

## The Role of Black Artists in the Reconceptualization of U.S. Resale Royalty Rights

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### INTRODUCTION

In the past few years, Black artists have been at the forefront of advocacy on the issue of resale royalties for visual artists in the United States. These efforts have occurred in conjunction with a significant uptick in the value of pieces on the resale market and growing appreciation specifically for Black art. In 2022, global auction houses set new records in annual sales, reporting revenue close to eight billion dollars apiece.<sup>1</sup> Following a decrease in sales globally in 2020 as a result of the pandemic,<sup>2</sup> the success of art transactions seemed to offer evidence of renewed success in the art market generally and in the United States specifically. For example, in 2022, the Paul Allen sale at Christie's New York brought in a total of \$1.6 billion, cementing it as the largest single-owner sale in auction history, with several pieces within the collection going for

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1. Lyle Niedens, *Sotheby's, Christies Post Record Annual Sales, Defy Weak Economy*, INVESTOPEDIA (Dec. 21, 2022), <https://www.investopedia.com/large-auction-houses-record-highest-sales-ever-in-2022-6951545> [https://perma.cc/4M5M-JPLE] [https://web.archive.org/web/20231009153709/https://www.investopedia.com/large-auction-houses-record-highest-sales-ever-in-2022-6951545].

2. Angelica Villa, *2021 Art Basel Global Market Report Reveals 22 Percent Drop in 2020 Sales To \$50 Billion*, ARTNEWS (Mar. 16, 2021), <https://www.artnews.com/art-news/market/2021-art-basel-report-says-50-billion-1234586822/> [https://perma.cc/R2W9-CHF8] [https://web.archive.org/web/20231009153944/https://www.artnews.com/art-news/market/2021-art-basel-report-says-50-billion-1234586822/].

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more than \$100 million each.<sup>3</sup> As the U.S. art market has grown and matured, there has been increased attention on the promotion and sale of work by diverse artists as condemnation of organizations that have systematically excluded underrepresented individuals became more widespread. This advocacy has prompted change as it directly implicated the practices of museums, galleries, auction houses, and collectors.<sup>4</sup> Actors at every level of the art world have responded, demonstrating greater intentionality in the inclusion and support of diverse artists through better collection, exhibition, and consignment practices. Yet, inequities within the U.S. art market have persisted. Despite measurable increases in the sales of fine art, the myth of the starving artist lives on, specifically as creators of visual art in the United States remain shut out from direct financial benefits of the sale of their work, particularly in the secondary market.<sup>5</sup>

The issue of resale royalties for artists has been a topic of contentious debate in the United States for decades. A key aspect in the consideration of this provision today rests within the evaluation of the role of Black visual artists to the U.S. art market. Between 2008 and 2021, the market for work by Black artists grew by close to 400%.<sup>6</sup> While on its face, this increase appears to represent tremendous growth in the recognition of Black artists, more careful analysis reveals that there is still great inequity given the structure of the U.S. art market with respect to royalties. Resale royalties, also known as *droit de suite*,<sup>7</sup> are recognized in legislation by more than seventy countries abroad.<sup>8</sup> In practice, these provisions recognize a so-called “natural right” of artists to benefit from their work long term by providing artists with a reasonable percentage of the

3. Jacqui Palumbo & Oscar Holland, *Record-Breaking Sale of Microsoft Co-Founder's Art Collection Surpasses \$1.6 Billion*, CNN (Nov. 10, 2022), <https://www.cnn.com/style/article/paul-allen-collection-christies-auction-record/index.html> [https://perma.cc/FVJ8-TUUJ] [https://web.archive.org/web/20231009154139/https://www.cnn.com/style/article/paul-allen-collection-christies-auction-record/index.html].

4. *The “Black Renaissance” in Full Swing*, ARTPRICE, <https://www.artprice.com/artprice-reports/the-contemporary-art-market-report-2021/the-black-renaissance-in-full-swing> [https://perma.cc/87GQ-7TXR] [https://web.archive.org/web/20231009154327/https://www.artprice.com/artprice-reports/the-contemporary-art-market-report-2021/the-black-renaissance-in-full-swing] (last visited Nov. 4, 2023).

5. Eileen Kinsella, *A New Study Shows that Most Artists Make Very Little Money, with Women Faring the Worst*, ARTNET NEWS (Nov. 29, 2017), <https://news.artnet.com/market/artists-make-less-10k-year-1162295> [https://perma.cc/9N4R-4ET6] [https://web.archive.org/web/20231009154432/https://news.artnet.com/market/artists-make-less-10k-year-1162295].

6. Julia Halperin & Charlotte Burns, *Introducing the 2022 Burns Halperin Report*, ARTNET NEWS (Dec. 13, 2022), <https://news.artnet.com/art-world/letter-from-the-editors-introducing-the-2022-burns-halperin-report-2227445> [https://perma.cc/43R5-ALNH] [https://web.archive.org/web/20231009154605/https://news.artnet.com/art-world/letter-from-the-editors-introducing-the-2022-burns-halperin-report-2227445].

7. *Droit de suite* translates roughly from French to English as a “right of following.” See Michael B. Reddy, *The Droit de Suite: Why American Fine Artists Should Have a Right To a Resale Royalty*, 15 LOY. L.A. ENT. L. REV. 509, 509 n.5 (1995).

8. OFF. OF THE REG. OF COPYRIGHTS, *RESALE ROYALTIES: AN UPDATED ANALYSIS* (2013), <https://www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf> [https://perma.cc/R49R-YG4A] [https://web.archive.org/web/20231009155200/https://www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf].

profits from the sale of their work in the secondary market.<sup>9</sup> In the United States, the legislative implementation of *droit de suite* has been largely unsuccessful on both the state and federal level. In countries where *droit de suite* has been implemented, there is no shortage of criticism regarding the merits of the policy,<sup>10</sup> as many view its shortcomings as an additional harm in the plethora of inequities faced by visual artists.

Focusing on more recent advocacy for resale royalties in the United States, there is a clear connection to the work of Black artists at the center of the conversation. Modern attempts to ensure a legal right to resale royalties have taken place through more targeted models including, but not limited to, mandatory terms for public auctions of Black art, specialized contract provisions in private art sales, and the use of Blockchain technology in the development of smart contracts.<sup>11</sup> Furthermore, many successful models of securing resale royalties for artists have been developed as a result of the work of organizations committed to supporting the work of contemporary Black artists, such as the Souls Grown Deep Foundation<sup>12</sup> and the Dean Collection.<sup>13</sup>

This Note will examine the unique position of Black artists in the establishment of a legal right to resale royalties in the United States and the broader implications of this effort on the enhancement of equity for all American visual artists. Part I reviews the history of *droit de suite*, focusing on the history of resale royalty rights in the United States and pertinent factors that have contributed to the failed implementation of *droit de suite* thus far. Part II analyzes the harms perpetuated by an absence of resale royalty rights for visual artists in the United States, with a particular focus on the impact on Black artists despite an increased popularity of Black art. Part III examines the

9. M. Elizabeth Petty, *Rauschenberg, Royalties, and Artist's Rights: Potential Droit de Suite Legislation in the United States*, 22 WM. & MARY BILL RIGHTS J. 977, 983 (2014).

10. Guy A. Rub, *The Unconvincing Case for Resale Royalties*, YALE L.J.F. (Apr. 25, 2014), <https://www.yalelawjournal.org/forum/the-unconvincing-case-for-resale-royalties> [https://perma.cc/L5XZ-QG2Y] [https://web.archive.org/web/20230610065448/https://www.yalelawjournal.org/forum/the-unconvincing-case-for-resale-royalties].

11. See SOULS GROWN DEEP FOUND. & COMTY. P'SHIP, BIENNIAL REPORT (2022), [https://indd.adobe.com/view/publication/000db57c-ba8a-469b-9ba9-d8cf021166c1/dgk2/publication-web-resources/pdf/SGD\\_Digital\\_Annual\\_Report\\_2019-21.pdf](https://indd.adobe.com/view/publication/000db57c-ba8a-469b-9ba9-d8cf021166c1/dgk2/publication-web-resources/pdf/SGD_Digital_Annual_Report_2019-21.pdf) [https://perma.cc/5B6A-WJS3] [https://web.archive.org/web/20231104231223/https://indd.adobe.com/view/publication/000db57c-ba8a-469b-9ba9-d8cf021166c1/dgk2/publication-web-resources/pdf/SGD\_Digital\_Annual\_Report\_2019-21.pdf]; FAIRCHAIN, <https://fairchain.art/> [https://perma.cc/9DFM-HM35] [https://web.archive.org/web/20231011212041/https://fairchain.art/] (last visited Nov. 4, 2023); Keith Estiler, *Destinee Ross-Sutton Is Making Sure Black Artists Get Royalties if Their Works Resell*, HYPEBEAST (Aug. 14, 2020), <https://hypebeast.com/2020/8/destinee-ross-sutton-say-it-loud-christies-reseller-contract-info> [https://perma.cc/8BXM-EVUD] [https://web.archive.org/web/20231009155631/https://hypebeast.com/2020/8/destinee-ross-sutton-say-it-loud-christies-reseller-contract-info].

12. *Souls Grown Deep Foundation*, SOULS GROWN DEEP, <https://www.soulsgrowndeep.org/foundation/about> [https://perma.cc/8F6R-4MMX] [https://web.archive.org/web/20231011212830/https://www.soulsgrowndeep.org/foundation/about] (last visited Nov. 4, 2023).

13. The Dean Collection (@thedeancollection), INSTAGRAM, <https://www.instagram.com/thedeancollection/?hl=en> [https://perma.cc/KYP7-TSU7] (last visited Nov. 4, 2023).

methodologies through which resale royalty rights have been reframed in the United States and the consideration of Black art in particular within these models. Overall, given the various dimensions of the American art market, the primary focus will be on public art transactions; however, the merging of contractual solutions with technological advancements is presumably adaptable to private sales as well. Ultimately, this Note argues that the reconceptualization of resale royalty rights toward an approach of individual implementation presents the most promising solution for securing a legal right to resale royalties in the U.S. art market, and increasing equity in the U.S. art market for all visual artists.

## I. CONSIDERING THE HISTORY OF RE SALE ROYALTIES

### A. ANALYZING INTERNATIONAL LEGISLATIVE MODELS OF *DROIT DE SUITE*

The topic of resale royalties for visual artists globally has typically been framed in the context of a legislative policy known as *droit de suite*. Within *droit de suite* legislation, there is a common underlying interest in promoting fairness for artists by rectifying the unequal distribution of profits in the secondary market, as visual art appreciates from the time of the initial sale.<sup>14</sup> Furthermore, resale royalties are particularly significant for artists globally who are disproportionately impacted by the remnants of structural racism and elitism within the art world.<sup>15</sup> The evolution of resale royalty legislation in the European Union (“EU”), and the United Kingdom (“UK”) illustrates several key components that inform the analysis of resale royalty legislation in the United States.

Discussions at the 1886 Berne Convention for the Protection of Literary and Artistic Works laid the groundwork for a legal right to resale royalties.<sup>16</sup> At this meeting, representatives from various countries developed a framework to incorporate protections for creators and establish an ideology regarding the moral rights of artists

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14. See Herbert I. Lazerow, *Art Resale Royalty Options 4* (Univ. of San Diego Sch. Of L., Research Paper No. 15-198, 2015), [https://digital.sandiego.edu/cgi/viewcontent.cgi?article=1006&context=law\\_fac\\_works](https://digital.sandiego.edu/cgi/viewcontent.cgi?article=1006&context=law_fac_works) [https://perma.cc/A27U-A2L8] [https://web.archive.org/web/20231011214313/https://digital.sandiego.edu/cgi/viewcontent.cgi?article=1006&context=law\_fac\_works].

15. Lauren van Haften-Schick & Amy Whitaker, *From the Artist's Contract To the Blockchain Ledger: New Forms of Artists' Funding Using Equity and Resale Royalties*, 46 J. CULTURAL ECON. 287, 292 (2022) (“Resale royalties can be especially meaningful for artists impacted by the lingering disenfranchisement of colonization and structural racism; for example, Farchy and Graddy (2017: 29) find that after Australia’s resale royalty scheme came into effect in 2010 Aboriginal artists benefited substantially.”).

16. Today, the Berne Convention for the Protection of Literary and Artistic Works reflects a set of international standards and laws that serve to protect copyrighted works from infringement across the member countries. The Convention originated at a meeting of ten European member countries in Berne, Switzerland in 1886. Samuel Jacobs, *The Effect of the 1886 Berne Convention on the U.S. Copyright System's Treatment of Moral Rights and Copyright Term, and Where that Leaves Us Today*, 23 MICH. TELECOMM. & TECH. L. REV. 169, 171 (2016). As of the writing of this Note, the Berne Convention consists of over 180 member countries and jurisdictions.

to their work.<sup>17</sup> In 1886, the Convention did not explicitly define a right to resale royalties; however, these discussions informed the historical development of this right.<sup>18</sup> With the passage of *droit de suite* laws in 1920, France was the first country to recognize an artist's legal right to resale royalties through legislation.<sup>19</sup> The French *droit de suite* model allowed for artists to receive ongoing financial benefits for any consignment of their work within the art market after the initial sale. Specifically, the law provides that artists receive a payment consisting of a 3% royalty on the subsequent sale price of applicable works, covering sales at both private and public auctions and lasting the period of the artist's life plus fifty years.<sup>20</sup> Overall, the French law was impactful because it recognized an artist's inherent right to reap the financial rewards of their work, based on the undeniable link between an artist and the value of their work.<sup>21</sup>

The French model of *droit de suite* set a precedent which is followed across the EU through the legislation of individual Member States. The Berne Convention incorporated more explicit language regarding resale royalty rights in a 1948 revision to the Convention under Article 6bis(1). The revision specifically outlined an optional provision for *droit de suite*, stating:

(1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work. (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.<sup>22</sup>

In accordance with this provision, in 2001, the EU introduced a Directive requiring all Member States to establish *droit de suite* legislation on a country-specific basis no later than 2006. The text of the law recognized resale royalty rights as a natural right, stating, “[i]n the field of copyright, the resale right is an unassailable and inalienable right, enjoyed by the author of an original work of graphic or plastic art, to an economic interest in successive sales of the work concerned.”<sup>23</sup> Under EU *droit de suite* legislation, Member States have the ability to establish a minimum threshold price, not to exceed 3,000€, for resale royalties. For sales of work above a Member State's established threshold price, the resale requirement is triggered.<sup>24</sup> Today, there are a range of

17. *Id.* at 170.

18. Reddy, *supra* note 7, at 515.

19. Deborah A. DeMott, *Looking Beyond the Easel: Artists' Contexts and Resale Payments*, 27 DUKE J. GENDER L. & POL'Y 135, 135 (2020).

20. Reddy, *supra* note 7, at 516.

21. *Id.*

22. Berne Convention for the Protection of Literary and Artistic Works art. 6bis(1), Sept. 9, 1886, S. Treaty Doc. No. 99-27, 828 U.N.T.S. 221 [hereinafter Berne Convention].

23. Allison Schten, *No More Starving Artists: Why the Art Market Needs a Universal Artist Resale Royalty* 7 NOTRE DAME J. INT'L & COMPAR. L. 115, 118 (2017).

24. *Id.*

minimum prices among Member States. For example, legislation in Germany reflects a minimum price of 400€, whereas Austrian law sets forth a 3,000€ threshold.<sup>25</sup> Pursuant to this model, the total amount of royalties for a given artist is determined by a sliding scale rate, with the total amount of royalties from resales capped at 12,500€ in the EU.<sup>26</sup> Adopting a relatively standard approach to resale royalties across the EU has provided an additional measure of security for artists, further embodying the principles set forth at the Berne Conference.

*Droit de suite* legislation in the UK is set forth in the Artist's Resale Right (Amendment) Regulations of 2011 ("ARR Regulations").<sup>27</sup> The ARR Regulations recognize the right of artists and their estates to receive a fair share of the proceeds from the resale of work.<sup>28</sup> The threshold price for resale royalties under the ARR Regulations is £1000, allowing artists to collect profits on a sliding scale according to the resale price of the artwork itself.<sup>29</sup> Royalty payments are capped at a total amount of €12,500 for the single sale of a given work.<sup>30</sup> The UK art market has continued to grow since the implementation of *droit de suite* legislation, despite the expressed concerns of auction houses and art dealers about the potential chilling effects of the legislation at the time of its passage. Furthermore, artists have shared in the benefits of the UK art market success as a result of ARR Regulations. Data as of 2020 revealed that *droit de suite* provisions in the UK have resulted in a total of over £65 million distributed to over 5,000 artists.<sup>31</sup> In all, the regulations have created an equitable system for the distribution of profits from the secondary market as art sales have continued to break records globally.

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25. *Id.*

26. *Id.* at 119.

27. *Guidance: Artist's Resale Right*, GOV.UK (May 16, 2014), <https://www.gov.uk/guidance/artists-resale-right#introduction> [https://perma.cc/M7TR-SWXT] [https://web.archive.org/web/20231013202822/https://www.gov.uk/guidance/artists-resale-right#introduction].

28. Artist's Resale Right (Amendment) Regulations 2009, SI 2792, art. 2 (UK), [http://www.legislation.gov.uk/uksi/2009/2792/pdfs/uksi\\_20092792\\_en.pdf](http://www.legislation.gov.uk/uksi/2009/2792/pdfs/uksi_20092792_en.pdf) [https://perma.cc/QT2T-G78J] [https://web.archive.org/web/20231013205408/https://www.legislation.gov.uk/uksi/2009/2792/pdfs/uksi\_20092792\_en.pdf].

29. *Guidance: Artist's Resale Right*, *supra* note 27.

30. *Id.*

31. Jessica Wang, *Flipping Black Art: Christie's Special Contract*, CARDOZO INT'L & COMPARATIVE L. REV. ONLINE (Sept. 28, 2020), <https://www.cardozociclr.com/post/flipping-black-art-christie-s-special-contract> [https://perma.cc/JX4F-4DKG] [https://web.archive.org/web/20231013210239/https://www.cardozociclr.com/post/flipping-black-art-christie-s-special-contract].

## B. EVOLUTION OF RESALE RIGHTS IN THE UNITED STATES

The United States is among a very small minority of countries that still do not incorporate a right to resale royalties.<sup>32</sup> Despite this, in 2021, art sales in the United States accounted for nearly half of art transactions globally, resulting in a total of approximately \$28 billion in sales.<sup>33</sup> On both the federal and state level, attempts to implement legislation recognizing the right of artists to resale royalties have been unsuccessful. The main source of conflict is the perception that a legal right to resale royalties infringes on the scope of the Copyright Act of 1976. Yet, the most recent guidance of the U.S. Copyright Office advocates for the establishment of a resale royalty system.<sup>34</sup> Overall, progress to implement resale royalty rights for artists in the United States on a legislative basis is at an impasse, further highlighting the importance of an evolved approach.

### 1. *Close v. Sotheby's* and the California Resale Royalty Act

The 2018 Ninth Circuit case *Close v. Sotheby's* was the final factor prompting a halt in attempts to implement *droit de suite* legislation in the United States. The case consisted of three class-action lawsuits brought by individual artists in California against Sotheby's, Christie's, and eBay for failure to pay royalties pursuant to the 1977 California Resale Royalty Act ("CRRA").<sup>35</sup> In addition to the question of royalties for plaintiffs, the main issue before the Ninth Circuit was whether claims under CRRA were preempted by federal copyright law.<sup>36</sup>

The CRRA is recognized as "the first, and thus far only, American recognition of the *droit de suite*."<sup>37</sup> CRRA require sellers of fine art to withhold 5% of the resale price for the artist for the period of the artist's lifetime plus twenty years so long as: (1) The resale price is greater than the original purchase price; (2) the work is sold for more than \$1,000; and (3) the seller is a resident of California, or the sale takes place in California, and the artist is either a resident of California for two years or a U.S. citizen.<sup>38</sup> By the time of the *Close* decision in 2018, close to 400 artists had benefited from the legislation, with the amount of royalties distributed totaling \$328,000.<sup>39</sup> The

32. Other countries that do not currently offer a legislative model for resale royalties, as of the writing of this Note, include Canada, China, and Switzerland. Each of these countries is currently considering proposals for implementation. See Lazerow, *supra* note 14, at 1–2.

33. Press Release, Art Basel, The Art Basel and UBS Global Art Market Report (Mar. 29, 2022), [https://d2u3kfw92fzu7.cloudfront.net/The%20Art%20Market%202022\\_Press%20Release%20I%20EN.pdf](https://d2u3kfw92fzu7.cloudfront.net/The%20Art%20Market%202022_Press%20Release%20I%20EN.pdf) [<https://perma.cc/F5D7-27JP>] [[https://web.archive.org/web/20231105021313/https://d2u3kfw92fzu7.cloudfront.net/The%20Art%20Market%202022\\_Press%20Release%20I%20EN.pdf](https://web.archive.org/web/20231105021313/https://d2u3kfw92fzu7.cloudfront.net/The%20Art%20Market%202022_Press%20Release%20I%20EN.pdf)].

34. See OFF. OF THE REG. OF COPYRIGHTS, *supra* note 8.

35. See *Close v. Sotheby's, Inc.*, 894 F.3d 1061 (9th Cir. 2018).

36. *Id.* at 1064.

37. *Id.* at 1066.

38. Reddy, *supra* note 7, at 521–22.

39. OFF. OF THE REG. OF COPYRIGHTS, *supra* note 8, at 22.

potentially complex enforcement process was the overarching critique of CRRA. The Act placed responsibility on artists themselves to bring an action for damages in order to collect within three years after the resale date or one year of receiving actual notice, whichever is later.<sup>40</sup>

Analyzing the CRRA in the context of *Close*, the Ninth Circuit held that plaintiffs' claims for damages under the Act were barred, affirming the position of the district court. The court explicitly addressed the question of preemption, concluding that "the CRRA falls within the subject matter of the Copyright Act and asserts rights equivalent to those found in § 106(3) of the Copyright Act. The CRRA is therefore expressly preempted by § 301(a)."<sup>41</sup> The court's analysis highlighted a key tension of the CRRA, which is its attempt to grant rights equivalent to those granted by the 1976 federal Copyright Act. The first sale doctrine of the 1976 Copyright Act granted a copyright holder a limited right of exclusivity over distribution for the primary sale of a copyrighted work. However, the CRRA permitted artists to maintain a certain exclusivity right over their work in subsequent sales.<sup>42</sup> In fact, the Ninth Circuit addressed this discordance stating, "[t]he CRRA *expands* the federal distribution right because, whereas the first sale doctrine limits artists' right to payment to the first sale, the CRRA grants artists an unwaivable right to a 5% royalty on all downstream sales."<sup>43</sup> To mitigate this conflict, the court limited the relevant time frame of claims under the California Statute to the period between the effective date of the CRRA, January 1, 1977, and the effective date of the 1976 Act, January 1, 1978.<sup>44</sup> The holding in *Close* not only voided the effectiveness of the CRRA but it also further reinforced obstacles to the implementation of resale royalty legislation in the United States overall. Thus, the CRRA has not provided the same degree of relief to artists since the *Close* decision. This amounted to what many viewed as "a final nail in the coffin of a future that includes *droit de suite* for artists in the American legal system."<sup>45</sup> The underlying issue of state law preemption also shifted the focus of *droit de suite* toward implementation on the federal level; however, this too has proven to be a futile path.

## 2. U.S. Federal Legislation on *Droit de Suite*

Resale royalties have been evaluated on a federal level on numerous occasions, dating back to the mid-1970s with the proposed Visual Artists Residual Rights Bill of 1978.<sup>46</sup> This legislation sought to codify *droit de suite*, requiring the seller of any work

40. *Id.* at 23; CAL. CIV. CODE § 986(a)(3) (Deering 2023).

41. *Close*, 894 F.3d at 1072.

42. CAL. CIV. CODE § 986(b)(1) (Deering 2023).

43. *Close*, 894 F.3d at 1071.

44. *Id.* at 1076.

45. Ethan T. Ashley, *Case Review: Droit de Suite... Not So Sweet*, CTR. FOR ART L. (Sept. 27, 2018), [https://itsartlaw.org/2019/12/05/case-review-droit-de-suite-not-so-sweet/?lp\\_txn\\_id=56957](https://itsartlaw.org/2019/12/05/case-review-droit-de-suite-not-so-sweet/?lp_txn_id=56957) [<https://perma.cc/SJ7J-ZQDX>]

[<https://web.archive.org/web/20231014012724/https://itsartlaw.org/2018/09/27/case-review-droit-de-suite-not-so-sweet/>].

46. Visual Artists' Residual Rights Act, H.R. 11403, 95th Cong. (1978).



of visual art sold in the United States or abroad for more than \$1,000 to pay a 5% fee to a “National Commission on the Visual Arts.”<sup>47</sup> Artists would then be entitled to receive these payments in the form of royalties through the Commission.<sup>48</sup> After the bill failed to pass in 1978, Senator Edward Kennedy and Representative Ed Markey attempted to implement similar legislation in 1986 and 1987, seeking a 7% royalty rate on appreciated value.<sup>49</sup> Facing heavy opposition from prominent auction houses and dealers, this bill also failed. In 1988, however, there seemed to be new hope as the United States finally signed onto the Berne Convention.<sup>50</sup> While this signing was executed with what was deemed a “minimalist approach,” Congress was nonetheless prompted to review the issue of moral rights for artists in the context of the United States.<sup>51</sup> Following this review, Congress passed the 1990 Visual Artists Rights Act; however, the document was noticeably void of any language regarding a national scheme for resale royalties.<sup>52</sup>

### 3. Equity for Visual Artists Act of 2011

The next major efforts to implement *droit de suite* legislation into federal law occurred in 2011 with the introduction of the Equity for Visual Artists Act by New York Congressman Jerrold Nadler.<sup>53</sup> Nadler sought to introduce the *droit de suite* concept into federal law, proposing a 7% royalty on works sold for more than \$10,000 at public auction houses exclusively.<sup>54</sup> The unique distributive mechanism of this bill was that the 7% resale royalty would go toward a “visual artists’ collecting society.”<sup>55</sup> After taking a commission of up to 18%, the society would allocate half of the remaining amount to the artist directly and the other half toward a new fund dedicated toward art acquisitions for non-profit museums.<sup>56</sup> Ultimately, this bill did not go through.

47. *Id.* § 4(a).

48. *Id.*

49. OFF. OF THE REG. OF COPYRIGHTS, *DROIT DE SUITE: THE ARTIST’S RESALE ROYALTY*, at vi (1992), [https://www.copyright.gov/history/droit\\_de\\_suite.pdf](https://www.copyright.gov/history/droit_de_suite.pdf) [https://perma.cc/L7NE-TN95] [https://web.archive.org/web/20231014020412/https://www.copyright.gov/history/droit\_de\_suite.pdf]; Sarah Cascone, *New ‘American Royalties, Too’ Bill Would Allow Resale Royalties for US Artists*, ARTNET NEWS (Feb. 28, 2014), <https://news.artnet.com/market/new-american-royalties-too-bill-would-allow-resale-royalties-for-us-artists-3082> [https://perma.cc/UFZ6-JTMW] [https://web.archive.org/web/20231105051614/https://news.artnet.com/market/new-american-royalties-too-bill-would-allow-resale-royalties-for-us-artists-3082].

50. Jacobs, *supra* note 16, at 171.

51. *Id.*

52. Schten, *supra* note 23, at 123.

53. Tracy Zwick, *Battle Heats Up over Resale Royalties for Artists*, ART IN AM. (May 17, 2013), <https://www.artnews.com/art-in-america/features/battle-heats-up-over-resale-royalties-for-artists-59308/> [https://perma.cc/65P8-3GJB] [https://web.archive.org/web/20231010022511/https://www.artnews.com/art-in-america/features/battle-heats-up-over-resale-royalties-for-artists-59308/].

54. *Id.*

55. Equity for Visual Artists Act of 2011, S. 2000, 112th Cong. § 3 (2011).

56. CultureGrrl, *New U.S. Artists’ Equity Bill Is an Auction-House Inequity Bill*, ARTS J. (Dec. 20, 2011), [https://www.artsjournal.com/culturegrrl/2011/12/new\\_artists\\_equity\\_bill\\_create.html](https://www.artsjournal.com/culturegrrl/2011/12/new_artists_equity_bill_create.html) [https://perma.cc/AP68-FG3K]

However, despite its failure, the proposed bill's approach to resale royalties sparked conversation about the small remaining cut for artists under the 50-50 split model.<sup>57</sup>

#### 4. American Royalties Too Act

The 2014 American Royalties Too Act ("ART Act") presented a revitalized attempt at codifying *droit de suite* in federal legislation. The bill proposed a resale royalty of 5% for every work sold for more than \$5,000 at public auctions as well as online public auctions.<sup>58</sup> With this attempt, Congressman Nadler echoed the underlying principle of fairness for artists. However, auction houses spared no expense in voicing their opposition to the passage of this legislation. Spending nearly \$1 million on lobbying efforts, auction houses expressed concern that the proposed bill on royalties would negatively influence the art transactional market, driving sales from public to private deals and causing irreparable harm to the U.S. art market overall.<sup>59</sup> The ART Act was proposed again in 2015 and most recently in 2018, but it has not been re-introduced to date.<sup>60</sup>

Due to the impact of *Close* and the lack of momentum surrounding the passage of *droit de suite* on a federal level, the creation of resale royalty protections for artists through a legislative approach is unlikely. Yet, protecting an artist's right to benefit from the continued sale of their work remains an important agenda item as the global norms of the art world recognize this right as an indicator of equity.

## II. THE NECESSITY OF RESALE ROYALTY RIGHTS IN THE U.S. ART MARKET

### A. IMBALANCED DISTRIBUTION OF PROFITS FOR VISUAL ARTISTS

Although progress for resale royalties has stalled at the federal legislative level, the need for resale royalties within the U.S. art market overall has persisted as visual art continues to appreciate in value in the secondary market. A classic example supporting the need for advocacy of resale royalties is the case of Robert Rauschenberg. In 1973,

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[[https://web.archive.org/web/20231010024356/https://www.artsjournal.com/culturegrll/2011/12/new\\_artists\\_equity\\_bill\\_create.html](https://web.archive.org/web/20231010024356/https://www.artsjournal.com/culturegrll/2011/12/new_artists_equity_bill_create.html)].

57. *Id.*

58. Cascone, *supra* note 50.

59. Patricia Cohen, *Lobbyists Set To Fight Royalty Bill for Artists*, N.Y. TIMES (Mar. 3, 2014), [https://www.nytimes.com/2014/03/24/arts/design/auction-houses-taking-no-chances-on-american-royalties-too-act.html?\\_r=0](https://www.nytimes.com/2014/03/24/arts/design/auction-houses-taking-no-chances-on-american-royalties-too-act.html?_r=0) [<https://perma.cc/DUX8-ULJ9>] [[https://web.archive.org/save/https://www.nytimes.com/2014/03/24/arts/design/auction-houses-taking-no-chances-on-american-royalties-too-%20act.html?\\_r=0](https://web.archive.org/save/https://www.nytimes.com/2014/03/24/arts/design/auction-houses-taking-no-chances-on-american-royalties-too-%20act.html?_r=0)].

60. Press Release, Congressman Jerry Nadler, Nadler, Hatch, Leahy & Collins Introduce Bipartisan, Bicameral American Royalties Too Act (Sept. 25, 2018), <https://nadler.house.gov/news/documentsingle.aspx?DocumentID=391396> [<https://perma.cc/B356-KY9M>] [<https://web.archive.org/web/20231010031328/https://nadler.house.gov/news/documentsingle.aspx?DocumentID=391396>].

his piece *Double Feature*, which he sold to consignee Robert Scull in 1959 for \$2,300, sold for \$90,000 in an auction hosted at Sotheby's Parke Bernet.<sup>61</sup> This very same sale brought in \$85,000 for Rauschenberg's piece *Thaw*, which he had sold only a year prior to the Sculls for \$900.<sup>62</sup> The most recent sale of *Double Feature* at auction at Christie's in 2019 yielded \$88.8 million dollars.<sup>63</sup> This situation highlighted a problematic discrepancy in the U.S. art market structure—the artist witnessed the appreciated value of their work but did not benefit at all. Furthermore, it prompted Rauschenberg himself to become an advocate for introducing *droit de suite* legislation in the U.S. art market.<sup>64</sup>

The disparity in the distribution of profits from sales of artwork in the secondary market has become more evident as price transparency has become the new norm in the art transactional world.<sup>65</sup> Historically, the established convention among galleries and dealers was to disregard consumer protection laws that required consignors to conspicuously disclose the prices of the works.<sup>66</sup> Prices were noticeably absent at exhibition spaces at top-selling art fairs, such as Art Basel, and even some online listings.<sup>67</sup> One stated rationale for the absence was that dealers and gallery owners hoped to emphasize the symbolic value of art as opposed to its commercial value.<sup>68</sup> There were also a number of valuable business incentives for concealing prices, including protecting pricing models from competitors and allowing for preferential treatment to VIP customers.<sup>69</sup> The transition to online sales due to the COVID-19 pandemic partially explains the shift towards greater price transparency as the processes for art consignment adapted to a virtual format.<sup>70</sup> Furthermore, the increased use of technology overall to automate several processes of art transactions has been a contributing factor as well.<sup>71</sup>

The now measurable disparity in the distribution of profits within the U.S. art market objectively shows that visual artists are shut out from the direct financial

61. Petty, *supra* note 9, at 978.

62. *Id.*

63. Robert Rauschenberg, *Double Feature, 1959*, ARTSY, <https://www.artsy.net/artwork/robert-rauschenberg-double-feature> [https://perma.cc/R353-H3CF] [https://web.archive.org/web/20231105193053/https://www.artsy.net/artwork/robert-rauschenberg-double-feature] (last visited Nov. 5, 2023).

64. John Henry Merryman, *The Wrath of Robert Rauschenberg*, 41 AM. J. COMPAR. L. 103, 110 (1993).

65. Darla Migan, *Art Dealers Are Notorious for Obscuring Prices. But as the Market Shifts Online, Many Are Finally Embracing Price Transparency*, ARTNET NEWS (Oct. 19, 2020), <https://news.artnet.com/market/price-transparency-art-market-1915145> [https://perma.cc/UZ7D-BN5U] [https://web.archive.org/web/20231105193356/https://news.artnet.com/market/price-transparency-art-market-1915145].

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. Pippa Stevens, *Buy a Monet Instead of a Treasury? Art Has Shown Long-Term Returns that Rival Bonds*, CNBC (Dec. 7, 2019), <https://www.cnbc.com/2019/12/07/art-has-shown-long-term-returns-that-rival-bonds.html> [https://perma.cc/CJ23-JU76] [https://web.archive.org/web/20231012051054/https://www.cnbc.com/2019/12/07/art-has-shown-long-term-returns-that-rival-bonds.html].

benefits associated with the resale of their work.<sup>72</sup> Surely, Rauschenberg in his lifetime, and other living artists today, benefit from tangential factors associated with appreciated value, such as increased notoriety and the ability to set a higher initial sale price for new work. The immediate impact of this imbalanced system, however, is harmful, particularly for artists that rely upon the sale of their work to sustain their livelihood.<sup>73</sup>

The current structure of the U.S. art market favors the interest of collectors, agents, auction houses, and gallery representatives, all of whom stand to gain a cut of the sale from an artist's work.<sup>74</sup> Yet, that same artist is not legally entitled to any percentage of the profits of that sale. Artists themselves critique this condition of the U.S. art market: "The asymmetric profit distribution, artists argue, reflects the current system's moral defects and economic disincentives, failing to fulfill a fundamental principle that artists should benefit from the increasing value of their labor's output."<sup>75</sup> The fundamental principle that artists should benefit from the increased value of their labor is an otherwise key feature of U.S. copyright protections.<sup>76</sup> In fact, royalties are a fundamental aspect of profit distributions for almost all other forms of creative property, such as music and literature.<sup>77</sup> For American creators of unique works, such as sculptures, paintings, or collages, no such protection exists.<sup>78</sup>

The need for a resale royalty scheme in the U.S. art market is further heightened by the discord between rapid growth of the global art market and stagnant wealth of artists. Making adjustments for inflation, global art market sales increased by thirty percent between 2008 and 2021.<sup>79</sup> This growth takes into account the obvious downturn of sales in 2020 as a result of the COVID-19 pandemic, reflecting a recovery of all lost values in the art market and exceeding profit margins of the market pre-pandemic.<sup>80</sup> New York specifically emerged as the clear leader of the global marketplace, with \$3.27 billion in sales in the first half of 2022, reinforcing the position

72. Merryman, *supra* note 65, at 107.

73. Melissa Smith, *Young Black Artists Are More in Demand than Ever — but the Art World Is Burning Them Out*, ARTNET NEWS (Apr. 29, 2019), <https://news.artnet.com/market/young-black-artists-burning-out-1523446> [https://perma.cc/8TPA-42PJ] [https://web.archive.org/web/20231012051527/https://news.artnet.com/market/young-black-artists-burning-out-1523446].

74. See OFF. OF THE REG. OF COPYRIGHTS, *supra* note 8.

75. Chinmay G. Pandit, *A New Royalty: The Future of Compensation in the Visual Art Industry*, ONLABOR (May 11, 2022), <https://onlabor.org/a-new-royalty-the-future-of-compensation-in-the-visual-art-industry/> [https://perma.cc/2MC3-494C] [https://web.archive.org/web/20231105194449/https://onlabor.org/a-new-royalty-the-future-of-compensation-in-the-visual-art-industry/].

76. *Id.*

77. *Id.*

78. *Id.*

79. Halperin & Burns, *supra* note 6.

80. *The Art Market Returns To Strong Growth in the West*, ARTPRICE.COM, <https://www.artprice.com/artprice-reports/global-art-market-in-h1-2022-by-artprice-com> [https://perma.cc/UB87-SXH9] [https://web.archive.org/web/20231013053343/https://www.artprice.com/artprice-reports/global-art-market-in-h1-2022-by-artprice-com] (last visited Nov. 5, 2023); CLARE MCANDREW, *THE ART MARKET 2022*, at 11 (2022).

of the United States as a leading art market worldwide.<sup>81</sup> As further evidence of an upward trend in the global art market, leading rival auction houses Christie's and Sotheby's each announced annual sales of around \$8 billion dollars this past year, marking new records in the 200-year histories of these businesses.<sup>82</sup> The price of artworks has also increased. According to a study of the global art market conducted by UBS, the number of collectors purchasing works that cost more than \$1 million close to doubled, rising from twelve percent in 2021 to twenty-three percent in the first half of 2022.<sup>83</sup> In all, art sales by dealers and auction houses in 2022 reached a total of \$65.1 billion worldwide.<sup>84</sup>

In sharp contrast to the continued growth of the global art market, wealth among artists is not nearly as bountiful. According to the U.S. Bureau of Labor Statistics, the reported median annual income for fine artists, including painters, sculptors, and illustrators, in 2021 was \$60,820, up from \$52,340 in 2020 and \$54,170 in 2015.<sup>85</sup> However, it is estimated that the majority of artists make closer to \$10,000 or less annually from their artwork alone, emphasizing the fact that the myth of the starving artist is a clear reality among the majority of American artists.<sup>86</sup> Data of art transactions in the past few years reveals the severe imbalance in the distribution of profits from the sale of fine art. Furthermore, the abundance of profits in the global art market only further stresses the importance of resale royalties to an equitable system. Failing to provide such a system casts the U.S. art market in a negative light, as it is set apart from

81. *The Art Market Returns To Strong Growth in the West*, *supra* note 81.

82. Eileen Kinsella, *Christie's Generated \$8.4 Billion in Global Art Sales for 2022, Marking Its Best Year Yet*, ARTNET NEWS (Dec. 19, 2022), <https://news.artnet.com/market/christies-generated-8-4-billion-in-global-art-sales-for-2022-2232772> [<https://perma.cc/2X3Z-GGJM>] [<https://web.archive.org/web/20231013055542/https://news.artnet.com/market/christies-generated-8-4-billion-in-global-art-sales-for-2022-2232772>].

83. Brian Boucher, *Despite a Turbulent 2022, Wealthy Collectors Are Buying More – and Pricier – Art*, ART BASEL, <https://www.artbasel.com/stories/seven-key-takeaways-from-the-2022-art-market-survey-collectors?lang=en> [<https://perma.cc/7MP9-ZM3E>] [<https://web.archive.org/web/20231105201018/https://www.artbasel.com/stories/seven-key-takeaways-from-the-2022-art-market-survey-collectors?lang=en>] (last visited Nov. 5, 2023).

84. MCANDREW, *supra* note 81, at 14.

85. *Occupational Employment and Wages, May 2021*, U.S. BUREAU OF LAB. STATS., <https://www.bls.gov/oes/2021/May/oes271013.htm> [<https://web.archive.org/web/20231105201654/https://www.bls.gov/oes/2021/May/oes271013.htm>] (last visited Nov. 5, 2023); *Occupational Employment and Wages, May 2020*, U.S. BUREAU OF LAB. STATS., <https://www.bls.gov/oes/2020/may/oes271013.htm> [<https://web.archive.org/web/20231105201945/https://www.bls.gov/oes/2020/may/oes271013.htm>] (last visited Nov. 5, 2023); News Release, U.S. Bureau of Lab. Stats., *Occupational Employment and Wages—May 2015* (Mar. 30, 2016), [https://www.bls.gov/news.release/archives/ocwage\\_03302016.pdf](https://www.bls.gov/news.release/archives/ocwage_03302016.pdf) [[https://web.archive.org/web/20231105202350/https://www.bls.gov/news.release/archives/ocwage\\_03302016.pdf](https://web.archive.org/web/20231105202350/https://www.bls.gov/news.release/archives/ocwage_03302016.pdf)].

86. Anny Shaw, *Rapper Pays \$18.5M for Work at Auction but the Artist Gets Nothing—Is the System in Need of Reform*, ART NEWSPAPER (June 16, 2018), <https://www.theartnewspaper.com/2018/06/16/rapper-pays-dollar185m-for-work-at-auction-but-the-artist-gets-nothingis-the-system-in-need-of-reform> [<https://perma.cc/TN49-7NK8>] [<https://web.archive.org/web/20231105203028/https://www.theartnewspaper.com/2018/06/16/rapper-pays-dollar185m-for-work-at-auction-but-the-artist-gets-nothingis-the-system-in-need-of-reform>].

the majority of other countries. Additionally, it imposes a unique harm to American artists despite the position of the United States as a leader in the art market worldwide. Ultimately, this dynamic continues to privilege players in all sectors of the art world except for artists themselves.

## B. MINORITY ARTISTS EXPERIENCE AMPLIFIED EFFECTS OF INEQUITIES IN THE U.S. ART MARKET

### 1. Resale Royalty Implications for Contemporary Black Artists

In an environment where Black artists already lack substantive resources to maximize the performance of their work in private and public sales, the lack of *droit de suite* becomes increasingly exploitative. The example of two successful Black artists in particular helps to illustrate this point. Kerry James Marshall and Amy Sberald are both considered to be among the very top of high-performing contemporary artists, as well as within the category of African American artists.

#### a. Kerry James Marshall

At sixty-two years old, Kerry James Marshall holds the record among living African American artists for the highest price of a single work sold at auction.<sup>87</sup> In addition to this impressive feat, Marshall's auction results speak for themselves, reflecting an average sale price of \$8 million with a thirty-five percent price over estimate rate for his impressive work in painting.<sup>88</sup> Marshall's first sale to a major museum took place in 1993 when the Los Angeles County Museum of Art purchased his piece *De Style* for what Marshall estimates to be "around twelve thousand dollars."<sup>89</sup> In 2015, a work by Marshall titled *Still Life with Wedding Portrait*, previously donated to the Museum of Contemporary Art in Chicago for its benefit auction where it was sold for \$750,000, was listed at auction at Christie's for \$1.5 million.<sup>90</sup> The piece, however, surpassed

87. Sarah P. Hanson, *Kerry James Marshall Sets \$21M Record for a Living African American Artist at Sotheby's Sale*, ART NEWSPAPER (May 17, 2018), <https://www.theartnewspaper.com/2018/05/17/kerry-james-marshall-sets-dollar21m-record-for-a-living-african-american-artist-at-sothebys-sale> [https://perma.cc/X8K8-RBAT] [https://web.archive.org/web/20231105203435/https://www.theartnewspaper.com/2018/05/17/kerry-james-marshall-sets-dollar21m-record-for-a-living-african-american-artist-at-sothebys-sale].

88. *Kerry James Marshall*, ARTSY, [https://www.artsy.net/artist/kerry-james-marshall/auction-results?hide\\_upcoming=false](https://www.artsy.net/artist/kerry-james-marshall/auction-results?hide_upcoming=false) [https://perma.cc/QU99-CZZF] (last visited Nov. 5, 2023). At the time of writing this Note, Kerry James Marshall's average sale was \$8 million, with a thirty-five percent price over estimate rate. Those rates have since fluctuated and will continue to be updated in this source.

89. Calvin Tomkins, *The Epic Style of Kerry James Marshall*, NEW YORKER (Aug. 2, 2021), <https://www.newyorker.com/magazine/2021/08/09/the-epic-style-of-kerry-james-marshall> [https://perma.cc/FHC5-MW4Q] [https://web.archive.org/web/20231105204555/https://www.newyorker.com/magazine/2021/08/09/the-epic-style-of-kerry-james-marshall].

90. Bolaji Sosan, *Kerry James Marshall Painting Sells for Record \$5 Million*, SOC. LIFE CHI. (Nov. 19, 2017), <https://www.socialifechicago.com/kerry-james-marshall-still-life-with-wedding-portrait-sells-for-5>

estimates, ultimately selling for a final price of \$5 million.<sup>91</sup> While the increase in value was positive for Marshall, who was still creating and selling work at the time, he did not enjoy the full scope of benefits associated with this increase because he received exactly none of the increased value in royalties.<sup>92</sup>

In 2018, Marshall garnered a lot of attention in the art world with the sale of his painting *Past Times* for \$21.1 million to hip hop music mogul Sean Combs.<sup>93</sup> In addition to setting a new record for the most money paid for a work by a living African American artist, the sale was more than four times Marshall's previous record at auction of \$5 million.<sup>94</sup> This sale significantly surpassed estimates, which were between \$8 million to \$12 million, thus capturing the attention of the art world as Marshall "obliterated the glass ceiling of prejudicial art pricing."<sup>95</sup> The increased value of Marshall's work in his lifetime coincides with the increase in the value of Black art. However, as currently situated, the U.S. art market structure did not provide Marshall with any cut of this legendary sale. In contrast, the European model of *droit de suite* would have provided Marshall with \$14,700, limited by the cap on royalties.<sup>96</sup>

It is undeniably true that Marshall has benefited in many ways from the appreciation in value of his works. Because he is a living contemporary artist, the prices of his works at primary sale have increased as well, therefore allowing Marshall to reap financial rewards from the success of his works.<sup>97</sup> This, however, does not negate the inequity of the fact that Marshall and other contemporary Black artists must navigate an art world which has systematically oppressed Black creators. Considering the history of exclusion and exploitation within cultural industries in the United States, the growing popularity of Black art in the secondary market indicates the urgent need for a system to ensure redress.

#### b. Amy Sherald

The controversy surrounding the sale of Amy Sherald's oil on canvas work, *Welfare Queen*, represents the systemic problem created by a lack of resale royalties. Sherald has achieved numerous impressive accomplishments in her career, including completing

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million/ [https://perma.cc/PH3Q-27DW]  
 [https://web.archive.org/web/20231105204900/https://www.socialifechicago.com/kerry-james-marshall-still-life-with-wedding-portrait-sells-for-5-million/].

91. *Id.*

92. Deanna Isaacs, *A Kerry James Marshall Painting Sold for \$5 Million, but He Didn't See Any of It*, CHI. READER (Dec. 19, 2017), <https://chicagoreader.com/columns-opinion/a-kerry-james-marshall-painting-sold-for-5-million-but-he-didnt-see-any-of-it/> [https://perma.cc/PB96-WNRE] [https://web.archive.org/web/20231105205049/https://chicagoreader.com/columns-opinion/a-kerry-james-marshall-painting-sold-for-5-million-but-he-didnt-see-any-of-it/] ("In just two years, the painting's market value had jumped \$4 million, none of which would make its way back to the artist who had conceived of it, created it, and given it away.")

93. Shaw, *supra* note 87.

94. Hanson, *supra* note 88.

95. Shaw, *supra* note 87.

96. *Id.*

97. Isaacs, *supra* note 93.

the portrait of First Lady Michelle Obama in 2016.<sup>98</sup> Simultaneously, Sherald had major health complications and financial stress that required her to work as a waitress to maintain basic living costs while building her career as an artist.<sup>99</sup> Sherald ultimately sold *Welfare Queen* to Professor Imani Phillips, the Hughes-Roger Professor of African American Studies at Princeton University.<sup>100</sup> Sherald generously agreed to a payment plan, allowing Phillips to pay the full amount over time to account for her financial needs.<sup>101</sup> When *Welfare Queen* was included in the twentieth-century and contemporary evening sale at Phillips New York in 2021, the piece sold for \$3.2 million, outperforming the estimated price by over \$1 million. Sherald, of course, did not receive any of these profits.<sup>102</sup>

Amy Sherald's experience with the sale of this work provides a critical lens into the ethical implications associated with a lack of resale royalties for Black women artists in particular. Through both the technical aspects of the work and the historical origins of the "welfare queen" trope, Sherald's painting rejected the stereotypical framing of Black women as exploiting public benefits by portraying the subject with colors and imagery that evoke a sense of royalty.<sup>103</sup> The implications of the sale of this work in the context of the resale royalty debate are significant as well.<sup>104</sup> Scholars of visual art and sociology discussed this aspect of the piece, stating that "Welfare Queen is consistent with Sherald's aim of creating space to reimagine cultural archetypes and economic systems beyond structural racism. Systems of resale royalties—and equity for artists in the financial sense—embody the democratic values of community and intergenerational collaboration that have surrounded Sherald's work."<sup>105</sup> Like Sherald's reclamation of the welfare queen in this work, the concept of resale royalties has been re-envisioned through the experience of Sherald and other Black artists.

98. Dodie Kazanjian, *Amy Sherald, Michelle Obama's Portraitist, Readies Her New York Debut*, VOGUE (July 15, 2019), <https://www.vogue.com/article/amy-sherald-new-york-debut-vogue-august-2019-issue> [https://perma.cc/7XFC-E8SV] [https://web.archive.org/web/20231105205656/https://www.vogue.com/article/amy-sherald-new-york-debut-vogue-august-2019-issue].

99. *Id.*

100. Cheryl Finley et al., *The Recent Sale of Amy Sherald's 'Welfare Queen' Symbolizes the Urgent Need for Resale Royalties and Economic Equity for Artists*, ARTNET NEWS (Nov. 22, 2021), <https://news.artnet.com/opinion/amy-sheralds-welfare-queen-resale-royalties-economic-equity-artists-2037904> [https://perma.cc/AG4K-ALV7] [https://web.archive.org/web/20231105210003/https://news.artnet.com/opinion/amy-sheralds-welfare-queen-resale-royalties-economic-equity-artists-2037904].

101. *Id.*

102. *Amy Sherald*, ARTSY, [https://www.artsy.net/artist/amy-sherald/auction-results?hide\\_upcoming=false&metric=in](https://www.artsy.net/artist/amy-sherald/auction-results?hide_upcoming=false&metric=in) [https://perma.cc/343D-R7PY] [https://web.archive.org/web/20231105210213/https://www.artsy.net/artist/amy-sherald/auction-results?hide\_upcoming=false&allow\_empty\_created\_dates=true&metric=in&currency=&include\_estimate\_range=false&include\_unknown\_prices=true&allow\_unspecified\_sale\_dates=true] (last visited Nov. 5, 2023). At the time of writing this Note, Amy Sherald's average sale was \$5 million, with a 324% price over estimate rate. Those rates have since fluctuated and will continue to be updated in this source.

103. Finley et al., *supra* note 101.

104. *Id.*

105. *Id.*



Overall, like Marshall, Sherald has undoubtedly benefited from the appreciation in value of her work, allowing her to make sales in the primary market now at much higher prices. The average sales price of her work over the last thirty-six months was \$5 million, with her works selling for an average of 324% more than the estimated prices.<sup>106</sup> As the work of Sherald and other contemporary Black artists continues to grow in popularity and change hands in subsequent sales, the exclusion of these artists from profits generated in the secondary market is unsettling. Yet, this dynamic is mitigated in part for well-known working artists such as Sherald and Marshall as they are able to benefit from increased prices for the sale of their work in the primary market. Thus, a lack of resale royalty is particularly harmful for Black artists with less notoriety or delayed recognition.

## 2. Historical Exclusion of Black Artists and Resultant Barriers to Success

While the popularity and success of Kerry James Marshall and Amy Sherald offer insight into the issue of the lack of resale royalties in the U.S. art market, the treatment of Black artists within the American market reveals broader systemic harms. Speaking about *droit de suite* in the context of Black art, Maxwell Anderson, founder of the art foundation Souls Grown Deep, stated, “The introduction of *droit de suite* legislation in the US would help rectify this inconvenience for well-known contemporary artists like Marshall but it would be an even bigger boon for historically disadvantaged artists who have been left out of the American canon of art for reasons of race, gender or other socio-economic limitations.”<sup>107</sup> A pattern of inequitable treatment toward minority artists has worked in tandem with overall negative conditions in the U.S. art market, thus amplifying the harmful effects of an art market structure that lacks resale royalty provisions. Historical conditions of segregation, racial discrimination, and inferior treatment toward Black artists resulted in indifference toward innovative work by Black artists for years. Furthermore, the little inclusion of work by Black artists that did occur as the American art market gained traction in the twentieth century brought new challenges of appropriation and devaluation which continue to affect the poor treatment of Black art today.<sup>108</sup> In recent years, the market for work by Black artists has

106. Amy Sherald, *supra* note 103.

107. Maxwell L. Anderson, *Why American Artists Should Benefit from the Resale of Their Works*, ART NEWSPAPER (Jan. 4, 2019), <https://www.theartnewspaper.com/2019/01/04/why-american-artists-should-benefit-from-the-resale-of-their-works> [https://perma.cc/F67P-DVR5] [https://web.archive.org/web/20231105215355/https://www.theartnewspaper.com/2019/01/04/why-american-artists-should-benefit-from-the-resale-of-their-works].

108. Shelly Feldman, *The Discriminatory Effect of U.S. Intellectual Property Law on Black Artists*, MICH. J. RACE & L. BLOG (Mar. 28, 2022), <https://mjr.l.org/2022/03/28/the-discriminatory-effect-of-u-s-intellectual-property-law-on-black-artists/> [https://perma.cc/L7RU-DRM4] [https://web.archive.org/web/20240416010143/https://mjr.l.org/2022/03/28/the-discriminatory-effect-of-u-s-intellectual-property-law-on-black-artists/].

grown tremendously, particularly within the genre of Contemporary Art.<sup>109</sup> For example, six out of ten of the most highly priced contemporary works to sell at auction as of September 2018 were created by African American artists.<sup>110</sup>

At the same time, various institutions within the art world have started to pay attention to the fact that minority artists do not have the same resources in terms of gallery representation, museum acquisitions, and exhibition access. For example, in 2019, an organization of Black artists criticized the fact that the Metropolitan Museum of Art in New York had hosted exactly eight exhibitions focused on African American artists out of approximately 400 over the past ten years.<sup>111</sup> At this time, the collection at the National Gallery of Art contained only 986 works by Black artists out of 153,621 pieces, amounting to less than one percent.<sup>112</sup> In 2020, as imagery of racial violence resulting from the murder of George Floyd challenged the conscience of leaders across industries, a nation-wide call for accountability prompted various institutions in the art world to make public commitments toward dismantling systemic racism.<sup>113</sup> Indeed, positive strides have been made toward the greater inclusion of minority artists since 2020; however, work by Black artists continues to represent a very small percentage of the overall auction market.<sup>114</sup> Furthermore, the absence of diverse perspectives among leading galleries, auction houses, museums, and art fairs has further perpetuated an isolating experience for Black artists.<sup>115</sup> These conditions, combined with the disparity

109. Robin Pogrebin, *Artists of Color and Women Soar at Christie's '21st Century' Sale*, N.Y. TIMES (May 10, 2022), <https://www.nytimes.com/2022/05/10/arts/design/christies-contemporary-auction.html> [https://perma.cc/9N75-NCXX] [https://web.archive.org/web/20231105215800/https://www.nytimes.com/2022/05/10/arts/design/christies-contemporary-auction.html].

110. Charlotte Burns & Julia Halperin, *For African American Artists, the Market Remains Woefully Unbalanced*, SOTHEBY'S (Feb. 13, 2019), <https://www.sothebys.com/en/articles/for-african-american-artists-the-market-remains-woefully-unbalanced> [https://perma.cc/WTT3-FHBK] [https://web.archive.org/web/20231105220011/https://www.sothebys.com/en/articles/for-african-american-artists-the-market-remains-woefully-unbalanced].

111. Nicquel Terry Ellis, *Art So White: Black Artists Want Representation (Beyond Slavery) in the Met, National Gallery, USA TODAY* (May 5, 2019), <https://www.usatoday.com/story/news/nation/2019/05/05/black-artists-african-american-art-museums-galleries-collections-painting/3483422002/> [https://perma.cc/5JLP-R7CH] [https://web.archive.org/web/20231105220529/https://www.usatoday.com/story/news/nation/2019/05/05/black-artists-african-american-art-museums-galleries-collections-painting/3483422002/].

112. *Id.*

113. Jo Lawson-Tancred, *Two Years Ago, Museums Across the U.S. Promised To Address Diversity and Equity. Here's Exactly What They Have Done So Far*, ARTNET NEWS (Sept. 5, 2022), <https://news.artnet.com/art-world/museum-dei-plans-2022-2161690> [https://perma.cc/PML2-Q4SU] [https://web.archive.org/web/20231006155110/https://news.artnet.com/art-world/museum-dei-plans-2022-2161690].

114. Julia Halperin & Charlotte Burns, *Exactly how Underrepresented Are Women and Black American Artists in the Art World? Read the Full Data Rundown Here*, ARTNET NEWS (Dec. 13, 2022), <https://news.artnet.com/art-world/full-data-rundown-burns-halperin-report-2227460> [https://perma.cc/XMK7-62CM] [https://web.archive.org/web/20231006160313/https://news.artnet.com/art-world/full-data-rundown-burns-halperin-report-2227460].

115. Margaret Carrigan, *How the Art World Is Grappling with Its Systemic Race Inequality*, ART NEWSPAPER (July 10, 2020), <https://www.theartnewspaper.com/2020/07/10/how-the-art-industry-is>

in the distribution of profits from the sale of work in the secondary market, place minority artists—and Black artists in particular—in a marginalized position within the U.S. art market and the global art market overall.

### 3. Establishing Substantive Resources To Protect Black Artists

Institutions in the U.S. art market have seemingly responded to the call to increase the representation of Black artists; however, it becomes difficult to view these efforts as much more than an exercise of “performative wokeness” given the lack of perceptible change in the position of minority artists within the overall art world.<sup>116</sup> Black artists have shared their sentiment that recognition alone is not sufficient, stating that,

[W]hile the industry’s gatekeepers are now paying attention to black culture, establishing strong relationships with them is still disproportionately harder for all artists of color than for their white peers. And if black artists have nabbed a spot, they’ve done it by serving as their own advocates, translators, and promoters in a system not designed to fully understand—or accommodate—blackness.<sup>117</sup>

By failing to provide Black artists with resources to be continually successful, promises of change are futile. Additionally, the threat of burnout continues to exist for Black artists given the unpredictability of trends in the art market.<sup>118</sup> While Black art is popular now, it is not certain that this moment of popularity will last. Thus, artists may feel pressure to produce at a higher volume to capitalize on this moment. Ultimately, establishing a system to ensure resale royalties for artists would redress the unique concerns of minority artists by offering the substantive solution of ongoing benefits from the resale of increasingly valuable work.

### 4. A Solution of Fairness and Support for Contemporary Black Artists

An additional concern for Black and minority artists in the U.S. art market is the fact that high figures for sales of work by Black artists are extremely concentrated among a very small population of artists. A survey by *Artnet News* and *In Other Words* reported that only eleven African American artists had cumulative auction sales exceeding \$1 million in the ten years up to 2018.<sup>119</sup> Additionally, seventy-seven percent

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grappling-with-its-systemic-race-inequality [https://perma.cc/HEF3-5N7T]  
[https://web.archive.org/web/20231006160734/https://www.theartnewspaper.com/2020/07/10/how-the-art-industry-is-grappling-with-its-systemic-race-inequality].

116. *Id.*

117. Smith, *supra* note 74.

118. *Id.* (“The art world demands that all artists pay their dues—but black burnout, many artists say, is the result of unfair and unequal distribution of those dues.”).

119. Maxwell Anderson, ‘Self-Taught’ Black Artists Are Often the Last To Benefit when Their Prices Go Up. But We Can Change That — Here’s How, ARTNET NEWS (Nov. 25, 2020), <https://news.artnet.com/opinion/resale-royalties-souls-grown-deep-1926363> [https://perma.cc/P6JC-HZ28] [https://web.archive.org/web/20231006195545/https://news.artnet.com/opinion/resale-royalties-souls-grown-deep-1926363].

of the \$2.2 billion auction sales for African American artists in this ten-year time period consisted of works by Jean-Michel Basquiat alone.<sup>120</sup> Of course, one explanation for this is the ability of auction houses to assign value to works and determine certain outcomes through various marketing strategies, such as promotion dedicated to a certain work or the strategic construction of a catalog of work in a given sale.<sup>121</sup> Yet, these figures further emblemize the problematic treatment of Black artists in the transactional art market.<sup>122</sup> An equitable solution to even the playing field for Black artists would grant overdue recognition for artists who have made substantial contributions to the field of art independent of their ability to surpass the \$1 million mark in sales at auction.<sup>123</sup> The practical and substantive method to doing so includes establishing a standard for resale royalties to offer protection for artists and their estates and to mitigate the inherent flaws in the art market. The current demand for Black artists who have been historically undervalued and overlooked presents the ideal climate for demanding such a change.

The current demand for work by both contemporary and historical Black artists in the global art market reflects what is viewed by many as a renaissance of Black art, underscoring the unique position of Black artists in the American art marketplace to institute substantive changes around the issue of resale royalties.<sup>124</sup> One key example of this is the recent auction success of African American artist Ernie Barnes. In 2022, his painting *Sugar Shack*, famous for its feature on the 1970s sitcom “Good Times” and as the cover art of American R&B artist Marvin Gaye’s album, sold for \$15 million, significantly surpassing the estimated price of \$200,000.<sup>125</sup> The next day, another Barnes work sold for \$2.3 million compared to an \$150,000 price estimate.<sup>126</sup> Beyond underscoring the issue of undervaluation and lack of documentation, the Barnes example reflects a potentially problematic phenomena of mainstream attention toward the work of Black artists.<sup>127</sup> Furthermore, the success of Barnes’s work underscores the

120. James Pickford, *Black Artists Matter: The Winds of Change Are Blowing Through the Art World*, FIN. TIMES (Aug. 24, 2020), <https://www.ft.com/content/10c8bef5-b62f-464f-a3ee-1512056c62aa> [<https://perma.cc/6FS2-8DDY>] [<https://web.archive.org/web/20231006162914/https://www.ft.com/content/10c8bef5-b62f-464f-a3ee-1512056c62aa>].

121. *Id.*

122. Anderson, *supra* note 120.

123. Pickford, *supra* note 121.

124. *The “Black Renaissance” in Full Swing*, ARTPRICE.COM, <https://www.artprice.com/artprice-reports/the-contemporary-art-market-report-2021/the-black-renaissance-in-full-swing#:~:text=The%20remarkable%20rise%20of%20non,and%20the%20entire%20Art%20Market> [<https://perma.cc/T9JS-4MF8>] [<https://web.archive.org/web/20231006200715/https://www.artprice.com/artprice-reports/the-contemporary-art-market-report-2021/the-black-renaissance-in-full-swing>] (last visited Nov. 5, 2023).

125. Katya Kazakina, *The Surprising New Record for Earnie Barnes Didn’t Come from Left Field. We Deconstruct the Playbook for Selling ‘The Sugar Shack,’* ARTNET NEWS (May 20, 2022), <https://news.artnet.com/news-pro/deconstructing-the-playbook-for-selling-ernie-barnes-sugar-shack-2118710> [<https://perma.cc/5USF-858Z>] [<https://web.archive.org/web/20231105225428/https://news.artnet.com/market/adam-lindemann-madonna-2118789>].

126. *Id.*

127. Yvonne Bynoe, *Record Breaking Ernie Barnes Sales Highlight the Need for More Documentation of Black Artists*, BLACK ART IN AM. (Aug. 20, 2022), <https://www.blackartinamerica.com/blogs/news/record->

sense of urgency for resale royalties. As work by Black artists has gained significant popularity in recent years, there is a sizable cohort of Black artists who are not able to meet the market demands due to age. Included in this group are African American artists McArthur Binion and Howardena Pindell, who shared their sentiments about the disproportionate pressures on Black artists in an interview with the *New York Times*.<sup>128</sup> Pindell specifically commented on the bittersweet reality of the newfound demand for the work of Black artists, stating, “The kind of elation I may have had back 30 years, I’m past that point.”<sup>129</sup>

Overall, while the current climate for Black artists reflects a necessary departure from a history of exclusion and discreditation, the unbalanced distribution of profits from the appreciated value of Black art offers clear evidence of the continued systemic harms of this pattern. Thus, Black artists are in a unique position of leverage to drive change on the subject of resale royalties, which will increase equity in the market for all.

### III. BLACK ARTISTS AND THE RECONCEPTUALIZATION OF RESALE ROYALTY RIGHTS IN THE U.S. ART MARKET

#### A. NON-LEGISLATIVE APPROACHES TO *DROIT DE SUITE* IN THE U.S. ART MARKET

Whereas resale royalty discussions in the United States thus far have focused on a legislative approach to implementation, a privatized resale royalty solution seeks to effectuate a model for artists to retain economic interest through a more targeted approach. A non-legislative approach refers to actions taken by art organizations, auction houses, and collectors to guarantee a right to royalties for the resale of certain work. Unlike the public approach which employs a blanket approach to resale royalties, privatized solutions implant the idea of resale royalties to dealers, collectors, and purchasers on a case-by-case basis. For example, a buyer may consent to providing a resale royalty for a particular work, a special auction, or all of their transactions with a given dealer of an auction house.

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[<https://perma.cc/7F2B-NY7K>]

[<https://web.archive.org/web/20231006202710/https://www.blackartinamerica.com/blogs/news/record-breaking-ernie-barnes-sales-highlight-the-need-for-more-documentation-of-black-artists>].

128. Hilarie M. Sheets, *Discovered After 70, Black Artists Find Success, Too, Has Its Price*, N.Y. TIMES (Mar. 23, 2019), <https://www.nytimes.com/2019/03/23/arts/design/black-artists-older-success.html> [https://perma.cc/5NVS-B2C2]

[<https://web.archive.org/web/20231105231030/https://www.nytimes.com/2019/03/23/arts/design/black-artists-older-success.html>].

129. *Id.*

### 1. Black Artists and Privatized Approaches To Resale Royalties

Between 2008 and 2021, the amount of money spent on work by Black artists grew by approximately 389.5%.<sup>130</sup> The clear rise in the demand for work by Black artists over the past few years has created a valuable window of opportunity for the implementation of resale royalty rights in the U.S. art market by emphasizing the clash between overdue recognition for the work of Black artists and the inequity associated with massive appreciations in price for works by Black artists in the secondary market. In 2021, the market for works by Black artists further demonstrated this, reaching a new record of \$626.2 million in sales, the overwhelming majority of which took place in the secondary market.<sup>131</sup> The combination of these trends has made resale royalties a priority again, as evidenced by the emergence of several successful organizations committed to procuring resale royalties for Black artists. However, these organizations have approached the issue of resale royalties in a unique capacity, departing from the unsuccessful focuses of past legislation. The tie between Black artists and resale royalty advocacy within the past few years reveals a shift toward the privatization of resale royalty rights. Specifically, many successful examples of resale royalty rights have taken place on a contractual basis. Overall, the success of these models has influenced the establishment of new parameters around the collection of Black art, which will ultimately address inequities to the benefit of all artists in the U.S. art market.

Three key examples that demonstrate the critical role of Black artists in the development of privatized resale royalty solutions are Souls Grown Deep Foundation, the advocacy of the Dean Foundation, and a 2020 exhibition of work by Black artists at Christie's New York titled *Say It Loud: I'm Black and I'm Proud*.<sup>132</sup> A common attribute of these models is their prioritization of Black artists within their advocacy for resale royalty rights. Furthermore, each of these models helps to illustrate the multifaceted nature of non-legislative resale royalty rights through the engagement of key representatives within the art world. Black artists are integral to the success of each of these strategies, given the social and ethical factors which emerge in connection to the purchase of Black art.

### 2. Critiques of Resale Royalty Rights

It would be naïve to suggest that the enactment of a resale royalty right would not present its own potential host of challenges and biases. In fact, a right to resale royalties would likely pose the greatest benefit to the small pool of already successful artists whose work receives acclaim in the secondary market. Yet, this fact should not preclude an argument in favor of instituting such a right. First, any scheme for resale royalties would increase options for artists to receive a valuable benefit from the appreciated value of their work, as demonstrated by the effect of this right abroad. Additionally,

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130. Halperin & Burns, *supra* note 115.

131. *Id.*

132. *Souls Grown Deep Foundation*, *supra* note 12; FAIRCHAIN, *supra* note 11; *see* Estiler, *supra* note 11.

centering the experience of Black artists within this debate, it is evident that provisioning a right to resale royalties is timely and necessary to build in a measure of protection for a group of artists who have been historically disadvantaged within the market. While the focus on Black artists is a contemporary feature of the art market, the longevity of this phenomena is not clear. Thus, capitalizing on the existing condition of the market, which stands to offer long-term protection for minority artists through the application of contract-based solutions, is crucial.

A successful approach to the Implementation of resale royalties takes into account the principal criticisms of *droit de suite* legislation. Among these critiques, a recurring concern is that resale royalty payments contribute to the concentration of wealth among already wealthy and well-respected artists.<sup>133</sup> A study of *droit de suite* in France supports this, reporting that approximately seventy percent of the royalty payments went to the estates of only a handful of famous twentieth-century artists, such as Pablo Picasso and Henri Matisse.<sup>134</sup> Furthermore, *droit de suite* legislation has consistently faced opposition from key players in the art market, including sellers, museums, and galleries, who object to what they view as an added tax, increasing the cost of art transactions and reducing overall profits.<sup>135</sup> In their view, the mechanics of the art market require the labor of dealers, collectors, and auction houses, which justifies the distribution of profits for the appreciated value of work.<sup>136</sup> Furthermore, for collectors, the risk of purchasing an artist's work before it has reached its full value potential would be greater if faced with a potential resale royalty tax, thereby decreasing sale activity in the primary market.<sup>137</sup>

A contractual approach to the implementation of a legal right to resale royalties for artists addresses these concerns about *droit de suite* legislation. For one, the provision of royalties for artists is still useful even if these payments occur in small amounts to the general population of artists.<sup>138</sup> Legislative models of *droit de suite* in the EU seek to address the needs of artists generally. Contrastingly, a contractual approach provides artists with agency to negotiate terms that more specifically address their needs. Due to the reduced financial burden, this would ultimately provide artists with more freedom to focus on their work.<sup>139</sup> A study by the UK Intellectual Property Office shortly following the passage of the ARR Regulations supports this fact, finding that most artists reinvested even small totals of resale royalty payments back into their art to purchase necessary materials and equipment.<sup>140</sup> Contractual solutions to resale royalty payments also help to emphasize the fundamental importance of the inherent tie

133. Anne Sanders, *Artists' Resale Royalties: Bonus or Burden?*, 42 ART & AUSTL. 450, 451 (2004).

134. Phillip McCouat, *Should Artists Get Royalties?*, J. ART SOC'Y, <https://www.artinsociety.com/should-artists-get-royalties.html> [https://perma.cc/RU6W-G7N9] [https://web.archive.org/web/20231206201439/https://www.artinsociety.com/should-artists-get-royalties.html] (last visited Dec. 6, 2023).

135. DeMott, *supra* note 19, at 141.

136. *Id.*

137. *Id.* at 141–42.

138. *Id.* at 144.

139. *Id.*

140. *Id.*

between an artist and their work in the recognized value of a piece. While dealers, auction houses, gallery owners, and purchasers are important players within the art market for analyzing demand, determining trends, and serving as patrons for artists, it is the artist who has the most clear, ongoing connection with their work despite periods of increased and decreased value for a given work.<sup>141</sup> Thus, contractual solutions to resale royalties strike the appropriate balance between recognizing the entitlement of artists and sustaining the overall robustness of the U.S. art market.

### 3. Souls Grown Deep

Souls Grown Deep represents one of the leading organizations committed to the promotion of work by Black artists. The foundation was founded in 2010 by art collector William Arnette with a model centered on the acquisition of works by Black artists and the transfer of these works to the permanent collection of established American and international art museums.<sup>142</sup> Since its founding, the foundation has contributed to the acquisition of over 500 works by more than 110 Black artists by museums across the United States.<sup>143</sup> In 2020, Souls Grown Deep initiated a resale royalty program which has become a defining aspect of the foundation in terms of its overall impact on the art market.<sup>144</sup> The Souls Grown Deep model, known as the Resale Royalty Award Program (“RRAP”), offers living artists a 5% resale royalty threshold of proceeds from secondary market sales at up to \$85,000 annually per artist.<sup>145</sup> This unprecedented model applies not only to future transactions but also to past transactions for pieces within the Souls Grown Deep collection, thus providing the estates of accomplished Black artists with this right as well.<sup>146</sup> Furthermore, the program includes sales at auction, within galleries, and to museums.<sup>147</sup>

141. *Id.* at 143.

142. Victoria Stapley-Brown, *Souls Grown Deep Expands the Canon of US Art*, ART NEWSPAPER (June 7, 2017), <https://www.theartnewspaper.com/2017/06/07/souls-grown-deep-expands-the-canon-of-us-art> [https://perma.cc/BJS5-BMN4] [https://web.archive.org/web/20231106020943/https://www.theartnewspaper.com/2017/06/07/souls-grown-deep-expands-the-canon-of-us-art].

143. *Souls Grown Deep Foundation*, *supra* note 12.

144. Cassie Packard, *Souls Grown Deep Starts Unprecedented Resale Royalties for Artists*, HYPERALLERGIC (Nov. 5, 2020), <https://hyperallergic.com/599296/souls-grown-deep-starts-unprecedented-resale-royalties-for-artists/> [https://perma.cc/5RWD-3JQS] [https://web.archive.org/web/20231206204542/https://hyperallergic.com/599296/souls-grown-deep-starts-unprecedented-resale-royalties-for-artists/].

145. *Resale Royalty Award Program*, SOULS GROWN DEEP (Nov. 5, 2020), <https://www.soulsgrowndeep.org/foundation/resale-royalty-award-program> [https://perma.cc/SCR4-VPUH] [https://web.archive.org/web/20230121134419/https://www.soulsgrowndeep.org/foundation/resale-royalty-award-program].

146. *Id.*

147. *Id.* (“Since the initial purchases of the artworks in the collection decades ago, the artists’ careers and art world reputations have advanced significantly through the work of Souls Grown Deep and other advocates and the original rates are a fraction of what the works are sold for today. The awards under RRAP will acknowledge these artists.”)



The Souls Grown Deep approach to contractual resale royalties has effectively leveraged the modern trend toward the recognition of Black art to redress the systemic disregard for and undervaluation of this work throughout history. In addition to the symbolic importance of increasing recognition for the work of Black artists, the foundation has promoted a strategy for increasing equity in the U.S. art market, with tangible benefits for Black artists in the form of royalties. Since the establishment of this program in November 2020, Souls Grown Deep has continued to make its mark in the art world, including the acquisition of forty works by the National Gallery of Art in December 2020, the acquisition of work by five university art museums in 2021, and historical acquisitions by Tate Modern and other international institutions in 2021.<sup>148</sup>

The success of RRAP suggests that the effectiveness of contractual resale royalty rights is uniquely informed by the social and ethical considerations associated with the collection of Black art. As social awareness in the art world overall has resulted in a new consciousness for the experience of Black artists, this has bolstered support for resale royalties on a privatized basis. The president of Souls Grown Deep acknowledged the importance of resale royalties specifically to Black artists in a statement on the RRAP, stating, “Our resale royalty award program is a belated acknowledgment that visual artists, whose creativity spawns fortunes for others, should participate in downstream earnings, just as do musicians, writers, and patent holders. This program is particularly overdue for artists of color who have been routinely excluded from the art market.”<sup>149</sup> Centering this program on the work of Black artists has allowed Souls Grown Deep to not only provide restitution for the unique harms faced by Black artists but also implant a valuable protectionary measure for artists in the realm of art acquisitions within the United States as well. The role of Black artists has become a key distinguishing factor in this approach to resale royalties, which stands to increase equity in the U.S. art market for all artists.

#### 4. The Dean’s Choice

Another key example of advocacy with respect to the implementation of a privatized right to resale royalties is the “Dean’s Choice.” Dean’s Choice is defined as “an option

148. Press Release, Nat’l Gallery of Art, National Gallery of Art Acquires Forty Works by African American Artists from Souls Grown Deep Foundation (Dec. 28, 2020), <https://www.nga.gov/press/acquisitions/2020/soulsgrowndeep.html> [<https://perma.cc/3WBZ-9AT3>] [<https://web.archive.org/web/20230601223035/https://www.nga.gov/press/acquisitions/2020/soulsgrowndeep.html>]; *Five University Art Museums Acquire Artwork from the Collection of Souls Grown Deep*, SOULS GROWN DEEP (Nov. 18, 2021), <https://www.soulsgrowndeep.org/five-university-art-museums-acquire-artwork-collection-souls-grown-deep> [<https://perma.cc/6DCX-BEUB>] [<https://web.archive.org/web/20221128170503/https://www.soulsgrowndeep.org/five-university-art-museums-acquire-artwork-collection-souls-grown-deep>]; Francesca Aton, *Tate Modern and Other International Institutions Acquire Artworks from Souls Grown Deep Collection for the First Time*, ARTNEWS (Apr. 19, 2022), <https://www.artnews.com/art-news/news/souls-grown-deep-collection-first-international-acquisitions-1234625740/> [<https://perma.cc/7G5P-JTCJ>] [<https://web.archive.org/web/20231106023733/https://www.artnews.com/art-news/news/souls-grown-deep-collection-first-international-acquisitions-1234625740/>].

149. Packard, *supra* note 145.

for collectors selling a work through an auction house or gallery to simply check a box—yes or no—to indicate whether they’d like to give a percentage of the sale to the artist.<sup>150</sup> This model for resale royalties specifically addresses the collection of Black art from the perspective of collectors such as music producer Kaseem “Swizz Beatz” Dean and his wife, recording artist Alicia Keys, who are co-founders of the Dean Collection.<sup>151</sup> Beyond his recognition as one of the largest collectors of work by Black artists, Dean is also acknowledged for his strong support of the art community, including advocacy on behalf of artists for resale royalties.<sup>152</sup> In fact, Dean is considered to be among the first collectors to openly support resale royalties for artists. At the 2018 Sotheby’s auction at which Kerry James Marshall’s piece *Past Times* sold for \$21.1 million, Dean spoke about the importance of providing artists with resale royalties.<sup>153</sup> As a result, Sotheby’s art advisor, Joel Strauss, publicly decided to provide Marshall with a percentage of royalties from the \$1.8 million sale of the *Study for Past Times* at an auction later that year.<sup>154</sup> This gesture represented likely the first time that a living artist received a cut from a U.S. Sotheby’s sale.<sup>155</sup>

Ultimately, the Dean’s Choice provides additional insight into a non-legislative resale royalties model which builds upon the desire of collectors of Black art to engage in the practice of collection mindfully.<sup>156</sup> Practically speaking, this model would allow collectors to opt into an agreement to provide a royalty back to the artist, or the artist’s family, upon any subsequent sale of the work.<sup>157</sup> By voicing the importance of resale royalties to an audience like Sotheby’s, Dean created awareness about an issue, from a

150. Podcast: 5 Questions To Kasseem “Swizz Beatz” Dean, ART FIX, <https://art-fix.com/story/5-questions-to-kasseem-swizz-beatz-dean/> [https://perma.cc/TNC6-TZWC] [https://web.archive.org/web/20231206210601/https://art-fix.com/story/5-questions-to-kasseem-swizz-beatz-dean/] (last visited Dec. 6, 2023).

151. Sanja Lazic, *The Dean Collection*, WIDEWALLS (Oct. 29, 2014), <https://www.widewalls.ch/magazine/the-dean-collection-swizz-beatz-scope-miami-beach-2014> [https://perma.cc/YRD3-DRN8] [https://web.archive.org/web/20201204232909/https://www.widewalls.ch/magazine/the-dean-collection-swizz-beatz-scope-miami-beach-2014].

152. Eileen Kinsella, *Swizz Beatz To the Art World: Pay Your Artists Royalties when Their Work Is Resold*, ARTNET NEWS (Sept. 25, 2018), <https://news.artnet.com/market/swizz-beatz-sothebys-artist-royalties-1355674> [https://perma.cc/79TY-QCN3] [https://web.archive.org/web/20231014212440/https://news.artnet.com/market/swizz-beatz-sothebys-artist-royalties-1355674].

153. *Id.*

154. *Id.*

155. M.H. Miller, *How Swizz Beatz Bridged the Worlds of Hip-Hop and Contemporary Art*, N.Y. TIMES (Feb. 13, 2019), <https://www.nytimes.com/2019/02/13/t-magazine/swizz-beatz-art.html> [https://perma.cc/89A3-CV4U] [https://web.archive.org/web/20231004100849/https://www.nytimes.com/2019/02/13/t-magazine/swizz-beatz-art.html].

156. Antwaun Sargent, *Dean’s List: Swizz Beatz and Alicia Keys Focus on Collecting African-American Art*, ARTNEWS (Dec. 16, 2019), <https://www.artnews.com/art-news/news/swizz-beatz-alicia-keys-art-collection-13359/> [https://perma.cc/F2X7-5DDK] [https://web.archive.org/web/20230323022622/https://www.artnews.com/art-news/news/swizz-beatz-alicia-keys-art-collection-13359/].

157. *Id.*

collector's perspective, that is direct and personal to the very artists whose works are sold by major auction houses. Dean characterized his approach to resale royalty advocacy as "an appeal for real patrons."<sup>158</sup> The consideration of the Dean Choice by Sotheby's and the visible effects of Dean's advocacy for resale royalties overall further help to include important perspectives from institutions within the art world. Moreover, focusing on the experience of Black artists offers an important distinction from previous attempts at implementing resale royalties.

### 5. *Say it Loud: I'm Black and I'm Proud, an Exhibition at Christie's New York*

The 2020 auction curated by Destinee Ross-Sutton at Christie's New York offers an additional approach to implementing resale royalty rights. The sale, titled *Say it Loud: I'm Black and I'm Proud*, focused exclusively on work by Black artists and shed light on the auction houses' perspective on the tie between Black art and resale royalties. Christie's employed several stipulations with this sale, making it somewhat unique. First, the auction house provided that 100% of proceeds go directly to the artists.<sup>159</sup> Additionally, Christie's asked prospective purchasers to agree to specialized contract terms that restrict purchasers from reselling works from the sale for at least five years.<sup>160</sup> After the initial five-year period, purchasers remain contractually bound to offer the artist a first right of refusal before pursuing a subsequent sale.<sup>161</sup> If an artist consents to the sale, the purchaser could go through with the transaction; however, the artist would be entitled to fifteen percent of the profits.<sup>162</sup>

Buyers participating in this sale met the terms with full cooperation, indicating a clear willingness among Black art collectors to honor the right of artists to resale royalties.<sup>163</sup> An article commenting on the success of the exhibition stated, "The contract also serves as what [Ross-Sutton] calls 'a litmus test' for the motivations of the buyer. Although she had her doubts about how people would respond to the limitations . . . it's basically been a feeding frenzy. It's encouraging that people aren't going radio silent when you send the agreement."<sup>164</sup> By instituting this requirement as a barrier to entry for purchasers in this sale, Ross-Sutton further strengthened the tie between resale royalties and the sale of Black art. Furthermore, this sale set a valuable precedent for the implementation of resale royalties with respect to a major player in the art market.

A combined analysis of the Christie's model, the "Dean Choice" provision, and the trailblazing efforts of Souls Grown Deep illustrates the overall shift of the consideration of resale royalties within the U.S. art market toward a focus on a privatized strategy of implementation. Additionally, these cases highlight an approach to resale royalties that

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158. *Id.* (internal quotations omitted).

159. Estiler, *supra* note 11.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* (internal quotations omitted).

centers the experience of artists who have been historically overlooked and disadvantaged by the art world. Perhaps the most promising aspect of these solutions is the unique capacity of an individualized approach to resale royalties to address nuances of the art market that are not as effectively captured by *droit de suite* legislation. Each of these solutions directly engages players in the art world that have historically objected to *droit de suite*, including collectors and auction houses. The newfound success for resale royalty advocacy conveys the significance of framing the resale royalty debate today around the growth of Black art.

## B. INCREASING EQUITY FOR ARTISTS IN THE U.S. ART MARKET THROUGH CONTRACTUAL RESALE ROYALTY MODELS

### 1. Efficiency, Accessibility, and Enforceability in Contractual Solutions for Resale Royalties

In addition to an overall shift toward the privatization of resale royalty rights, contractual models specifically have emerged as a lucrative solution to the absence of *droit de suite* in the U.S. art market. Contractual solutions for resale royalties are a mechanism to advance resale royalty advocacy at the organizational level by protecting this right in a way that is practical and accessible for all artists.<sup>165</sup> Modern examples of contractual resale royalties leverage advances in technology as well as the ethical motivations of contemporary art collectors to enhance the effectiveness of these solutions.

### 2. The Artist's Reserved Rights Transfer and Sale Agreement

The initial model for contractual resale royalties rights was developed by lawyer Robert Projansky and art curator Seth Siegelau in 1971.<sup>166</sup> This model, known colloquially as the "Artist's Contract," provided a template for artists to draft contract terms, protecting the various interests of the artists, including the right to resale royalties.<sup>167</sup> Projansky and Siegelau structured the Artist's Contract by permanently attaching a notice of the agreement to the work itself. Under the terms of the agreement, a purchaser would agree not to alienate or sell the work without binding the buyer to the covenant as well.<sup>168</sup> With regards to resale royalties, the covenant stipulated that the artist would receive 15% of the proceeds every time a purchaser

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165. Christopher G. Bradley & Brian L. Frye, *Art in the Age of Contractual Negotiation*, 107 KY. L.J. 547, 549 (2019).

166. Lauren van Haften-Schick, *Can Artists Use Their Sale Contracts To Game the System?*, FRIEZE (Mar. 10, 2021), <https://www.frieze.com/article/can-artists-use-their-sale-contracts-game-system> [https://perma.cc/S5YP-HCBT] [https://web.archive.org/web/20231007000908/https://www.frieze.com/article/can-artists-use-their-sale-contracts-game-system].

167. Bradley & Frye, *supra* note 166, at 549.

168. *Id.* at 577.

resold the work.<sup>169</sup> There was skepticism regarding the enforceability of the Artist's Contract due to its attempt to bind subsequent parties to a contract to which they were not initially a party.<sup>170</sup> The Artist's Contract was, however, very effective in terms of its impact on reframing the relationship between artists and collectors in a legal framework, in contrast to the informal norms in the art world at large.<sup>171</sup> Contractual solutions to resale royalties today address the issue of enforceability through the use of technology such as blockchain. Furthermore, the general social awareness of the art market today suggests that there are persuasive social and ethical factors associated with the collection of contemporary art which create an additional incentive for both the initial and subsequent buyers to honor contract terms that mandate royalty payments to artists.

### 3. The Artist's Contract Revised

In 2019, prominent U.S. art lawyers and curators collaborated on the development of a revised edition of the Artist's Contract.<sup>172</sup> This rendition of the contract enables artists to designate a charitable organization as the recipient of the 15% of resale profits from the sale of their work.<sup>173</sup> This modernized attempt draws upon the ethical inclinations of contemporary art collectors by adding a philanthropic angle.<sup>174</sup> Specifically, once the buyer honors this stipulation of the contract, the reseller has the option to receive a tax deduction upon the completion of the donation.<sup>175</sup> While this approach does not directly address the issue of financial burden faced by American artists, it nonetheless serves a significant redistributive function, redressing the issue of inequity in the U.S. art market. Notably, by offering a direct benefit, this solution addresses the hesitations of buyers due to their assumed risk with respect to resale royalties. Additionally, it promotes the continued interest of artists in their work by allowing creators to align any appreciated value in their work with their social values and philanthropic interests.<sup>176</sup> Ultimately, this solution further normalizes a royalty scheme in the sale of work in the secondary market and leverages the current climate of social awareness within the art market.

169. *Id.*

170. *Id.* at 549.

171. *Id.* at 550.

172. van Haften-Schick, *supra* note 167.

173. Joseph del Pesco, *How a New Kind of Artist Contract Could Provide a Simple, Effective Way To Redistribute the Art Market's Wealth*, ARTNET NEWS (July 27, 2020), <https://news.artnet.com/opinion/resale-royalties-contract-kadist-joseph-del-pesco-1897169> [<https://perma.cc/NAD6-C366>] [<https://web.archive.org/web/20231007004139/https://news.artnet.com/opinion/resale-royalties-contract-kadist-joseph-del-pesco-1897169>].

174. *Id.*

175. *Id.*

176. van Haften-Schick, *supra* note 167.

#### 4. The Use of Technology in Art Sales Agreements

Technology is another distinguishing feature of resale royalty mechanisms today and acts as a key factor within contractual solutions. For example, the Fair Artists' Reserved Equity ("FARE") Contract offers an accessible online database for artists, including legal templates for drafting sales contracts that contain resale royalty stipulations.<sup>177</sup> Several models of contractual resale royalties today also employ blockchain technology to ensure compliance with predetermined conditions in an automated process format known as "smart contracts."<sup>178</sup> A blockchain represents a "distributed ledger technology in which information is kept secure by having many interconnected copies of the ledger."<sup>179</sup> Blockchain technology presents a solution that guarantees efficiency and eliminates the previous difficulty faced by artists of tracking down their work. In the context of the art market, blockchain is viewed as a tool with the capacity to "change funding models for artists and arts organizations because of its distinctive properties as a distributed and immutable record that can be maintained without trust in a central record-keeping authority."<sup>180</sup> In practice, smart contracts are based upon a code that sets forth various conditions for the completion of a transaction.<sup>181</sup> Failure to comply with any of these conditions results in the failure of the transaction overall.<sup>182</sup> Thus, the challenges of enforceability of royalty legislation that existed within the CRRRA model and various forms of *droit de suite* legislation abroad are significantly mitigated.<sup>183</sup>

A recently founded organization called Fairchain is a leader in the space of blockchain technology and art sales agreements. Fairchain has developed a model

177. *The Fare Contract*, THE ARTIST'S CONTRACT, <https://www.artistscontract.com/fare-contract> [<https://perma.cc/SZ22-L6GU>] [<https://web.archive.org/web/20231010032650/https://www.artistscontract.com/fare-contract>] (last visited Nov. 5, 2023).

178. Blockchain technology is defined as "a shared, immutable ledger that facilitates the process of recording transactions and tracking assets in a business network." *What is Blockchain Technology?*, IBM, <https://www.ibm.com/topics/what-is-blockchain#:~:text=Blockchain%20overview,patents%2C%20copyrights%2C%20branding> [<https://perma.cc/EN8RJAWN>] [<https://web.archive.org/web/20231010033023/https://www.ibm.com/topics/blockchain%20>] (last visited Nov. 5, 2023). In other words, it provides a means of tracking transactions through a digitized secure process. See generally *id.*; *What Are Smart Contracts on Blockchain*, IBM, <https://www.ibm.com/topics/smart-contracts> [<https://perma.cc/A67W-NXZP>] [<https://web.archive.org/save/https://www.ibm.com/topics/smart-contracts>] (last visited Nov. 5, 2023).

179. van Haften-Schick & Whitaker, *supra* note 15, at 295; see also Amy Whitaker, *Art and Blockchain: A Primer, History, and Taxonomy of Blockchain Use Cases in the Arts*, ARTIVATE: J. ENTREPRENEURSHIP ARTS, summer 2019, at 21.

180. van Haften-Schick & Whitaker, *supra* note 15, at 295.

181. Charlotte Kent, *Artists Have Been Attempting To Secure Royalties on Their Work for More than a Century. Blockchain Finally Offers Them a Breakthrough*, ARTNET NEWS, (Apr. 7, 2021), <https://news.artnet.com/opinion/artists-blockchain-resale-royalties-1956903> [<https://perma.cc/EW7R-YKRY>] [<https://web.archive.org/web/20231013012812/https://news.artnet.com/opinion/artists-blockchain-resale-royalties-1956903>].

182. *Id.*

183. See van Haften-Schick & Whitaker, *supra* note 15.

which generates digital certificates of title and authenticity for works of art.<sup>184</sup> This aspect of the model is significant, given the fact that authenticity poses one of the greatest risks to purchasers in the art market.<sup>185</sup> Questionable provenance can greatly decrease the value of a work going forward; therefore, the ability to ensure authentication in an automated process presents a valuable benefit to buyers.<sup>186</sup> The Fairchain framework requires new buyers to sign an agreement in which they commit to convey a percentage of the transaction value for a work to the original artist.<sup>187</sup> This percentage is determined up front by the artist when the work is initially sold, thereby affixing the terms of the agreement to the work permanently through a smart contract.<sup>188</sup> Accordingly, the Fairchain contract does not have the enforceability issues of traditional contracts because a new contract is generated with each subsequent sale. Additionally, with this approach the artist receives the royalty payment automatically, ensuring a procedurally sound and reliable process.<sup>189</sup>

One example of the Fairchain model in practice was a 2022 auction presented in partnership with Good Black Art, an art collecting platform, titled *MY PEOPLE*.<sup>190</sup> This auction featured the work of five Black artists, each representing diverse spaces within the diaspora through their varying backgrounds and choice of artistic style.<sup>191</sup> In line with the Fairchain mission, the works were backed with digital certificates of title and authenticity, which required the buyer's adherence to a 10% resale royalty for artists in the case of future resale.<sup>192</sup> Works were available for bidding on Artsy, which committed to donating 10% of show sale proceeds to Derrick Adams's The Last Resort Artist Retreat, a residency dedicated to investing in the growth and education of young Black creatives in Baltimore, Maryland.<sup>193</sup>

184. *About Us*, FAIRCHAIN, <https://fairchain.art/about-us/> [https://perma.cc/J9PH-4L63] [https://web.archive.org/web/20231013232700/https://fairchain.art/about-us/] (last visited Nov. 5, 2023).

185. See Lawrence M. Shindell, *Provenance and Title Risks in the Art Industry: Mitigating These Risks in Museum Management and Curatorship*, 31 MUSEUM MGMT. & CURATORSHIP 406, 406 (2016).

186. See *id.* at 410.

187. Pandit, *supra* note 76.

188. *Id.*

189. *Id.*

190. *MY PEOPLE: Good Black Art Benefit Auction 2022*, ARTSY, [https://artsy.net/auction/my-people-dot-good-black-art-benefit-auction-2022?sort=sale\\_position](https://artsy.net/auction/my-people-dot-good-black-art-benefit-auction-2022?sort=sale_position) [https://perma.cc/4K4C-58MK] [https://web.archive.org/web/20231013235145/https://www.artsy.net/auction/my-people-dot-good-black-art-benefit-auction-2022?sort=sale\_position] (last visited Nov. 5, 2023). Good Black Art provides a platform for the sale of work by emerging Black artists. The company was founded by Phillip Collins in 2021 with the goal of increasing accessibility for aspiring and established collectors. See *Vision*, GOOD BLACK ART, <https://goodblackart.com/pages/about> [https://perma.cc/85LY-DBPZ] [https://web.archive.org/web/20231019211006/https://goodblackart.com/pages/about] (last visited Nov. 5, 2023).

191. Emily Davenport, *New Exhibition in Manhattan Aims To Uplift Black Community and Artists*, AMNY (Sept. 12, 2022), <https://www.amny.com/entertainment/arts-entertainment/new-exhibition-manhattan-uplift-black-community-artists/> [https://perma.cc/FA4L-EV9D] [https://web.archive.org/web/20231106042456/https://www.amny.com/entertainment/arts-entertainment/new-exhibition-manhattan-uplift-black-community-artists/].

192. *MY PEOPLE: Good Black Art Benefit Auction 2022*, *supra* note 190.

193. *Id.*

The Fairchain model was also a key aspect of a February 2023 Artsy auction presented in honor of Black History Month.<sup>194</sup> Again featuring exclusively work by Black artists, the auction was framed to purchasers as an opportunity to invest in and support an equitable future for all artists.<sup>195</sup> In addition to the mandatory resale royalty provision, a portion of the proceeds from this sale was donated to 15 Percent Pledge, an organization committed to advancing opportunity and equity for Black-owned businesses.<sup>196</sup> In all, these examples illustrate the feasibility of implementing a legal right to resale royalties with modern mechanisms of the art market. Furthermore, the vision of Black artists and collectors exists at the center of each of these sales, reinforcing the intrinsic tie between Black art and consideration of resale royalties today. More specifically, the use of the Artsy platform in both of these auctions meant that bidding was available online.<sup>197</sup> This use of technology not only serves to increase accessibility in art collection, but it also addresses concerns of transparency and exposure in the marketplace by increasing the visibility of sales that celebrate Black art.<sup>198</sup>

Overall, the development of contractual resale royalty solutions emphasizes the reconceptualization of *droit de suite* provisions within the American art market toward an individualized approach. While resale royalties offer to serve as a redress for the history of inadequate recognition of the contributions of Black artists, the inequity that exists due to the lack of *droit de suite* legislation in the U.S. art market applies across the board.<sup>199</sup> Contractual solutions offer a vehicle to implement resale royalty rights on a large scale due to their emphasis on efficiency, accessibility, and reliability.

194. *Artsy Impact Auction: Black History Month Focus, Presented with Fairchain*, ARTSY, [https://www.artsy.net/auction/artsy-impact-auction-black-history-month-focus-presented-with-fairchain?sort=sale\\_position](https://www.artsy.net/auction/artsy-impact-auction-black-history-month-focus-presented-with-fairchain?sort=sale_position) [https://perma.cc/2UJ5-CFT5] [https://web.archive.org/web/20231106043236/https://www.artsy.net/auction/artsy-impact-auction-black-history-month-focus-presented-with-fairchain?sort=sale\_position] (last visited Nov. 5, 2023).

195. Artsy Editorial, *Meet the 8 Artists of Artsy and Fairchain's Black History Month Impact Auction*, ARTSY (Feb. 14, 2023, 1:53 PM), <https://www.artsy.net/article/artsy-editorial-meet-8-artists-artsy-fairchains-black-history-month-impact-auction> [https://perma.cc/AZJ8-NMEF] [https://web.archive.org/web/20231014005046/https://www.artsy.net/article/artsy-editorial-meet-8-artists-artsy-fairchains-black-history-month-impact-auction].

196. *Id.*

197. *About*, ARTSY, <https://www.artsy.net/about> [https://perma.cc/EXJ5-GUVV] [https://web.archive.org/web/20231014170830/https://www.artsy.net/about] (last visited Nov. 5, 2023). Artsy is considered one of the largest online marketplaces for art. Through its website, as well as its mobile app, Artsy allows aspiring collectors to browse through a catalog of artwork consisting of work by artists around the globe. See Ben Popper, *Gallery View: How Artsy Finally Convinced Galleries To Sell Fine Art Online*, VERGE (July 18, 2017), <https://www.theverge.com/2017/7/18/15983712/artsy-fine-art-galleries-online-auction-sales> [https://perma.cc/U2VB-24D9] [https://web.archive.org/web/20231014171542/https://www.theverge.com/2017/7/18/15983712/artsy-fine-art-galleries-online-auction-sales].

198. *About*, *supra* note 198.

199. Schten, *supra* note 23, at 133.



**C. ADDRESSING THE INEQUITIES PERPETUATED BY AN ABSENCE OF *DROIT DE SUITE* LEGISLATION IN THE U.S. ART MARKET**

**1. Establishing New Norms for U.S. Resale Royalties**

The position of Black artists within this space is critical to the status of resale royalty rights in the U.S. art market today. A recurring critique of *droit de suite* legislation globally is that artists do not have the necessary bargaining power to demand resale royalties. The increased focus on the contributions by Black artists in the past five years has established a platform for substantive progress on the issue of resale royalties. Prior promises of change and increased equity in the art market have been superficial, as evidenced by data that illustrates that the work of Black American artists on the whole continues to be undervalued, comprising a small percentage of the global auction market.<sup>200</sup> The continued demonstration of commitment toward the promotion of Black artists by museums, auction houses, collectors, and galleries presents a valuable opportunity to hold these agents accountable. The demonstrated willingness of purchasers of Black art to consent to resale royalty terms is already evidence of this opportunity.

**2. Incorporating Diverse Perspectives of Players in the Art World**

The reconceptualization of resale royalty rights in the U.S. market today addresses several pertinent critiques of *droit de suite* legislation. Specifically, the shift toward privatization has resulted in a strategy that balances the different interests of players across the art world. Auction houses, for example, previously objected to the potential harm that resale royalty provisions might create for art transactions, ultimately driving down the profits from the sale of work. The willingness of these same institutions to institute resale royalty provisions in sales contracts for work by Black artists reflects a step toward broader acceptance of resale royalty rights within the art world. The privatization of resale royalty rights has also catered to the concerns of art collectors by including strategies that mitigate apprehension around the perceived risks associated with resale royalty provisions. For example, Kadist, a non-profit contemporary art organization, introduced a tax benefit.<sup>201</sup> Additionally, an overall climate of social awareness around the ethical implications of collecting the work of contemporary and Black artists has further captured the interests of art collectors on the subject of resale royalties.

Gallery owners have also taken on a visible role within attempts to implement resale royalties. For example, Jack Shainman, a prominent New York art dealer, provides artists with a percentage of the resale value; therefore, he encourages buyers to resell work back through his gallery to ensure that artists receive this benefit by facilitating

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200. See Halperin & Burns, *supra* note 6.

201. del Pesco, *supra* note 174.

the purchase process.<sup>202</sup> Lastly, artists themselves are best served by the shift toward privatization in resale royalty rights. The modern focus on accessibility and efficiency in contractual resale royalty rights has resulted in a template that is accessible for artists of all backgrounds and success levels. Furthermore, these templates provide a guideline for resale royalty provisions, thus allowing the artist to maintain agency over the specific terms and specifications of a sale agreement.

### 3. Leveraging Advancements in Technology

A privatized approach to resale royalties effectively leverages modern advancements in technology to increase efficiency and ensure legal enforceability. Specifically, the use of blockchain technology has allowed provisions tied to the original sale of a piece to apply to future purchasers by generating new contracts, thereby securing the right to resale royalties for the artist in perpetuity. This solution mitigates previous inefficiencies in the process of collecting royalties for artists by eliminating the need for a third party or commission agency to facilitate the transmission of funds. Furthermore, the adaptation of technological solutions for art transactions with respect to resale royalties has addressed other risks associated with the purchase of art, such as authenticity, through measures that increase transparency and accessibility of provenance.

### 4. Increasing Equity in the U.S. Art Market for All Artists

Trends within the art market already demonstrate that only a subset of artists generate profits of a certain margin. While the normalization of resale royalties would not necessarily change this fact, it would provide relief to underrepresented artists who stand to benefit significantly from this right. On an individual basis, even a small amount of royalties for artists who would otherwise receive nothing is significant, particularly lesser-known artists.<sup>203</sup> In fact, the majority of American fine artists are estimated to earn only \$7,000 per year.<sup>204</sup> Thus, even a small royalty amount would facilitate the purchase of supplies or cover the cost of bills, thus allowing an artist to dedicate more time toward their craft.<sup>205</sup> The fact that resale royalties would likely generate the largest profits for artists whose work is already valued highly in primary sales does not negate the significance or overall efficacy of this right. With respect to Black artists specifically, allowing contemporary artists to collect royalties is a logical solution given the history of exclusion that delayed recognition and high valuation of Black art. Furthermore, for all artists, the dramatic appreciation of the value of artworks in the secondary market has resulted in an imbalance between actors in the art market and the artists. The redistributive capacity of resale royalties, as well as the

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202. Kinsella, *supra* note 153.

203. See Reddy, *supra* note 7, at 531.

204. *Id.*

205. *Id.*

timeliness of this step toward increased equity, illustrates the importance of this right to the continued success of the U.S. art market.

#### IV. CONCLUSION

Looking at the evolution of *droit de suite* from a global perspective, the trend toward including resale royalty provisions on a contractual basis suggests a major turning point for the recognition of this right within the United States. This trend follows the broader shift toward using contracts in art transactions within the American art market. However, the success of resale royalty models today is directly attributable to the bargaining power of Black artists because the demand for work by Black artists has transformed the U.S. art market. Given the large role that American artists play in the creation of innovative visual work and the United States' role as a leader in global art transactions, the recognition of royalty resale rights within the U.S. market is significant.

In sum, Black artists have challenged leaders in the art world to institute substantive measures to address systemic inequities in the context of a newfound social consciousness of racial injustice across industries in the United States. The recognition of resale royalty rights falls right within this goal given the disparity in the distribution of profits for the sale of work in the secondary market. Contractual measures that secure a legal right to resale royalties are a multi-faceted solution that addresses this inequity, remedies the historical exclusion of Black artists, and enhances equity in the U.S. art market for all visual artists.