an equity stake in their works, and thus a right to share in future profits.⁴⁴

A. *The Origins of the Resale Royalty Right*

The concept of a resale royalty right originated in late 19th century France.⁴⁵ As the art market grew, the most desirable works became increasingly valuable on the

³⁹ *Id.* (“The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.”).

⁴⁰ Frye, *supra* note 5, at 240, 245–46.

⁴¹ U.S. COPYRIGHT OFFICE, *RE SALE ROYALTIES: AN UPDATED ANALYSIS* (Dec. 2013), <https://www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf> [<https://perma.cc/FTK5-NN2W>].

⁴² *Close v. Sotheby’s, Inc.*, 894 F.3d 1061, 1076 (9th Cir. 2018).

⁴³ *Resale Royalty Right*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/docs/resaleroyalty/> [<https://perma.cc/4TQ7-ZMDA>].

⁴⁴ Our use of “equity” here merely reflects the point that resale royalties essentially give artists a cut of the upside of all of their art, which is quite similar economically to retaining (involuntarily) an equity interest. (They pay for the interest, of course, in the form of a lower sales price.)

As we note below, Amy Whitaker has recently made the case for artists retaining more formal “equity interests” in their art. See *infra* notes 249–254 and accompanying text.

⁴⁵ LILIANE DE PIERREDON-FAWCETT, *THE DROIT DE SUITE IN LITERARY AND ARTISTIC PROPERTY 2* (John M. Kernochan ed., Louise-Martin-Valiquette trans., 1991).

secondary market.⁴⁶ Some artists were upset when collectors sold their works for a handsome profit. They demanded a resale royalty right, hoping to share in the bounty.⁴⁷

The *Société des Amis du Luxembourg* (“Society of Friends of the Luxembourg”), an artists’ organization created in 1903, proposed the creation of a descendible resale royalty right of 1–2% of the sale price of an artwork, lasting for fifty years after its initial sale.⁴⁸ And, in 1909, artists formed two groups to advocate for the creation of a resale royalty right: the *Commission permanente du droit d’auteur aux artistes* (“Permanent Committee on Authors’ Rights for Artists”) and *Le Droit d’Auteur aux artistes* (“Author’s Rights for Artists”).⁴⁹ In 1914, the French government first considered a bill proposing a resale royalty right.⁵⁰ And on May 20, 1920, France created the first resale royalty right, which gave artists an inalienable and descendible right to a percentage of the sale price of their artworks sold at public auction for the duration of the copyright in the artwork, “on the condition that these works, such as paintings, sculpture, or designs, are original and represent a personal creation of the artist.”⁵¹

Gradually, some other countries began to create similar resale royalty rights, including Belgium, Czechoslovakia, Poland, Uruguay, and Italy.⁵² In 1948, the Berne Convention for the Protection of Literary and Artistic Works was revised to include an optional resale royalty right.⁵³ The Tunis Model Law on Copyright for Developing Countries of 1976 also incorporated an optional resale royalty right.⁵⁴

Today, more than seventy countries have created a resale royalty right,⁵⁵ although some are honored only in the breach. For example, some countries have created a resale royalty right that cannot be enforced.⁵⁶ Others require private enforcement of the resale royalty right, which is often impractical or impossible.⁵⁷

⁴⁶ *Id.* at 4–5.

⁴⁷ *See id.* at 2–4.

⁴⁸ *Id.* at 3.

⁴⁹ *Id.* at 3–4.

⁵⁰ *Id.* at 4.

⁵¹ Law of May 20, 1920, Imposing on Public Sales of Artworks a Right Inuring to the Benefit of Artists, 1920 B.L.D. 236, 20 DUV. & BOC. 539., reprinted in DE PIERREDON-FAWCETT, *supra* note 45, at 218. Specifically, the law entitled artists to 1% of the sale price from 1,000 to 10,000 francs; 1.5% of the sale price from 10,000 to 20,000 francs; 2% of the sale price from 20,000 to 50,000 francs; and 3% of the sale price over 50,000 francs. *Id.*

⁵² DE PIERREDON-FAWCETT, *supra* note 45, at 4–5.

⁵³ *See* Berne Convention, *supra* note 16, at art. 14*ter*. “The Berne Convention was formally amended at the 1948 Brussels revision conference to include *droit de suite* under then-Article 14*bis*. . . . [T]he *droit de suite* provision of the Berne Convention, which is essentially identical to the original Article 14*bis*, is now found under Article 14*ter*.” U.S. COPYRIGHT OFFICE, *supra* note 41, at 4.

⁵⁴ *See* Tunis Model Law on Copyright for Developing Countries, art. 4*bis* (1976).

⁵⁵ U.S. COPYRIGHT OFFICE, *supra* note 41, at 17.

⁵⁶ Frye, *supra* note 5, at 246 (“Some countries have created a nominal resale royalty right, but have not enabled enforcement.” (citing Anna J. Mitran, *Royalties Too?: Exploring Resale Royalties for New Media Art*, 101 CORNELL L. REV. 1349, 1370 (2016))).

⁵⁷ *See id.* at 246, 270.

B. The Resale Royalty Right in the United States

While the United States has never created a resale royalty right, it has periodically considered creating one. The Visual Artists' Residual Rights Act of 1978 proposed a resale royalty right of 5% of the sale price of artwork sold for \$1,000 or more.⁵⁸ The Visual Artists Rights Amendment of 1986 proposed a resale royalty right of 7% of the difference between the purchase and sale price of an artwork if the sale price was more than \$500 and at least 140% of the purchase price.⁵⁹ The Visual Artists Rights Act of 1987 proposed a resale royalty right of 7% of the difference between the purchase and sale price of an artwork if the sale price was more than \$1,000 and at least 150% of the purchase price.⁶⁰ The Visual Artists Rights Act of 1990 directed the Copyright Office to conduct a study of resale royalty rights, "in consultation with the Chair of the National Endowment for the Arts."⁶¹

In 1992, the Copyright Office released a report opposing the creation of resale royalty rights, primarily on economic efficiency grounds, which took the steam out of the campaign, but demands for a resale royalty right eventually resurfaced.⁶² In 2011, Congress considered and rejected yet another proposal to create a resale royalty right, but asked the Copyright Office to revisit the question of resale royalties.⁶³ In 2013, the Copyright Office released another report on resale royalties, which reversed its previous conclusions. The report recommended the creation of both a resale royalty right and resale royalty organizations to collect and distribute resale royalties. Among other things, the report concluded that the Copyright Act disadvantages visual artists who typically sell original works of art rather than copies, and that the creation of a resale royalty right could provide an incentive to create and distribute artworks, without harming the United States art market.⁶⁴

In response to the 2013 study, Congress considered the American Royalties Too Act of 2014, with the all-too-predictable "backronym" the "ART Act," which once again proposed the creation of a resale royalty right.⁶⁵ Under the ART Act, resale royalties would have been inalienable, so long as the artist retained the copyright in the work, and would have been payable to resale royalty right management organizations regulated by the Copyright Office. In addition, the failure to pay resale royalties would have been treated as a form of copyright infringement.⁶⁶ While the ART Act of 2014 failed, it was reintroduced in 2018 with bipartisan support. Nevertheless, it appears to have failed again.

⁵⁸ Visual Artists' Residual Rights Act of 1978, H.R. 11403, 95th Cong. § 4(a)(1) (1978).

⁵⁹ Visual Artists Rights Amendment of 1986, S. 2796, 99th Cong. § 3(d)(1)–(2) (1986).

⁶⁰ Visual Artists Rights Act of 1987, S. 1619, 100th Cong. § 3(d)(1)–(2) (1987).

⁶¹ Visual Artists Rights Act of 1990, H.R. 2690, 101st Cong. § 8(a)(1), (b)(1) (1990).

⁶² See U.S. COPYRIGHT OFFICE, *DROIT DE SUITE: THE ARTIST'S RESELL ROYALTY* 142–43 (Dec. 1992), https://www.copyright.gov/history/droit_de_suite.pdf [<https://perma.cc/6QPV-9PFF>].

⁶³ See Equity for Visual Artists Act of 2011, S. 2000, 112th Cong. § 3(b)(2)–(3) (2011).

⁶⁴ Frye, *supra* note 5, at 250–51 (footnotes omitted) (citing U.S. COPYRIGHT OFFICE, *supra* note 41).

⁶⁵ American Royalties Too Act of 2014, S. 2045, 113th Cong. § 3(7), (b)(A) (2014).

⁶⁶ Frye, *supra* note 5, at 251 (footnotes omitted).

C. *The Justification of Statutory Resale Royalty Rights*

Proponents typically offer equitable justifications for resale royalty rights.⁶⁷ They observe that most artists do not benefit from copyright protection because they sell unique copies rather than reproductions, and therefore are entitled to some other form of protection.⁶⁸ And they argue that equity entitles artists to a percentage of the resale price of their works, just like other authors share in the profits generated by their copyrighted works.⁶⁹ But as scholars have convincingly argued, the standard equitable arguments cannot withstand scrutiny.⁷⁰

The equitable claim to additional rights is unconvincing because authors choose their market. Artists receive copyright protection on the same terms as any other author and choose whether or not to use it. Most authors sell the copyright in their work to publishers who hope to profit by selling reproductions in a commodity market. By contrast, most artists sell unique copies of their work to collectors in a scarcity market. Choosing not to use your copyright does not entitle you to additional rights, and successful artists can profit from any demand for reproductions.

The equitable claim to a percentage of resale profits is also unconvincing because artists are already fully compensated by the sale price of their work. Both authors and artists sell at whatever price the market will bear, and that price reflects the risk of failure. The art market is notoriously risky. Some works become extremely valuable, but most become worthless. Authors and artists alike may feel cheated if their work becomes popular and a downstream buyer collects the profit. But they don't offer refunds when their work is unpopular and the buyer takes a loss.

Scholars have argued that resale royalty rights are actually *inequitable*, because they benefit successful artists at the expense of unsuccessful artists.⁷¹ If a resale royalty right exists, the sale price of a work on the primary market should be discounted to reflect the present value of the resale royalty right. However, while all artists pay for the resale royalty right on the primary market,⁷² only successful artists will collect a royalty on the secondary market.⁷³ Consequently, the resale royalty right is effectively a tax on unsuccessful artists for the benefit of successful artists.⁷⁴

⁶⁷ See, e.g., Guy A. Rub, *The Unconvincing Case for Resale Royalties*, 124 YALE L.J. FORUM 1, 3–4 (2014) (addressing the justification that resale royalties “are required to level the playing field and address a built-in disfavoring or discrimination in our copyright law against visual artists”).

⁶⁸ See *id.* at 4–5.

⁶⁹ See *id.*

⁷⁰ See *id.* at 9.

⁷¹ See, e.g., Christopher Sprigman & Guy Rub, *Resale Royalties Would Hurt Emerging Artists*, ARTSY (Aug. 8, 2018, 5:00 PM), <https://www.artsy.net/article/artsy-editorial-resale-royalties-hurt-emerging-artists> [<https://perma.cc/66TU-J4SS>].

⁷² *Id.* (“[I]f resale royalties are the law, dealers will realize that buyers’ willingness to pay will drop, and they will be forced to lower prices in the primary market art market. Who loses? The sellers in the primary market, a.k.a. practically *all* artists—both young and old, newcomers and the well-established, and everyone in between.” (emphasis added)).

⁷³ *Id.* (“The data shows that the likely beneficiaries in the [secondary] market will be, almost exclusively, the super-stars of the art world. The other 99% of artists will be left out in the cold.”).

⁷⁴ *Id.*

In 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.⁷⁵ Collectors buying works without a proven secondary market should pray the resale royalty right will become relevant. And the price of works created by artists with a proven secondary market would presumably already reflect the resale royalty right.

Resale royalty rights are actually inequitable because they misallocate resources. Effectively, resale royalty rights are simply a tax on the secondary art market that is redistributed to successful artists. While there is nothing wrong with taxing the secondary art market, there is no reason to distribute the proceeds to successful artists, who already benefit from the increase in the market price of their works. On the contrary, equity favors redistribution to the unsuccessful artists who took the same risks as the successful artists but reaped none of the rewards.⁷⁶

III. PRIVATE RESELL ROYALTY RIGHTS

Resale royalty rights are created by the government, as a kind of para-copyright in works of art.⁷⁷ This is both their strength and their weakness. If they are validly enacted, they are enforceable and have the power of the government behind them. But getting them enacted is difficult. And, even if enacted, they may not be valid if they exceed the powers of the government enacting them.

But people can agree to many things that the government can't force on them. Once people agree to something, the government can often enforce their agreement, even if it couldn't enforce the outcome on its own authority. So even if the government won't or can't create resale royalty rights, maybe people can agree to them. Maybe people can create private resale royalty rights.

Private resale royalty rights can take many different forms and may or may not resemble the canonical forms of the resale royalty right. The primary practical issue with broad private resale royalty rights is their enforceability; the normative issue turns largely on their potential injury on third parties uninvolved in the original

⁷⁵ See John Henry Merryman, Comment, *The Wrath of Robert Rauschenberg*, 41 AM. J. COMP. L. 103, 107 (1993).

⁷⁶ Frye, *supra* note 5, at 266–67; see also Merryman, *supra* note 75, at 122 (“We have seen, however, that only the successful artists whose works have a secondary market would receive any benefit from the *droit de suite*. Put another way, the money paid to artists from resales would go to those who appear to need it least. Many of the remaining mass of serious, working artists are self-employed, lack access to health and retirement plans and lead economically precarious lives. That suggests that if 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.”). Merryman wonders whether such a tax would be constitutional under the Intellectual Property Clause. See *id.* at 122 n.37. If not, surely it would be a constitutional sales tax.

⁷⁷ Frye, *supra* note 5, at 258 (“The resale royalty right . . . is essentially a form of para-copyright that grants authors certain rights in particular copies of their works of authorship, rather than the underlying work itself.”).

transaction and on impairment of overall market functioning due to increasing transaction costs by requiring more investigation at time of sale.⁷⁸

The first known contractual resale royalty right was created in 1904 by André Level, a Parisian art collector, when he founded *La Peau de l'Ours* (“The Bearskin”), the first art investment fund.⁷⁹ *La Peau de l'Ours* bought artwork on the primary market, typically directly from the artist, and offered the artist 20% of the profit on their work when the fund was liquidated in 1914.⁸⁰ The fund generated a modest but respectable profit, and the artists received their due share.⁸¹

Today, as one of us has explored at length, art funds are a much-discussed, but relatively little-used investment vehicle.⁸² Theoretically, art funds could help retail investors diversify their holdings and increase the liquidity of the art market, but in practice they are mostly just a way of separating suckers from their money. Unlike *La Peau de l'Ours*, contemporary art funds typically purchase artwork on the secondary market, and do not have any relationship with the artist, contractual or otherwise.⁸³ If artists want a contractual resale royalty right, they need to secure it for themselves at the time of initial sale on the primary market.

Currently, the paradigmatic way for artists to pursue a private resale royalty right is to use the “Artist’s Contract,” a form agreement created in 1971.⁸⁴ Among other things, the Artist’s Contract provides that the buyer of a work will give the artist 15% of the profit on any future sale of the work and will require future buyers to make the same agreement.⁸⁵ Many artists have used the Artist’s Contract, often modifying it to suit their own needs and preferences. Some lawyers and artists have created variations on the Artist’s Contract, intended to achieve similar goals.⁸⁶

⁷⁸ See *id.* at 270.

⁷⁹ See Brian L. Frye, *New Art for the People: Art Funds & Financial Technology*, 93 CHI.-KENT L. REV. 113, 116–18 (2018).

⁸⁰ *Id.* at 117–19.

⁸¹ See *id.* at 119–20.

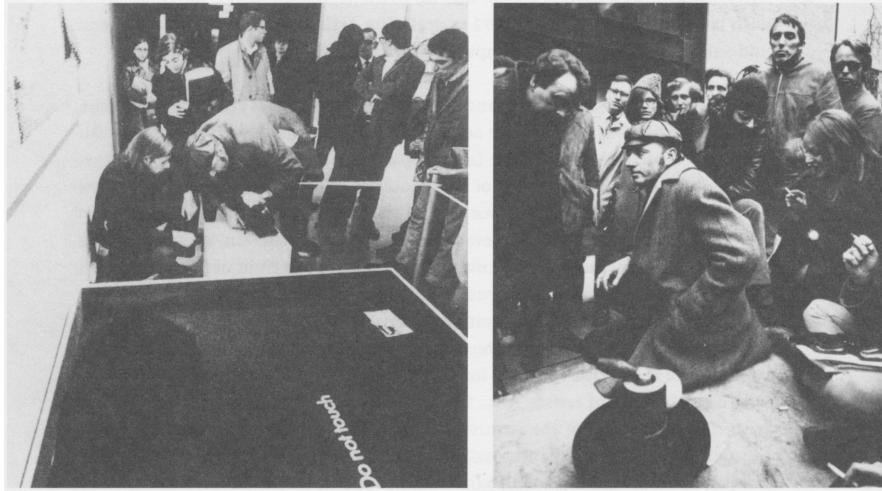
⁸² See generally *id.* (discussing how art funds can be a form of an investment vehicle).

⁸³ See *id.* at 123.

⁸⁴ See generally ARTIST’S CONTRACT, *supra* note 6 (providing a form contract intended to give artists a way to ensure certain moral rights including resale royalty rights).

⁸⁵ *Id.* at 2–3.

⁸⁶ See generally MARIA EICHHORN, THE ARTIST’S CONTRACT (Gerti Fietzek ed., 2009) (featuring a series of interviews with individuals who have either used the Artist’s Contract or come up with their own form of the contract to suit their needs).



Vassilakis Takis and friends removing *Tele-Sculpture* (1965) from the Museum of Modern Art⁸⁷

A. *The Origins of the Artist's Contract*

The Artist's Contract was born out of an artist's fit of pique. In 1968, the Museum of Modern Art in New York (MoMA) presented the exhibition "The Machine as Seen at the End of the Mechanical Age," which was curated by K. G. Pontus Hultén.⁸⁸ Among many other things, the exhibition included Takis's *Tele-Sculpture* (1960), which was in the MoMA collection.⁸⁹ In a letter to Hultén, Takis objected to MoMA showing *Tele-Sculpture*, rather than one of his newer works, but Hultén ignored him.⁹⁰ Accordingly, at 4:00 p.m. on January 3, 1969, Takis and three of his friends marched into MoMA and simply removed *Tele-Sculpture* from the exhibition.⁹¹ The event unfolded as follows:

⁸⁷ *Id.* at 40.

⁸⁸ Sam Thorne, *The Making of a Museum*, FRIEZE (Jan. 6, 2017), <https://frieze.com/article/making-museum> [<https://perma.cc/5MJ8-M5KD>]. Karl Gunnar Vougt Pontus Hultén (1924–2006) was a Swedish museum director. Roberta Smith, *Pontus Hulten, 82, Champion of Contemporary Art, Dies*, N.Y. TIMES (Oct. 30, 2006), https://www.nytimes.com/2006/10/30/arts/30hult.html?_r=1&bl&ex=1162357200&en=89dfa8591e6f1830&ei=5087%0A&oref=slogin [<https://perma.cc/VM8A-QTCT>]. In 1959, he became the director of the Moderna Museet in Stockholm and, in 1973, he became the first director of the Georges Pompidou Center in Paris. *Id.*

⁸⁹ See *Messing with MoMA: Critical Interventions at the Museum of Modern Art, 1939–Now*, MOMA, <https://www.moma.org/interactives/exhibitions/2015/messingwithmoma/> [<https://perma.cc/JA6P-PRNB>]. Takis was born Panagiotis Vassilakis on October 25, 1925, in Athens, Greece. *Chronology*, TAKIS FOUNDATION: RESEARCH CENTER FOR THE ART & THE SCIENCE, <https://takisfoundation.org/chronology/> [<https://perma.cc/E3MU-XUGC>].

⁹⁰ John Perreault, *Whose Art?*, THE VILLAGE VOICE, Jan. 9, 1969, at 16, *reprinted in* ART WORKERS' COALITION, DOCUMENTS 1 2 (1969).

⁹¹ EICHHORN, *supra* note 86, at 10; Perreault, *supra* note 90, at 2; *see also* *Sculptor Takes Work Out of Modern Museum Show*, N.Y. TIMES, Jan. 4, 1969, at 24.

In a crowded gallery, in front of stunned guards, Takis moved in on his own work, cut the wires, unplugged it, and, protected by Farman and Willoughby, gently carried it out into the museum garden, with a coolness that was unbelievable. It was very well rehearsed and on the surface looked more like a movie jewel-robbery than the anarchist's ballet that it really was. Takis and his bearded cadre left a small wake of handbills, strategically handed out to the guards as they approached, and to the few bystanders that seemed to get what was going on.⁹²

According to Takis, "I am guarding my work. I want written assurance that this will be permanently removed from this show and that the museum will not ever again exhibit it without my permission."⁹³

One of the handbills distributed by Takis objected to the following:

1. The exhibition of works by living artists against their express consent.
2. The degree of control exercised by museums, galleries and private collectors over the work of living artists.
3. The lack of consultation between museum authorities and artists, particularly with regard to the maintenance and installation of their works.
4. The unauthorized use of photographs and other material for publicity purposes.⁹⁴

After Takis and his friends staged a ninety-minute protest in the MoMA sculpture garden, MoMA Director Bates Lowry met with them for two hours.⁹⁵ Eventually, he agreed to remove *Tele-Sculpture* from the show and to continue the conversation on January 24, 1969.⁹⁶

B. *The Art Workers Coalition*

Takis's protest inspired the formation of a group of artists who objected to the social norms of the art world.⁹⁷ MoMA remained the focal point of their opposition, the foil in their attempt to reconstitute governing art world norms. Within a couple of weeks, their objections included the lack of a resale royalty right:

⁹² Perreault, *supra* note 90, at 2.

⁹³ *Id.*

⁹⁴ Statement, Takis Vassilakis (Jan. 5, 1969), *reprinted in* ART WORKERS' COALITION, DOCUMENTS 1 5 (1969).

⁹⁵ Perreault, *supra* note 90, at 2.

⁹⁶ Memorandum from Bates Lowry to the Staff of the Museum of Modern Art (Mar. 18, 1969), *reprinted in* ART WORKERS' COALITION, DOCUMENTS 1 33, 33–34 (1969) [hereinafter Bates Lowry Memo 1]; *see also* Press Release, Artists Protest Against Museum of Modern Art (Mar. 14, 1969), *reprinted in* ART WORKERS' COALITION, DOCUMENTS 1 31, 31.

⁹⁷ Initially, the group of artists included Gregory Battcock, Hans Haacke, Tom Lloyd, Willoughby Sharp, Takis Vassilakis, Wen-Ying Tsai, and John Perreault. Bates Lowry Memo 1, *supra* note 96, at 34.

6) A plan should be evolved to provide the artist with some percentage of the resale price of his work, whether this goes up or down. At present artists, unlike writers or composers, receive money only from the first sale of their work, and the effect of any later sale is felt only by the subsequent owners. This is particularly important for the majority of artists who only sell a few works and who can never hope to sell a work to a major museum, with the attendant publicity and price increase this could bring to all their work.⁹⁸

The artists wanted twelve people to participate in a negotiation.⁹⁹ Lowry proposed six artists and six MoMA staffers, and the artists agreed.¹⁰⁰ But on January 24, ten artists and critics showed up at MoMA.¹⁰¹ Lowry refused to meet with them but agreed to meet with a smaller group of artists on January 28.¹⁰²

A few days later, a group of artists presented Lowry with a list of “13 Demands,” including a demand that MoMA take a position on resale royalties: “8. The Museum should declare its position on copyright legislation and the proposed arts proceeds act.”¹⁰³

Lowry ultimately responded by proposing the creation of a “Special Committee on Artist Relations” to consider the demands, in consultation with the artistic community.¹⁰⁴ But the artists rejected his proposal because it did not provide for an immediate “public hearing” and it failed to address their other demands. They requested a response by March 7.¹⁰⁵ Among other things, they wanted more money: “Artists are tired of being exploited. There are very few artists who make a living out of their art.”¹⁰⁶

Soon afterward, the artists began threatening another protest.¹⁰⁷ MoMA announced the creation of a Special Committee on Artist Relations.¹⁰⁸ But the artists were not mollified. They issued a press release, stating that MoMA’s response to

⁹⁸ Alex Gross, *Artists Attack MoMA*, THE EAST VILLAGE OTHER, Jan. 24, 1969, reprinted in ART WORKERS’ COALITION, DOCUMENTS 1 9, 10 (1969).

⁹⁹ Bates Lowry Memo 1, *supra* note 96, at 33.

¹⁰⁰ *Id.*

¹⁰¹ Press Release, *supra* note 96, at 31.

¹⁰² *Id.*; see also Bates Lowry Memo 1, *supra* note 96, at 34.

¹⁰³ 13 Demands (Jan. 28, 1969), reprinted in ART WORKERS’ COALITION, DOCUMENTS 1 13, 13 (1969); see also Press Release, *supra* note 96, at 31.

¹⁰⁴ Letter from Bates Lowry, Director, the Museum of Modern Art, to Art Workers’ Coalition (Feb. 14, 1969), reprinted in ART WORKERS’ COALITION, DOCUMENTS 1 18, 18 (1969) [hereinafter Bates Lowry Letter].

¹⁰⁵ Letter from Art Workers’ Coalition to Bates Lowry, Director, the Museum of Modern Art (Feb. 22, 1969), reprinted in ART WORKERS’ COALITION, DOCUMENTS 1 22, 22 (1969) [hereinafter A.W.C. Letter].

¹⁰⁶ John Perreault, *Outside the Museum*, THE VILLAGE VOICE, Mar. 6, 1969, reprinted in ART WORKERS’ COALITION, DOCUMENTS 1 23, 23 (1969).

¹⁰⁷ Grace Glueck, *Artists Threaten Sit-in at the Modern*, N.Y. TIMES, Mar. 7, 1969, at 26; Innis MacBeath, *Artists May Hold Museum Sit-In*, N.Y. TIMES, Mar. 8, 1969, reprinted in ART WORKERS’ COALITION, DOCUMENTS 1 27, 27 (1969); see also Letter from Art Workers’ Coalition to Bates Lowry, Director, the Museum of Modern Art (Mar. 10, 1969), reprinted in ART WORKERS’ COALITION, DOCUMENTS 1 28, 28 (1969).

¹⁰⁸ MacBeath, *supra* note 107, at 27.

their demands was unacceptable and that they would “resort to whatever action they deem necessary.”¹⁰⁹

On March 22, about twenty-five artists showed up at MoMA and demanded free admission, brandishing fake annual passes stamped “ART WORKERS.”¹¹⁰ Most were denied admission, but they distributed handbills calling for a protest on March 30 at 3:00 p.m.¹¹¹ The artists objected to both MoMA’s actions and its aesthetic decisions.¹¹² But a minority of the artists observed that the galleries were no different.¹¹³



Demonstration, MoMA, March 30, 1969¹¹⁴

On the morning of March 30, MoMA put a sign at the museum entrance: “The Demonstration is in the Garden. Please Enter by the 54th Street Gate.”¹¹⁵ MoMA’s staff distributed a statement to museum patrons, which observed that there would be a protest, announced that the museum had created a committee to address the protestors’ demands, and asked that the protestors stay in the garden.¹¹⁶ Around 3:00

¹⁰⁹ Press Release, *supra* note 96, at 32.

¹¹⁰ Memorandum from Bates Lowry to the Staff of the Museum of Modern Art (Mar. 24, 1969), *reprinted in* ART WORKERS’ COALITION, DOCUMENTS 1 38, 38 (1969) [hereinafter Bates Lowry Memo 2].

¹¹¹ *Id.*

¹¹² *Id.* at 40.

¹¹³ *Id.* at 45.

¹¹⁴ March 30th Demonstration, *reprinted in* ART WORKERS’ COALITION, DOCUMENTS 1 52, 52 (1969).

¹¹⁵ *Art Workers’ Coalition demonstrates for artists’ rights, 1969*, GLOBAL NONVIOLENT ACTION DATABASE (May 11, 2015), <https://nvdatabase.swarthmore.edu/content/art-workers-coalition-demonstrates-artists-rights-1969> [<https://perma.cc/YR4S-W5GC>].

¹¹⁶ Statement by Bates Lowry, Director, the Museum of Modern Art (Mar. 30, 1969), *reprinted in* ART WORKERS’ COALITION, DOCUMENTS 1 49, 49 (1969).

p.m., about three hundred protesters showed up carrying signs reading, “Bury the Mausoleum of Modern Art” and “Dump Dada and Moma.”¹¹⁷ Many of the protestors used the gate, but some attempted to march into the museum through the back door.¹¹⁸ The protestors addressed the crowd through a portable bullhorn, and then left through the lobby.¹¹⁹ The protest was organized by the “Art Workers Coalition Committee for the Black Bloc,”¹²⁰ and many of the speakers demanded more minority representation in the MoMA collection, among other things.¹²¹

for everyone in the arts photographers, printers, sculptors,
OPEN HEARING designers, film-makers, museum workers, painters,
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 6 to 10 pm
 choreographers, composers, critics & writers,

GIVE AND HEAR
 EVIDENCE ON
 ARTIST
 MUSEUM
 GALLERY
 COMMUNITY
 PROBLEMS
 SOLUTIONS

69

Poster announcing AWC Open Hearing¹²²

¹¹⁷ Robert Windeler, *Modern Museum Protest Target*, N.Y. TIMES, Mar. 31, 1969, reprinted in ART WORKERS' COALITION, DOCUMENTS 1 55, 55 (1969).

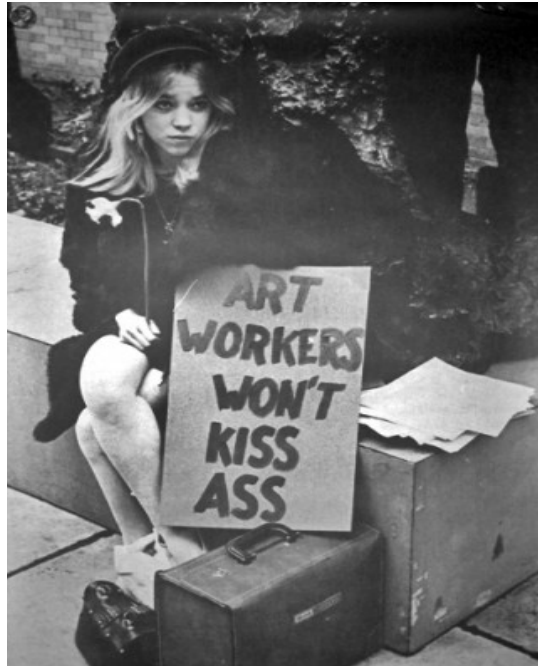
¹¹⁸ *Id.*

¹¹⁹ Memorandum from Bates Lowry to the Staff of the Museum of Modern Art (Mar. 31, 1969), reprinted in ART WORKERS' COALITION, DOCUMENTS 1 54, 54 (1969) [hereinafter Bates Lowry Memo 3].

¹²⁰ Windeler, *supra* note 117.

¹²¹ Alex Gross, *Black Art-Tech Art-Prick Art*, THE EAST VILLAGE OTHER, Apr. 2, 1969, reprinted in ART WORKERS' COALITION, DOCUMENTS 1 56, 56 (1969); Windeler, *supra* note 117.

¹²² Open Hearing Announcement, reprinted in ART WORKERS' COALITION, DOCUMENTS 1 69, 69 (1969).



An AWC protest slogan¹²³

Shortly after the protest, the group now describing itself as the Art Workers Coalition (“AWC”) announced an open hearing at the School of Visual Arts on April 10 to address the question: “What should be the program of the art workers regarding museum reform and to establish the program of an open art workers coalition?”¹²⁴ About two hundred and fifty people attended the four-hour hearing, and about fifty people spoke or submitted a prepared statement, some of which were read aloud.¹²⁵ Many of the speakers objected to MoMA’s exclusion of African American and Puerto Rican artists and called for the creation of a new gallery.¹²⁶ Others objected to the art market itself.

For example, Sol LeWitt submitted a statement expressing his belief that artists should have certain inalienable rights in the works they create, including a resale royalty right:

¹²³ *Art Workers Won’t Kiss Ass*, HALF LETTER PRESS, <https://halfletterpress.com/art-workers-wont-kiss-ass/> [<https://perma.cc/LT5W-7QUT>].

¹²⁴ John Perreault, *MoMA & the Workers*, THE VILLAGE VOICE, Apr. 10, 1969, reprinted in ART WORKERS’ COALITION, DOCUMENTS 1 68, 68 (1969). The AWC was not the only group protesting. For example, the Guerilla Art Action Group and Art Workers United also protested and criticized the AWC as bourgeois. EICHORN, *supra* note 86, at 11 n.14.

¹²⁵ Grace Glueck, *‘J’accuse, Baby!’ She Cried*, N.Y. TIMES, Apr. 20, 1969, at D28.

¹²⁶ Grace Glueck, *Dissidents Stir Art World*, N.Y. TIMES, Apr. 12, 1969, at 41; see generally ART WORKERS’ COALITION, OPEN HEARING (1969) (compilation of the statements given over the course of the Open Hearing).

Some Points bearing on the relationship of works of art to museums and collectors:

1. A work of art by a living artist would still be the property of the artist. The collector would, in a sense, be the custodian of that art.
2. The artist would be consulted when his work is displayed, reproduced or used in any way.
3. The museum, collector or publication would compensate the artist for use of his art. This is a rental, beyond the original purchase price. The rental could be nominal; the principle of a royalty would be used.
4. An artist would have the right to retrieve his work from a collection if he compensates the purchaser with the original price or a mutually agreeable substitute.
5. When a work is resold from one collector to another, the artist would be compensated with a percentage of the price.
6. An artist should have the right to change or destroy any work of his as long as he lives.¹²⁷

Seth Siegelaub suggested that artists should think carefully about what they want, and use their art as leverage in order to get it:

I wish to speak extemporaneously about my feelings about what's going on here today, and what's been going on in the last few weeks. There seems to be a community of artists working throughout the world. There's a whole social fabric that rests very, very precariously on something we know as an art object, and art itself. I think if one wanted to describe this manifestation graphically, you would say that an art object would be a rock in a pool and at various functionary levels going out from this rock would be dealers, critics, the museums, the mass media, a whole fabric or system, all barricading that little object. Well, it would seem that anyone who's interested as I am in my work to try and change the machinery or the context in which the art has been made and is being seen, would see that the greatest asset that artists have is their art. It would seem that for a social protest or any other type of action in withdrawing your work or setting tight controls over it, you could achieve the goals that are being sought. . . . It would seem that all this has to do, in a certain sense, with the context in which art is being seen, and the rights which the artist has in having it seen in the proper fashion. And it would seem that the art is the one thing that you have and the artist always has and which picks you out from anyone else. There's a class of human beings who make art and a class who don't, some of whom happen to be curators of museums, directors or museum trustees. This is the way your leverage lies. I would think that by using that leverage you could achieve much greater goals

¹²⁷ Sol LeWitt, Statement at A.W.C. Open Hearing, in ART WORKERS' COALITION, *supra* note 126, at 54; *see also* Glueck, *supra* note 125 (observing that film editor Bill Gordy suggested "artists should sell their work on a royalty basis, insisting on contracts that would guarantee a percentage of the profits from later resales"). Many of LeWitt's points made it into the Artist's Contract as promulgated.

than in any other ways. It's the one seemingly unique aspect of an artist, that he makes art and no-one else does.¹²⁸

Bill Gordy argued that artists could use contract law to create a resale royalty right:

The real enemies of the artist are indifference to his work and lack of money. Let's talk about money. It would be nice if this group could agree, but even if it can't, there's a good deal that artists can do to help themselves financially, without new legislation, on an individual basis. The existing law of contracts allows you to sell your work with the provision that you will receive a percentage of the profit gained from any later resales, a kind of commission. Perhaps the knowledge that he would benefit from any later increases in value of his work would take some of the pressure off an artist to start at the top, to become a superstar overnight. The art speculator is looked down on now, but let's encourage him. His trading is the only mechanism that can drive art prices up. Let speculation thrive, as long as the artist gets his cut.

Legally, artists together and separately, should uphold the principle that an artist continues to own the rights to his work the way an author owns a literary property. The painting or sculpture is like a manuscript; the owner can keep it, or show it to his friends, but the artist continues to hold the rights of reproduction, including the right to collect royalties if he wants them. . . .

Many rights can be had just by taking them, without asking museums, galleries, or anybody else. Artists don't have to beg for everything, even though it sometimes seems so. Let's all stop begging, even when it pretends to be "demanding." At the appropriate time, I would like to see someone move that a committee be formed, with legal advice, to draft a model sales contract that secures the maximum possible control for the artist over his work. Individuals can then, if they want to, agree to sell or give up certain rights, but let's start out, from now on, in the position of landlords, rather than tenants. You can have artists without museums; you can't have museums without artists.¹²⁹

And Alex Gross argued that the AWC should create a form contract for artists to use when selling works, as well as norms governing the purchase of works by museums:

So much has been said about the ideology of A.W.C. and about the contrast between reforming the Museums on the one hand and setting up an alternate structure to them on the other, that I wonder if an important

¹²⁸ Seth Siegelau, Statement at A.W.C. Open Hearing, *in* ART WORKERS' COALITION, *supra* note 126, at 59–60.

¹²⁹ Bill Gordy, Statement at A.W.C. Open Hearing, *in* ART WORKERS' COALITION, *supra* note 126, at 97–98.

point has not been missed. . . . I am speaking about the actual return an artist can expect when he sells a work of art. The museums may or may not be eventually reformed or an alternate structure may or may not eventually be set up, and certainly both are desirable, but what about the artist here and now when he sells a work of art?

As things now stand, he will receive the selling price and that is the end of it. But if the buyer one day resells the work of art, it is this buyer alone who may profit from any increase in price. I believe this is grotesquely unfair to the artist. . . . Extreme cases where the artist is living in penury while his pictures fetch outrageous prices may be an exception, but they are by no means unknown. In any case an artist can be said to possess some sort of proprietary interest in his work even after he has sold it. I believe the A.W.C. must give further currency to this notion and also help the artist to obtain a fairer return for his work by instituting a form which I shall refer to, for the sake of simplicity, as an A.W.C. sheet. I believe this sheet has a great role to play in the future of dealings in the art world and may serve to perpetuate the name of the A.W.C. long after the group itself has ceased to exist.

As I see it, the A.W.C. sheet will consist of a form listing the name of the artist, the work of art (if it has a name), a description or reproduction of this, and, most important, the name of the purchaser and the price he has paid for the work of art. At the bottom of the A.W.C. sheet will be a statement that the buyer guarantees to pay the artist a certain percentage of the profit he may make if he ever decides to resell the work of art. This statement the buyer will be required to read and sign. The percentage could vary between 10 and 33% and should perhaps be decided at future meetings of the A.W.C. or perhaps be left open for the artists and the purchaser to decide among themselves.

Large quantities of these sheets should be printed up and the word should be spread among artists that this sheet is to serve as the standard form or at least as a model for all sales of all works of art. Obviously the force of the A.W.C. Sheet will be partly symbolic and honorary at first, and it may be difficult for artists in all cases to determine if their works of art may not have been secretly or accidentally resold in distant parts of the country or the world. In the absence of a central agency handling and checking up on all works of art covered by A.W.C. Sheets, it will also be difficult to be certain that the regulations I have described have been carried out in all cases. In this connection I am somewhat hopeful that the mere existence of the A.W.C. Sheet may spur into existence the body necessary to enforce its provisions, and that this body will perhaps comprise the nucleus of something resembling the first trade union for artists in this country. . . .

What I have described also has a second part. I have spoken of the duty of the buyer to share his profits with the artist when reselling the work of art, but there is also another factor. By far the largest and most important buyers of works of art are our museums. There is absolutely no reason why the museums should not agree to strengthen the A.W.C.

principle here and now by promising to pay a percentage of the price for any work created by a living artist to the artist himself. . . .

If the museums were to disagree and refuse to adopt it, then it would seem fair to me that artists all over the country should repossess their work from museums all over the country or engage in such demonstrations, sit-ins, or other acts as seem likely in each individual case to bring the museum in question to its senses. What is being proposed is scarcely a radical principle—it would merely reinforce what is already a relatively popular notion, that a creator should have some sort of proprietary right in his work even after he has sold it—this is almost a principle of common law. . . . Popular feeling will very probably run highly in favor of the artists if they make this a principle plank of their platform. The direction is forward, and the time to take steps in that direction is now.¹³⁰

These comments provide an illuminating bridge between the legal technology chosen—the form contract to be used by like-minded individuals selling their works—and the intended goal, widescale social change.

The AWC’s summary of the hearing observed that several speakers had called for the creation of a resale royalty right:

5. Several artists made a point of the fact that once a work leaves an artist’s hands, it is no longer in his control. Several people suggested that the law of France respecting the re-sale of art be enacted in the United States. This would result in no work being resold in the artist’s lifetime without his permission, and a proportion of accrued profit on all subsequent sales would go to the artist. It was also urged that no work by an artist could be shown or photographed without his permission and that certain fees should be paid for all instances of the exhibition of a work of art. Various practical schedules of rates and uniform contracts were outlined in the testimony.¹³¹

Accordingly, the AWC’s strategic plan called for the creation of “model contracts” for the exhibition and sale of works of art, as well as the redistribution of resources to unsuccessful artists:

1. Rentals. All exhibitions charging entry fees should pay the exhibiting artists rental fees for their work. This would apply to all work whether or not owned by the artist. A model contract should be drafted. Filmmakers should likewise be properly compensated not only for individual screenings but also for prints acquired for museum archives.

2. Resales. A percentage of the profit realised on resale of an artist’s work should revert to the artist. A model sale contract should be drafted.

¹³⁰ Alex Gross, Statement at A.W.C. Open Hearing, in ART WORKERS’ COALITION, *supra* note 126, at 109–13.

¹³¹ Synthetic Report of the Public Hearing Held April 10, 1969, *reprinted in* ART WORKERS’ COALITION, DOCUMENTS 1 102, 108 (1969).

3. Ownership. The artist never gives up ownership in his work. Reproduction and royalty rights and the right to retrieve his work for the original price and change or destroy it would also be provided for.

4. Social benefits. Research should be undertaken regarding the Scandinavian methods of giving support to artists, the possibility of creating a trust fund from contributions by successful artists, or from taxes levied on sales of “dead” art; such a fund would provide stipends, sickness benefits, help for dependents, etc. the possibility of obtaining guaranteed annual minimum wage or negative income tax for artists.¹³²

Again, the use of model contracts is linked to much broader set of altered social norms and structures. Apparently, the AWC itself planned to create a “standard form agreement” for artists, but it is unclear whether it ever actually drafted an agreement.¹³³ In any case, the AWC continued to see the creation of resale royalties as part of its mission. In November 1970, it published a “Statement of Demands.”¹³⁴ Among other things, it claimed that artists are entitled to an ongoing ownership interest in their work, including a resale royalty right:

UNTIL SUCH TIME AS A MINIMUM INCOME IS GUARANTEED FOR ALL PEOPLE, THE ECONOMIC POSITION OF ARTISTS SHOULD BE IMPROVED IN THE FOLLOWING WAYS:

1. Rental fees should be paid to artists or their heirs for all work exhibited where admissions are charged, whether or not the work is owned by the artist.
2. A percentage of the profit realized on the re-sale of an artist’s work should revert to the artist or his heirs.
3. A trust fund should be set up from a tax levied on the sales of the work of dead artists. This fund would provide stipends, health insurance, help for artists’ dependents, and other social benefits.¹³⁵

¹³² Legal and Economic Reforms, *in* ART WORKERS’ COALITION, DOCUMENTS 1 111, 113 (setting forth the strategic plan of the A.W.C.); *see also* Rosemarie Castoro, Statement at A.W.C. Open Hearing, *in* ART WORKERS’ COALITION, *supra* note 126, at 15 (advocating for the creation of a “trust fund” for artists funded by resale royalties); Hans Haacke, Statement at A.W.C. Open Hearing, *in* ART WORKERS’ COALITION, *supra* note 126, at 47 (proposing that the museum sell its old art works and buy new art); David Lee, Statement at A.W.C. Open Hearing, *in* ART WORKERS’ COALITION, *supra* note 126, at 40, 42 (proposing art rentals); Iain Whitecross, Statement at A.W.C. Open Hearing, *in* ART WORKERS’ COALITION, *supra* note 126, at 76 (suggesting that resale royalties be used to fund a trust for artists).

¹³³ *See* van Haften-Schick, *supra* note 10.

¹³⁴ Adrienne Skye Roberts, *The Economic Position of Artists Should Be Improved in the Following Ways*, OPEN SPACE (Nov. 2, 2011) (reproducing Art Workers Coalition, Statement of Demands (1970)), <https://openspace.sfmoma.org/2011/11/the-economic-position-of-artists-should-be-improved-in-the-following-ways/> [<https://perma.cc/G6GK-2UVL>].

¹³⁵ *Id.*

Notably, the AWC's demands contemplated both a resale royalty right and a redistributive tax on the sale of certain artworks.¹³⁶ While many have proposed the creation of a resale royalty right, few have proposed taxation and redistribution of the proceeds from the sale of artwork.¹³⁷

The AWC also made both economic and non-economic demands. The AWC not only wanted artists to profit from increases in the value of their works, but also to maintain control over their works after selling them.¹³⁸ In fact, the AWC's framing of its demands suggests that control was more important than profit.¹³⁹

Of course, the AWC's "demands" were really just "wishes." The AWC knew what it wanted; but had no coherent plan for how to get it. We see, in these early discussions, the artists and their allies trying on a number of different approaches. They emphasize the legal rights of French artists; they seek to evoke the rhetoric and practices of the labor movement; they claim support among the wider populace; they look for points of leverage wherever they can—with the moment of sale being the most promising. Their aims include initiating particular claims for particular rights, but more importantly, capitalizing on what they perceived to be broader momentum for social change. The economic and legal tools mentioned are to be deployed in service of a broader reworking of the "social fabric" of the art world.

Of course, as with the demands of most would-be revolutionaries, most of AWC's demands proved unrealistic. Particularly so with respect to royalties on future art sales, rent-payment, and other restrictions on exhibition. While museums, galleries, and collectors could have voluntarily chosen to pay resale royalties and rental fees, they had no legal obligation to do so, nor did popular support materialize to force institutions to pursue such practices.¹⁴⁰ The AWC's only practical road to success was probably federal legislation, which it never meaningfully pursued.

¹³⁶ *Id.*

¹³⁷ One of us recently proposed combining the two, suggesting several different potential models for the equitable redistribution of resale royalties. *See generally* Frye, *supra* note 5, at 269–76.

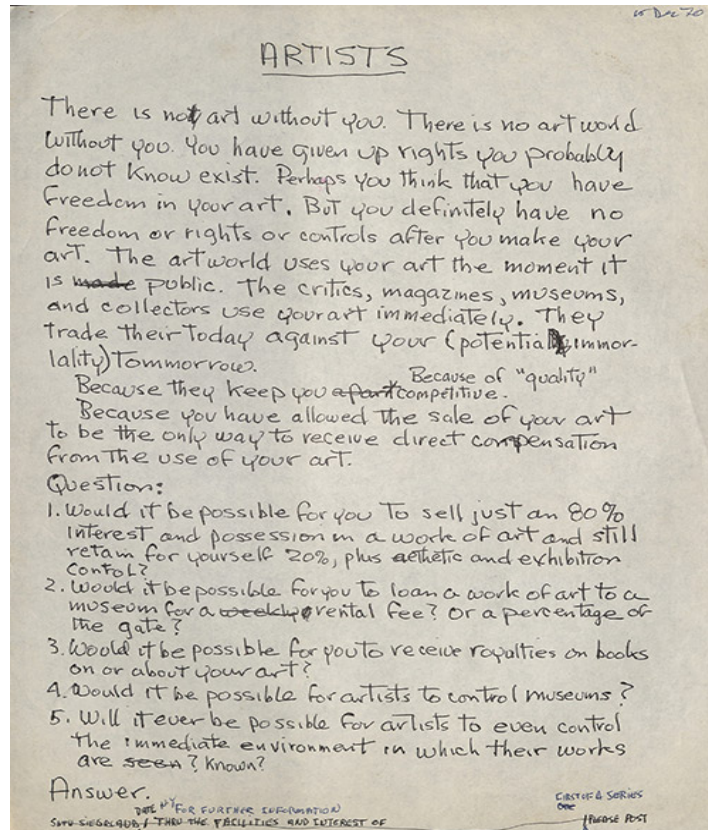
¹³⁸ Roberts, *supra* note 134.

¹³⁹ *See* Legal and Economic Reforms, *supra* note 132, at 113 (prefacing its list of economic reforms as necessary for artists to be "free," suggesting that control over the artists' work was paramount to profiting from their work).

¹⁴⁰ The first sale doctrine provides that a copyright owner's exclusive distribution right in a particular copy of a work of authorship is extinguished by the sale of that copy. 17 U.S.C. § 109(a) (2012) ("[T]he owner of a particular copy . . . lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy . . ."). And the Copyright Act explicitly provides that a copyright owner's exclusive right to public display of a work of authorship does not extend to particular copies of the work once they are sold. 17 U.S.C. § 109(c) (2012) ("Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.").

Accordingly, the AWC's demands had no direct effect on the art market or the art world more generally.¹⁴¹ But it did provide inspiration for others.

By mid-1971, the AWC had dissolved.¹⁴² Some splinter groups remained active after its dissolution, including Women Artists in Revolution, Guerilla Art Action Group, and Art Strike, and other groups have continued to advocate the ideas advanced by the AWC.¹⁴³



Seth Siegelau, Appeal to Artists (1970).¹⁴⁴

¹⁴¹ See, e.g., Press Release, MoMA, Art Workers Coalition: Summary of Points Raised (July 1969), https://www.moma.org/momaorg/shared/pdfs/docs/press_archives/4307/releases/MOMA_1969_Jan-June_0139.pdf [<https://perma.cc/QTC7-6FPL>] (responding to the demands of the AWC and indicating that the museum does not need to change or, in some cases, that it cannot feasibly comply with the AWC's demands).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *This is the Way Your Leverage Lies*, MoMA, <https://www.moma.org/interactives/exhibitions/2013/siegelau/> [<https://perma.cc/4M2U-WZEE>].

IV. THE ARTIST'S CONTRACT

Shortly after the AWC published its demands in November 1970, Seth Siegelau created a series of handbills that he circulated among artists.¹⁴⁵ Among other things, the handbills asked whether artists wanted a resale royalty right and other moral rights in their works. Siegelau's handbills were inspired by the AWC.¹⁴⁶ Siegelau had spoken at the AWC's open hearing on April 10, 1969, observing that artists should think about what they want.¹⁴⁷ His handbills raised many of the same issues addressed by the AWC's demands.¹⁴⁸



Seth Siegelau (1969)¹⁴⁹

A. Seth Siegelau & Robert Projansky

Seth Siegelau was an iconoclastic artist, scholar, gallerist, and impresario.¹⁵⁰ Today, he is remembered as an early proponent of “conceptualism,”¹⁵¹ an art

¹⁴⁵ See *id.*

¹⁴⁶ See EICHORN, *supra* note 86, at 39 (interview with Seth Siegelau).

¹⁴⁷ Seth Siegelau, Statement at A.W.C. Open Hearing, in ART WORKERS' COALITION, *supra* note 126, at 59–60 (1969).

¹⁴⁸ See EICHORN, *supra* note 86, at 39.

¹⁴⁹ Matthieu Laurette, *I Remember*, FRIEZE (Mar. 11, 2016), <https://frieze.com/article/i-remember-0> [<https://perma.cc/P3C5-SRWJ>].

¹⁵⁰ Siegelau was born in the Bronx in 1941, and died in Basel, Switzerland, on June 15, 2013. Andrew Russeth, *Seth Siegelau, Pioneering Dealer and Curator of Conceptual Art, Dies at 71*, OBSERVER (June 17, 2013, 12:45 PM), <http://observer.com/2013/06/seth-siegelau-pioneering-dealer-and-curator-of-conceptual-art-dies-at-71/> [<https://perma.cc/R75M-62QF>].

¹⁵¹ NOAH HOROWITZ, ART OF THE DEAL: CONTEMPORARY ART IN A GLOBAL FINANCIAL MARKET 94 (2011).

movement that focused on the “concept” or “idea” expressed by a work, rather than the physical object itself.¹⁵² As the American artist Sol LeWitt explained:

In conceptual art the idea or concept is the most important aspect of the work. When an artist uses a conceptual form of art, it means that all of the planning and decisions are made beforehand and the execution is a perfunctory affair. The idea becomes a machine that makes the art.¹⁵³

In 1964, Siegelaub opened Seth Siegelaub Contemporary Art in midtown Manhattan, an art gallery that also sold oriental rugs.¹⁵⁴ The gallery was not financially successful and closed in 1966, at which point Siegelaub became an independent curator focused on conceptual art.¹⁵⁵ Between 1968 and 1971, he organized twenty-one “exhibitions” that often had no tangible existence other than a catalogue.¹⁵⁶

According to Siegelaub, he discussed the idea of creating contractual resale royalties and moral rights with “over 500 artists, dealers, lawyers, collectors, museum people, critics and other concerned people involved in the day-to-day workings of the international art world.”¹⁵⁷ At a party in February 1971, Siegelaub asked his friend Jerold Ordover, a prominent art lawyer, to help him draft an artist’s resale royalty contract.¹⁵⁸ Ordover declined because he “didn’t have the time,” but Robert Projansky overheard Siegelaub’s request and volunteered to help him: “I was there and it seemed interesting and something different, a little bit of a challenge, so I said, ‘Sure, I’ll do it.’”¹⁵⁹

Projansky was a junior lawyer with an interest in the arts.¹⁶⁰ Coincidentally, he had served in the same Air Force reserve unit as Siegelaub in the mid-60s, but they

¹⁵² See *id.* at 93.

¹⁵³ Sol LeWitt, *Paragraphs on Conceptual Art*, ARTFORUM, Summer 1967.

¹⁵⁴ *This is the Way Your Leverage Lies*, *supra* note 144. Siegelaub’s gallery was located at 16 West 56th Street. See Walter Barker, *Art Work by Erwin F. Hebner Shown in New York Gallery*, ST. LOUIS POST-DISPATCH, May 25, 1965, at 19.

¹⁵⁵ EICHHORN, *supra* note 86, at 45 (interview with Seth Siegelaub); HOROWITZ, *supra* note 151, at 94–95; see also *A Conversation Between Seth Siegelaub and Hans Ulrich Obrist*, TRANS>, no. 6, 1999, at 51–63 (“Art reality was sort of framed by galleries which were rich and famous, or were poor, artists cooperatives, which were upstairs or downstairs, uptown or downtown. This type of experience, along with that of having a gallery myself for about 18 months or so from the Fall 1964 to Spring 1966, led me to think about other possibilities.”) [hereinafter Siegelaub & Obrist Interview].

¹⁵⁶ *This is the Way Your Leverage Lies*, *supra* note 144 (detailing Siegelaub’s “exhibitions, publications, and other projects”).

¹⁵⁷ ARTIST’S CONTRACT, *supra* note 6, at 1. There is no evidence to support this claim, but Siegelaub probably did talk to a lot of different people.

¹⁵⁸ Ordover practiced law in New York City from the 1950s until his death in 2008, representing many different artists and galleries. Press Release, Leslie Tonkonow, Merry Christmas Mr. Ordover (July 1, 2010), http://www.tonkonow.com/press_ordover.html [https://perma.cc/U86Q-34YS]. Most notably, Ordover represented the gallerist Leo Castelli and helped the artist Lawrence Weiner create a system for registering his text-based works. *Id.*

¹⁵⁹ EICHHORN, *supra* note 86, at 231 (interview with Robert Projansky, Apr. 23, 1998).

¹⁶⁰ Projansky was born on January 2, 1935, and grew up in White Plains, New York. He was admitted to the New York State Bar by the Second Judicial Department on March 16, 1966. *In re Projansky*, 286 A.D.2d 35 (N.Y.

did not know each other at the time.¹⁶¹ While Projansky had little experience practicing art law, he had attended some AWC events, was familiar with its demands for artist's rights, and understood more or less what Siegelauab wanted the contract to accomplish.¹⁶²



Robert Projansky¹⁶³

App. Div. 2001). He resigned from the practice of law on June 20, 2001 after being disciplined for allegedly using his attorney escrow account for the purpose of tax evasion. *Id.* He was the founding artistic director of The Grassroots Shakespeare Troupe in New York City, and was also a member of The Living Theatre. *As You Like It—Cast*, WILLAMETTE SHAKESPEARE, <http://www.willametteshakespeare.com/2009-cast/> [<https://perma.cc/ZBF3-XYRU>]. He currently lives in Portland, Oregon, where he continues to be involved with theater and political activism.

¹⁶¹ Robert Projansky described this as follows:

ME: Were you friends?

RP: Yes, he was a friend whom I knew through friends from around the art world. But coincidentally he and I had also been in a reserve Air Force Unit at the same place and in the same unit together. He was in charge of the parachutes. I didn't know him there. I just recognized him when I met him otherwise. He had a great big moustache and he was very distinctive looking. When I saw him around in the art world I recognized that he was the guy that I had seen up at the airport in White Plains.

ME: When was that?

RP: I think around 1965, '66, '67 something like that. That's when I was there and he was there all or part of that time.

EICHHORN, *supra* note 86, at 231 (interview with Robert Projansky, Apr. 23, 1998).

¹⁶² *See id.* at 233 (“ME: Did you work together with the Art Workers Coalition? They also drafted a contract of sorts, and they had public hearings to discuss these kinds of rights, in particular. Do you remember those? RP: I remember going to a public discussion or two of theirs. Pretty much I sat in the back and listened.” (citing *NAWC to Issue New Contract*, ART WORKERS NEWSLETTER (Nat'l Art Workers Cmty., New York, N.Y.), May 1971)).

¹⁶³ Robert Projansky, *The Perilous World of Art Law*, JURIS DR., June 1974, at 14, 15.

B. The Creation of the Artist's Contract

Siegelaub and Projansky created the Artist's Contract on February 24, 1971.¹⁶⁴ First, they hammered out its purposes and key terms. Then, Siegelaub wrote an introductory essay explaining the purpose and use of the form contract, while Projansky drafted the contract itself.¹⁶⁵

When they were done, they sent it to the printer:

My best recollection is that when we decided to do it, when I expressed some interest, he turned his attention from the other guy to me, and either we went ahead and did it that same day or within a day or two. We talked about it, we worked it out, we wrote the text, I drafted the Contract, we did everything in one day and night. I remember we were up most of the night during the printing and everything.¹⁶⁶

They entitled the form contract "The Artist's Reserved Rights Transfer and Sale Agreement"¹⁶⁷ and had it printed as a poster, with the form contract on one side and Siegelaub's essay on the other.¹⁶⁸ They wanted it to be distributed as widely as possible, and included the following notice: "Please POST, REPRODUCE, and USE this poster freely. This poster is not to be sold."¹⁶⁹ It was a labor of love—a legal tool produced not by entrepreneurs seeking business but by social justice warriors seeking community impact. Siegelaub observed, "We have done this for no recompense, for just the pleasure and challenge of the problem, feeling that should there ever be a question about artists' rights in reference to their art, the artist is more right than anyone else."¹⁷⁰

¹⁶⁴ See ARTIST'S CONTRACT, *supra* note 6, at 4 (inferring this because Siegelaub's essay at the beginning of the document is dated February 24, 1971, presumably the date on which the contract itself was drafted).

¹⁶⁵ See EICHHORN, *supra* note 86, at 231; ARTIST'S CONTRACT, *supra* note 6, at 1–2.

¹⁶⁶ EICHHORN, *supra* note 86, at 231.

¹⁶⁷ ARTIST'S CONTRACT, *supra* note 6, at 1.

¹⁶⁸ EICHHORN, *supra* note 86, at 45.

¹⁶⁹ ARTIST'S CONTRACT, *supra* note 6, at 4. As an aside, the Artist's Contract is surely an original work of authorship protected by copyright, based on the explanation and instructions, and the copyright vested jointly in Siegelaub and Projansky. The notice resembles a Creative Commons attribution-noncommercial license, which permits copying, distribution, and adaptation, but prohibits commercial uses. See *About the Licenses*, CREATIVE COMMONS, <https://creativecommons.org/licenses/> [<https://perma.cc/74Z9-64EM>]. While the notice does not explicitly require attribution, Siegelaub and Projansky may have expected it. The notice also prohibits the sale of the Artist's Contract. While copyright probably empowered Siegelaub and Projansky to prohibit commercial reproduction of the Artist's Contract, the first sale doctrine probably permitted the sale of a copy received from a third party. In any case, this blurring of the distinction between the intangible work and tangible copy may have reflected the artworld origins of the Artist's Contract.

¹⁷⁰ ARTIST'S CONTRACT, *supra* note 6, at 4.

The School of Visual Arts paid for the initial production and distribution of the poster.¹⁷¹ The entire document was also published in the April 1971 issue of *Art News*, as well as *Studio International* and *Arts Canada*.¹⁷² Before long, it became known as the “Artist’s Contract.”¹⁷³

C. *The Purpose of the Artist’s Contract*

The Artist’s Contract begins with Siegelau’s essay, which explains that the purpose of the contract is “to remedy some generally acknowledged inequities in the art world, particularly artists’ lack of control over the use of their work and participation in its economics after they no longer own it.”¹⁷⁴ Siegelau observes that artists can use the contract whenever they sell, trade, or give a work to someone and argues that the contract is justified because artists are entitled to retain both economic and moral rights in their works.¹⁷⁵

The Artist’s Contract is intended for use whenever an artist transfers ownership of a work by any means, including sale, trade, or gift.¹⁷⁶ It instructs the artist to complete two substantively identical copies of the agreement, striking out unwanted clauses and adding key terms like sale price.¹⁷⁷ Then, the artist and the recipient should both sign both copies, and the artist should attach a notice of the agreement to the work itself.¹⁷⁸

According to Siegelau, the Artist’s Contract was intended to benefit both artists and collectors by giving them the rights and benefits they actually want.¹⁷⁹ It gives artists the following contractual rights and benefits:

- 15% of any increase in the value of each work each time it is transferred in the future.
- a record of who owns each work at any given time.
- the right to be notified when the work is to be exhibited, so the artist can advise upon or . . . veto the proposed exhibition of his/her work.
- the right to borrow the work for exhibition for 2 months every five (5) years (at no cost to the owner).
- the right to be consulted if repairs become necessary.
- half of any rental income paid to the owner for the use of the work at exhibitions, if there ever is any.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ van Haften-Schick, *supra* note 10, at 2. The document is often called the “Projansky Contract,” but we will refer to it as the “Artist’s Contract,” because it incorporates contributions from both Siegelau and Projansky, as well as the artists and gallery owners Siegelau consulted. *See id.* (criticizing references to the document as the “Projansky Contract”).

¹⁷⁴ ARTIST’S CONTRACT, *supra* note 6, at 1.

¹⁷⁵ *Id.* at 2.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *See id.* at 1–2.

- all reproduction rights in the work.¹⁸⁰

Notably, the duration of those economic rights and benefits is the life of the artist “plus the life of a surviving spouse (if any) plus 21 years,” with the exception of “aesthetic” rights, which expire on the death of the artist.¹⁸¹

The Artist’s Contract also gives collectors the following rights and benefits: the “right to receive . . . a certified history and *provenance* of the work,” a “non-exploitative, one-to-one relationship” with the artist, privity of contract with the artist, “recognition that the artists maintains a moral relationship to the work,” and “assurance to the owner that he is using the work in harmony with the artist’s intentions.”¹⁸²

Of course, a cynic might observe that the putative rights and benefits given to the collector are of dubious value, with the exception of the right to a certified history and provenance of the work, which most collectors already expect to receive.¹⁸³ While the Artist’s Contract clearly benefits artists by giving them new and valuable rights, it is unclear how it benefits collectors, or why they should voluntarily agree to its terms—at least from an economic perspective.

From that perspective, it is difficult to imagine why collectors would agree to anything in the Artist’s Contract unless they believed the price reflected the present value of the contractual terms. If an artist’s work is in high demand, collectors might agree to the Artist’s Contract, especially if the price is below market. On the margins, surely it is a disincentive. A rationally minded collector would prefer to buy and sell on familiar terms and without additional restrictions.

Yet Siegelau insisted that the Artist’s Contract would not affect demand. Among other things, he argued that the contractual resale right applied only if the work increased in value, and the artist could always bargain with the collector over the nominal purchase price of the work.¹⁸⁴ But he acknowledged the obvious collective action problem, the sense in which the whole project relied on widespread rather than isolated use: “The more artists and dealers there are using it, the better and easier it will be for everybody.”¹⁸⁵ The contract’s success was explicitly linked to the success of the wider social consciousness he and his comrades were at that time seeking to inspire in the community of artists. If collectors have a choice, they will avoid the Artist’s Contract, and if galleries and artists want to make a sale, they will avoid the Artist’s Contract as well. Only acting as a group with few defectors could artists force buyers to play ball. Ultimately, the idea was to reshape the background norms of the art market such that artists’ preferred terms would be widely accepted. This was no small task, but the Artist’s Contract was intended as a

¹⁸⁰ *Id.* at 2.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Professor Whitaker discusses the fact that artists have sometimes actually been *forced* into the role of “guarantor” of their work. See generally Amy Whitaker, *Artist as Owner Not Guarantor: The Art Market from the Artist’s Point of View*, 34 J. VISUAL RESOURCES 48 (2018).

¹⁸⁴ ARTIST’S CONTRACT, *supra* note 6, at 4.

¹⁸⁵ *Id.*

way for individual artists to do their part, wielding private agreements written in legal language in order to accomplish broader social goals. It is from this perspective that Siegelau's optimistic statements begin to make sense—he is seeking to inspire a movement, not to describe existing reality.

Siegelau always insisted that the Artist's Contract was intended to solve practical problems confronting artists. It was a middle-of-the-road option in many ways, intended to leave intact (at least initially) many of the institutions that others found more problematic. There would still be a private market for art, looking much like the existing one, albeit with power shifted somewhat toward the artists. As Siegelau observed in a 1999 interview:

Its intention was just to first, articulate the kind of interests existing in a work of art, and then, to shift the relative power relationships concerning these interests more in favor of the artist. In no way was it intended to be a radical act; it was intended to be a practical real-life, hands-on, easy to-use, no-bullshit solution to a series of problems concerning artist's control over their work; it wasn't proposing to do away with the art object, it was just proposing a simple way that the artist could have more control over his or her artwork once it left their studio. Period. But the broader social-economic questions of the changing role and function of art in society, the possibility of alter native [sic] ways of art making or the support of the existence of the artist; all these important questions are not addressed here. As a practical solution, the contract did not question the limits of capitalism and its private property; it just shifted the balance of power in favor of the artist over some aspects of a work of art once it was sold.¹⁸⁶

Siegelau, reflecting back almost four decades after the composition of the Artist's Contract, draws an apt distinction between this work and more radical projects he and others imagined and pursued. For in fact, the Artist's Contract leaves much of the existing structure of the art world and art market in place.

It is easy to imagine that the radical artists, thinkers, and critics with whom Siegelau was generally allied might consider the approach embodied in the Artist's Contract to be inconsistent with their more communitarian values—a marginal improvement at best, falling far short of the revolution that was needed. The notion of discrete, art objects, essentially commodified, sold by individual artists for their profit to the highest bidder for individual use (even if restricted in large part by the Artist's Contract) might still have been widely viewed as reifying a narrow and bourgeois conception of the artistic endeavor.¹⁸⁷ Of course, one could argue that it was merely a first step, and that its success could have sparked further moves to consolidate a renewed social consciousness in the art world and beyond; in other

¹⁸⁶ Siegelau & Obrist Interview, *supra* note 155.

¹⁸⁷ For some examples of more stringent critiques and alternative approaches taken by contemporaries of Siegelau, see Miriam Kienle, *The "Exploits and Escapades" of the Robin Gallery: Ray Johnson's Queer Publicity Network as Counterpublic*, 42 OXFORD ART J. (forthcoming 2019) (on file with author).

words, one could defend it on tactical grounds if not strategic ones. Such are always the debates of would-be revolutionaries.

In any case, it is worth bearing in mind that while widespread adoption of the Artist's Contract would have represented a serious change, and while it was intended to provide an easy practical tool to take that step, nonetheless, to many, that step alone wouldn't have been enough.

D. The Function of the Artist's Contract

From a narrow legal perspective, the purpose of the Artist's Contract is twofold: to form an enforceable agreement with the desired contractual terms as between the artists and the initial collector, and then to enforce the agreement against third parties (i.e., subsequent buyers).

Forming an agreement may be problematic because many collectors will resist the terms of the Artist's Contract, but if the collector agrees, the agreement will probably be enforceable as between her and the artist. Contract law is intentionally flexible and accommodating. Almost any contractual term can be legally binding, so long as the parties to the contract agree to it and it is neither illegal nor against public policy. Accordingly, the terms of the Artist's Contract are probably enforceable against the initial buyer of the work, who is a party to the contract.

Enforcing the agreement against third parties, however, is probably impossible. As a practical matter, it is difficult for artists to know what a collector does with a work.¹⁸⁸ In order to enforce a contractual resale royalty right, the artist must know when the collector sells the work, and in order to enforce contractual moral rights, the artist must know how the collector uses the work. But most artists cannot realistically monitor collectors and enforce those rights.

Siegelaub argued that artists could collectively use self-help and social norms to enforce the Artist's Contract.¹⁸⁹ Even if compliance is hard to monitor, at least some breaches will be discovered. If artists punish the breaches they discover, it will discourage collectors from breaching and encourage them to honor the terms of the Artist's Contract. The art market depends on relationships and trust, and collectors who breach agreements will soon find themselves shut out. This reasoning is compelling so far as it goes. Of course, as the marketplace becomes broader and more diverse, such reputational and relational sanctions will become less effective.

If a collector does breach the Artist's Contract, it is almost certainly unenforceable at law, against a third party, due to a lack of privity of contract and the general legal reluctance to recognize burdens on items of personal property. The doctrine of privity of contract provides that contracts can only impose obligations on parties to the contract.¹⁹⁰ Accordingly, when a collector buys a work from an artist and agrees to the Artist's Contract, the collector is a party to the agreement, so privity

¹⁸⁸ See Gross, *supra* note 130, at 110–11 (discussing the difficulty of keeping track of the future transfers of a work, even after a buyer agrees to the resale royalty).

¹⁸⁹ See ARTIST'S CONTRACT, *supra* note 6, at 4.

¹⁹⁰ *Overview: privity of contract*, OXFORD LAW REFERENCE, <http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100347633> [https://perma.cc/76CV-VKSS].

of contract exists. But when the collector sells the artwork to someone else, that person is not a party to the agreement with the artist, so privity of contract does not exist. The artist and the collector have privity of contract, and the collector and the third party have privity of contract, but the artist and the third party do not. Similarly, with a few narrow exceptions, property law generally doesn't recognize covenants "running with" items of personal property.

In theory, the collector and the subsequent buyer could make the artist a third-party beneficiary of their agreement.¹⁹¹ But they are under no obligation to do so. If the buyer promises to pay the artist a resale royalty, the artist may be able to enforce that promise in some jurisdictions.¹⁹² But the artist cannot force the buyer to make the promise, nor bring a breach of contract action against a buyer who does not make the promise. At most, the artist can attempt a breach of contract action against the collector for failing to require the buyer to make the artist a third-party beneficiary.

The Artist's Contract purports to create privity of contract between artists and third parties. Specifically, it requires collectors to transfer their duties to the artist along with the work.¹⁹³ It prohibits collectors from selling unless the third party agrees to assume those duties.¹⁹⁴ Furthermore, it provides that third parties are bound by the terms of the Artist's Contract, whether or not they agree to them.¹⁹⁵

Unfortunately, none of those clauses are likely enforceable against third parties. Artists may have breach of contract claims against collectors who sell their work without requiring the buyer to agree to the terms of the Artist's Contract. But even if the buyer agrees to the terms, it is a contract with the collector, not the artist. While the artist may benefit from the new contract, the artist is still a non-party who can enforce it at best as a third-party beneficiary.¹⁹⁶

The policy reasons for the invalidity of the Artist's Contract become obvious when it is considered in the abstract. The Artist's Contract is designed for use by artists transferring their works to others.¹⁹⁷ But nothing intrinsic to the contract limits it to artists or their works. If the provisions of the Artist's Contract are valid, then anyone can bargain for them. A collector could resell a work subject to the Artist's Contract and claim the contract rights intended for artists. Anyone selling any kind of personal property could use the Artist's Contract to ensure future control over that property. If you can use the Artist's Contract to sell art, you can also use similar provisions to sell a car or a wastebasket. Would-be buyers of all sorts of objects would have to investigate in order to assure that the seller hadn't entered some side agreement with an unknown third party who would later seek to enforce the agreement against the buyer. This possibility represents a potentially serious

¹⁹¹ RESTATEMENT (SECOND) OF CONTRACTS § 304 cmt. b (AM. LAW INST. 1981).

¹⁹² See Frye, *supra* note 5, at 247–48.

¹⁹³ ARTIST'S CONTRACT, *supra* note 6, at 7.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ See RESTATEMENT (SECOND) OF CONTRACTS § 304 (AM. LAW INST. 1981).

¹⁹⁷ ARTIST'S CONTRACT, *supra* note 6, at 2.

hindrance to the functioning of markets in personal property of every sort, and is at least a large part of the reasons court don't generally enforce such encumbrances.¹⁹⁸

The resale royalty provision of the Artist's Contract is also in tension with the first sale doctrine, which provides that a copyright owner's exclusive distribution right only applies to the initial sale of any particular copy of a work.¹⁹⁹ Normally, when copyright owners sell a copy of a work, the buyers own the particular copy they purchased and can dispose of it in any way they like, so long as they do not infringe any of the other exclusive rights of the copyright owner.²⁰⁰ For better or worse, courts have allowed parties to contract around the first sale doctrine in relation to digital works because identifying a "particular copy" of a digital work is difficult, if not conceptually incoherent.²⁰¹ But the Supreme Court has consistently held that the first sale doctrine applies to the sale of tangible copies of a work of authorship, which would certainly include most works of visual art.²⁰²

In addition, some of the moral rights claimed by the Artist's Contract conflict with provisions of the Copyright Act. For example, the Artist's Contract enables the artist to prohibit the exhibition of the work,²⁰³ even though the sale of a copy of a work terminates this display right.²⁰⁴ Likewise, the Artist's Contract claims rights of attribution and integrity broader than those granted by VARA.

Of course, contractual agreements can and do preempt copyright defaults, especially in bilateral contracts.²⁰⁵ Courts have limited the application of the first sale doctrine by allowing copyright owners to characterize transactions as "licenses" rather than "sales."²⁰⁶ Accordingly, courts have recognized limitations on the first sale doctrine almost exclusively in relation to transactions involving digital property, and have rejected efforts to restrict the transfer of physical property.²⁰⁷ Artwork is typically physical property. Moreover, the Artist's Contract specifically refers to the contemplated transfer as a "sale."²⁰⁸ It is unclear whether courts would find the Artist's Contract enforceable as written.

The Artist's Contract is designed to give artists what they want; but if wishes were horses, beggars would ride. The law treats artists the same as anyone else, and

¹⁹⁸ These issues are discussed at length, convincingly, by Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373 (2002).

¹⁹⁹ 17 U.S.C. § 109(a) (2012) (codifying the first sale doctrine).

²⁰⁰ *See id.*

²⁰¹ *See, e.g.*, Adobe Systems Inc. v. Christenson, 809 F.3d 1071, 1078 (9th Cir. 2015).

²⁰² *See, e.g.*, Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 521–22, 535 (2013).

²⁰³ ARTIST'S CONTRACT, *supra* note 6, at 7.

²⁰⁴ *Kirtsaeng*, 568 U.S. at 523, 537.

²⁰⁵ *See generally* Christina Bohannon, *Copyright Preemption of Contracts*, 67 MD. L. REV. 616 (2008).

²⁰⁶ Irina D. Manta & David S. Olson, *Hello Barbie: First They Will Monitor You, Then They Will Discriminate Against You. Perfectly.*, 67 ALA. L. REV. 135, 146, 164–65 (2015).

²⁰⁷ *Compare* MAI Sys. Corp. v. Peak Comput., Inc., 991 F.2d 511, 519–20 (9th Cir. 1993) (enforcing restrictions on the use of software), *with Kirtsaeng*, 568 U.S. at 544–45 (invalidating restrictions on the transfer of books).

²⁰⁸ ARTIST'S CONTRACT, *supra* note 6, at 6 (the form contract itself, in Article One, characterizes the transaction as a "PURCHASE AND SALE").

intentionally prohibits contractual terms like those in the Artist's Contract, even if artists want them.

E. The Response to the Artist's Contract

The Artist's Contract immediately caught the attention of not only the international art press,²⁰⁹ but also of art lawyers.²¹⁰ It was widely reprinted by both arts organizations and legal scholars.²¹¹ And it was translated into many different languages including French, German, Italian, Swedish, and Dutch.²¹²

The art world's conventional wisdom, however, was rather skeptical of the viability of the Artist's Contract:

The agreement was imaginative—but it had a major flaw. It depended on the goodwill of prospective buyers (who didn't want to have their hands tied) and of museums (which generally denounced it as “unenforceable”) and of artists (who often weren't willing to risk losing a sale by insisting on having it signed) and of dealers (who generally like to keep big purchases secret).²¹³

Even Siegelau and Projansky candidly shared skepticism about their handiwork's adoption:

Controversial from the beginning, it was viewed as unenforceable, time-consuming and detrimental to sales—all of which proved to be true to varying degrees. Says Mr. Projansky, “We never expected this to become the standard of the art world, but we wanted to raise the subject and maybe influence some legislation.”²¹⁴

Lawyers and legal scholars were even more skeptical of the Artist's Contract. Many were already opposed to mandatory resale royalties, on economic grounds.²¹⁵ They observed that many provisions in the Artist's Contract were unenforceable as written, especially the contractual resale royalty, thus appearing to sink consensual imposition of such royalties on a broad scale.²¹⁶

Thus while it faced considerable skepticism from some pragmatists, the project captured the imagination of many. It drew considerable attention as a novel way of seeking to shift market power through a different legal form than that of legislation. As we turn to the (relatively few) known instances of its actual use, it becomes

²⁰⁹ See, e.g., Caroline Tisdall, *Fairer Share of the Spoils*, THE GUARDIAN, Feb. 23, 1971, at 8.

²¹⁰ van Haften-Schick, *supra* note 10, at 16–18 (discussing lawyers' reactions to the Artist's Contract).

²¹¹ *Id.* at 14, 21.

²¹² Robert Projansky, *The Rights of Artists*, JURIS DOCTOR, June 1974, at 16, 16.

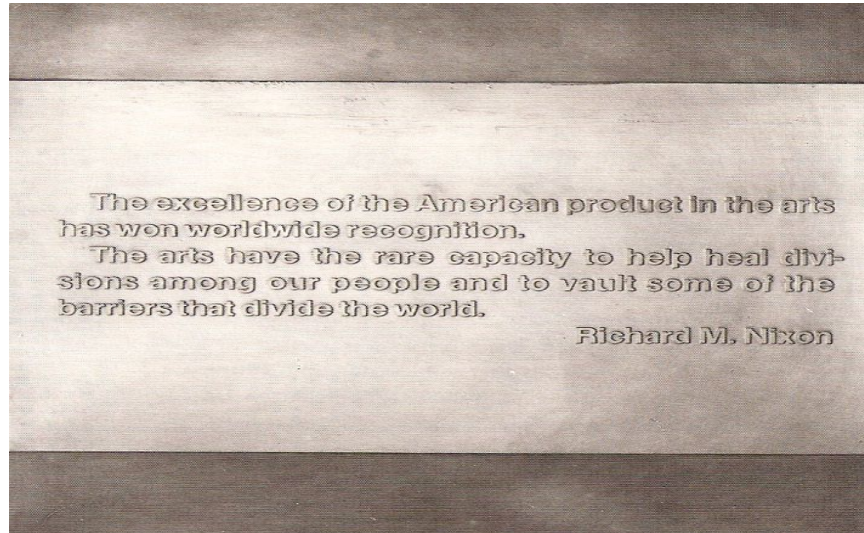
²¹³ Barbara Gold, *Money Talks the Loudest for Artists Today*, BALTIMORE SUN, Mar. 24, 1974, at D8.

²¹⁴ Roberta Smith, *When Artists Seek Royalties on Their Resales*, N.Y. TIMES (May 31, 1987), <https://www.nytimes.com/1987/05/31/arts/when-artists-seek-royalties-on-their-resales.html> [<https://perma.cc/TYH4-UX53>].

²¹⁵ See, e.g., Merryman, *supra* note 75, at 119.

²¹⁶ van Haften-Schick, *supra* note 10, at 17–19.

apparent that its “meaning” on a level other than that of strict legal enforceability was its strength.



Hans Haacke, *On Social Grease* (1975)²¹⁷

F. The Use of the Artist's Contract

The element of the Artist's Contract that received the most attention was its attempt to create a contractual resale royalty. But it also attempted to secure a litany of other moral rights. Indeed, Siegelau himself considered that the identification of those other moral rights, and the acknowledgment of them as issues worth negotiating—was important as the contractual resale royalty right and integral to the purpose of the Artist's Contract:

My first intention was to try to formulate the types of interests that artists have in their work, such as the control over the use of their work, the right of reproduction, etc. And although the Contract provided for a certain percentage of money on the increased value of its resale—the aspect that naturally got most of the attention because no businessman, collector or gallery was happy about it—it was essentially an attempt to formulate a list of all the possible interests of the artist in their work: the right to show his or her work, the right to control what happens to it when the artist no longer owns it, etc. And then once these interests were clear,

²¹⁷ *Hans Haacke Social Grease 1975 Hans Haacke*, GPTRAVEL CRAFT, <http://firestonepts.com/hans-haacke/hans-haacke-social-grease-1975-hans-haacke/> [<https://perma.cc/HX74-63RZ>].

to try to change the relationship between the artist and the people who successively own the work of art.²¹⁸

Initially, some artists wanted to use the Artist's Contract and some galleries agreed.²¹⁹ Today, the Artist's Contract is most strongly associated with Hans Haacke, a conceptual artist with strong ideological commitments.²²⁰ Haacke not only insisted on using the Artist's Contract but also insisted on enforcing it. For example, Haacke sold his work *On Social Grease* (1975), a set of six photoengraved magnesium plates mounted on aluminum featuring quotes from political and business leaders, subject to the Artist's Contract.²²¹ When the work eventually went up for auction in 1987, Haacke insisted that the auction house display the Artist's Contract along with the work and read it aloud immediately before the sale.²²² Haacke was not alone. Other artists, including Adrian Piper, also used the Artist's Contract.²²³

Other artists used versions of the Artist's Contract for more pragmatic reasons, primarily because they wanted to keep track of the ownership and exhibition of their works:

The French artist Daniel Buren also uses [the Artist's Contract], according to his dealer, John Weber (who is also Mr. Haacke's dealer) —but he uses it without the 15 percent resale clause, primarily to control the exhibition and installation of his exceedingly site-specific work. And both Edward Kienholz and Carl Andre have been known to use similar contracts intermittently.²²⁴

Some artists used the Artist's Contract briefly, then stopped. For example, the sculptor Jackie Winsor sold fifteen works pursuant to the Artist's Contract in the 1970s but stopped using it as her work became more popular and prices increased.²²⁵ Her use of the Artist's Contract was justified as follows:

In the beginning especially, when she was selling her sculptures for almost less than it cost to make them, Ms. Winsor seems to have used the contract as a device to establish, in her words, “my sense of their own value” and as a way “to get people not to be stupid with them,” and it usually worked.²²⁶

²¹⁸ EICHHORN, *supra* note 86, at 39.

²¹⁹ *Id.* at 41.

²²⁰ Smith, *supra* note 214.

²²¹ *Id.*

²²² *Id.*

²²³ EICHHORN, *supra* note 86, at 41 (stating that Carl Andre and Sol LeWitt used the Artist's Contract); van Haften-Schick, *supra* note 10, at 17 (discussing Adrian Piper and Jackie Winsor's use of the Artist's Contract).

²²⁴ Smith, *supra* 214.

²²⁵ *Id.*

²²⁶ *Id.*

Although Winsor realized she couldn't command high market prices at that point in her career, she felt that the legal document itself—fully enforceable or not—somehow affected her relationship to collectors, and even to herself. This is a classic example of the shaping of legal consciousness, that is, the way that legal language and devices interact with—change and are changed by—the social context surrounding their use. Legal language and legal devices shape conceptions of self and society held by those deploying and interacting with them.²²⁷ This is true even if there is no likelihood, or intention, of enforcement of legal rights through the formal legal system.

Many artists found that the Artist's Contract simply wasn't worth the trouble. Some collectors resisted it, and no one liked the red tape:

Ms. Winsor and her dealer, Paula Cooper, admit, as does Mr. Haacke, that some sales were lost because of their insistence on using the contract. They also recall—despite the apparent simplicity of Siegelau-Projansky form—the endless amounts of paperwork and negotiating time that went into each sale, factors that made its use impractical. Thus, by the late 1970's, the artist's contract was, with few exceptions, out of sight and out of mind in New York²²⁸

Absent the terms of the contract gaining widespread social acceptance, only a subset of artists could actually insist on using the Artist's Contract anyway, primarily the most successful ones.²²⁹ If an artist's work was in high demand, then collectors would swallow their objections, especially if the price was right. But if demand slipped, then collectors had plenty of other options.

Ironically, other artists used the Artist's Contract because their customers were insufficiently sophisticated about the art market to object. For instance, the Boston Visual Artists Union used a version of the Artist's Contract for all of its sales for a time:

In the six months the BVAU has been using this rather quietly worded contract, it has received almost universal acceptance by the art buyers. (There has been some controversy over binding heirs to the contract and establishing the rights of the artist to "show" the work.) But as Kyrá Montagu of the BVAU notes, "Most of the people who come into our gallery store are not serious investors. They are buying for themselves, untinged by commercial considerations and are pretty happy to sign."²³⁰

As a practical matter the BVAU contract was irrelevant, because none of the work appears to have had any meaningful value on the secondary market. The contract may have even increased sales by encouraging naïve consumers to assume

²²⁷ See, e.g., EWICK & SILBEY, *supra* note 11, at 50 (noting the "mutually constitutive" nature of various social structures, including that of "legality").

²²⁸ Smith, *supra* 214.

²²⁹ van Haften-Schick, *supra* note 10, at 16–17.

²³⁰ Ellen Goodman, *Artists Can't Eat Canvas*, BOSTON GLOBE, Oct. 24, 1975, at 27.

that the work would increase in value, rather than immediately become worthless. This is another expressive purpose potentially served by the contract, although apparently one unintended by Siegelau and Projansky.

Some artists objected to the Artist's Contract. Some thought it was just unrealistic red tape:

Like many other artists, Mel Bochner . . . remembers being opposed to the contract—even though he “liked the idea of trying to protect artists’ rights”—primarily because it seemed unenforceable. “The last thing I was interested in,” said Mr. Bochner, “was the formation of more bureaucracy, of another kind of art police. Also, I didn’t want to be the custodian of my own past.” Mr. Bochner also voiced his suspicion of the idea that “everything was going to increase in value forever,” and, giving the argument a little twist, said he felt that if artists wanted to share in the profits, they should be prepared to pay the collector a percentage of any decline in value if the work sold for less than its original price.²³¹

Others objected to the Artist's Contract on ideological grounds. For instance, some thought it cheapened art by further commodifying it.²³² Others thought it was inequitable, because it only benefited successful artists and did nothing for unsuccessful artists. For example, the National Art Workers Community argued that the Artist's Contract should have provided that a percentage of the contractual resale royalties be paid into a pension fund for artists in order to provide a benefit to all artists.²³³

G. The Aftermath of the Artist's Contract

The heyday of the Artist's Contract was short-lived, at least in part because its chief champion quickly departed the battlefield. In 1972, shortly after publishing the Artist's Contract, Siegelau abruptly quit the art world and moved to Paris to pursue other interests, including Marxist media theory and the history of handwoven textiles.²³⁴

²³¹ *E.g.*, Smith, *supra* note 214.

²³² *See, e.g.*, ALEXANDER ALBERRO, *CONCEPTUAL ART AND THE POLITICS OF PUBLICITY* 169 (2003).

²³³ van Haften-Schick, *supra* note 10, at 17.

²³⁴ *The Stuff That Matters. Textiles collected by Seth Siegelau for the CSROT, RAVEN ROW*, http://www.ravenrow.org/exhibition/the_stuff_that_matters/ [https://perma.cc/2K58-26K9]. Initially, Siegelau started a publishing company focused on Marxist media theory. van Haften-Schick, *supra* note 10, at 54 n.101. In 1986, he founded the Center for Social Research on Old Textiles, and eventually published an extensive bibliography of historical textiles, *Bibliographica Textilia Historiæ* in 1997. *The Stuff That Matters, supra*; *see also* Siegelau & Obrist Interview, *supra* note 155, at 51–63 (“I cannot speak for anybody but myself, but I do find it to be a very serious problem in one’s life to be interested in something and really approach it in a critical new way, which I have always tried to do, whether with political publishing, left media research or textile history. I am currently working on a bibliography of textile history, and I have asked myself many times why this project has not been done by a museum many years ago.”).

Projansky parlayed his role in drafting the Artist's Contract into a successful law practice representing artists. In 1974, he revised the Artist's Contract, making it shorter and easier to understand:

I recently decided that my supposed cleverness notwithstanding, the contract was so carefully drawn—to maintain a chain of privity, for example—that only a lawyer could appreciate it (or, some have said, even read it). So I have written a second edition, soon to be published and, I hope, distributed throughout the country. Amazingly, I found that it was possible to reduce the gross wordage by about 60 percent and still say the same things just as effectively—and make the contract itself more effective in terms of the artist getting people to sign it. Now few buyers will feel the need to show it to counsel first.²³⁵

The revised contract was published in the July 1975 issue of the Art Workers News.²³⁶ While it was indeed slightly shorter and easier to understand, it inevitably failed to solve the fatal enforceability problems that faced the original Artist's Contract.²³⁷ Charles Jurrist, another art lawyer, also published a model artist's contract in the same issue of Art Workers News.²³⁸ Jurrist's model contract was similar to the Artist's Contract, but limited it to the initial resale,²³⁹ the only one it could effectively bind.

Another approach, by artist June Wayne, looked to a different approach entirely, proposing a central registry:

Forget laws and contracts both, urges June Wayne, preferring instead a registry and escrow service for artists set up by a title company, bank, insurance company or government agency such as the patent office. When the artist sells a work, explains Wayne, the artist and buyer would agree on terms for residual rights and record them with the title company along with the first transfer of title from the painter to the new owner. On future sales, the purchaser would have to search the title and pay the artist's share to the title company; the latter would then forward the money on to the artist before transferring title.²⁴⁰

Such a system, akin to the car titling system or the real estate recordation system in place in many localities in the United States, was never adopted for art.²⁴¹ The

²³⁵ Robert Projansky, *The Rights of Artists*, JURIS DOCTOR, June 1974, at 16. These comments suggest that it is not clear that the Artist Contract's original author understood either the primary virtues, or limitations, of his handiwork.

²³⁶ Norman Nadel, *Artists Demand Share of Resale Profits*, EL PASO HERALD-POST, Mar. 15, 1975, at 39.

²³⁷ See Robert Projansky, *The Artist's Reserved Rights Transfer and Sale Agreement: Second Edition*, ART WORKERS NEWS, July 1975.

²³⁸ Nadel, *supra* note 236.

²³⁹ van Haften-Schick, *supra* note 10, at 19.

²⁴⁰ Barbara Isenberg, *Portrait of the Artist as a Financial Disaster*, L.A. TIMES, Apr. 27, 1975, at 588.

²⁴¹ See *infra* note 253 and accompanying text for some citations and discussions of subsequent proposals along these lines.

imposition of a centralized, inevitably complicated, bureaucratic system, might be effective at protecting the rights in question. But even if successful as a legal matter, such a project seems somehow limiting. Notably, it would be less empowering of artists themselves and less likely to usher in broader social changes in the art world, simply displacing their power and control to a distant bureaucracy. It lacks the élan—the upstart, grassroots vitality—of the Artist’s Contract as originally conceived. It could win the battle, by giving some successful artists some greater profits from their art, but lose the war if it failed to reshape the “legal consciousness” of those participating in the art market and thus to bring wider scale empowerment and reform.²⁴²

And that was that. For a few years in the early 1970s, the Artist’s Contract was the talk of the town, and then it was forgotten—until recently.

H. The Resurrection of the Artist’s Contract

In 2015, the Essex Street Gallery on the Lower East Side of Manhattan presented a group show titled “The Contract,” devoted to the Artist’s Contract.²⁴³ The show included historical works by Hans Haacke and Maria Eichhorn, as well as new works by Cameron Rowland, Wade Guyton, R.H. Quaytman, and others.²⁴⁴ All of the works in the show were offered for sale on the condition that the buyer agree to the terms of the Artist’s Contract, and most of them sold.²⁴⁵

The Essex Street Gallery show sparked new interest in the Artist’s Contract. Eichhorn published a collection of interviews with people involved in the creation or use of the Artist’s Contract.²⁴⁶ And several artists have picked up on the idea to propose 21st century versions of the Artist’s Contract.

For example, Alex Strada drafted a contract intended for use when selling her own work.²⁴⁷ In many respects, her contract is similar to the Artist’s Contract, but it provides that the collector must promise to sell the work in ten years and use the

²⁴² Cf. van Haften-Schick, *supra* note 10, at 23–24 (“[W]ere laws to pass that addressed all provisions in the Agreement, would it have fully succeeded by writing itself out of necessity (dematerializing perhaps), and fulfilling the aim of concretely influencing social politics? Or, might we be better off preserving the Agreement as a device of private law to be leveraged by artists, so that they may be the ones to reform and reauthor art industry norms?”).

²⁴³ Kibum Kim, *Could a Long-Forgotten Contract Settle the Artist Resale Royalties Debate?*, HYPERALLERGIC (Jan. 5, 2015), <https://hyperallergic.com/172688/could-a-long-forgotten-contract-settle-the-resale-royalties-debate/> [<https://perma.cc/PB9A-L6N9>].

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ See EICHORN, *supra* note 86.

²⁴⁷ Isaac Kaplan, *Alex Strada Is Contractually Binding Her Collectors to Support Emerging Female Artists*, ARTSY (Nov. 1, 2017, 7:16 PM), <https://www.artsy.net/article/artsy-editorial-alex-strada-contractually-binding-collectors-support-emerging-female-artists> [<https://perma.cc/55V5-QFZ8>].

“accrued value” to purchase a work by an emerging female artist, in consultation with Strada.²⁴⁸ It is unclear whether she has sold any work pursuant to this contract.

By contrast, Amy Whitaker argues that artists can use blockchain to create enforceable private resale royalty rights: “By registering artworks with blockchain to establish authenticity and create property rights which can then be split off and traded, artists can retain an ‘equity share’ in the works, much like the founder of a startup retains an ownership stake that grows in value as the company expands.”²⁴⁹ Under Whitaker’s proposal, artists selling work would “retain an equity stake in their work” and use blockchain to track it.²⁵⁰

Part of this proposal seems to be merely the familiar call for a centralized registry, clothed in trendy technological language. Of course, “blockchain” was the buzzword of 2017, and by now has become a running joke in many circles.²⁵¹ According to Whitaker, “[b]lockchain could provide an elegant private-sector solution that lets artists easily track an artwork and its traded price as it passes through the hands of collectors and institutions, bringing much-needed transparency to a market long on information asymmetry and opacity.”²⁵² Perhaps. But is tracking the ownership of and transactions in a work of art really the intractable part of this problem? It is unclear what blockchain adds to the mix. It is one thing to suggest the use of blockchain to authenticate inherently intangible and fungible digital assets. It is another to use it to authenticate physical objects. If the art market were to demand an online, centralized database run by a trusted intermediary, such a system would seem easier to introduce and more reliable than the cumbersome—and, judging by news stories, still quite risky—mechanisms offered by the blockchain. Proposals for centralized art registries have kicked around for a long time,²⁵³ and they seem to have failed more because of lack of political will than need for better recordkeeping technologies. Surely traditional methods are more than adequate, to the extent that

²⁴⁸ *Artist Contract 2017*, ALEX STRADA, <http://www.alexstrada.com/index.html#contract> [<https://perma.cc/U859-6VZ4>]; see also Kaplan, *supra* note 247.

²⁴⁹ Anna Louie Sussman, *Could Blockchain Put Money Back in Artists’ Hands?*, ARTSY (Mar. 16, 2017, 7:58 PM), <https://www.artsy.net/article/artsy-editorial-blockchain-money-artists-hands> [<https://perma.cc/44M6-E7M4>]; see also Whitaker, *supra* note 183, at 52–53.

²⁵⁰ Sussman, *supra* note 249; see also Whitaker, *supra* note 183 (presenting this idea at greater length).

²⁵¹ See, e.g., Matt Levine, *You Have to Threaten People Right*, BLOOMBERG: MONEY STUFF (Mar. 26, 2019, 11:59 AM), <https://www.bloomberg.com/opinion/articles/2019-03-26/you-have-to-threaten-people-right> (“Obviously I am quoting this mainly because it contains the words ‘blockchain blockchain blockchain,’ which has long been my dumb shorthand version of how blockchain projects are pitched to big banks. Apparently it is more or less accurate!”).

²⁵² Sussman, *supra* note 248; see also Whitaker, *supra* note 182.

²⁵³ See, e.g., Diane B. Schulder, *Art Proceeds Act: A Study of the Droit De Suite and a Proposed Enactment for the United States*, 61 NW. U. L. REV. 19 (1966) (discussing a system including a centralized registry for implementing resale royalties in the United States); Isenberg, *supra* note 240. Most successful registries appear to have been conceived and implemented to deal with art theft or looting. See, e.g., Steven A. Bibas, Note, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437 (1994) (arguing for changes in the law in light of the implementation of lost art registries); *Provenance in the World War II Era, 1933–1945: Lost Art Databases & Resources*, SMITHSONIAN INSTITUTION, https://provenance.si.edu/jsp/lost_art_databases.aspx [<https://perma.cc/W7M4-AB6R>] (listing registries).

parties actually consider reliable authentication and provenance an asset, rather than a liability.²⁵⁴

All that said, Whitaker offers interesting insights concerning artists retaining an “equity” interest in their work. Her work can be seen as an attempt to catalyze a new understanding of artists and their relationship with those who trade in their art. Her writings interestingly deploy legal and financial concepts to try to reshape the social and economic world of artists, much as Siegelau and Projansky’s project did.²⁵⁵

Thus, practical objections to a blockchain-based registry proposal resemble legal objections to the enforceability of the Artist’s Contract, in that they miss the broader point. Ultimately, with the benefit of hindsight, it seems clear that the highest and best purpose of the Artist’s Contract was to begin a conversation about what rights artists wanted and why they were entitled to those rights.²⁵⁶ Even if the Artist’s Contract was impractical and unenforceable, it was evidence that artists were serious about moral rights.

As Siegelau recognized, formal legal enforcement of contractual provisions is not the only way rights are created and disputes are resolved in the art world.²⁵⁷ They are the exception to the rule. When collectors make promises to artists they have incentives to keep those promises, other than the threat of a breach of contract action. Collectors want to maintain a friendly relationship with artists, not only to ensure that the artist’s disapproval doesn’t harm the market value of the work they already own, but also to ensure that they will have access to more works in the future.

More often than not, the most valuable legal rights are those you will never have to assert. Indeed, “legal” rights may be valuable even if they cannot formally be enforced. While the Artist’s Contract is largely unenforceable, collectors no doubt still respect its terms because in negotiating the transaction and signing the contract, they “accepted” its terms on a deeper level than a legal one. They may act according to it not because bound them legally but because it *persuaded* them—it came to shape or to express their values as well. In this sense, the Artist’s Contract can be seen as an element of the works it purports to regulate, and may even increase their value. The Artist’s Contract purports to benefit collectors, as well as artists, and ironically, maybe it does. Perhaps there are reasons to use legal language and legal documents, even if there is neither an intention or a capability to actually enforce any legal obligations.

V. THE ARTIST’S CONTRACT AND LEGAL CONSCIOUSNESS

Scholars of law and society have explored the ways in which legal documents serve purposes that go beyond enforcement in courts. Among these purposes are to associate a

²⁵⁴ Indeed, art market participants tend to avoid transparency and prefer secrecy. *See* Frye, *supra* note 79, at 133.

²⁵⁵ Whitaker, *supra* note 183; Amy Whitaker, *Ownership for Artists*, in *THE SOCIAL LIFE OF ARTISTIC PROPERTY* 70 (2014), <http://thesociallifeofartisticproperty.com/material/sociallifeofartisticproperty.pdf> [<https://perma.cc/MP6M-46EF>].

²⁵⁶ *See* EICHHORN, *supra* note 86, at 39.

²⁵⁷ *See id.* at 29–30.

particular transaction or relationship with values that are thought to be associated with law, such as formality, clarity, even legitimacy in the eyes of a given community or political unit. The law, in other words, serves an expressive function, shaping individual self-conceptions as well as broader societal beliefs.

As Lauren van Haften-Schick has observed, the Artist's Contract reflects the desire of many artists to maintain control over the work they produce, in order to shape its presentation and meaning.²⁵⁸ It uses legal rhetoric to express the gravity of their investment and concern. Essentially, the Artist's Contract reflects an attempt to shape the "legal consciousness" of the art world, to catalyze a shared understanding of artists and collectors as to their mutual obligations and expectations.

The Artist's Contract is important because it reflects an effort among artists, dealers, and collectors to create a mutually agreeable memorialization of a (purported?) shared understanding between the parties, a recognition and acknowledgement of the ongoing connection between the artist, the collector, and the artwork. Regardless of whether this is right or wrong, the legal document should be seen as a way of recognizing and *formalizing* that ongoing connection in *legal terms*. It's a way of challenging existing assumptions about property ownership and the relationship between artists and their work, and introducing new ideas of what equity, what justice, demands. The legal trappings are used instrumentally, for all sorts of purposes, including socially and politically organizing artists, but perhaps most of all developing a different relationship between artists, art, and collectors after the sale of art. The idea is for the artist to have more power (including financial rights) after the sale, but also to enlist the collector as an ally through the use of legal language, clearly specified expectations, and explicit agreement.

²⁵⁸ See *id.* at 13.