

## Resale Royalty Rights and The Context and Practice of Art Bargains

# Resale Royalty Rights and The Context and Practice of Art Bargains

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## 0. Introduction to the Questions

This note primarily discusses the *droit de suite*, or the "resale royalty right", a set of legal concepts which gives artists an ongoing interest in the financial life of their works once the works have been sold. These rights have been debated at length in the past, and, with the United Kingdom's recent enactment of a resale royalty on January 1, 2006, the discussion is bound to recur. The United States is now the only nation in the world with a major art market that does not use some form of resale royalty.<sup>[1]</sup> Whether or not resale royalty rights actually benefit artists is unclear. In an efficient market where transactions are conducted at arms-length between parties with equal bargaining power, there are reasons to believe it might not. However, the art world is nothing if not anomalous, and defies efficient market principles routinely. This is due in equal parts to the unique nature of the art object and deeply ingrained business style of art market participants.

Overall, this article takes the position that a resale royalty might have a positive impact for individual artists by putting cash in their pockets, but that its effects would most significantly register at the symbolic level, by wresting some amount of advantage back from the larger institutional interests that control and have historically controlled the art market. The resale royalty is probably a good thing, but it must be structured a certain way to maximize its advantages.

But that is not the end of the analysis. This article also aims to re-situate the *droit de suite* within earlier internal art-world discussions about the relation between art and the marketplace. Legal debate on the topic has been cut off from this history for the most part. Resale royalty rights have been, in America, just one part of a larger question of how art can function in an exchange economy, and to what degree its autonomy—thought by more than one branch of aesthetics to form the nucleus of its cultural value—may or may not be compromised by its status as a "commodity". This is a vast discussion, more vast than this paper can pretend to encompass. Instead, this note investigates one topos where this ongoing debate has been located: the MFA degree, which is understood as a near requirement for entry into the contemporary art market of today.

Generally speaking, the system built around intellectual property is designed as a system of rights, rather than as a system of rules for the overt regulation of markets. Rights

can be traded, bargains can be struck, and equilibrium achieved according to the utility maximizing decisions of parties. Even if the art market has befuddled economists, art work deserves an intellectual property treatment that grasps its idiosyncratic nature--that is, as a type of property--but without perpetuating or naturalizing enduring inefficiencies of the market (or mistaking the current status quo as an inevitable outcome tied to some intrinsic nature of the object). When those rights are of limited or no value to a participant, or when, because of market imbalances, they have no opportunity to barter with these rights, the legal system is obliged to consider creating new rights. One such right could be a resale royalty.

## 1. Recent History of the Debate

Past debate on the *droit de suite* [2], or the right for artists to participate in the economic increase of their work after it has been sold, have been extensive yet lacunae ridden. Commentators from within the art-world tend to position themselves pro- or anti-according to obvious biases: museums, gallerists, auction houses, and collectors view *droit de suite* negatively, while artists and their supporters view it in a positive light.[3] There is enough sophistication and variety in the discussion, however, that blanket assumptions under-serve it, though these general contours seem to persist. Analysis of the *droit de suite* from the legal community tends to cabin debate around the question of whether resale royalty is a moral right derived from civil law systems foreign to United States jurisprudence, and therefore inapplicable to our tradition. They often rely on an economic portrait of the art market and the incentives of its participants that is dated or simplistic. Recently, however, the work of a school of economic thought called Cultural Economics[4] has formulated a more realistic portrait of the art market, better capturing the micro-politics of exchange within that market and the multiple incentives for creation of artists. This work seems to hold out the promise of moving the legal debate forward, or at least introducing new terms.

Debate over *droit de suite* peaked in the early 1990's, when the United States saw the passage of the Visual Artists Rights Act ("VARA"), which recognized the moral rights of attribution and integrity, but did not recognize amongst these a resale royalty right.[5] As part of VARA, Congress requested a report on the feasibility of such a right from the Register of Copyrights, and was presented with a report from Copyright Office on December 1, 1992, which ultimately recommended against adopting such a law. However, the Report mentioned that its conclusions should be reconsidered if other nations such as the UK. adopted *droit de suite* laws.[6] The U.K. did so on February 16, 2006.[7] The Report also mentioned that it was conducted with insufficient empirical evidence comparing the respective remuneration of visual artists and other creators.[8] In effect, the Report admitted it had no data nor clear grasp of the material conditions of American artists versus other creators, and therefore an insufficient grasp of the probable effects of *droit de suite*[9] on the art market. [10] This is precisely the gap that this paper seeks to address, and to supply arguments for the economic necessity of the *droit de suite*. Though no announcements have been made, one anticipates that the debate over *droit de suite* will be renewed given that the United States is the only developed nation with a large art market without some form of a resale royalty.

## 1.1: General Explanation of Droit de Suite and Why We Are Talking About It Again in 2006

The idea for a resale royalty for visual artists originated in France in the 1920s.[11] Known as the *droit de suite*, it describes the right of artists to participate in the increased economic value of their work after its initial sale. Since France adopted the *droit de suite* in 1920, at least forty seven other countries and the State of California have implemented the royalty.[12] *Droit de Suite* entails a protection not otherwise addressed by copyright law in that it specifically extends visual artists' chances of profiting from the extended economic life of the unique objects they produce and is designed to remedy their seeming inability to capture revenue, as musicians and composers do, from selling multiple reproducible copies of the work.[13] To the extent that art's value lies largely in the fact that it is unique, visual artists are disfavored under the copyright regime, which was intended to protect creators who might monetize their work through distributing reproductions of it.[14]

The *droit de suite* has been conceptualized within the framework of "moral rights", that is, a bundle of rights largely European in origin and theorized in common law traditions as a sort of "tort protection of the honor and reputation of the personality of the creators such and as expressed in their works, and protecting the cultural heritage of civilization." [15] In European, or civil law, countries, moral rights have a longer tradition and more succinct definition: they comprise the rights of paternity, integrity, and attribution [16] which attach to the personality and reputation of the creator and remain with him despite complete alienation of the work.[17] In effect, under civil law they are akin to personal civil rights, and are similarly inalienable.[18] However, even in civil law systems, *droit de suite* is not simply or entirely derived as a moral right because, crucially, *it is also an economic one*. It is thus more similar to the rights of reproduction theorized under copyright law since it is pecuniary in nature, at least to the extent that both are designed to allow an artist to benefit from the exploitation of her work.[19] From this perspective, artists should benefit from increases based on the artist's continued work and enhanced reputation [20] as a matter of equity, and not as a matter of welfare.[21] This is the basic tension within the debate over its acceptability as it is unclear on what basis the resale royalty is more successfully justified, since it seems equal parts a manifestation of moral rights—which in the United States are in a relatively early stage of development [22]—and the economic rights under copyright, which the U.S. law recognizes with more certitude.

## **2. Historical Evolution of Resale Royalty Concepts**

### 2.1: The Projansky Contract

Consistent discussion of the *droit de suite* in America coalesced in the mid-1960's with the publication of several widely read law journal articles [23], and then gained currency within the art world with the 1971 creation of "The Artist's Reserved Rights Transfer and Sale Agreement." The cause for resale royalty got a further boost in 1973 with the highly visible feud between Robert Rauschenberg and collector Robert Scull, wherein the latter re-sold a Rauschenberg piece for \$85,000 that he had purchased for less than \$1,000 just a few years earlier. The Scull sale is popularly held to have galvanized early attempts at *droit de suite* legislation in the U.S., but the Projansky Agreement actually predated it by a few years.

The Projansky Agreement was an effort that came from within the art world in response to growing awareness of general imbalances in the negotiating power between artists and the consumers of their services.[24] As such it bears witness to the felt needs of an emergently self-aware art community at that time. Importantly, it was developed with the heavy participation of artists and gallerists, as a conscious alternative to political or legislative solutions[25], and claimed to have been designed with “special awareness of the current ordinary practices and economic realities of the art world, particularly its private, cash, and informal nature.”[26] The brainchild of artist and dealer Seth Siegel and attorney Robert Projansky, the contract specified, among other rights, that artists would receive fifteen percent of the appreciated value each time a work was resold, donated, exchanged, or otherwise transferred.[27]

The Projansky Contract was drafted in consultation with hundreds of artists and gallerists with the stated goal of remedying some of the “generally acknowledged inequities in the art world, in particular artists’ lack of control over the use of their work and limited participation in its economics after they no longer own it.”[28] It was distributed widely and freely within the New York art world, including through publication in art magazines, and enjoyed a certain level of popularity deriving from its self-help nature.[29] Today, the contract is not frequently used, with the possible exception of Hans Haacke and a few other original supporters.[30]

#### *Description*

Under the Projansky contract, when an art work is resold by its initial purchaser (or otherwise passed by operation of law to a new owner), the new buyer agrees to file a Transfer Agreement and Record which names the artist, title of the work, date of creation, identification number of the work, and sale price, amongst other data.[31] In order to render the contract enforceable against subsequent transferees, the buyer agrees that he will not alienate the work without procuring the future transferee’s agreement to be bound by the terms of the original contract, evidenced by his signature on the Transfer and Agreement Record.[32] Privity is thereby retained with subsequent transferees. In the case where a collector alienates a work without signing a Transfer Agreement, any transferee taking the work with notice of the contract will be bound as if the Agreement and Record had been signed.[33] The economic benefits would accrue to the artist for his life, plus the life of a surviving spouse, plus twenty one years.

The Projansky Contract secures more than just the resale right and includes provisions reserving to the artist several other “moral style” rights: receiving notice and consent of the work’s exhibit, copy and reproduction rights, and with notice to the owner of 120 days, to possess the work for exhibition, as well as the right to be consulted if the work requires repair.[34] The collector is further bound not to destroy, damage, alter, modify, or change the work and is obligated to remit one-half of any earnings for rental for public exhibition.[35] The artist may not assign the rights under the contract during his lifetime except for those granted under the Copyright Act of 1976.[36] The Projansky contract broadens the rights of an artist under existing copyright law since the well known “first-sale doctrine” generally permits an owner to control a work’s exhibition and display.[37] In return, under the contract the artist will keep records of each transfer in order to provide the collector, upon request, a provenance of the work.[38] The artist will also authenticate the work to the collector or his successor.[39]

#### *Problematic Implementation*

The obvious problem with the Projansky Agreement was that artists lacked individual bargaining power sufficient to get gallerists and collectors to use the contract in number. Individuals simply lacked leverage in order to get the contract used initially. And then when it then came to enforcement of the contract, artists were at the whim of collectors and dealers in two ways: for information about resales and prices, and then relying on collectors and dealers to bind subsequent purchasers.[40] The text that accompanied the contract recognized the extent to which its success is almost entirely dependent on the good will of dealers—both in providing the artist with information on sales, but also in encouraging and normalizing the use of the contract.[41] The contract relied on each buyer agreeing to bind a subsequent purchaser. Failure to do so would require an artist to bring a lawsuit in order to enforce his rights and recover. Enforcing the contract was difficult in that it required large amounts of legwork on the part of the artist for tracking down unreported sales and parties to sales, and then the costs of litigation, which likely outweighed recovery in any case.[42] Even if the contract provided for recovery of legal fees, the disincentives to undertake a lawsuit were substantial.

These burdens proved insurmountable.[43] The Projansky Agreement was largely abandoned within six years, even after it was redrafted so that legalistic terms were simplified for better layperson comprehension.[44]

## 2.2 California's Resale Royalty Act[45]

California passed America's first and only resale royalty statute in 1976.[46] It has been described as “perhaps the State's most neglected and underused law. Many of those who could benefit are ignorant of the Act; others who are aware of the Act feel impotent to enforce it. Those whom the Act seeks to regulate do not comply with its provisions. The monitoring necessary for individual enforcement is an impossible bureaucratic nightmare attempted by no one. Apparent lack of effective means to collectively enforce the Act has made it virtually irrelevant. As a result, visual artists continue to be exploited and remain uncompensated for their residual interests in resold artwork.”[47]

The Act applies to all resales, public auctions, and private sales where the gross sale price is at least \$1,000 and where a gross profit results from the transaction. The seller must reside in California or the sale must take place in California and the right is not transferable though it is waivable under certain conditions[48] per a 1982 Amendment.[49] As distinct from the Projansky contract, the California Act levies on the gross sale price, not simply the difference between the current sale and previous purchase price.[50] The Act does not apply to resales occurring after the artist's death nor to sales that occur within ten years of the initial sale by the artists provided that all intervening sales occur between art dealers.[51] Collection procedures require the seller or agent to withhold the five percent from the sale and then locate and pay the artist. If a seller can't find the artist, the seller pays the royalty into the California Arts Council (“CAC”) fund. If, in turn, the CAC cannot find the artist and the artist does not come forward to collect within seven years from the date of sale, the funds escheat to CAC.[52] If there is a discovered breach by a seller, a suit may be brought by the artists or CAC, but the discovery of breach must be within three years of the date of sale or one year within the finding of sale.

### Frequent Circumvention

The California law is easily circumvented since it requires that either an artist be a resident of California or the transaction take place between two parties within the state. A California dealer who locates a buyer can loophole around the law by selling the work to a dummy Delaware corporation for less than the original purchase price and then complete the sale outside of California.[53] In addition, lacking collective enforcement, the lone artist is still dependent on the gallerist or dealer and private collector to undertake a reasonable search to find him or else remit to the CAC. The artist is always dependent on the dealer or individual to know that a sale has taken place and has to undertake the exhausting work of tracking resales and contacting sellers to collect payments not forthcoming. It was reported that dealers often resisted giving resale information to artists.[54] In addition, artists are reluctant to shoulder the initial costs of a suit to enforce the right, and even less likely to proceed against a seller who is an influential collector, dealer, relative, or friend.[55]

The Act has successfully survived challenges to its constitutionality[56] under separate theories of a violation of the commerce clause, a taking in violation of the fourteenth amendment, and a violation of the contracts clause.[57] There is speculation remaining about whether it would survive the Federal Copyright Act of 1976 pre-emption clause, with many commentators arguing it would not.[58]

### 2.3 European Styles of Droit de Suite & the UK Implementation

French Parliament enacted the droit de suite in 1920. Under it, artists may claim a percentage of the gross sales price received on each public sale of the work. The right is inalienable, endures throughout the artist's life plus fifty years, and consists of a three percent royalty paid by the seller on all sales above a very low base amount.[59] The royalty is collected irrespective of whether the seller makes a profit.[60] While the law applies to all public and private sales of a work, in practice it has been applied only to public sales at auction, not galleries or private sales between individuals.[61]

Collection is undertaken and funds distributed by The Union of Artistic Property ("SPADEM") or the Société des Auteurs dans les Arts Graphiques et Plastiques ("ADAGP"), which are two private organizations to which most French Artists belong.[62] SPADEM tracks auction catalogues supplied to it through agreements with the auction houses and keeps a portion of the collected royalties to cover administrative fees. The administration runs relatively efficiently in France as of 1992 [63], for every twenty dollars collected, more than sixteen dollars were distributed.

The benefit of the French system is that collective enforcement both creates the leverage needed to get other institutions to accept the resale royalty as part of the bargain, and also defrays the administrative expense of collection.[64] Each payment to an artist is accompanied by a detailed statement of the transactions concerned. Importantly, and despite the actual drafting of the law which technically makes it applicable to all sales--public auction and private gallery alike, the French system collects mainly from auction houses [65], which comprise a much larger percentage of the French resale market than in the United States.[66]

#### Other countries

At least 47 nations, of which at least 14 are European, with the notable exception of Switzerland, have enacted some form of *droit de suite*. [67] The French model has provided the template by which most countries have patterned their resale royalty policies. Its main features are obligatory collective administration through an artists' rights society,

indefeasibility of the right, that beneficiaries of the *droit de suite* should be artists and their heirs, and application of a fixed percentage on the total resale price, not just profits.[68]

### U.K. Implementation

As of 2001, the EU adopted a directive that all member states would have to implement a resale royalty statute by 2006.[69] It meant to address trade distortion in the internal market caused by inconsistent policies and enforcement practices by member countries. With the passage of this year, the UK became the latest country with a major art market to institute a resale royalty scheme. It follows generally the French model, but with significant alterations.[70] The UK resale royalty covers all sales between art world professionals—defined as “any individual acting in the course of a business of dealing in works of art”[71]—and therefore does not cover sales between private individuals or between an individual and a museum. It is levied on galleries, private dealers, and auction house alike for all sales of work above €1,000 (approximately \$1,200)[72]; the amount of royalty is set on a sliding scale and decreases as the sale price gets higher[73]; the resale royalty is capped at €12,500 (approximately \$15,000) and is not alienable, waivable, or otherwise assignable (with an exception for charities) except for purposes of collection. It is collectively enforced through an agency known as “DACs.” Though DACs is not granted a collecting monopoly under the statute, it is the only collecting agency currently in existence. Importantly, the resale royalty applies to works of graphic or plastic arts—a picture, collage, painting, drawing, print, engraving, photograph, sculpture, etc—but leaves out new mediums such as video, film, performances, and internet work.[74]

The UK legislation represents the most modern and nuanced implementation of a resale royalty. Its main features are a right that is not waivable, that collects from the gross sales price of the work, and that is only applicable to sales between art professionals.[75] The ease with which the UK got a relatively intelligently crafted bill is impressive[76], but since it was the result of a directive, debate focused on the shape of the right, and not on its basis in common law or otherwise.[77]

## **3. Legal & Economic Arguments for Droite de Suite**

Works of fine art behave differently than other types of intellectual property and seem to inhabit a netherworld between chattel and intellectual property for many reasons, some of which will be discussed below.[78] Artists are relatively under-served by copyright law in that the thrust of its protection is based around the right to make or sell reproducible copies of an original work.[79] In an economy where value is derived from the original and unique work, the right to reproductions is of limited worth.[80] Further, additional sticks in the bundle of rights afforded under copyright—the rights of public display, exhibition, and reproduction most obviously—are curtailed by the robust “first sale doctrine” under 17 USC §109, which permits owners use and display rights under almost all circumstances.[81]

Copyright law's general bias against visual art has existed for some time. Visual art was unprotected by copyright law until 1870, and even then, the rights granted were problematic since they were developed mainly to protect the creative assets embodied in the form of a book.[82] The structural bias against the visual arts is perhaps well illustrated by the pre-1976 requirement of affixing the copyright notice to a work before it was either sold or displayed publicly, which directly clashed with the sensibilities of many artists, some of whom were loathe to disrupt the surface of their work even with their own signature.[83]

The crux of *droit de suite* is to make good on this insufficiency in copyright law, and to restore the key imperative of compensating artists when their works are exploited. Unlike works that are exploited in sales of copies, rent, or public display (all of these being of negligible value in the fine arts), fine art is “exploited” primarily when it changes owners through sale and resale of the original physical embodiment—that is, the initial work. Advocates for *droit de suite* reason that it compensates the artist for lack of an exploitable reproduction right.

### 3.1 Decreased prices to artists?

It is probably a truism that artists do not have the monopoly on being in a bad bargaining position early in their careers. But in other areas—music, for instance—artists can expect to make money on royalties, a revenue stream currently not available to visual artists. From an economic point of view, it is reasonable to assume that a resale royalty could depress initial selling prices since buyers would pay less for works in anticipation that their profits at re-sale would decrease by the amount owed back to the artist. Despite the fact that artists might be willing to accept a lower price in exchange for the right to participate in resale profits, it has been argued that this chilling effect on prices might work against any incentivizing effects the resale royalty might have. However, most available evidence from markets where the resale royalty is in effect tends to negate this concern—there is little showing that in these markets works sell for less than elsewhere, or less than before the royalty was imposed.[84]

Assuming an efficient market, it seems reasonable that there would be some discounting effect, since, even despite the anomalies of the art object, art consumers are notionally rational. Analysis from the economic point of view is persuasive that there probably should and would be a discounting effect on purchase prices.

#### Discounting Effect on Initial Prices

A well known study done shortly after the California law was enacted looked at the investment behavior of art purchasers under resale royalty conditions.[85] The study discounted the purchase price at rates that reflected the impact of a resale royalty to show that artists selling their work will always have a smaller discounted compensation under a royalty scheme than without.[86] In fact, the situation is probably more severe than this study reflects: given that the artist bears a much larger amount of unsystematic risk than a purchaser in that they cannot diversify or spread their risk very well, the rate at which a purchaser might discount the future royalty payment will probably be higher than Bolch assumes.[87]

The explanation for this is as follows: if an artist chooses not to sell to a low bidding collector, instead choosing to hold his work to sell later on his own, he alone bears the risk of whether it will increase in value or not. But this is not a realistic option in any case, since artists at the beginning of a career need to sell work in order to create a market for it. Holding it does him no good. At the same time, he cannot diversify the risk he faces: he holds art, nothing else. He expects his art to appreciate in value at the general rate, but the discount rate he’ll apply to royalties will be higher because these are relatively more uncertain for a younger artists. The buyer discounts at a lower rate and attaches a higher present value to the royalty cashflow, while the artist attaches a low present value, and will sell them for less.

It follows that a collector would price the resale royalty into his bid, reducing it according to his normal discount rate for future cashflows, but then reduce it further owing to the gap between his own required rate of return and the much higher one of the artist. In an efficient market where players had parity, this gap, theorized as the “cooperation rent”, would be shared halfway.[88] But as it is the case that artists lack negotiation power, it would likely be absorbed in full by him.[89]

#### *Risk & Utility*

The future resale royalty dollars are both more risky and, for an artist who sells the work when he is young and unknown and receives the royalty when he is older with an established market, these dollars will carry less utility.[90] This is tantamount to forcing an artists to invest in his own work, since the artist is forced to accept a riskier payment in the future instead of a certain payoff today. Without a resale royalty, the artist receives a single, certain initial payment and bears no future risk (that is born alone by the purchaser). With *droit de suite*, the artist receives a lower purchase price but may receive an uncertain future income from the royalty. The artist thus shares risk with the purchaser.[91]

Given that most young artists are relatively risk averse relative to collectors and dealers in that they cannot spread risk, having them bear more of it might be undesirable. But if they are risk seeking and are more willing than collectors and speculators to gamble on the increase of their reputation, this undesirability loses significance. The latter scenario is entirely in line with most artist’s self perception--the mytheme of "believing in oneself even if nobody else does" tends to describe the typical approach of many artists (as discussed below).[92]

#### *Qualifying the Discount Effect*

This analysis assumes a great deal of efficiency and acumen on the part of art buyers, an assumption which may not hold up to scrutiny.[93] It also overlooks the fact that any speculative buyer who operates with this level of precision is unlikely to purchase art from an artist lacking an existing and liquid secondary market.[94]

A resale royalty would affect the demand of speculative buyers more than a collector who arguably buys without a pure profit motive and plans to hold the work for a length of time. This begs the question of the difference between speculative investors and collectors, each of whom have different ratios of psychic consumption benefits. Collectors hold works and have no immediate plans for sale; speculators are the opposite. Speculators are highly risk sensitive and leave the market when risk factors increase. Risk might be increased due to information asymmetries between the buyer and the dealer, there might be attribution problems with the work, or the work might be made in media prone to degradation. Most critically, speculators are highly sensitive to shifts in transaction costs. A resale royalty, any restrictions on selling, or any rise in insurance or storage or other associated costs might drive them out of the market. Taxes are also a major consideration and any situation that increases taxes risks pushing out speculators. On the other hand, when tax treatment of art objects is favorable or offers a chance to avoid or cheat on taxes, more speculative consumption tends to occurs.[95]

Prices being depressed may have the collateral effect of lowering the barriers to entry for art investment—creating an opportunity for collectors marginally locked out by current high prices.

Concerns over the discounting effect do not properly conceptualize the income earning life of an artist. Artistic careers tend to arc, hit an apex, and then recede—artists

cannot create forever, and later work tends often not to have the same value as earlier work (to a degree).[96] Therefore, arguments about the utility of dollars early in a career *vis a vis* their utility later must take into account that towards the end of the artist's productive career and after, the income from resale royalties will both be more significant and more meaningful, since he is likely not making work to sell (or there is better likelihood that the later work is competing with the early work and thus undermining prices, or it is of lower quality).

### 3.2 Effort, Reputation, and Promotion

#### Reputation

The resale royalty gives an artist a chance to recuperate a better portion of the major externality of their success—their enhanced reputation. Without the royalty, this value goes in full to the collector/re-seller. Older artists naturally benefit from enhanced reputation by the increased value they can get for new works, but under resale, they can also capture revenue from the resale market. Thus, there is incentive for artists to make new work and undertake activities that may give them reputational benefits.[97]

It also permits artists to experiment with styles and different types of art making, in contrast to the current sense that artists are under pressure (both externally applied and arising from their own need to earn a living) to make work similar to the art they are known for or that sold well.[98]

#### Signalling

The resale royalty creates a residual interest in early works and incentivizes the artist to maintain the values of those works.[99] The artist wants to convince buyers that she will maintain the future resale price of her work either by restricting future output (if early and late works are substitutes) or by expanding future output (if early and late works are complementary).[100] The resale royalty provides a credible assurance the artist will behave this way because she has an interest in maintaining the resale value of the work. It is a pre-commitment to continue production, in effect, assuming later works complement and do not hurt earlier works and remain desirable. Phrased another way, it is a pledge to not produce future bad work, work that undermines, mimics, or directly competes with early work.

This pre-commitment enables the artist to charge a higher rate initially. The signaling function tells the buyers the artists will act to maximize the royalty—but knowing that most artists are risk loving and that they have few options, this might be of lesser value.[101] The “signaling effect” overcomes the asymmetry of information that is natural to the transaction—in advance, the collector knows little of an artist's ambitions, capacity for work, skill or willingness to do what it takes to self-promote. [102] The artist thus expresses that his work is worth investing in by his being willing to take part of his compensation in future royalties.[103]

In theory, the signaling effect also keeps the artists from doing things that might harm the value of early work such as making quantities of bad work (Rauschenberg), publicity seeking that is perceived to undermine their seriousness (Koons, Schnabel), or taking bizarre intellectual positions (Hockney).

#### Promotion

*Droit de suite* impacts dealers in two ways: in choosing what amount to invest in promoting an artist and in choosing what to pay the artist for his work. When dealers promote heavily, they are likely to buy work outright, the better to maximize what they can recoup as costs. In these scenarios they choose to act as speculators and buy and hold work for themselves. On the other hand, if a dealer is risk averse, he might prefer consignment.[104] A resale royalty operates like a tax on the dealer's earnings. [105] Because a dealer bears the costs of promotion alone (generally, artists can't afford them) but has to share the proceeds, he will tend to spend less on promotion, which risks weakening demand and thus the ultimate sale price for the work.[106] For the artist, the effects of this loss of promotion on sales might entirely offset any gains from a resale royalty, wiping out its benefit completely.

Alternately, the dealer might choose to promote at the same as previous levels, but will want to sell more works per promotional expense so as to make up for what the resale royalty takes. If this is the case—that the same fixed level of promotion can result in a more than usual number of sales (and assuming the artist can meet the dealer's increased demand)—then the dealer will sell more work, and *droit de suite* benefits the artist at the dealer's expense.[107]

### *3.3 Efficiency Concerns & Dealers*

With respect to dealers and gallerists, it is generally acknowledged within the artworld (even if economists don't believe it with certainty)[108] that gallerists have monopsony power—that is, there are relatively few gallerists to artists. It is a dealer's market, as it were.[109] Dealers can take advantage of monopsonistic power by paying younger artists the “reservation price” for their work, or the true minimum value an artist can accept.[110] If the gallerist must pay a royalty, they will be motivated to reduce the price paid to the artist, but by definition, the reservation price is already set at the bare minimum the artist can live on.[111] Artists, because of their weak economic position, generally don't have cash cushions or easy access to credit and are therefore not able to concede more to bargaining partners once the reservation price is reached. The dealer simply cannot lower the price further against the artist. Assuming the right cannot be waived or the artists is unwilling to waive it or cannot be swayed to do so, the resale royalty helps the artists in this scenario but does so owing to the perverse circumstance of their having been already driven to the limit, bargain-wise.[112]

Large scale price manipulation and constraints of trade in the market might make the concerns over discounting effects too theoretical in the short term. For instance, much has been made of the prevalence of “right of first refusal” clauses in contracts of sale and the distorting impacts they may have, which give gallerists extensive control over resale markets, some of which have been challenged as restraints on trade.[113] These concerns over discounting effects also fly in the face of significant data from France and Germany, both of which experienced increases in sales after implementing *droit de suite*. [114]

Gallerists also put forth contradictory arguments. They claim, on the one hand, that only a very small percentage of works—fewer than one tenth of one percent—ever find a secondary market, and so *droit de suite* would benefit only a few. At the same time they claim that the damages of *droit de suite* could be very large and would specifically impact younger artists because gallerists subsidize unknown talent through resale and secondary market activity of well known artists.[115]

Finally, sales in the secondary market, whether it be from a gallery, dealer, auction, museum, other private party, estate sale, foreclosure, or bankruptcy (as distinct from sales from an artist directly) might be discounted because the buyer incurs risk since authorship cannot be directly sourced and prior owners and unsecured interests might exist unknown to the buyer.[116] Buying directly from an artist—or a dealer through consignment[117]—might carry a premium (thus counteracting the discount effect) since it reduces the chance of forgery, copying, or otherwise clouds over the authenticity of the work, and reduces the need to investigate prior ownership.[118]

### 3.4 Waivability

Unwaivability is a common feature of all implementations of *droit de suite*, but it is an alien feature to most copyright and associated rights (which are almost categorically waivable). [119] Unwaivability is of concern because it reduces the chance for artists to bargain with the right, and, like all restraints on alienability, reduces the benefit of Pareto effects via flexible transfers. However, most of the ill effects of the resale right are done away with if the right is waivable, though the compelling counterargument is that it could mean *droit de suite* would always be bargained away for lack of artist leverage (in the same way as the Projansky contract), or never be enforced, or enforced so unevenly as to lose significance.[120]

Characterizing the *droit de suite* as primarily an economic right is also undermined by non-waivability as it invites comparison to a moral right[121], or more unfortunately, to a welfare right or disability benefit, which are similarly unwaivable[122], and so are considered as less than a pure property right.[123]

While unwaivability has the benefit of protecting the artist from being forced lower than the reservation price or otherwise overmastered, the signaling effect of the resale is greatly undermined. When it is unwaivable, risk averse artists are forced to absorb and bear additional risk in their own work as opposed to waive it when desirable. Arguments in favor of inalienability include: the sense that artists would be compelled by stronger gallerists to waive the right; that the resale “bonds” the artist to his work and effectively makes him commit to enhancing its value;[124] or that the costs of administering the right—involving setting up a system that monitors and tracks sales—would be high and unwaivability would be required to reduce and spread these costs.[125]

All of the *droit de suite* regimes rely on collective enforcement executed by a quasi-public administration agency working on behalf of artists. In the United States context, this sort of body would have to emerge *ex nihilo*. Perhaps the most obvious advantage of making the right waivable, alienable, and freely assignable is that it would obviate the creation of such a body as artists could rely on the services of private parties.

Another loss of the right’s not being alienable is that the waiver can help cure the situation of artists not having a revenue stream independent of sales of work. This is in many ways the root of the problem.[126] Most young artists have little capital and cannot borrow against this highly speculative future earning due to the lack of capital markets for this type of instrument.[127] Expanded waivability, transfer, or assignment provisions of the right would permit the artist to create an instrument out of it; if the right is drafted so that it is separable from the work, or can be sold in advance of a work that does not yet exist, the artist could in effect create a security tied to the future income stream of resale royalties.

Using the future income of resale royalties would not be unlike what David Bowie accomplished with his Bowie Bonds, where proceeds come in the form of a loan and are

non taxable, and outflows are tax deductible as interest.[128] It has the benefit of putting capital into the pockets of artists when dollars are at their highest possible utility. It allows them to weather the transitional phase of their career as they move out of the MFA program and into a costly urban environment (see below).[129]

#### 4. There are no poor artists anyway: *Fairness and charity arguments*

A strong current of fairness argument runs within the debate surrounding resale royalties. At an early point, legal discussions of *droit de suite* in the United States tended to interpret it mainly through its origins in French law in the early 20<sup>th</sup> century, inviting an unfair comparison. French law bifurcates the welfare right of artists from the economic rights of artists (*droit de suite*). These are two separate concepts, though the two are merged in the sense that private galleries are relieved of the duty to pay *droit de suite* because they pay periodically into a state managed artist welfare fund. In practice, then, if not in theory, in France the economic right *droit de suite* and social security right for artists are intertwined at the level of administration.[130] To a great degree, the French rule was initially stimulated by a social sense of charity, largely driven by concerns for artists living in squalor while collectors made fortune on the resale of cheaply purchased works. Comparison between the French conceptualization and American conceptualization of *droit de suite* is inapt—France is a nation with a much more expanded set of social entitlements than the U.S. Connecting *droit de suite* to this French model makes it easy for opponents of *droit de suite* to discredit it as the product of fairness arguments and a social entitlement mindset foreign to American jurisprudence and policy.

##### 4.1 Reconnecting the Debate

In the United States, the *droit de suite* was historically phrased as the right for an artist to participate in the economic life of work they have created after that work has been sold. This is clearly an author's economic right, emerging from the doctrines supporting copyright. At the same time, the rhetoric of the Projansky Agreement spoke openly of fairness—these were the “generally acknowledged inequities” it wanted to remedy. But rather than a generic expression of sympathy for poor or socially underprivileged artists, the Projansky Contract predicated its demands on the recognition that the art market had systematically been shaped and designed to best serve the interests of those who were perceived to control capital: wealthy collectors, dealers, auction houses, and museums. Placing the accent in the right place is important here, otherwise the fairness argument of Projansky can be elided into a social welfare rationale, which is far easier to dismiss. At the same time, losing sight of the fairness demands embodied in the Projansky Agreement prevents understanding *droit de suite* as a measure aimed at improving efficiency in the economics of the art market—that concept of efficiency being directly related to the creative habitat, economic lives, and socio-economic ecology of artistic production.

This was precisely the rhetoric of the Art Worker's Coalition, a loose affiliation of artists and protesters, which led to the Projansky contract's being drafted. Calls for resale royalties and other expanded rights for artists were a direct response to the perceived consolidation and corporatization of the art market since the 60's.[131] The *droit de suite* was thus part of a larger programmatic awareness of being in an art world, where internal lines of interest and influence could not be productively segregated from the outside. From the

beginning, then, in the United States the resale royalty discussion was couched within a larger institutional critique and critical reassessment of artists' self-understanding and the idea that cultural institutions are 'neutral'. Seth Siegel, who would later go on to draft the Projansky Contract, stated it thus: "The art is the one thing you have....This is where your leverage lies. I would think that by using that leverage you could achieve much greater goals than in any other way." As commentators have expressed, this "leverage" was understood as a refusal to operate according to traditional practices, rules, and interests of galleries, museums, and collectors.[132]

Thinking *droit de suite* as an effort by American artists to create parity within an art economy seemingly in the palm of consolidated interests restores the stakes of the legal debate. Resale royalty is not simply about putting dollars in artists' pockets via wealth transfer, but is rooted in efforts to preserve the health and functionality of the art sector by boosting at the same artists' autonomy and economic self-interestedness.

#### 4.2 Monroe Price's Charity

Most legal analysis has not managed to keep this connection, and has instead focused on a narrow construction of the issue. Specifically, as early as 1968, Monroe Price looked at the art market of his day—that is, three years before the walk out at MOMA orchestrated by the Arts Workers Coalitions—and argued that American artists had no need for *droit de suite* legislation because they were not, in actuality, poor. Price was interested in rejecting a florid cliché he diagnosed as the basis for royalty. He described it thus:

“a vision of the starving artist, with his genius unappreciated, using his last pennies to purchase canvas and pigments which he turns into a misunderstood masterpiece, The painting is sold for a pittance, probably to buy medicine for a tubercular wife...Thirty years later the artist is still without funds and his children are in rags; meanwhile his paintings, now the subject of a Museum of Modern Art retrospective and a Harry Abrams parlor-table book, fetch small fortunes at Park-Bernet and Christie's”[133]

Gleeful as it might have been to skewer this cliché, what went with it was the chance for a sophisticated understanding of the art market and its inequities. It deadened further discussion. Further, what is significant is not so much the error of the conclusion, but the fact that Price looked at conditions in the art market and failed to see anything that resembled what the Art Workers Coalition described.[134] Even as he advocated resale rights arising from contracts, he failed to realize the deeper problems of leverage. He failed to realize that the inequities had themselves become invisible, that is, fully absorbed into the status quo and thereby systemic.

Price was writing early in the debate, 1968, but his work shaped the legal debate as later discussions tended to take for granted that the *droit de suite* was largely a cash transfer for the benefit of artists.

### **5. The material conditions of creativity: What are the economic problems of artists?**

In order to fill the gaps apparent in Price and still unfulfilled as of the time the Copyright Office issued its 1992 report[135], it is necessary to ask: what are the economic conditions faced by artists? Who is an artist in America? Understanding the situation of

contemporary visual artists who produce in the gallery system is to peer into the patterns of deskilled labor, movements of human capital to urban centers, and the hostility of such U.S. urban centers towards non-white collar workers.

### 5.1 Portrait of the Artist

As noted in recent Bureau of Labor statistics and confirmed by recent art world studies, artists that expect to have a career based on the sale of work require a BA or BFA, and an MFA (Master of Fine Arts) degree. The attendant costs of these degrees may be as high as \$200,000. Debt alone for the two-year MFA program is usually around \$60,000.[136] Fine artists who worked mostly based on freelance or commission were reported as numbering 29,000 in the United States; they may find it difficult to earn a living solely by selling their work. Only the most successful craft and fine artists receive major commissions for their work. According to Labor's report, competition among artists for the privilege of being shown in galleries is expected to remain acute, and grants from sponsors such as private foundations, State and local arts councils, and the National Endowment for the Arts should remain competitive.[137]

#### Earnings

Earnings for self employed artists vary widely. Most find it difficult to rely on income earned from selling paintings or other works of art. Like other self-employed workers, freelance artists must provide their own health insurance and other benefits. Klaiman reports that artists earn on average \$24,000, several thousand dollars below that for other professionals[138]; and artists have higher rates of multiple jobholding than other professionals; are prone to unemployment roughly twice those of other professionals and have had annual earnings ranging from 77% to 88% of other professionals.[139] This is relatively optimistic, as one early study portrayed the income "penalty" faced by those choosing to enter the visual artists as second highest only to those entering the clergy.[140][141]

#### Opportunities

Outside jobs available to an MFA graduate include teaching positions both at university and secondary school level, though there is steep competition for them. The streamlined career paths for artists today: "a BFA or, less frequently, a BA from a university art department or degree granting art school, followed by an M.F.A., involvement with art in New York, the "national recognition" called for in most CAA [College Arts Association] studio job listings, and a teaching job in a university, or for some, a studio in New York or Los Angeles or Chicago.[142]

Typically, college and university art teachers are hired as artists rather than art educators—meaning, they are offered jobs based on the strength of their career and reputation as working artists with exhibition histories and frequently, active markets for their work. The index of their ability to make art—and teach the making of it—are credentials earned almost exclusively in the marketplace.[143]

Typical salaries are often not enough to cover studio as well as living expenses. Other desirable work that an MFA holder might be qualified for include art assistant, art handler, gallery work, delivery, or museum or non-profit space administration. These jobs are generally low paying and sought out not primarily because they are remunerative, but because they provide necessary contacts and access. They are generally susceptible to what has been called by cultural theorists as a "cultural discount." [144] Artists may also take up

contracting, carpentry, or, in cities where manual labor is unionized or office jobs more abundant, an artist may temp.

Benefits from these jobs are unlikely, loan service kicks in shortly after graduation, and a young artist is in the position of having to work a full time job that barely sustains living expenses, while at the same time setting up a studio, making art, and remaining visible to curators, gallerists, other artists, and critics.

### Urbanism

Owing to the nature of the art world and its concentration in urban centers, artists tend to move to larger cities. They need to heighten their chance of coming into contact with gallerists, curators, and potential collectors, and, most importantly, get access to a peer group and critical audience. Typical cities tend to be New York or Los Angeles, with Chicago, San Francisco, Providence, Philadelphia, Austin, or Boston as secondary options. These cities have the highest costs of living in the United States, especially New York where the art market is most heavily concentrated.[145]

These conditions seem to have produced a concrete, negative effect. Within the last ten years, due to escalating costs of living, there has evolved a phenomenon of “brain drain” out of the United States as artists decamp to European cities such as Berlin, where a better balance can be struck between cost of living, peer access, exposure, and exhibition opportunities.[146]

### Oversupply

Nevertheless, the willingness of artist to work for low incomes is high. The production of MFA’s continues at a growing rate.[147] There is relatively little attrition and a relative oversupply of artists persists. Explanations proffered include: that artists may perceive themselves to lack skills that are transferable to other jobs (even if this is not the case), or artists embrace an anti-mainstream outlook and tend to decry normal jobs or believe they could never be happy doing them.[148] Also, since artists for the most part are highly trained and skilled individuals, they would only consider jobs with high levels of autonomy.

Other theories suggest that artists are more prone than others to overconfidence or self deceit and are inclined to overestimate their skills and chances for success. They may be more likely to ignore available information on rates of success, and prone to relying on, or believing in, luck.

Increasingly, information on success and relative chances is not available until later in an artist’s career, often after an artist has invested heavily in education and incurred debt. The opportunity costs feels too high to leave, and due to the ambiguity of how success comes about, artists are reluctant to shift careers because they may believe they are always on the verge of a breakthrough.[149] Things are much less clear early on in one’s career, and actual market information does not really come until after school[150]

Theorists have also pointed to several mini-narrative or mythemes that artists are prone to use in describing their situation and choosing behaviors. For some, there exists a persistent idea that artists should be poor[151]—either artists believe that it is the nature of the artist to remain “outside” of the mainstream, economic or otherwise, or the public, which may have a residual resentment for the artist or not understand his material needs, or thinks that the high pleasure he derives from work more than makes up for his impoverishment.[152]

## 5.2 Creativity and the Market

Most artists have a high degree of personal creativity and produce work independent of extrinsic motivating factors. This is the traditional art historical point of view and is reinforced by the idea that artists are “born artists” and would produce regardless of economic aspirations. Frey adds to this formulation that such personal creativity—creation without an end in mind—is possible only when the activity is both undirected and time consuming[153]. As soon as the artist receives compensation for producing art—whether through the market or public moneys—the artist’s opportunity cost of time increases.[154] And the cost of spending time on undirected activity rises. The time consuming activity is then reduced in favor of producing “tried out work for the artistic market.” This opportunity cost trap tends to affect successful artists, while younger artists who do not sell, and thus keep their opportunity costs low, can better “afford” to spend time with u[155]ndirected and potentially more creative activities. This might explain why younger are more creative than older ones, and in part why artists are making their most valuable work at younger ages.[156]

## **6. Artist Training and the Failure to Articulate a Relation to the Market**

### 6.1 What is an MFA?

Howard Singerman begins his book on the history of the MFA degree with a simple reflection: “Although I hold a Master of Fine Arts degree in sculpture, I do not have the traditional skills of the sculptor, I cannot carve or cast or weld or model in clay.”[157] His argument suggests that in order for arts training to earn credibility as an academic discipline it had to shed its vocational or craft emphasis and artist-teachers had to undertake theoretical research and scholarship, the better to assimilate to their academic peers.[158] Art was confused over whether it was a blue collar or white collar (“professional” pursuit) profession. This is understood as the result of a process over the course of the 20<sup>th</sup> century wherein the MFA is at war with itself. MFA programs had their origins in the 1920’s; by the 1960’s 31 new MFA programs; by the 1970’s 44 more; ten thousand degrees were awarded between 1990 and 1995.

According to debates within art, artists going back to the 1950’s have assailed the MFA as a poor index of competence—it has been described derisively as a mere “by-product of art education” but not a warranty of skill. Unlike other professions such as law or medicine, there are no “legal licensing requirements for the practice of art [and] a formal degree gives only minute competitive advantages to its holder in any marketplace other than that of teaching (the claim to being a ‘certified sculptor’ or a ‘qualified poet’ being fruitless.)”[159] Nonetheless, it is widely acknowledged as one of the few requirements to gain entry to the professional art world and is deeply valuable.

### The MFA and Market Values

The degree of imbrication of the art market (and art making) with the consumer market is a topic of persistent debate and has shaped many definitions of what art is—for some, art is typified by the very negation and active resistance to the values of the marketplace.[160] Visual arts, as opposed to other art forms, seem to have embraced this mytheme to a very high degree, starting in art school. “It has not been uncommon during the past decade for the student to experience an avant-garde context during their art school

years, but to find difficulty in sustaining such attitudes outside of the school and then to discover that they have not been taught skills to allow them to work in any other way.”[161] The two poles of the debate might be summarized best by the economist Bruno Frey who argues that most people believe that mass culture produces a low quality of art, and that a considerable part of the philosophical discourse is devoted to rejecting the market as a decision making mechanism for culture,[162] and yet one of the great market advantages is that it produces variety.[163]

The penetration of market values into the teaching of artists might be generally held to be a bad thing though this is articulated with ambivalence and the critique has led to few affirmative changes to art school curricula. One senses a great degree of confusion and reluctance to deal with the question, which is a direct result of the MFA degree’s aspiration to achieve intellectual credibility by obscuring its relation to artisanal labor. Lack of discussion seems to lead to an exaggerated reaction: in the 1990’s we were assailed with reports of MFA programs as becoming little more than staging grounds or pre-career platforms. This theme peaked with the show held at Los Angeles MOCA in the summer of 2001 entitled “Public Offerings”. The show took as its topic the increasing penetration of marketplace values and pressures on student work. The work on display was the student work or first shows of many significant artists from the period-- the “breakout” works in many cases produced while still in the MFA.

The show nominally took as its topic the market’s thirst for innovation and the churn of younger artists, and made the case, arguably, that persistent market pressures have changed the topic of the MFA program. Increasingly, artists learn to market their work by marketing themselves, or asserting themselves as “personalities”—as brands.[164] In addition, the art market described in the Public Offerings show was anything but a neutral marketplace, but one in fact composed of players (dealers, influential collectors, curators) whose interests in capital—cultural and pecuniary—were indistinguishable: “the relation of the individual artists to the market and of the market to critical value, meaning and education is much more exposed and direct. The language we use to try to explain the market’s choices—either to ameliorate its arbitrariness or elide its institutionalized machinations—works to naturalize and personalize its workings....But artists aren’t “grabbed” naturally: they are seen and shown in relation to the interests, both personal and professional...of curators, critics, gallerists, teachers, and artists. What is shared back and forth—what is the currency of this exchange—is subjectivity, self-interest, personality: the exteriorization and exaggeration of the self for another. The task of art education now, the goal of seeing someone as an artist, is to intensify and objectify personality, to specularize—that is, to make visual—sheer difference as a particular kind of artistic subjectivity.”[165]

The artists on display were amongst the most popular of the 1990s—Matthew Barney, Chris Ofili, Sarah Lucas, etc. The work was described as student-ish, immature, morally weak and not as yet formed, but, and most importantly, it had already been validated by the market, throwing into relief the question of whether, at this stage, critical reaction was besides the point. While the show touted the “go-go” opportunism of young, market attuned artists, it also gestured towards the negative side effects: increased stratification and competition between artists (thus eroding the peer group) and the emergence of a “winner take all attitude”,[166] which mirrors the economic concept of winner take all markets[167], or those characterized by rewards being concentrated in the hands of a few top performers, with small or no differences in talent or effort often giving rise to enormous differences in income. Winner take all markets are also described as attracting too many participants and

predict an outcome of consistent oversupply, with many participants being marginalized by low earnings, sporadic employment, or both.[168]

### *6.2 A non-reaction*

The academic art world's obvious discomfort with the imbrication of the market and the studio might be a result of a perceived powerlessness to effect an alternative. In the gap, artists seem to have developed skills as operators in the dual economy of the arts and deny its relation to the market the better to attract selfless gifting: "By being ironic about what lies at the center of the arts, the artworld playfully consolidates the denial of the economy." [169]

But the non-reaction at the institutional level might be damaging to young artists in that it leaves them laboring under exorbitant myths, not trained to deal with features of the reality beyond art school. In fact, the increasing penetration of the market seems to be happening even as art professors might deny it or minimize it, which further weakens artists's chances of being mentored as to how to deal best with the market pressures put on them.[170]

As such, the treatment of tactical survival in the art world is less emphasized—left in large part to shop talk gained from peers and mentors or to the bizarre cottage industry of survival guides to becoming an artist. By and large, artists learn business practice through anecdotes and the mistakes or fortunes of themselves or others. It is a cliché that artists hate admitting they are caught up in the market; at the scale of institutions, it can be said that the MFA seems to perpetuate this cliché. In a basic way then, a professionally trained artist who lacks business acumen in dealing with gallerists, dealers, and other consumers of their work has become the acceptable norm.

## **7. Conclusion.**

Where the crux of most economic analysis is utility maximization, in the particular context of the art market, this model seems inadequate to the dynamic. Likewise, where the generalized critique of economic analysis is that it tends to assume away the particularities of the markets it describes, and thus homogenize them, the art market is sufficiently exceptional in its particularities that this problem is of course acute.

The degree of overlap between the art market (and art making) and the consumer market is a topic of persistent debate and has shaped many definitions of what art can be—for some, art is typified by its very negation of the values of the marketplace. Throughout the 20<sup>th</sup> Century, art has desired to disentangle itself from the market, and in some narratives of its efforts to do so, ends up embracing variations of the characteristically "conservative" fear that consumer demand will dictate to artistic choice. [171] Expressions of this are common and seem to have in part contributed to the perception of contemporary art as being elitist and distant.

Alternately, there have been practically oriented formulations that acknowledge art's embeddedness in the fabric of capitalist exchange. They have been by far a minority. Earlier in the century, art historian Roger Fry spoke of eliminating corruption, conspiracy, and restraint of trade in the art market, and dreamed of securing art's future in a democratic, competitive market economy and educated, aesthetically sensitive middle class that could sustain demand for art while resisting mass production.[172]

Fry was describing a phenomenon that has not come to pass: currently, most reflections on art and commerce partake of a generalized critique of consumerism and

lament markets categorically; art history and art criticism have affirmed these positions by tending to validate *avant garde* values openly hostile to mainstream aesthetics and which, one might add, are largely impracticable in the context of today's professionalized art world. Other accounts have pointed to art's failure to disentangle itself as the core value of modernism (modernist). [173] Still other discourses celebrate the embrace of market values and consumerist desire and encode these forms of dissent (early postmodern). Questions about art's unfortunate status as it is subsumed by the markets it serves, and how its possibilities are foreclosed, are plentiful, while substantive reflection on ways out of the dilemma are rare: one gets a sense of exhaustion--that any relation to the exchange economy whatsoever unduly compromises advanced art, or else that any improvements that could be made in terms of bettering artists' stakes in these moments of exchange would be too insignificant to alter the fundamental condition.

Where the art academy has largely suppressed or redirected the debate and thereby stunted it, attitudes have arisen to fill the gap: in some sectors of the art world, popular aesthetics and marketplace values are openly embraced if not flaunted. These artists seem to pursue a conscious de-differentiation of organizational forms and happily merge the values of disinterested cultural institution (museum, *avant garde* artist) and the small cap, member-managed business. In a reversal of the tradition of critique, art becomes commerce, taking it openly as its content.

Artists offer, amongst other things, commentary on society and the market; it is unrealistic to expect that painful or negative commentary to be purchased.[174] This sort of statement is usually the basis of an argument for public funding of the arts, in order to protect them from the marketplace. In fact, this is the core tension that this paper wants to trace: how can we grow a vigorous, healthy, diverse art world of ideas by feeding it with the food of intellectual property rights?

In a basic way, the medium of intellectual property rights is the marketplace. It is where intellectual property rights are traded and distributed. The goal of the resale royalty right is to allow an artist to partake in the value his work creates and thereby gain greater opportunity for authentic, autonomous creation. At the same time, the resale right might further shackle him to the marketplace, and allow for a penetration of market concerns that could, ultimately, be unhealthy for the ecology of creation. To the greatest extent possible, any rights should be flexible. Any resale right crafted for the American context should consider making waivability a feasible option.

Artists in general really have no systematic way of relating to the market even though it is perhaps definitional to a career in art: how do I articulate a relation to selling my work? Each artist is left to do it on his own. Over the years, artists have protected themselves by a thick skin of habit, innate myth, mini-narrative, and double blind to help mediate their relation to commerce. As a by-product of the failure to systematically and consciously articulate a relation to the market, many inefficiencies arise, all to the detriment of artists.

Even if art making, as economists describe it, is an activity with high amounts of innate satisfaction and is a relatively less alienated form of labor, it still functions inextricably within the general marketplace. One can take it as a given, then, that any artists who enters the market (whether by choice or necessity, and whether in full faith or with great skepticism) would want to undertake successful decisions therein. Every artist necessarily *plays to win* once the choice to enter the game is made. It is in this spirit that these reflections have been shared.

[1] Among the 47 countries with such guarantees are: Algeria, Belgium, Chile, Denmark, France, Germany, Italy, Luxembourg, Poland, Portugal, Sweden, Tunisia, Turkey, the United Kingdom, Uruguay; It is enforced more regularly in France, Germany, Belgium, and Denmark; the EU has directed that all members harmonize by 2102 and currently 12 of 15 member states have the right. In Europe, Switzerland is without a resale right; in Asia, Japan does not either.

[2] The resale royalty right gives an artist a percentage of the income generated from sales of the work after he has sold it initially. For example, a painter who sells a work to a collector would be owed a percentage of the resale price if the collector were to later sell the work.

[3] The Public Hearings held by the Copyright Office in the process of assembling its 1992 report, however, show that in fact there are some examples of diversity within these groups—for instance, John Weber of John Weber Gallery was a New York gallerist in support of *droit de suite*.

[4] The Journal of Cultural Economics is the nucleus of this body of largely European scholarship.

[5] Visual Artists Rights Act, Pub. L. No. 101-650, Title VI, 104 Stat. 5089 (1990)(codified at 17 U.S.C §§ 106A, 107, 113, 301, 411, 412 and 506).

The United States entered the Berne Convention on March 1, 1989 and since the Berne Convention was not self-executing, implemented it under the Berne Convention Implementation Act of 1988 (Pub. L. No. 100-568, 100 Stat. 2853 (1988)). The Berne convention does not specifically mention moral rights but recognizes certain inherent rights, that of integrity and that of attribution. It states in Article 6bis: (1) Independently of the author's economic rights, and even after...transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of of other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation." The Berne Convention also includes a separate *droit de suite* provision under Article 14ter. It reads:

“1. The author, or after his death the persons and institutions authorized by national legislation shall...enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.

2. 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

3. The procedure for collection and the amounts shall be matters for determination by national legislation.; (See also Art, Artifact, and Architecture Law, Jessica L. Darraby, 2005 Edition, at 533; See also “Droit de Suite: the Artist's Resale Royalty,” Report of the Register of Copyrights, Dec. 1992, at 52 n.210.)

When the United States joined the Berne through enactment of BCIA, it did not incorporate either 6bis or 14ter, despite debate. The Senate report clearly states that a “moral rights” doctrine is not incorporated into the U.S. law” (S. Rep. No. 352, 100<sup>th</sup> Cong., 2d Sess. (1988)

In 1990, the United States passed the Visual Artists' Rights Act of 1990 (“VARA”), which created rights which are “analogous to those protected by Article 6bis of the Berne Convention.” These are therefore not necessarily identical rights and it is unclear how or if American courts will rely on opinion of foreign courts in relation to Article 6 bis. VARA gives artists rights of action, damages, and injunctive relief when two inherent rights mentioned under 6bis are violated: right of attribution and right of integrity;

[6] See VARA.

[7] See Copyright Office of the United States Executive Summary, 16 VLANY 318, at 385: “Should the European Community succeed in harmonizing existing *droit de suite* laws, Congress may want to take another look at the resale royalty, particularly if the Community decides to extend the Royalty to all its member states.”; Legal commentators have stated that the United States will likely be obligated to stay in step with other developed countries.

[8] See Droit de Suite Report Executive Summary, from 16 VLANY 381, at 385.

[9] *Id.*

[10] *Id.* at 390; (“Neither the administrative hearing process nor independent research supplied the Office with sufficient current empirical data. Therefore, the Office could not accurately compare the respective remuneration of authors who create in many, and artists who create in limited, or unique, copies. Any conclusions that we could make about the number of artists who would benefit from the resale royalty would be based on anecdotal evidence and limited sample size. Most significantly, there is no clear evidence indicating the frequency of resale or works of fine art. Thus even if Congress determines that the Copyright Act does treat fine visual artists in a manner less favorable than authors or composers, it is not clear that the

resale royalty right is the best means to offset this disadvantage, particularly if it is not triggered with any frequency within the copyright term.”)

[11] See Jeffrey C. Wu, *Art Resale Rights and the Art Resale Market: A Follow Up Study*, 46 JCPS 531, at 90.

[12] See Pfister, *Tax Matters, in Understanding International Art Markets and Management*, ed. Iain Robertson, Routledge, 2005; Copyright Office Report, p. 1; The United Kingdom, which did not have a resale royalty law as of 1992, recently enacted one that went into effect on January 1, 2006.

[13] See 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, 22 (1966)

[14] *Id.* at 25.

[15] *Id.*

[16] Paternity is the right of authenticating a work, integrity is the right for the work not to be modified or mutilated or destroyed, attribution is the right to be credited

[17] Lewis D. Solomon and Linda V. Gill, *Federal and Resale Royalty Legislation: “What Hath Art Wrought?”*, 26 UCLA L. Rev 322, at 324, n. 10.

[18] Susan P. Liemer, *Understanding Artists’ Moral Rights: A Primer*, 7 Boston University Public Interest Law Journal, 7 BUPIJ 41, 42.

[19] Schulder, at 23.

[20] See *Droit de Suite Executive Summary*, p. 388-389.

[21] *Id.*

[22] IN 1990, VARA amended the 1976 Copyright Statute and expressly provided for national statutory moral rights of attribution and integrity. Prior to that, the moral rights landscape was composed of state moral rights legislation and other causes of action such as defamation, violation of privacy, unfair competition, contract interpretation, and other provisions of the copyright act.

[23] See Schulder, at 19; Price; Schulder’s interest seems to have been prompted in part by President Kennedy’s creation of a President’s Advisory Council on the Arts (Schulder, at 19).

[24] The Contract states: “The Agreement has been designed to remedy some generally acknowledged inequities in the art world, particularly artist’s lack of control over the use of their work and participation in its economics after they no longer own it.”

[25] See Alexander Alberro, *Conceptual Art and the Politics of Publicity*, MIT Press, 2003, p. 168 (stating that the contract’s explanatory preface clarified that it was preferable to legislation because it could have immediate effect and “involved no organization, no dues, no government agency, no meetings, no public registration, no nothing...”)

[26] See “The Artist’s Reserved Rights and Transfer and Sale Agreement,” *Studio International*, April, 1971.

[27] “Appreciated Value” of the Work for purposes of this Agreement shall be the increase, if any, in the value or price of the Work set forth in a current duly executed and filed TRANSFER AGREEMENT AND RECORD, or, if there be no prior duly executed and filed TRANSFER AGREEMENT AND RECORD, over the price or value set forth in ARTICLE ONE herein,” *The Artist’s Reserved Rights Transfer and Sale Agreement*.

[28] *Id.*

[29] Comments that accompanied the Contract state:

“We realize that this Agreement is essentially unprecedented in the art world and that it just may cause a little rumbling and trembling; on the other hand, the ills it remedies are universally acknowledged to exist and no other practical way has ever been devised to cure them.

Whether or not you, the artist, use it is of course up to you; what we have given you is a legal tool which you can use yourself to establish ongoing rights when you transfer your work. This is a substitute for what has existed before—nothing.” (Transfer Agreement Comments, Seth Siegelau, 24 February 1971.)

[30] The contract was initially employed by artists connected to Siegelau, such as Sol Lewitt, Carl Andre, Hans Haacke, and Joseph Kosuth.

[31] See contract language; see Schulder.

[32] See Lewis D. Solomon and Linda V. Gill, “Federal And State Resale Royalty Legislation: “What Hath Art Wrought?” 26 UCLA L. Rev. 322

[33] *Id.*

[34] See contract; art. 8, 9, 11, 13, 16, 6...(verify)

[35] See Solomon and Gill.

[36] These might not amount to much since under the Copyright Revision Act of 1976, 17 U.S.C. 106(5), the right to display a work publicly is one of the copyright rights retained by the artist, but under § 109 these rights are largely negated since “the owner of a particular copy...is entitled, without authority of the copyright owner, to display that copy publicly...” rights known as the first-sale doctrine.

[37] See 17 USCA § 109; Solomon and Gill, at 328.

[38] *Id.*, 329

[39] See contract art. 6.

[40] From Siegelau’s comments accompanying the contract: “If you have a dealer, he is going to be very important in getting people to sign the contract when he sells your work. The dealer should make use of the Agreement a policy of the gallery, thereby giving the artists in the gallery collective strength against those few collectors and institutions who do not really have the artist’s interests at heart.”

“Remember, your dealer knows all the ins and outs that go down in the business of the art world. He knows the ways to get the few reluctant to sign the Agreement—the better the dealer the more ways and the more buyers he knows and the easier it will be. He can do what he does now when he wants things for his artists—give the buyer favors, exchange privileges, preferential treatment, discounts, hot tips, time, advice and all the other things that collectors expect and appreciate.”

“...A dealer shouldn’t be expected to do this for nothing; it seems reasonable to compensate the dealer with some part of the 15% he/she is collecting for the artist, perhaps one-third of it...”

“...Getting the contract signed is mostly a state of mind. If your dealer does not think the benefits of the Agreement are important to you, he will have dozens of reasons why he can’t get those few reluctant buyers to sign it; on the other hand, if he seriously wants you to have these benefits he will be able to overcome all those obstacles without losing a single sale.”

[41] *Id.*

[42] Solomon and Gill, p. 330.

[43] Siegelau had predicted, with ironic naivete, “Obviously, your friends will not give you a hard time; they will sign the Agreement with you. The ONLY trouble will come when you are selling to someone who is not a friend. Since surely 75% of all art that is sold is bought by people who are friends of the artist or dealer—friends who dine together, see each other socially, drink together, weekend together, etc.—whatever resistance may appear will come only in respect to some portion of the 25% of your work that is being sold to strangers. Of these people, most will wish to be on good terms with you and will be happy to enter into the Agreement with you. This leaves perhaps 5% of your sales which will encounter serious resistance over the contract. Even this real resistance should decrease toward zero as the contract comes into widespread use. In a manner of speaking, this contract will help you discover who your friends are.”

[44] Carl Andre, an early adopter of the Agreement as of 1971, later decided to use the contract only for major sales owing to the time consuming burden of tracking down sales of which he had not been notified.

[45] Failed attempts to pass a resale royalty law have occurred in several states including New York. Attempts to enact it at the federal level have likewise run aground.

Chart: A History of Legislative Proposals by Congress to Enact a Federal Resale Royalty, Including VARA

Congressional Proposal	Congress	Session	Year	Comments
H.R. 11403	95 <sup>th</sup>	2d	1978	(Waxman)?
S. 2796	99 <sup>th</sup>	2d	1986	
H.R. 5722	99 <sup>th</sup>	2d	1986	(Kennedy)?
S. 1619	100 <sup>th</sup>	1 <sup>st</sup>	1987	
H.R. 3221	100 <sup>th</sup>	1 <sup>st</sup>	1987	
S. 1198	101 <sup>st</sup>	1 <sup>st</sup>	1989	VARA—omits resale royalty
H.R. 2690	101 <sup>st</sup>	1 <sup>st</sup>	1989	VARA—omits resale royalty

[46] CAL. CIV. CODE § 986 went effective January 1, 1977

[47] McInerney, *California Resale Royalty Act, Private Sector Enforcement*, 19 Univ. of San Fran. L. Rec. 1, 3 (1984); it was described thus in 1992 by Jean-Marc Gutton: "...The 1976 Law is nevertheless inapplicable as it stands. An isolated case, ignored by all parties concerned, and far too complicated to apply, it thus cannot be used as a reference." (See *Droit de Suite Hearings* from 16 VLANY 185.

[48] See Cal. Civ. Code § 986 (waiver is permitted only by a written contract, and then only for an amount in excess of the statutory 5 percent. The right to collect the royalty is assignable (in anticipation of a collection agency) to individuals or entities and such assignment does not constitute a waiver.)

[49] *Id.*

[50] *Id.*

[51] *Id.*, ("Art dealer" means a person who is actively and principally engaged in or conducting the business of selling works of fine art for which business such person validly holds a sales tax permit).

[52] *Id.*

[53] See Ashley, *A Critical Comment on California's Droit de Suite*, 29 Hastings L.J. 249, 258 (1977).

[54] See Copyright Office Hearings

[55] Solomon and Gill, at 336.

[56] *Id.*

[57] See *Morseburg v. Bayon*, 621 F. 2d 972 (9<sup>th</sup> Cir. 1980) (finding that the goal of resale royalty is "an economic interest bestowed on an artist...by the state because of its desire to promote artistic endeavor generally.") In *Morseburg*, the Plaintiff argued that the Copyright Act of 1909 preempted the resale legislation and violated due process and the Contracts Clause of the Constitution. The Court argued that all impairments of private contracts by state laws are not improper since "the State must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result. The degree to which a state may impair the obligations of contract varies with the public need for that impairment. An insignificant impairment does not need the extensive justification that otherwise might be necessary." Plaintiff's further contention of contracts clause violation was rejected because the five percent royalty payment served a public purpose and was not "severe." The state statute was neither "arbitrary nor capricious" nor did it affect "fundamental rights."

[58] This is due to the fact that the statute seemingly affects the right of distribution of copies of works in that the owner no longer has an unrestricted right of sale due to the royalty owed; it thus deals with subject matter of the 1976 Act. Solomon and Gill, p. 340.

[59] See Gill and Solomon, at 324.

[60] *Id.*

[61] Galleries are exempted from the droit de suite based on a collective agreement that they instead pay directly into a social security fund for artists

[62] See Gill and Solomon, p. 326.

[63] But see the hearing transcript since in Sweden it runs at a loss.

[64] Other benefits are reportedly that the use of resale royalty curbs volatility in the market by driving away speculative investors: "The fluctuations in the art market over the past ten years are particularly significant on this point. They prove that, far from ruining the market in the countries where *droit de suite* is applied, it brings those countries a level of stability for which they are envied by countries where the right is not applied, and which have been attracted by the false market of financial speculation." Gutton testimony, p. 188. The point here is that speculative investors tend to create more chaos, and the resale drives them away to places where they can reduce transaction fees.

[65] In 1990 ADAGP collected royalties for 1,650 of its 2,500 members for a total of more than \$10.5 million dollars. In its distribution, 1100 members received an amount between \$20 and \$2,000; 400 between \$2,000 and \$20,000; 100 members \$20,000 to \$40,000; and 50 received more than \$40,000. In 1998, France sold 9,000 items worth \$76.2 million Euros, and collected around 2.3 million Euro. ADAGP reportedly distributed approximately \$1.8 million euros that year to artists. REMEMBER, this is not counting galleries.

[66] However, for contemporary art sales and living artists, the bulk of sales is done by galleries. Galleries are exempted from the droit de suite based on a collective agreement that they instead pay directly into a social security fund for artists (Artist Social Security Employers' Contribution). The payment of social security money in lieu fo the resale risks eliding the two, thought they are conceived as totally different. "We must not mix social security and author's rights.

[67] As of 1992, See an update of this; testimony of Gutton.

[68] Testimony of Jean-Marc Gutton, p. 190.

[69] Implementing Droit de Suite (artist's resale right) in England, Clare McAndrew and Lorna Dallas-Conte, The Arts Council of England.

[70] UK Law 2006 No. 346

[71] *Id.*

[72] See *Id.*, (Exemption where sellers "previously acquired the work directly from the author less than three years before the sale and the sale price does not exceed €10,000;")

[73] The royalty scale is cumulative, so that when the sale price cuts across more than one band, the royalty on each portion of the price will be calculated and added together for the sum. The scale is:

Portion of Sale Price	Royalty Rate
From 0 to 50,000 euro	4%
From 50,000.01 to 200,000 euro	3%
From 200,000.01 to 350,000 euro	1%
From 350,000.01 to 500,000 euro	.5%
Above 500,000 euro	.25%

[74] *Id.*

[75] Two examples of how *droit de suite* in the UK would work that reveal the relatively small economic impact of the resale right relative to the commissions and VAT (the VAT has since been lowered to 5% in comparison to a US import tax of) :

	Damien Hirst's Spin Painting, <i>Beautiful</i> , <i>Abstract, Whirlwind, Cosmic, Comic,</i> <i>Expanding, Scatalogical'</i>	Mark Rothko's 'No.9 (Black and White on Wine)
Sold at auction	36,700.00	8,955,277.00
Droit de Suite 3 percent	1,101.00	8,342.30
VAT 17.5 per cent	6,422.50	1,567,173.48
Sales commission 15 percent, paid by seller	5,505.00	1,343,291.55
Sales commission 15 percent, paid by buyer	5,505.00	1,343,291.55
Real term price/value	55,233.50	13,217,375.88

[76] Driven by concerns of losing market share to New York and Switzerland—two nations without the resale right—the English report suggest that the London Mayor and UK Government should "support the efforts of Assemblyman Brodsky in New York to introduce legislation that would introduce a resale right in New York." Diversion of trade arguments are not as applicable to the United States scenario.

[77] See "Going, going, gone?: The impact of the *droit de suite* on London's art market," London Assembly Economic Development, Culture Sport and Tourism Committee, January 2006. (stating that the United Kingdom has no choice on whether or not to implement the directive, so the aim...was never to argue whether or not to imlement the *droit de suite* in January 2006. What we wanted to do is examine the potential effects for good or bad, to try to influence how the directive is implements, and to make recommendations that could be adopted when it is reviewed in 2009." See also, "Implementing Droit de Suite (artist's resale right) in England, Clare McAndrew and Lorna Dallas-Conte, The Arts Council of England.

[78] See Perlmutter, p. 400; This was recognized by the Copyright Office's report, which stated that the copyright laws favor exploitation of literary and musical works while a visual artist's expression is usually embodied in an end product, sold to a single purchaser. The artist's current work and reputation continue to affect the value of that earlier work.

[79] *Id.*

[80] See Copyright Office Hearings.

[81] 17 U.S.C. § 109.

[82] See Perlmutter, p. 400.

[83] See Perlmutter; 402.

[84] See Copyright Office Hearings.

[85] Ben Bolch et al., *An Economic Analysis of the California Art Royalty Statute*, 10 CONN. L.R. 689 (1978).

[86] *Id.*

[87] Conversation with Professor Mark Weinstein, USC Marshall School of Business.

[88] See Larry S. Karp and Jeffrey M. Perloff, *Legal Requirements that Artists Receive Resale Royalties*, 13 *International Review of Law & Economics* 63.; but see Kirstein and Schmidchen where cooperation rent is split evenly and the artists does bear it disproportionately.

[89] See “Do Artists Benefit from Resale Royalties? An Economic Analysis of a New EU Directive,”

[90] Bolch alludes to the utility effect, but curiously dismisses it as a largely psychological effect. “To the extent that a ‘starving artist’ is facing a ‘wealthy’ buyer...there is no exploitation of the artist in this situation. Although both the artists and the buyer agree on the future price of the work, they differ in their preferences for present consumption relative to future consumption. In a non-coerced exchange, both parties benefit. However, at some later time, because of increased wealth or for other reasons, the artist may have lesser need for present consumption and may in retrospect view the sale with regret, feeling that a just price was not obtained at the time of original sale.” (Bolch, 10 *Connecticut Law Review* 689, at 693).

[91] See Karp and Perloff, 645

[92] The easy example of how artists and dealers differ is to look at a dealer who buys a portfolio of work and has only a few high payoffs but can still profit while an artists can’t do this.

[93] See Goeltz, *In Support of the Resale Royalty*, 7 *Cardozo Arts & Ent. J.* 227.

[94] *Id.*

[95] See Chong; (A powerful dealer can tie up the work of a particular artist, acting as a monopsonist buyer in dealing with artists and as a monopolist when dealing with collectors. This works best under certain conditions: a successful artist who produces a few works each year; a (restrictive) resale agreement that a dealer can persuade buyers to sign. The resale agreement is hard to enforce, but the dealer can blackball the collector who breaks it. Similarly, a powerful collector can gain marketshare over artists—one way to do this is to buy the entire MFA thesis show. Any collector with significant share of an artist input can impact the reputation and market for the artist’s work. Collectors can also off-load works en masse, and drive down the value of an artist’s market.)

[96] Artists like Rauschenberg and Jim Dine are exemplars of this phenomenon.

[97] This might mean seeking out lower paying but well publicized public commissions, or teaching, or participating in more shows, or just staying active and visibly engaged.

[98] See Perloff in Palgrave, p. 646: “the larger an artist’s share of the resale price, the greater the incentive to the artist to put effort into producing more or better quality works or engaging in other activities that increase the artist’s reputation.”

[99] See Solow.

[100] *Id.*

[101] See Weatherall, 13, (“An important factor is whether her pieces complement the previous or are substitutes for prior works when artists return to earlier styles when not successful, this probably renders earlier works less value. De Chirico is a prime example of the latter where as [sic] Picasso is an enlightening example of the former as his works from the Blue Period would have been of little value today if it were not for the interest in the later abstract style.”)

[102] See Hansmann and Santilli, at 264.

[103] However, if the resale is a mandatory right, this effect is lessened.

[104] Consignment means the dealer does not buy the work outright, but sells them on behalf of the artist and takes a commission, typically 50%.

[105] Both the California and U.K. laws exempt the dealers’ first sales, so promotion and immediate dealer concerns might be moot at first glance. However, we can assume that the dealer prices will be impacted to the degree that collectors will discount them, so even if the dealer’s initial sale is not levied, the prices he can command will reflect the royalty’s effect.

[106] See Solow, at 211, (“Resale royalties can be used by an artist who sells to an art gallery or other dealer to affect the dealer’s pricing and promotional activities, and then the quantity sold. The problem facing the artist is to induce the dealer to provide promotional services, which can be accomplished by allowing the dealer to have ownership in the artwork. At the same time, the artist does not want the dealer to mark up the price too

much, since that reduces the quantity sold. The resale royalty allows the artist to balance these considerations, since it allows the artist to provide a partial interest to the dealer.”)

[107] See Perloff, at 647; but see Kirstein and Schmidchen for an analysis of the promotional effort as a “team production” undertaken cooperatively. In this scenario the art promotes—or increase value—by producing additional high quality pieces, investing in skills, maximizing exposure, making use of existing contacts with potential buyers, opinion makers, etc.—so that in principal the artist’s efforts have a “substantial or complementary” effect expected return of the work. But if he has sold the work to the dealer, the artist’s motivation to make these efforts is diminished to the equilibrium where effort costs equal value of the resale income. The two party’s efforts are complements and the marginal benefit of one’s contribution is only maximized if the other has contributed as well. However, getting optimal effort is difficult since the artist stands to gain less proportionally, and so is prone to contribute less, which in turn erodes the promotional efforts of the dealer.

[108] See *eg* Perloff, Solow

[109] Note that it’s the gallerists and dealers who enjoy this monopsony, as collectors themselves are often in competition with one another to make purchases and get access to coveted artists. The gallerist, as “broker,” thus enjoys the monopsony over artists (sellers) and the near monopoly over collectors (buyers) interested in an artist’s work.

[110] See Perloff; the popular practice of gallerists buying works from MFA students or arriving at their MFA thesis shows and buying work tends to support the idea of monopsony power wielded by gallerists.

[111] The reasons artists do not contract directly with collectors is the traditionally high transaction costs of finding them. The boom in MFA’s now necessitates the role of curators and dealers whose claim is to provide the service of weeding out and selecting the best art.

[112] There is a tendency for gallerists to obfuscate over money. Abbing, at 34 relates that an artist found out his dealer, who owed him in arrears up to two years, despite his regular hounding her, paid other artists more regularly despite their being legally less deserving. These other artists, he learns, had learned better how to deal with the dealer: she liked to be portrayed as generous when paying her artists. “The name of the game was generosity; [the dealer liked to play the role of the generous one; It’s a role that history had made for her: she had to be the Maecenas... [he] did not play the game right because he did not give her the chance to play her role as the generous one. The rules of the game include a taboo that prevents an artist-dealer relationship from being a normal business relationship”

[113] See Martha Lufkin, “Are Contemporary Dealers Too Powerful?” Forbes Online, July 7, 2005.; see also *Wildenstein & Co., Inc. v. Wallis*, 79 N.Y. 2d 641, 584 N.Y.S.2d 752, 595 N.E.2d 828 (1992) (rights of first refusal also known as pre-emptive rights; by settlement agreement executed during lifetime of director-collector Hal B. Wallis, dealer acquired preemptive rights and future consignment interests to portions of Wallis’s collection—this was upheld as not a restraint on alienation).

[114] See Copyright Office Hearing.

[115] Goetzl p. 258; See Bolch also.

[116] Darraby, at 35

[117] See “Memorandum submitted by Rebecca Salter, artist, Taken Before the Culture, Media, and Sports Committee” on Tuesday 8 March 2005, in *The Market for Art, Sixth Report of Session 2004-05, Report of House of Commons Culture Media, and Sport Committee, Ordered by House of Commons*. (Consignments are commonly used but have the disadvantage of the following problems: “...the artists has no physical possession but has legal ownership, but it is hard to enforce their rights: with no right to inspect records, they never know if it has been sold and to whom, generally lack of information, the work being rented out for profit or consigned to other galleries without knowledge, consent, approval, works owned by artist’s being seized when galleries go out of business, consigned works being lost. Without paperwork, artists have trouble verifying ownership (in case of seizure), getting paid on time, and verifying amounts... in the meantime the money is free working capital—an interest fee loan, in effect. Galleries can also “give” work away on the basis that it is good for an artist’s reputation.)

[118] See Darraby.

[119] See Hansmann & Santilli, p. 275

[120] Dworkin asserts that the existence of an uncontrolled power to agree to waive moral rights would undermine the entire concept of them. Unless a contract can be attacked on grounds of undue influence or restraint of trade, standard form contracts will become the norm, and these contracts will likely strip authors of

rights as a matter of course. (See Gerald Dworkin, *Moral Rights and the Common Law Countries*, Australian Intellectual Property Journal 5; 5 -36)

[121] VARA rights may not be transferred or assigned to third persons because for such purposes they are personal rather than economic rights see 17 USCA 106A(b); H.R. Rep. No. 514, 101<sup>st</sup> Cong. 2d Sess. 16 (1990). The rights may be waived by the author if certain statutory formalities are met. Under the California statute, the right to the royalty is essentially non-waivable and the statute requires waiver only by a written contract, and then only for an amount in excess of the statutory 5 percent. However, the right to collect the royalty is assignable (in anticipation of a collection agency) to individuals or entities and such assignment does not constitute a waiver.

[122] In UK, waivability/inalienability: comments to the act stated it was preferable to treat the resale right as a “compassionate allowance,” as applies to pensions and statutory benefits which are expressly declared to be inalienable by the statutes creating them. (See DACS comments).

[123] Of course these restraints are motivated by paternalistic concerns for the benefit of the poor and to protect them from shopping opportunities; social benefit opportunities are meant to induce people to consume food, housing, health care, or education by making these services cheaper and prohibiting transfers. (see Rose Ackerman, p. 959)

[124] *Id.*, 276.

[125] *Id.*

[126] See Karp & Perfloff, 165.

[127] *Id.*

[128] See Karen Richardson, Bankers Hope for a Reprise of Bowie Bonds, Wall Street Journal Online, August 23, 2005.

[129] The U.K and California laws permit waivability for the purposes of collection, and seem to contemplate public or private agencies that would undertake the collection and deduct administrative fees. It is unclear how an arrangement where a company forwarded money to an artist in exchange for being assigned the right to collect and hold the royalty for itself would be viewed. U.K. law does not permit the right to be assigned to anyone other than a charity or collecting agency that manages the right—defining managing the right as “the collection of resale royalty on behalf of the holder of the right in return for a fixed fee or a percentage of the royalty.” The U.K. law also does not permit the right to be the basis of a “charge” or serve as collateral for a loan.

[130] See Copyright Office Hearings on the Droit de Suite, p. 196, exchange Patry, Advisor to the Copyright Office and Jean-Marc Gutton of ADIGP:

Patry: I asked the question for this reason: if the United States Congress is to seriously consider a *droit de suite*, we, of course, would look to France for your experience, and the argument might be...: “Well, in France they have a *droit de suite* that applies to galleries, but there has been an agreement entered into that the galleries don’t pay a *droit de suite* to the artists, instead they pay into a social security fund. So, what is really needed is not a *droit de suite* for artists, but what we need is some sort of a change in our social security laws for artists.” So, my question is this: how do you respond to the argument that *droit de suite* is not the most important and that what is more important is a social security fund for artists?

Gutton: It’s absolutely a different demand... We must not mix social security and author’s rights. We cannot compare anything about it. If we are studying authors’ rights, we are not studying social [security]. For me, it is another study, it’s another domain...”

[131] The larger art establishment drew much wrath from the Art Workers Coalition, which was formed in response to protested curatorial practices at the Museum of Modern Art that involved substitution of artist work and display against their wishes. Gregory Battcock, who made the opening remarks at the first AWC meeting held in 1969 said: “The museum today, such as the Modern, the Whitney, and the Metropolitan...actively supports antiquated values and distorted obsessions that are not simply hypocritical, they are oppressive, reactionary, culturally debilitating, and socially and aesthetically negative. The simple fact is that those who control the museum—whatever museum you care to consider—are the superrich who control all legitimate communicative agencies. The trustees of the museums direct N.B.C. and C.B.C., the New York Times, and the associated press...they own AT&T, Ford, General Motors, the great multi-billion foundations, Columbia University, Alcoa...besides sitting on the boards of each other’s museums. The implications of these facts are enormous. Do you realize that it is those art loving, culturally committed trustees of the Metropolitan

Museum who are waging war in Vietnam?...It could be no worse if control and administration of the museum were turned over to the department of defense." (See Alberro, 127)

[132] See Alberro, 128.

[133] See Price, at 1335.

[134] Thus, when Robert Rauschenberg had his well known encounter with collector Robert Scull in 1973, which is conventionally described as the main catalyst for serious debate and initiatives for a resale royalty in the U.S, it cannot be detached from the larger critique of issues of control, inequality, and power within the art world at the time. Monroe Price later repudiated his position, stating, "Let me say my thinking on the topic has been enriched. There are a couple of things different from the time when the article was written. First, economic benefits and royalty rights haven't come through contracts in the marketplace...Symbolically, it is important for artists to organize, determine their priorities, and get a law through." Quoted by Perlmutter as reported by George Clack, *Artist's Rights*, The Cultural Post, Mar./Apr. 1977 at 11

[135] See Copyright Office Report.

[136] Post-secondary training is recommended if not required to obtain arts-related employment post graduation, as the Department of Labor reports in a study conducted recently that "postsecondary training is recommended for all artist specialties. Although formal training is not strictly required, it is very difficult to become skilled enough to make a living without some training

[137] Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook*, 2006-07 Edition.

[138] See Klainman, at ix.

[139] See Klainman, *More Than Once in a Blue Moon*, p. 4

[140] Hans Abbing, *Why Are Artists Poor*, at 112 (quoting Baumiol, 1966); Who is and who is not an artist is of relevance in estimating the share of artists in the population and in estimating artist incomes. If a subjective evaluation is used, per capita income tends to go down than if one takes a more restricted definition of who is an artist—such as completion of art school.

[141] Bruno Frey, 28.

[142] There is a complex interplay here at work: strong early work gets artist both gallery attention and academic prospects, since many academic posts hire artists with some amount of exposure. The security of the teaching job lets them develop their career with less emphasis on meeting the need of immediate living expenses, and may provide a buffer between gallery and market directives, letting them more freely choose projects and develop work at their own pace or according to their own ideas. They may exercise more self-direction over their career. At the same time, there is the concern that such a situation inhibits or limits production, even as academia gives the artists a platform and a certain amount of credibility and cachet.

[143] Howard Singerman, "Art Subjects", at 188.

[144] Cultural theorist Andrew Ross posited this as the phenomenon whereby below subsistence level wages permeate industries where workers are willing to exchange compensation for proximity to a perceived culturally valuable activity—art, film, music, where all of these industries are known for the notoriously low wages paid to entry level employees and non-principals.

[145] Data suggest that the primary factor in determining an art economy is at least in some part, perhaps a large part, on the presence of artists and a professional art world—that is training, studios, and degree granting institutions, and museums. Singerman and other art historians write of New York usurping Paris as the center of the art world in the 1950's in part because of the increase in art school and artists based there fueled by GI bill money. (The IPO catalogue backs this up). Such arguments counteract arguments claiming that Paris lost its dominance to New York because of the imposition of the droit de suite.

[146] Robert Storr, *Nice Work if You Can Get It*, in *Civilization* (reporting on the opportunity costs faced by artists and the shrinking number of jobs that support sustainable living and work mixtures; cultural capitals like New York, which prides itself on its breadth and depth of culture, face losses as people opt for other cities.)

[147] Complaints about the expansion of the MFA mark post war expansions spurred by GI Bill students whose college and art costs were paid by the government—ninety percent of whom were men. Singerman argues that these students were in part responsible for the ascendance of ab-ex painting styles in the art school.

[148] See Abbing.

[149] *Id.*, 114-115

[150] *Id.*, 119; Abbing has an interesting insight on the perpetual nature of this information gap: “In the first place, newcomer’s expectations can be extremely high, almost to the point of expecting some kind of salvation. Consequently, when these neophytes become disappointed, they hide their disappointment and so the next generation is again misinformed. There is a parallel situation with immigrants. Immigrants often send a far too rosy image of the Promised Land back to their homelands and therefore the migrations continue. These kinds of images continue to go uncorrected as long as underwhelmed immigrants continue to send these positive messages. They do so because they are afraid to admit that their decisions to emigrate may have been a mistake after all.” (120) “In principal, immigrants can correct false information, while in the arts, there are fundamental beliefs that resists verification. Due to these myths *everybody in our society tends to be ill-informed about the arts.*” Abbings five most damaging false myths about the arts are: making authentic art will be endlessly rewarding (even when no other rewards are forthcoming); talent in the arts is natural or God-given; Certain talents in the arts will only appear at a later point in someone’s career; Success in the arts depends exclusively on talent and commitment; Everyone has an equal chance in the arts.” Abbing goes on to say “It is difficult to avoid these myths, as many of them have an air of *righteousness* about them.”

[151] There is also the image of the self-described “maoist at heart” who believes in “not living beyond my means, to be really centered around my goals, not to believe in luck, ...the goal is something higher, to be able to spend time within myself and to know on those days that are bad and I’m down that inside of myself is something that is good and that is worthy and that the bad thing that I’m going through will pass as well.” In Klainman.

[152] *See* Abbing at 100; Abbing lists the common mythology of the arts that contribute to its economic anomalies:

1. Art is sacred; 2. Through art, artists and art consumers relate to a sacred world; 3. Art is remote and superfluous; 4. Art is a gift; 5. Artists are gifted; 6. Art serves the general interest; 7. Art is good for people; 8. Artists are autonomous and other professionals are not autonomous; 9. There is freedom of expression in the arts; 10. The work of art is authentic and the artist is the unique creator of it; in other professions such authenticity does not exist; 11. Creating authentic work gives one endless private satisfaction 12. Artists are selflessly devoted to art; 13. Artists are only intrinsically motivated; 14. Money and commerce devalue art; 15. Artistic quality can only exist if it is independent of costs and demand; 16. Artists have to suffer; 17. Talent is natural or God-given;; 18. Everybody has the same chance of being gifted or talented; 19. Certain talents in the arts only appear later in someone’s career; 20. Because extraordinary talent is rare, only a large pool of artists can provide society with a few extremely talented artists; 21. Success in the arts depends on talent and commitment exclusively; 23. Successful artists are often self-taught; 24. Given talent and commitment, equal chances exist in the arts; the best is victorious; 25. Because the best win, the arts are democratic and righteous; 26. The high incomes earned by some artists are fair.

[153] *See* Frey at 140.

[154] *Id.*

[155] *Id.*

[156] Frey also cites a psychological, as opposed to economic, approach to creativity where extrinsic monetary rewards tend to reduce creativity, and, according to a well cited study (Condry 1977, pp. 470-471) where individuals who are rewarded “seem to work harder and produce more activity, but the activity is of lower quality, contains more errors, and is more stereotyped and less creative than the work of comparable non-rewarded subjects working on the same problems.”

How do prices and monetary incentives affect creative production? The relationship is more complex than the simple assumption that more money equals more art production. Or is this simple formulation adequate? For instance, guaranteed public funding for art institutions tends to lead them to lack innovation and promote conservatism. These institutions never develop the skills to innovate and find funding on their own, thus leaving their constituents under-served. Perversely, in these failures there might be an indirect promotion of creative innovation as constituents are left to seek ways to fulfill demands outside of government funds. This could be interpreted as an argument that it is productive to underfund arts organizations. (See Frey, at 138)

[157] Singerman, *Art Subjects*, at 6

[158] *Id.*

[159] Singerman 147;

[160] This is the position of the historical *avant-garde*.

[161] Ian Burn quoted in Singerman, at 207

[162] *See* Frey at 11.

[163] *Id.* at 13.

[164] “From My Institution to Yours”, Howard Singerman, in *Public Offerings Catalogue*, at 268.

[165] *Id.*

[166] *See Id.*

[167] *See* Abbing, 107.

[168] *More Than Once in A blue Moon*, p. 96 – 97; one of the problems artists face is that their employment problems relative to those who lack skills entirely—uneducated minority teenagers for instance—are not as acute and so they seem to warrant less aid.

[169] *See* Abbing, p. 48

[170] Singerman notes that recent trends in LA art education focus on teaching students how to be artists rather than students, but it is unclear if this means a concomitant emphasis on developing then business and negotiation skills from within the curriculum.

[171] The general critique of the market can be formulated in many ways and is well articulated thus: “The claim that the market succeeds in maximizing the satisfaction of consumer preferences is often criticized on the grounds that, at least in practice, its operation may not achieve this goal. In particular, alongside most technical issues about ‘market failure’ in the case of externalities and public goods, it may be argued that there are also many ways in which consumer preferences may fail to control producer decisions: for instance, by the power of producers to prevent or inhibit consumer access to relevant information, or indeed by influencing the character and formation of preferences themselves. In short, the idea of consumer sovereignty is essentially a myth since the market economies leave consumers too vulnerable to the power of producers. By contrast, it seems, defenders of non-market cultural practices fear that consumer sovereignty might be a reality, which would make cultural producers too vulnerable to the power of consumers; too vulnerable since the only kind of authority that consumers have (ie, about their own preferences) may be seen as an inappropriate basis for the control of cultural production. The market thus threatens the authority of cultural practitioners: a characteristically “conservative” fear...” (Russell Keat, *Cultural Goods and the Limits of the Market*, )

[172] Crauford Goodwin, *Roger Fry: Art and Commerce*, 22 *Journal of Cultural Economics* 43-47, 1998.

[173] *See* Tom Crow, *Modern Art in the Common Culture*.

[174] *See* Abbing; Abbing states that this is the strong argument for public subsidy of the arts.