

The Unconvincing Case for Resale Royalties

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INTRODUCTION

Here we go again. In late February 2014 a group of congresspersons introduced a bill—The American Royalties Too Act of 2014 (known for its catchy abbreviation: the ART Act),¹ which, if passed, will grant visual artists² a right to collect royalties when their artworks are resold. This is the fifth attempt to pass such legislation.³ However, unlike their predecessors, the proponents of the current bill are now armed with a comprehensive report, published by the U.S. Copyright Office in December 2013, urging Congress to consider such resale royalty rights.⁴

This Essay casts doubts on the desirability of this legislative initiative by focusing on a fundamental question: Does our legal system need to provide additional subsidies to visual artists?

There are two main rationales for enacting resale royalty rights. Historically, resale royalty initiatives, both domestically and abroad, were motivated by a romantic notion that artists are so poor and in such a weak bargaining position that they deserve special legal protection. In addition, the Copyright Office, as well as the proponents of the ART Act, argue that in its current form, the Copyright Act disfavors—maybe even discriminates

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1. S. 2045, 113th Cong. (2014); H.R. 4103, 113th Cong. (2014).
 2. The term “visual artists” is commonly used in the discussion on resale royalty rights. As used in this Essay, visual artists are artists who create works that are typically sold in one or very few copies. Painters and sculptors are the archetypal examples.
 3. Previous bills that introduced resale royalty rights are the Equity for Visual Artists Act of 2011, S. 2000, 112th Cong. (2011); Visual Artists Rights Act of 1987, S. 1619, 100th Cong. (1987); Visual Artists Rights Amendment of 1986, S. 2796, 99th Cong. (1986); Visual Artists’ Residual Rights Act of 1978, H.R. 11403, 95th Cong. (1978). Additional initiatives, at least since the 1960s, did not result in the introduction of a bill.
 4. U.S. COPYRIGHT OFFICE, *RESALE ROYALTIES: AN UPDATED ANALYSIS* (2013) [hereinafter *COPYRIGHT OFFICE REPORT*]. The position taken in this report is dramatically different from the position taken by the Copyright Office in the past. See U.S. COPYRIGHT OFFICE, *DROIT DE SUITE: THE ARTIST’S RESALE ROYALTY* (1992) (opposing the enactment of resale royalty rights).

against—visual artists, and so resale royalties are needed to level the playing field.

This Essay shows that both rationales are misguided. Visual artists are neither poor nor in a weak bargaining position vis-à-vis their buyers, and the Copyright Act does not disfavor these artists in any way. Therefore, there is no convincing justification to enact resale royalty rights and to force society to incur their significant costs. Moreover, this Essay argues that the drafters of the ART Act made several surprising choices—including making the right to collect resale royalties transferable and retroactive—that are inconsistent with the recommendations of the Copyright Office and that make the Act especially harmful.

I. THE STARVING ARTISTS RATIONALE

Historically, resale royalty rights, also known as *droite de suite*, emerged, first in France and then in other countries, to address the perception of extreme poverty and weakness of artists in contrast with the wealth and wellbeing of their buyers.⁵ Anecdotal stories about famous artists who lived in poverty while their buyers made a fortune reselling their old works fueled these legislative initiatives.⁶

Those anecdotal stories were (and still are) a weak justification for a legislative reform. In many cases, the stories themselves were taken out of context and created a misleading impression.⁷ Moreover, it is impossible to deduce from those isolated incidents that there are broad problems in the interactions between visual artists and their buyers that justify legal intervention.

There is no convincing evidence that visual artists are especially poor. While the empirical research on the question is incomplete, most studies

5. Monroe E. Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite*, 77 YALE L.J. 1333, 1334-35 (1968).

6. For example, the COPYRIGHT OFFICE REPORT, *supra* note 4, at 6, mentions the story of Robert Rauschenberg, one of the greatest visual artists of the twentieth century, who sold one of his earlier works for \$900 and was enraged when several years later it was sold by someone else for \$85,000. See also John Henry Merryman, *The Wrath of Robert Rauschenberg*, 41 AM. J. COMP. L. 103, 107-08 (1992) (discussing a “persistent folklore that clouds the *droit de suite*,” as demonstrated by the stories regarding the exploitation of expressionist painters that led to the enactment of resale royalties in France).

7. See, e.g., Merryman, *supra* note 6, at 108-11 (exploring some of those stories and finding that they were false, as neither Robert Rauschenberg nor French expressionist painters were exploited by their buyers).

conclude that artists' lifetime earnings "very closely approximate what they could achieve in non-artistic pursuits."⁸

More importantly, visual artists do not seem to typically be in a poor bargaining position. The primary market for fine art, in which visual artists operate, is very competitive. The United States is home for more than 6,000 galleries and art dealers. The largest fifty companies in this industry generate only about forty percent of the revenues.⁹ Thus, visual artists, unlike most non-visual artists (e.g., recording artists, composers, directors) do not need to deal with powerful intermediaries with substantial market power to get their work sold. Because barriers to entry into the artworks market are low, it is unlikely that market concentration will develop in the foreseeable future.

It is therefore difficult to see why—and the Copyright Office Report does not explain why—visual artists do not already receive fair consideration for their works. To illustrate this point, consider the claim—mentioned in the Copyright Office Report—that the value of certain fine art increases by ten percent a year.¹⁰ Even if this generous appreciation figure is true, there is no convincing reason that the price paid in the initial sale of visual artworks will not reflect this expected appreciation.¹¹

The conclusion is that visual artists are neither poor nor in a weak bargaining position, and therefore, the historic reasoning for enacting resale royalty rights, which can be called the "Starving Artists Rationale," cannot justify their enactment nowadays.

II. THE DISCRIMINATION AGAINST VISUAL ARTISTS RATIONALE

The Copyright Office Report and the proponents of the ART Act seem to have abandoned, at least to a degree, the "starving artists rationale" as the *raison d'être* for enacting resale royalty rights. Instead, a different justification is being put forward. Resale royalties, the argument goes, are required to level

8. Randall K. Filer, *The "Starving Artist"—Myth or Reality? Earnings of Artists in the United States*, 94 J. POL. ECON. 56, 59 (1986); see Guy A. Rub, *Stronger than Kryptonite: Inalienable Profit Sharing Schemes in Copyright Law*, 27 HARV. J. L. & TECH 49, 83 (2013) (exploring other studies that reached similar results); see also COPYRIGHT OFFICE REPORT, *supra* note 4, at 34-35 (suggesting that visual artists' earnings approximate those of other artists).

9. *Art Dealers & Galleries Industry Profile*, FIRST RESEARCH (Sept. 16, 2013), <http://www.firstresearch.com/Industry-Research/Art-Dealers-and-Galleries.html>; see also Rub, *supra* note 8, at 133.

10. COPYRIGHT OFFICE REPORT, *supra* note 4, at 11.

11. Another aspect of this argument, is that denying part of this expected appreciation of artworks from buyers, as proposed by the ART Act, will reduce the prices in the initial sale of artworks. See *infra* Part III.

the playing field and address a built-in disfavoring or discrimination in our copyright law against visual artists.¹² This Part first introduces this argument and then explains why, despite its intuitive appeal, it is false.

Visual artists and non-visual artists differ in the ways in which they are compensated for their work. Visual artists rely on a “single copy business model.” They typically create one unique copy of the work that they sell. Pablo Picasso created one copy of the *Guernica*, for which he was paid 200,000 francs.¹³ This copy is now a major attraction at the Museo Reina Sofia in Madrid. While, without copyright law protection, others might create copies of the *Guernica*, those copies would be a poor substitute for Picasso’s original masterpiece.

In contrast, the initial original work created by a non-visual artist typically does not have significant value. The value, in this “multi-copies business model,” comes from selling copies of the original work and its adaptations. The original copy of *Harry Potter and the Sorcerer’s Stone* might not be worth millions,¹⁴ but by selling millions of copies of the book, its sequels, and their movie rights, its author, J.K. Rowling, became a billionaire.¹⁵

Copyright law, as the name itself suggests, focuses on the creation of copies. It gives content creators the right to prevent others from reproducing their works. This right is crucial to the success of the multi-copies business

12. *E.g.*, COPYRIGHT OFFICE REPORT, *supra* note 4, at 2 (“[M]any visual artists [are placed] at a material disadvantage vis-à-vis other authors, and therefore the Office supports congressional consideration of a resale royalty right.”); *id.* at 31 (“[C]opyright law has effectively discriminated against [visual artists] in many respects for centuries.” (quoting Shira Perlmutter, *Resale Royalties for Artists: An Analysis of the Register of Copyrights’ Report*, 16 COLUM.-VLA J.L. & ARTS 395, 403 (1992))); *See, e.g.*, Press Release, Senator Ed Markey, Markey, Baldwin, and Nadler Introduce Legislation to Level the Playing Field for American Visual Artists (Feb. 26, 2014), <http://www.markey.senate.gov/news/press-releases/markey-baldwin-and-nadler-introduce-legislation-to-level-the-playing-field-for-american-visual-artists> (quoting Senator Tammy Baldwin as saying that “[j]ust as our copyright laws extend to musicians and authors to encourage their artistic creativity, they should also apply to our visual artists”).
13. *Picasso: Love & War 1935-1945*, NAT’L GALLERY OF VICT., http://www.ngv.vic.gov.au/picasso/education/ed_JTE_ITG.html (last visited Apr. 21, 2014).
14. Original works under this model might have some value as a collection item. *See, e.g.*, Deborah L. Jacobs, *Springsteen’s Handwritten ‘Born To Run’ Lyrics Fetch \$197,000 At Auction*, FORBES (Dec. 5, 2013, 11:57 AM), <http://www.forbes.com/sites/deborahljacobs/2013/12/05/springsteens-handwritten-born-to-run-lyrics-fetch-160000-at-auction>. However, even in that case, the value of the original manuscript is almost negligible in comparison to the value of the millions of copies of that song that were sold.
15. Julie Watson & Tomas Kellner, *J.K. Rowling and the Billion-Dollar Empire*, FORBES (Feb. 26, 2004, 3:31 PM), http://www.forbes.com/maserati/billionaires2004/cx_jw_0226rowlingbillo4.html.

model employed by non-visual artists. Yet it is practically irrelevant under the single-copy business model employed by visual artists.

Therefore, so the argument goes, because copyright law primarily helps non-visual artists, it disfavors visual artists.¹⁶ Shouldn't this discrimination against visual artists be corrected by providing them with new legal rights?

This argument is misguided, and it turns copyright theory on its head. To appreciate its fallacy we first must take a step back and remind ourselves why society decided to have copyright protection in the first place.

Copyright law deals with a certain failure in the market for non-visual works. An artist spends significant resources on creating such a work but without copyright protection, some publishers will be able to create and sell copies of it. Because copies of a non-visual work are close-to-perfect substitutes, the copying publishers will be able to compete with the artist and drive prices down to the marginal costs, thus preventing the artist from recouping the fixed costs of creation. Artists will then be disincentivized to produce non-visual works and society as a whole will be harmed. By making the creation of copies illegal, copyright law addresses this problem.

But visual artists, like most producers of goods,¹⁷ simply do not suffer from the problem that copyright law mitigates. Because copies are a poor substitute for original visual artworks, free copying does not significantly harm the commercial value of the work. Therefore, nothing prevents the seller of a visual artwork from capturing the full expected value of her work in the initial sale. The complex and imperfect mechanisms of copyright law are not needed to foster a market for visual artworks.

Many other laws provide rights that are important for some – typically naturally disadvantaged individuals – and practically useless to others. For example, federal regulations promulgated under Title 49 require certain car manufacturers to install a LATCH system, which helps secure children seats.¹⁸ The LATCH system is valuable to young children (and their parents) but is not especially useful to people who do not have children. Nevertheless, can anyone seriously argue that Title 49 discriminates against those who do not have children? Of course not. The Copyright Act is no different. It creates rights that are valuable to those who are naturally disadvantaged in the marketplace: non-

16. COPYRIGHT OFFICE REPORT, *supra* note 4, at 31-36.

17. Most manufacturers produce items that cannot be easily and cheaply reproduced. The business model of visual artists is therefore not very different from the business models of car manufacturers, farmers, or carpenters. All those manufacturers cover their costs and make profit just by producing goods and then selling them to buyers. While cars are frequently resold, car manufacturers do not need resale royalty rights to sustain their business model. The same is true for visual artists.

18. 49 C.F.R. § 571.213 (2012). LATCH stands for “Lower Anchors and Tethers for Children.”

visual artists. Like the LATCH systems installed in compliance with Title 49, the Copyright Act mitigates a problem that others – visual artists – simply do not face. There is nothing discriminatory in this mechanism.

III. THE COSTS OF RESALE ROYALTY RIGHTS

Resale royalty initiatives seem to try to solve a problem that does not exist. Therefore, they do not generate real social benefits. This Part briefly suggests that on the other hand, there are significant costs to resale royalties.¹⁹ In fact, even if one believes that the law should better compensate visual artists, resale royalties are an ineffective and inefficient way to do so.

First and foremost, it is unlikely that resale royalty rights increase authors' total compensation in competitive markets, such as the market for visual artwork.²⁰ In competitive markets, the buyers' willingness to pay reflects the value they expect to obtain from the products they buy. Part of this value comes from the potential proceeds of future resale transactions.²¹ If buyers are forced by law to share their future resale proceeds with others, then the value they will attribute to the work—as well as their willingness to pay—will naturally decrease.²²

While resale royalties will not increase the total income of visual artists, they will redistribute some of it. The compensation in the initial sale will decrease for all artists, while some artists, typically the most successful ones, will be compensated for that decrease by collecting royalties when their work is resold. This redistribution harms visual artists as a group. The delay in earning from the initial sale to future resale transactions is undesirable because artists typically place a higher value on income earned when they are young and struggling. The redistribution to successful artists is undesirable because those

19. The focus of this Essay is on the lack of benefits from resale royalty rights. Therefore, the discussion on the costs of this mechanism is brief. Those costs have been explored at length elsewhere. See, e.g., Henry Hansmann & Marina Santilli, *Royalties for Artists Versus Royalties for Authors and Composers*, 25 J. CULTURAL ECON. 259 (2001); Merryman, *supra* note 6; Price, *supra* note 5; Rub, *supra* note 8.

20. See Rub, *supra* note 8, at 96-98.

21. See Guy A. Rub, *Rebalancing Copyright Exhaustion*, 64 EMORY L.J., at *32-*34 (forthcoming 2015).

22. Most law and economics scholars do not seriously doubt that resale royalty rights will reduce the buyers' willingness to pay. See, e.g., Hansmann & Santilli, *supra* note 19, at 262; Rub, *supra* note 8, at 97-98. However, the empirical data on this phenomenon is incomplete and inconclusive. See, e.g., COPYRIGHT OFFICE REPORT, *supra* note 4, at 44-45; Rub, *supra* note 8, at 97 n.201.

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artists do not value extra income as much as less successful (and typically poorer) artists do.²³

Finally, resale royalties do not just transfer income from younger to older and more successful artists. They also waste resources along the way because of the significant transaction costs of running the resale royalty rights system. These costs include, among other things, costs of locating the authors and their heirs, costs of monitoring, and costs of litigation.

Resale royalty initiatives, domestically and abroad, have experimented with a variety of solutions to the transaction costs problem. Unfortunately, these solutions are neither perfect nor costless. The law can, for example, require artists to use intermediaries to collect and distribute resale royalties, but these intermediaries must be paid for their services.²⁴ Resale royalties can be applied only to professional repeat resellers, like auction houses, who can better handle the transaction costs,²⁵ but this both limits the effectiveness of resale royalty rights and creates a distortion in the market by incentivizing resellers to use private sales when it might otherwise be inefficient to do so. Similarly, the law can force authors and their heirs to register with a central registry system,²⁶ but such a system is not free and it must be constantly updated. Under any resale royalty regime, therefore, these types of costs will deny artists and their heirs some of the benefits of the royalties collected from resellers.

The conclusion is that resale royalty rights do not increase the total income of artists, but instead inefficiently redistribute wealth to older and more successful artists while generating wasteful transaction costs. Therefore, as their purported benefits are largely illusory, they are not justified.

IV. TRANSFERABLE AND RETROACTIVE RESALE ROYALTY RIGHTS

The vast majority of countries that adopted resale royalty rights chose to make those rights inalienable and non-waivable. They are held only by

23. See Rub, *supra* note 8, at 99-101; see also William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 327 (1989).

24. Royalties under the proposed ART Act are to be collected and distributed by private “copyright collection societies.” S. 2045, 113th Cong. § 3 (2014). Those societies, according to the proposed ART Act, will be allowed to deduct a “reasonable amount of administrative expenses” from the royalties they distribute. *Id.* §5.

25. The proposed ART Act provides that royalties are due for sales over \$5,000 conducted by auction houses with annual volume of sales of over \$1 million. *Id.* §§ 2-3.

26. This requirement was proposed by the Copyright Office, see COPYRIGHT OFFICE REPORT, *supra* note 4, at 80, but it was not included in the proposed ART Act, see S. 2045.

authors, and, in some legal systems, their heirs.²⁷ However, the proposed ART Act significantly deviates from this model – and from the recommendations of the Copyright Office²⁸ – by granting the right to collect resale royalties to copyright owners rather than authors.²⁹ Because ownership of copyright can be transferred, resale royalty rights under the ART Act will also be transferable.³⁰

Making resale royalty rights transferable might have significant effects. Buyers of visual artworks could routinely require the selling artists to transfer the copyright together with the artworks themselves (or to give the buyers permanent transferable licenses) in order to avoid paying resale royalties in the future. This would de facto make resale royalties irrelevant going forward.³¹

If artists are routinely required to transfer and thus waive their rights to collect resale royalties, such royalties will primarily benefit one group: well-established artists and their heirs. Because these artists have already sold many of their works, they will not be significantly affected by potential future decreases in prices in the initial market for art. Yet, they will receive a windfall from future resales of their own work. In contrast with the recommendations of the Copyright Office,³² the proposed ART Act is retroactive—it applies to

27. See, e.g., Directive 2001/84, of the European Parliament and of the Council of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art, 2001 O.J. (L 272) 32, 32 (stating that in the European Union “the resale right is an unassignable and inalienable right, enjoyed by the author”).

28. COPYRIGHT OFFICE REPORT, *supra* note 4, at 78-79.

29. See S. 2045 § 3.

30. It is possible that making resale royalties transferable was not a choice but a drafting mistake. First, there is some tension within the proposed ART Act. While the right to collect royalties is given to copyright owners, other mechanisms within the proposed act refer to authors and not owners. For example, copyright collection societies must be “authorized by not fewer than 10,000 authors.” *Id.* § 5. Second, the proponents of the ART Act state that resale royalties are desirable partly because they are common in other countries. It is therefore less likely that they intentionally deviated so dramatically from the scheme adopted elsewhere. Third, in their public statements, the proponents of the ART Act did not highlight this meaningful choice, which also raises the possibility that it is a drafting mistake. See, e.g., Press Release, Senator Ed Markey, Markey, Baldwin, and Nadler Introduce Legislation to Level the Playing Field for American Visual Artists (Feb. 26, 2014), <http://www.markey.senate.gov/news/press-releases/markey-baldwin-and-nadler-introduce-legislation-to-level-the-playing-field-for-american-visual-artists>.

31. A similar phenomenon has occurred in the past. When the Copyright Act of 1909 granted authors a right to restore the copyright interest in their works twenty-eight years after publication, publishers routinely required authors to de facto waive that right by transferring it to the publishers. See Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the “Inalienable” Right To Terminate*, 62 FLA. L. REV. 1329, 1336-37 (2010). Consequently, in the Copyright Act of 1976, Congress made this right inalienable. Copyright Act of 1976, 17 U.S.C. § 203 (2012).

32. COPYRIGHT OFFICE REPORT, *supra* note 4, at 77-78.

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old and new works alike.³³ Because copyright in visual artworks is typically not valuable under current law, it is quite common to sell those works without the copyright, which remains with the artist.³⁴ Therefore, well-established artists, whose works are still being resold from time to time, but who were not required to transfer their copyright in the initial sale, might reap considerable royalties under the ART Act.

If the ART Act will primarily benefit well-established artists whose works were sold before the time of its enactment, then the justifications for supporting this initiative are even weaker. If that is the case, then the ART Act does not promote the production or distribution of art.³⁵ It is nothing more than a tax to be paid to certain visual artists by current owners of artworks. This Essay questions whether visual artists deserve extra compensation. But even if they do, it seems grossly unfair to place the burden of this system on the current owners of artworks, who purchased those works without knowing of the future limitations that Congress would place on their ownership interests.³⁶

CONCLUSION

The Copyright Office Report and the proponents of the ART Act call Congress to intervene in the market for visual art by granting a right to collect royalties on resale of artwork. This Essay questions the justifications for such intervention.

Resale royalties are an ineffective and inefficient tool to support visual artists. Moreover, the purported justifications for providing special support to these artists are unconvincing. Visual artists operate in a competitive market that does not require this type of legal intervention. Congress is advised to leave it alone.

33. S. 2045 § 3.

34. See COPYRIGHT OFFICE REPORT, *supra* note 4, at 12.

35. This might put the constitutionality of the ART Act into question, because the Constitution requires Congress to enact copyright legislation to “promote the progress of science and useful arts.” U.S. CONST. art. I, § 8, cl. 8. The Supreme Court, however, has interpreted Congress’s power to enact copyright legislation under this clause very broadly. See *Golan v. Holder*, 132 S. Ct. 873 (2012); see also *Eldred v. Ashcroft*, 537 U.S. 186, 248–49 (2003) (Breyer, J., dissenting) (criticizing Congress for enacting a statute that primarily benefits the holders of existing copyrights).

36. This harm to the rights of existing owners of artworks might amount to taking without compensation, which is prohibited by the Fifth Amendment. See COPYRIGHT OFFICE REPORT, *supra* note 4, at 60–63 (analyzing this argument and concluding that “in the interests of avoiding constitutional doubt . . . we recommend . . . making any resale royalty legislation prospective in application”).

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