possible worlds for both artists and art buyers.[132] Essentially, the resale royalty imposes a seven percent tax on the sale of art, which, like any tax, lowers the demand for a particular good or service. In this case, the seven percent tax on the sale of art will arguably depress the art market. Moreover, critics assert that the resale royalty will remunerate the well-known artist at the expense of the unknown artist.[133]

Finally, critics argue that the resale royalty will encourage neither the production nor the dissemination of art. Because at least ninety percent of the artwork available does not have a resale market at all,[134] and most new artists lack any initial market for their work,[135] an increase of funds is needed to purchase works of art. This increase could be accomplished by providing tax breaks or direct subsidies.[136] The resale royalty, however, reduces those funds by imposing a tax on a work of art. The result will be a smaller and less dynamic art market.

It appears that a national resale royalty will not become an immediate reality. If the Kennedy Bill is passed, the question will be studied during the one year mandate. We are left, however, with an unsatisfactory situation that calls for national uniformity one way or another. What would happen if another state, besides California, passed a resale royalty law? For example, take the situation in which a California resident sold a painting in New York. Because the two bases of jurisdiction are residency of the seller and the place of sale, could royalties be imposed by both California and New York?[137] The answer is not clear. Finally, the California Act is subject to strong preemption arguments under section 301 of the Act, even though the issue was resolved in favor of the legislation under the 1909 Act.[138] The lone state might eventually be deprived of recognizing the resale royalty.

If the resale royalty is revived, it should incorporate the requirement, contained in the 1987 version of the Kennedy Bill, that there be at least a 150% resale profit for the royalty to apply. The problem is that a few years of rapid inflation might make the 150% profit look like a paltry increase. Thus, if the government is going to regulate the price of art in this way, it will need a mechanism and regulatory structure to adjust these rates periodically to reflect economic reality. The Copyright Royalty Tribunal represents one appropriate forum for carrying out this task. Perhaps the better solution, however, would lie in a private industry group process similar to the new jukebox provisions[139] and the satellite retransmission compulsory license,[140] where Copyright Royalty intervention would occur if a private effort fails.

132 At the Senate Subcommittee Hearings on Patents, Copyrights, and Trademarks, several speakers argued that "such a law would be difficult to administer, at the least, and possibly injurious to the careers of some young artists." *See* McGill, *U.S Bill on Artists Right is Debated*, N.Y. Times, Nov. 19, 1986, at C33, col. 1.

133 Visual Artists Rights Act: *Hearing on H.R. 3221 Before the Subcomm. on Courts Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 291 (1987) (statement of R. Fredrick Woolworth) [hereinafter Hearing on H.R. 3221].

134 *See, e.g.*, Bolch, Damon, & Hinshaw, *Visual Artists Rights Act of 1987: A Case of Misguided Legislation*, 8 CATO J. 71 (1988).

135 *See* Weil, *Resale Royalties: Nobody Benefits*, ARTNEWS, Mar. 1978, at 58.

136 *Hearings on S. 1619*, *supra* note 6, (remark of David Lloyd Kreeger).

137 *See* L. DUBOFF, ART LAW IN A NUTSHELL 240-44 (1984).

138 *See* Morseburg v. Baylon, 621 F.2d 972 (9th Cir.), *cert. denied*, 440 U.S. 983 (1980); 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.22[B] (1988).

E. *Conclusion*

Even with its somewhat limited acceptance of the moral right, the Kennedy Bill is an idea whose time has come. Congress can no longer ignore the worldwide trend toward recognition of moral rights. The moral right already exists in the form of nine different state statutes.[141] Other state laws will certainly follow. Undoubtedly, one of the most important justifications for supporting the Kennedy Bill is that it will provide a coherent *national* moral rights law which would bring order and predictability to the current fray.

III. IN SUPPORT OF THE RESALE ROYALTY

THOMAS M. GOETZL****

My objectives in this discussion are two-fold: first, to add some anecdotal color and detail to Professor Leaffer's analysis based on my work on the California Art Preservation Act[142] and on the Kennedy Bill;[143] and second, as an unrepentant, un-

139 17 U.S.C. § 116 (1982 & Supp. V 1987).

140 17 U.S.C. § 119 (1982 & Supp. V 1987).

141 *See supra* note 16.

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142 California Art Preservation Act, CAL. CIV. CODE § 987 (West 1982 & Supp. 1989).

143 Visual Artists Rights Act, *supra* note 2. This bill with minor exceptions is identical to S. 2796, 99th Cong., 2d Sess. (1986), "The Visual Artists Rights Amendment of 1986." These are not the first attempts to introduce legislation in Congress providing for payment of a royalty on the resale of their works. In 1978, Congressman H. Waxman of California introduced H.R. 11403, 95th Cong., 2d Sess. (1978). This writer was an invited conferee at the discussion conference called by Congressman Waxman.

abashed supporter of the resale royalty, to present some arguments in its defense which may persuade some of you to join me in its advocacy.

I was privileged to testify at the first Kennedy Bill hearing in November, 1986, at the Cooper Union in New York City.[144] Among the other witnesses who testified was Alfred Crimi. All of us who have taught Law and the Arts have had occasion to read *Crimi v. Rutgers Presbyterian Church*.[145] Crimi's 800 square foot fresco, which was commissioned for the chancel of the Rutgers Presbyterian Church in Manhattan, had been printed in 1938. Its destruction eight years later stunned the artist, provoking his lawsuit.[146] Alfred Crimi, now an elderly man, fairly shook with anger as his testimony caused him to recall the trauma he suffered at that time. Whenever I reread that opinion, I envision a Daumier caricature of a judge peering down from on high at Crimi, who is a rather diminutive man, shaking his finger and scolding him. Because Crimi, a Sicilian emigrant, had looked to Continental law for examples of moral rights to support his case, I imagine the judge admonishing Crimi to go back where he came from if he didn't like our laws. And on the other hand, I hear the judge lecturing Crimi that had he been so concerned about protecting his art work, he should have so provided in his contract with the church.[147] It was apparent from his testimony at the Kennedy Bill hearing that Crimi enthusiastically supports both the California Act and the Kennedy Bill.

In addition to Crimi's eloquent and emotional testimony, other witnesses testified regarding both the moral rights[148] and the copyright notice[149] provisions of the Kennedy Bill. I was the only witness to present testimony directed to the resale royalty right[150] provisions. The 99th Congress closed with no action having been taken on the Kennedy Bill.

The Kennedy Bill was reintroduced in the 100th Congress, and in December of 1987 another hearing was held in Washington, D.C.[151] Due primarily to the distance and resulting expense,

144 Visual Artists Rights Act of 1986: *Hearing on S. 2796 Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Judiciary Comm.*, 99th Cong., 2d Sess. (1986)[hereinafter *1986 Hearing*].

145 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. 1949). *See supra* notes 54-62 and accompanying text.

146 A. CRIMNI, A LOOK BACK — A STEP FORWARD: MY LIFE STORY 138-166 (1988).

147 *Id.* at 576-77, 89 N.Y.S.2d at 819.

148 Visual Artists Rights Act, *supra* note 2, § 3.

149 *Id.*

150 *Id.*

151 *See generally Hearings on S. 1619*, *supra* note 6.

both the 1986 New York Hearing and the 1987 Washington, D.C. Hearing included very few witnesses from the West.[152] This is despite the fact that California alone has experience under the resale royalty law,[153] and pioneered the art preservation law[154] protecting the moral rights of artists. If the subcommittee had really wanted an accurate picture of the operation of these laws, it should have heard more from the arts community which is affected by and directly benefiting from them.

Professor Leaffer referred to the impact of the recently enacted Berne Convention Implementation Act of 1988[155] upon the copyright notice provision of the Kennedy Bill.[156] Although the Berne Act is more a response to the commercial needs of the communication/information industry than to the wishes of the artistic community, I think it safe to conclude that the Berne Act,[157] as a practical matter, has removed the incentive to retain the copyright notice provision of the Kennedy Bill.[158]

I would like to add a couple of background anecdotes with respect to the moral rights provisions.[159] The California Art Preservation Act makes special provision for works of art which cannot be removed from a building without alteration or destruction.[160] The original drafts of the bill for that Act had included no

152 In fact, at the 1986 Congressional Hearings, the author was the only witness from west of Washington, D.C. *1986 Hearing*, *supra* note 144. The 1987 Hearings included only two witnesses from California. *Hearings on S. 1619*, *supra* note 6.

153 CAL. CIV. CODE § 986 (West 1982 & Supp. 1989).

154 *Id.* §§ 987, 989.

155 Berne Implementation Act, *supra* note 37.

156 Kennedy Bill, *supra* note 34, § 2.

157 Berne Convention, Paris Act, *supra* note 84, § 2.

158 Kennedy Bill, *supra* note 34. During the last Congress, Rep. Kastenmeier began to circulate a draft substitute for H.R. 3221 (the House counterpart to S. 1619) in which the copyright notice provision had been eliminated. *Id.*

159 *Id.* at § 3.

160 The California Art Preservation Act reads in part:

> (h) *Removal from building; waiver.* (1) If a work of fine art cannot be removed from a building without substantial physical defacement, mutilation, alteration, or destruction of such work, the rights and duties created under this section, unless expressly reserved by an instrument in writing signed by the owner of such building and properly recorded, shall be deemed waived. Such instrument, if properly recorded, shall be binding on subsequent owners of such building.
>
> (2) If the owner of a building wishes to remove a work of fine art which is a part of such building but which can be removed from the building without substantial harm to such fine art, and in the course of or after removal, the owner intends to cause or allow the fine art to suffer physical defacement, mutilation, alteration, or destruction, the rights and duties created under this section shall apply unless the owner has diligently attempted without success to notify the artist, or, if the artist is deceased, his heir, legatee, or personal representative, in writing of his intended action affecting the work of fine art, or unless he did provide notice and that person failed within 90 days either to remove the work or to pay for its removal. If such work is removed at the

such provision.[161] Those of us working with California State Senator Alan Sieroty, the bill's sponsor, speculated about who its opponents might be: perhaps collectors whose traditional property rights would be compromised, or dealers acting on behalf of those collectors. We were surprised to learn that there would be opposition from the very powerful real estate industry.

Meetings with industry representatives quickly disclosed their concerns. If there were an absolute prohibition on the destruction of works of art, then an owner or buyer of real estate with artwork attached to it would be precluded from demolishing or remodeling that building unless the artist had waived his rights.[162] To address these objections, negotiations were conducted which resulted in the adoption of language to accommodate this concern.[163] Similar language is included in the Kennedy bill.[164]

Interestingly, the California statute makes it clear that only *constructive* notice will suffice.[165] If the instrument has not been recorded, then neither actual notice or inquiry notice will work. Again, the Kennedy Bill has retained this feature.[166]

Professor Leaffer also referred to the fact that the California Art Preservation Act and the Kennedy Bill require protected art to be of "recognized quality"[167] and "recognized stature,"[168] respectively. Presumably, the intended meaning is the same. This

expense of the artist, his heir, legatee, or personal representative, title to such fine art shall pass to that person. CAL. CIV. CODE § 987(h) (West 1987 & Supp. 1989).

161 *See* California Bill SB 2143, one of the forerunners to CAL. CIV. CODE § 987 (West 1982 & Supp. 1989).

162 *See* CAL. CIV. CODE § 987 (g)(3) (West 1982 & Supp. 1989), which reads in relevant part, "[T]he rights and duties created under this section . . . [e]xcept as provided in paragraph (1) of subdivision (h), may not be waived except by an instrument in writing expressly so providing which is signed by the artist."

163 SB 2143 (1978) section 1 (e)(4)-(5) and SB 668 (1979) section 1(h), provide essentially that the artist's right of integrity is deemed waived unless the owner of the building to which it is attached signs and records an agreement preserving that right. Interestingly, the California statute makes it quite clear that it is only *constructive notice* that will suffice. CAL. CIV. CODE § 987(h)(1) (West 1982 & Supp. 1989). "[R]ights and duties created under this section, unless expressly reserved by an instrument in writing signed by the owner of such building and properly recorded, shall be deemed waived." *Id.*

164 Kennedy Bill, *supra* note 34, § 4.

165 California Art Preservation Act, CAL. CIV. CODE § 987(h)(1) (West 1982 & Supp. 1989) (". . . unless . . . properly recorded, shall be deemed waived").

166 Kennedy Bill, *supra* note 34, § 4.

167 CAL. CIV. CODE §§ 987(b)(2), 987(f) (West 1982 & Supp. 1989).

(b)(2) "Fine art" means an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality, but shall not include work prepared under contract for commercial use by its purchaser.

. . . .

(f) *Determination of recognized quality.* In determining whether a work of fine art is of recognized quality, the trier of fact shall rely on the opinions of

qualifying language was added in response to critics who expressed concern that frivolous claims might be brought regarding art work that did not merit protection. At the California State Senate Committee Hearing in the summer of 1978, which was prior to the adoption of the "recognized quality" language, one committee member objected to the Bill, expressing concern that a kindergarten teacher might tear up a child's finger painting and then be sued for the destruction of that work of art.[169]

In response, it was pointed out that in no other context is a plaintiff required to establish that damaged property was of any particular "quality" or "stature" in order to state a cause of action.[170] Furthermore, practical economics assure that frivolous lawsuits are not often pursued.[171] Accordingly, I would urge that that language be omitted from the Kennedy Bill since it unnecessarily increases the plaintiff-artist's burden and invites a subjective determination of what constitutes "recognized stature."[172]

One thorough examination of current moral rights case law concludes that adequate protection for an artists right of integrity would evolve even without statutes.[173] In contrast, Peter Karlen, a well known attorney in the area of moral rights disputes,[174] suggests that while common law theories may suffice for the academician, he attributes his success in this area to the existence of the California Art Preservation Act. By simply writing to the offending collector, which is often a governmental entity or a corporation,[175] and pointing to the relevant language of the Act which prohibits a particular practice, Karlen generally gets imme-

artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art. *Id.*

168 Kennedy Bill, *supra* note 34, § 2. *See supra* note 115.

169 Richard Mayer, Vice President of Artists Equity Association, Inc. and a prominent art activist, who testified at the Hearing, related this debate to the author. The California Legislature retains no official transcript of the Hearings.

170 *Id.*

171 Victims who suffer only insignificant harms are seldom willing to incur litigation expenses. Moreover, lawyers are not likely to accept such cases on a contingent fee basis.

172 Plaintiff must secure testimony of experts to establish the work of art involved was of "recognized stature." *See supra* note 115, at 166-67. In California, it is possible that plaintiff could recover those expert witness fees. *See* CAL. CIV. CODE § 987(e)(4) (West 1982 & Supp. 1989).

173 Damich, *The Right of Personality: A Basis for the Protection of the Moral Rights of Authors Common Law*, 23 GA. L. REV. 1 (1988).

174 *See, e.g.*, Karlen, *Moral Rights in California*, 19 SAN DIEGO L. REV. 675 (1982).

175 These are the owners most likely to mutilate or destroy art. Individual collectors are far more likely to protect their own self-interest and refrain from such vandalism. Recall, for example, the fate of Crimi's fresco, Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 89 N.Y.S. 2d 813 (Sup. Ct. 1949), as well as Alexander Calder's mobile, mutilated by the Allegheny County Airport Commission, ARTNEWS, Jan. 1978, at 39, Richard Serra's Tilted Arc, threatened by the G.S.A., and Isamu Noguchi's sculpture,

diate results. Indeed, the very dearth of reported cases echoes the success of this statute. Even in cases where the harm has already occurred, all that remains is to negotiate a settlement of the artist's claim for damages to his reputation.

The immediate issue is what form the Kennedy Bill will take in the upcoming 101st Congress. Clearly, the moral rights provisions will continue to be the heart of the Bill. Although the writer is still committed to supporting the Bill, he does not feel the same urgency about the moral rights provisions as about the resale royalty provisions. Nine states,[176] plus California, have now enacted moral rights legislation. Together with California, these states are home to one-third of the nation's population and the majority of the nation's important art markets. Nevertheless, there are compelling reasons to welcome federal legislation on the subject. First, federal legislation would afford artists protection in the remaining forty states. Second, it would provide a minimum level of uniformity throughout the country.[177] Finally, this legislation would reduce potentially troublesome choice-of-law/conflict-of-law issues.[178]

I would like to turn the focus to the resale royalty right provisions of the Kennedy Bill. As Professor Leaffer previously indicated, the version which was conditionally voted out of the Subcommittee on Patents, Copyrights and Trademarks on August 10, 1988, deleted the resale royalty right altogether.[179] In its place was a requirement that the National Endowment for the Arts, in cooperation with the Copyright Office of the Library of Congress, conduct a study to analyze the feasibility of enabling artists to participate in the economic exploitation of their work even after it has been sold.[180] A report is to be submitted to the Congress within twelve months of the effective date of this legislation.

I am eager to restore the resale royalty right provisions to the Kennedy Bill—and not just in reaction to the recent, highly

destroyed by the Bank of Tokyo in New York, ARTNEWS, May 1988, at 143. *See generally supra* notes 58-67 and accompanying text.

176 *See supra* note 16.

177 *See* § 9 of the Discussion Draft containing an Amendment in the nature of a substitute to S. 1619 providing there would *not* be preemption of state laws to the extent such provided the same or additional rights and protection. This very important provision was insisted upon by Artists Equity Association, Inc. to insure that no gains won in particular states would by forfeited in the effort to federalize the *droit moral*.

178 *Id.*

179 Kennedy Bill, *supra* note 34.

180 *Id.* at § 8(a).

publicized resale of a Jasper Johns painting for $17.1 million.[181] Rather, it is because fundamental fairness requires Congress to treat visual artists on a par with other creative persons.[182]

Ever since the California Resale Royalty Act went into effect twelve years ago,[183] it has generated enormous challenge, controversy and criticism.[184] Interestingly, there is persistent controversy about whether or not the California statute works. It is consistently referred to in the literature as being neglected, underused, even moribund.[185] There is, however, no reliable official source of information on the frequency or amount of art being resold.[186] Opponents and supporters must therefore rely upon anecdotal evidence of whether resale royalties have been paid. Opponents will occasionally refer to instances in which resale royalties were not paid, but requests for documentation inevitably go unanswered. On the other hand, in my capacity as an arts advocate and as a longtime board member of the California Lawyers for the Arts, I hear of countless royalties paid to many artists. Although some lawsuits have been filed to collect resale royalties, there are no reported opinions.[187] The law is clear

181 Wall St. J., Nov. 28, 1988, at 1, col. 6. The original sale of this work (perhaps aptly titled "False Start") earned Johns less than $2,000. In the same month, five other paintings by contemporary American artists resold at prices in excess of four million dollars each. *Id.* It is no longer the long dead artists whose works resale for astronomical prices. A Picasso just sold at auction in New York for 47.85 million dollars. N.Y. Times, May 10, 1989, at C21, col. 1.

182 Whether the resale royalty should be measured by five percent of the gross resale price, as it is in California, or by seven percent of the appreciation, as it was in the 1987 version of the Kennedy Bill, is beyond the scope of this discussion. *See* CAL. CIV. CODE § 986(a) (West 1982 & Supp. 1989). Visual Artists Rights Act, *supra* note 2, § 3(d).

183 California Preservation Act, CAL. CIV. CODE § 987 (West 1982 & Supp. 1989).

184 To no avail this challenge assumed constitutional proportions in Morseberg v. Balyon. 621 F.2d 972 (9th Cir.), *cert. denied*, 449 U.S. 983 (1980) (unsuccessful constitutional challenge under the copyright clause, U.S. CONST. art. 1, § 8, cl. 8, the contract clause, U.S. CONST. art. 1, § 10, cl. 1, and the due process clause, U.S. CONST. amends. V, XIV). Although the preemption issue was tested under the 1909 Copyright Act, the absence of subsequent constitutional challenges on this ground suggests concession that the same outcome would probably still be reached under the 1976 Copyright Revision Act.

185 *See, e.g.*, McInerney, *California Resale Royalties Act: Private Sector Enforcement*, 19 U.S.F. L. REV. 1, 3 (1984); Siegel, *The Resale Royalty Provisions of the Visual Artists Rights Act: Their History and Theory*, 93 DICK. L. REV. 1, 3 (1988) [hereinafter Siegel].

186 One survey, conducted in December 1986 by the Bay Area Lawyers for the Arts ("BALA"), was based upon a very small return confined to the San Francisco area. While it disclosed some knowledge, use, and general approval of the resale royalty, the survey itself was based on too small a sampling to be definitive. *See* Robinson, *BALA Survey Artists and Galleries on Resale Royalties*, BALA GRAM, Nov./Dec. 1986, at 1, *reprinted in Hearings on S. 1619*, *supra* note 6 at 119.

187 A number of documented settlements exists in the author's files. Such cases are generally heard in small claims court or promptly settled.

enough.[188] That some may fail to comply with the law hardly proves the law is ineffective, as some critics have charged; it merely shows that it cannot be perfectly enforced. However, few, if any, laws can be.

A recent article characterizes supporters of the resale royalty as holding a romantic view of the artist.[189] That is not accurate.[190] Advocates of the resale royalty simply want equity for artists vis-a-vis other creators. It is an appeal to fairness.[191] Recall, if you will, that copyright law began with books and copies. Gradually, new subject matter has been added to the copyright law.[192] And, over the course of time, in response to lobbying efforts, new exclusive rights have been added.[193] The common theme seems to be a desire by Congress, pursuant to Constitutional authorization,[194] to assure that those who have created intellectual property can benefit economically from the use of their creations for the term allowed.[195] Songwriters and lyricists, for example are entitled to royalties whenever their compositions are broadcast on the radio[196] or, now, played on a jukebox.[197] And

[188] All an artist need do is establish that there was a resale and that the threshold requirements were met. *See* CAL. CIV. CODE § 986 (West 1982 & Supp. 1989).

[189] Siegel, *supra* note 185, at 4.

[190] The French justify their *droit de suite* on the rationale that where there has been a major increase in the value of a work of art, it must be primarily attributable to the continuing efforts of the artist who created it to enhance his artistic talent and reputation. Goetzl & Sutton, *Copyright and the Visual Artist's Display Right: A New Doctrinal Analysis*, 9 COLUM. J.L. & ARTS 15, 39 n.89 (1984). The German rationale (perhaps it is a bit romantic) is that the true value of the art was always inherent in the work. At the time of the first sale, the public lagged far behind in its taste and understanding because it failed to appreciate the full value of the work. Only later, when the public taste has matured and the art work has attained its true value, must the artist be allowed to share in that higher resale price. *Id.*

[191] *See id.* at 48-51 and accompanying text for a detailed exposition of this view.

[192] *See* 17 U.S.C. §§ 101-02 (1982 & Supp. V 1987). A definition for "computer program" was added in 1980. *Id.* § 101. In 1976, Congress explained the works of authorship list in section 102. *Id.* § 102.

[193] *See, e.g.*, 17 U.S.C. §§ 106-18 (1982 &Supp. V 1987). Sections 107 through 118 are exceptions, limitations, and the scope that Congress has placed on the copyright owners' exclusive rights granted in section 106. *Id.*

[194] U.S. CONST. art. I, § 8. "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*

[195] *See generally* 17 U.S.C. §§ 302-05 (1982 & Supp. V 1987), which define the duration of the copyright for works created before and after January 1, 1978, as well as the terminal date applicable to all terms of copyright.

[196] 17 U.S.C. § 106(4) (1982 & Supp. V 1987). *See, e.g.*, Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975).

[197] 17 U.S.C. §§ 106(4), 116 (1982 & Supp. IV 1986). Section 106(4) gives the copyright owner "exclusive rights" over any public performance of the copyrighted work. *Id.* Section 116 limits the liability section of § 106(4) in the case of "nondramatic musical work embodied in a phonorecord," when the work is in a coin-operated phonorecord player. *Id.* at § 116(a). *See, e.g.*, Broadcast Music, Inc. v. Xanthas, Inc., 674 F. Supp. 553 (E.D. La. 1987), *modified*, 855 F.2d 233 (5th Cir. 1988) (summary judgment against jukebox owner/operator for multiple violations of Copyright Act, damages equal to three times the amount of unpaid registration fees).

that entitlement exists in addition to any royalties to which they may be entitled from the sale of sheet music and records.[198] Authors are entitled to royalties not only from sales of copies of their books,[199] but also from the sale of film rights.[200] And the film rights belong to the author even though it is rare that a book will be made into a film. So to criticize the resale royalty by pointing out that only a small percentage of art work will ever be resold at a higher price misses the point. The resale royalty is an economic right and artists whose works sell in a secondary market ought to benefit from that sale.

Some have charged that it is simply unnecessary to have a statute granting a resale royalty right. They argue that an artist who wishes to have such a right should simply include it in the original sales contract. That is what Crimi was told.[201] Few artists, however, anticipate this need and, fewer yet have the bargaining power to meet it. The Projansky Contract[202] has been around for two decades. Although it is well drafted, few artists have successfully persuaded collectors to sign it. Critics describe the non-waivability[203] of the resale royalty right as unnecessarily patronizing. However, legislation which seeks to protect a class of people who generally lack proportionate negotiating power often provides non-waivable rights.[204]

[198] 17 U.S.C. § 106(1), (3)(1982 & Supp. V 1987). *See, e.g.*, Interstate Hotel Co. of Nebraska v. Remick Music Corp., 157 F.2d 744 (8th Cir. 1946), *cert. denied*, 329 U.S. 809 (1947)(copyright holders awarded injunction and damages for defendant's public performance of compositions without license or consent despite defendant's public purchase of sheet music).

[199] *See, e.g.*, Shapiro, Bernstein & Co. v. Bleeker, 224 F. Supp. 595 (S.D. Cal. 1963) (plaintiff has burden to show actual damage suffered or defendant's profits resulting from book published with 1,000 separate righthand melodies, twelve of which belonged to plaintiff).

[200] 17 U.S.C. § 106(2)(1982) (allows owners of copyright to "prepare derivative works based upon the copyrighted work"). *See, e.g.*, National Business List v. Dun & Bradstreet, Inc., 552 F. Supp. 89 (N.D. Ill. 1982)(unauthorized use of credit bureau's mailing list constituted copyright infringement).

[201] Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. 1949), discussed *supra* notes 58-63 and accompanying text.

[202] ART LAW, *supra* note 12, app. 24, at 1131.

[203] *See* CAL. CIV. CODE § 986(a)(West 1982). "The right of the artist to receive an amount equal to 5 percent of the amount of such sale is not transferable and may be waived only by a contract in writing providing for an amount in excess of 5 percent." *Id.*

[204] Consider, for example, statutes providing rights for such diverse classes as tenants, consumers, patients and, mobile home buyers. *See, e.g.*, CAL. CIV. CODE §§ 1942.1, 3097 (West 1982 & Supp. 1989); CAL. HEALTH & SAFETY CODE §§ 1430, 1599.81, and 18039 (West 1982 & Supp. 1989), respectively. Section 18039 provides: "No agreement entered into pursuant to this chapter shall contain any provision by which the buyer waives his or her rights under this chapter, and any waiver shall be deemed contrary to public policy and shall be void and unenforceable." *Id.* at § 18039.

It is frequently alleged that the resale royalty has failed to accomplish its purpose of providing money for poor artists. Again, the argument is misdirected. The resale royalty was never intended as welfare legislation. No one has ever dared intimate that other rights granted by the copyright law are ineffective because they fail to provide royalties, for example, to poor street musicians or to poor, unpublished authors. Nor is patent law attacked for failing to assure royalties to inventors whose inventions never find a market. Visual artists should be treated like other creative people.

What the resale royalty right can do is assist undiscovered artists who, early in their careers, are required by economic exigencies to sell their works at prices which hardly recoup their out-of-pocket production costs. The resale royalty right offers such artists the prospect of making some money in the future from those works.

Critics also assail the resale royalty right for allegedly damaging the art market. They insist that fewer than one-tenth of one percent of art works ever find a secondary market. At the same time, however, they claim that a dealer's ability to subsidize young undiscovered artists occurs through the backroom resales of works by established artists.[205]

One scenario, which I would find more entertaining had it not been so seriously proposed, had would-be collectors using complicated equations to calculate prices at which they would purchase art.[206] These "investment-minded collectors" would attempt to discount the price quoted in order to compensate for the amount potentially owed under the resale royalty provision. That is not, however, what happens in the real world.[207] A resale royalty that has only a remote possibility of becoming payable at some later date is hardly likely to affect the purchase price.

Such investment-minded collectors would most probably be

[205] Bolch, Damon & Hinshaw, *An Economic Analysis of the California Art Royalty Statute*, 10 CONN. L. REV. 689, 696 (1978) [hereinafter Bolch, Damon & Hinshaw]. A 1980 study suggested that the resales of works by just five artists—Robert Rauschenberg, Jasper Johns, Frank Stella, William de Kooning, and Alexander Calder—accounted for over one third of the dollar volume of all resales. Camp, *Art Resale Rights and the Art Resale Market: An Empirical Study*, 28 BULL. COPYRIGHT SOC'Y. 146, 153 (1980).

[206] Bolch, Damon & Hinshaw, *supra* note 205, at 697.

[207] Art generally changes hands at prices stated in round numbers. Furthermore, the equations they would have to apply must properly include several variables, only one of which—the resale royalty percentage—can be predicted. Other variables which should be taken into account might include the amount of a dealer's commission on a resale, the rate at which income taxes might be assessed on any gains, the rate of inflation, and (especially) whether the work will have a secondary market at all at an appreciated price, and under circumstances where a resale royalty statute will apply to the transaction.

wholly unwilling to buy the art of *any* artist without an established resale market. Indeed, such an analysis totally ignores what Professor DuBoff has aptly identified as the "psychic dividend"[208] or the pleasure of owning a work of art.

A resale royalty right is not going to drive collectors away from the purchase of contemporary art, as has often been charged. At the turn of the century, when Congress was considering legislation to grant composers a public performance for profit right, the infant radio industries protested. They claimed that an obligation to pay a royalty every time they played contemporary copyrighted music would compel them to confine their repertoire to classical music already in the public domain. Well, spin the dial on the radio; that is not what is happening. There has always been a market for contemporary music. There will always be a market for contemporary art. The resale royalty right will not affect that.

Finally, I want to respond to the "unfairness" argument. It is said by some that, for example, it would be unnecessarily avaricious for Jasper Johns[209] to seek a royalty upon the resale of his $17.1 million painting ($850,000 at 5%). Rather, he should be grateful because now Leo Castelli, his dealer, can, and has announced that he will,[210] raise the prices on Jasper Johns' new works. Why should artists be the only socialists in this capitalist society? If they are successful, why shouldn't they get richer just like anyone else? Imagine calling up Irving Berlin after having broadcast an hour-long concert of his music, and telling him he should be grateful for the exposure. Now he'll sell more sheet music and records, and, after all, he has all the money a centenarian could possibly need. No, it is *his* music and he is entitled to be paid for the broadcasting of his music. And so too, why shouldn't a collector be required to pay the artist a royalty for the ongoing enjoyment of his work (the very existence of a secondary market in which to sell the work).

In summary, fundamental fairness and opportunity to harvest equal economic rewards from the variety of ways by which one's creativity is exploited under the authority of the Copyright

[208] ART LAW, *supra* note 12, at 364. DuBoff analogizes the investment in art to investment in financial markets. Instead of receiving a dividend as a percentage return on invested capital, the investor receives what DuBoff terms a "psychic dividend," — the investor can measure the value of his investment in terms of its aesthetic appeal. If that dividend should begin to decrease, he may desire to sell the work and purchase another. *Id.*

[209] The author does not ascribe any particular position to Jasper Johns personally.

[210] Wall St. J., Nov. 28, 1988, at 1, col. 6. *See supra* note 181 and accompanying text.

Clause of the United States Constitution should compel Congress to provide visual artists with a right to resale royalty. I hope some of you will join me in the effort to persuade our elected representatives to restore the resale royalty provision to the Kennedy Bill when it is reintroduced in the 101st Congress this year.

IV. The Case Against An American *Droit de Suite*

Gilbert S. Edelson*****

A. *Introduction*

The "Visual Artists Rights Act of 1987,"[211] introduced in the 100th Congress by Senators Kennedy and Kastan, had three principal components: (i) a provision exempting visual artists from the copyright notice requirement, (ii) a grant of "moral rights" to visual artists, and (iii) provisions for a "resale royalty" of seven percent of the profits derived from the resale of artwork to be paid to the artist, or to the artist's estate, within fifty years of the artist's death.[212] This latter provision was coupled with a requirement that all art sales covered by the bill be publicly registered in the Copyright Office.

During the hearings on the Bill, it became apparent that there was widespread support in the visual arts community for both the "moral rights" provision and for the elimination of the copyright notice,[213] but that the community was sharply divided on the "resale royalty" and the public registration of sales.[214]

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211 Visual Artists Rights Act, *supra* note 2. *See also* Markey Bill, *supra* note 53. These are not the first attempts to introduce legislation in Congress providing for payment of a "royalty" to artists on the resale of their works. In 1978, Congressman Henry A. Waxman of California introduced similar legislation. H.R. 11403, 95th Cong., 2d Sess. (1978).

212 *See generally id.*

213 *See Hearings on S. 1619*, *supra* note 6.

214 *Id.*

> As a number of studies have shown, one effect of the resale proceeds right is to depress the primary market for contemporary art. . . .
>
> The proposition that the right favors the few artists at the expense of many seems irrefutable
>
> [but] S. 1619 contains other important provisions. I . . . urge your support for the proposal to remove the requirement of copyright notice. I also favor the proposal to create rights of paternity and integrity in the artist . . .

Id. at 83 (statement of John Henry Merryman, Professor of Law, Stanford University, Chairman, Visual Arts Division of the American Bar Association's Forum on the Entertainment and Sports Industries).

Following the hearings, the Bill was changed, amending the "moral rights" component, eliminating the "resale royalty," and mandating a study on its feasibility.[215] The Bill was not enacted, but has since been re-introduced by Senator Kennedy in the 101st Congress, and is referred to as the Kennedy Bill.[216]

The enactment of enabling legislation for adherence to the Berne Convention[217] accomplishes the elimination of the copyright notice requirement. Additionally, little controversy remains over the "moral rights" concept. Thus, the focus of this Article is on the issues surrounding the "royalty"— issues which have divided the art community.

Proponents of the controversial "resale royalty" concept argue that it will help artists in a number of ways.[218] The resale royalty provides artists with a continuing financial interest in their work similar to that now enjoyed by composers and authors, who are entitled to royalties from the sale of their copyrighted works.[219] Furthermore supporters assert that it is inequitable for the profits from a work's appreciation in value to accrue solely to the collector-purchaser when the artist is responsible for the creative element of art, the element which gives the work its financial value.

Why then would anyone seriously concerned about the welfare of artists oppose legislation so plainly beneficial to their interests? This portion of the symposium addresses the reasons for opposing the "resale royalty." It argues that the superficial appeal of this notion cannot withstand closer scrutiny. The term "resale royalty" is a misnomer; the proposal is essentially calling for mandatory profit-sharing, and constitutes a discriminatory surtax on the profit from the sale of those works of art to which it applies. A surtax on a product necessarily inhibits its sale, with

215 Kennedy Bill, *supra* note 34.

216 *Id.*

217 Berne Implementation Act, *supra* note 37; Berne Convention, *supra* note 38.

218 *See generally* Professor Goetzl's discussion favoring the resale royalty, *supra* notes 142-82 and accompanying text.

219 17 U.S.C. §§ 102, 106-118 (1982 & Supp. V 1987).

> The resale proceeds right (in French, *droit de suite;* in German, *Folgerecht*), like the copyright, is a patrimonial or property right of the artist, not a right of personality. It does not apply to the "primary market"—that is, to transfers of works by the artist who created them. But subsequent transactions (sometimes referred to as the "secondary market") are subject to the artist's right to share in the proceeds. Thus if Artist sells a painting to Collector, and Collector then sells it to Museum, the Collector-Museum transaction may, depending on the applicable law and the facts, be subject to the proceeds right.

Merryman & Elsen, *supra* note 122, at 213.