

Constitutional Hazard: The California Resale Royalty Act and the Futility of State-Level Implementation of *Droit de Suite* Legislation

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INTRODUCTION

Répétition d'un Ballet, the famous painting by French artist Edgar Degas, sold for \$401,000 in 1965. The jubilant seller bragged that Degas originally asked a mere \$100 for the painting.¹ In his early career, celebrated American artist Norman Rockwell sold original works like *Homecoming Marine* and *Breaking Home Ties* for a few hundred dollars each.² In the last decade, these paintings were resold for \$9.2 million and \$15.4 million at Sotheby's auctions, but the Rockwell estate received nothing in these transactions.³ Over the centuries, great wealth in the arts has rarely translated into great wealth for the artist.⁴ Since its inception in France, the resale royalty known as the *droit de suite* has aimed at remedying this perceived injustice.⁵

Although a resale royalty right is currently recognized in seventy-nine

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1. Diane B. Schulder, *Art Proceeds Act: A Study of the Droit de Suite and a Proposed Enactment for the United States*, 61 NW. U. L. REV. 19, 23–24 (1967).

2. See, e.g., AM. SOC'Y ILLUSTRATORS P'SHIP ("ASIP"), COMMENTS SUBMITTED IN RESPONSE TO U.S. COPYRIGHT OFFICE'S SEPT. 19, 2012 NOTICE OF INQUIRY 4–5 (2012).

3. See *id.*

4. This problem has long been recognized by visual artists:

The folklore of the art world is replete with tales of wealth and poverty, of fortunes made in the gamble of art collecting, and of artists, whose paintings now bring vast sums, dying, cold and hungry in a Paris garret, or whose heirs, like *la pauvre fille* of Millet, sold flowers on the streets to subsist.

Rita E. Hauser, *The French Droit de Suite: The Problem of Protection for the Underprivileged Artist under the Copyright Law*, 11 COPYRIGHT L. SYMP. 1, 1 (1962) (internal citation omitted). While Norman Rockwell and his heirs accumulated great wealth through copyright ownership and the exploitation of reproductions of his works, Rockwell's story serves as the exception to the rule that visual artists primarily benefit through the sale of their original works, and not through reproductions and reprints. See Elliott Morss, *Norman Rockwell Made A Fortune, But He Could Have Made More*, GLOBAL ECON. INTERSECTION (Mar. 29, 2014), available at <http://econintersect.com/a/blogs/blog1.php/norman-rockwell-made-a-fortune>.

5. See, e.g., 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8C.04[A][1] (2012).

jurisdictions, California is the only American jurisdiction to have adopted it.⁶ The California Resale Royalties Act (CRRA), enacted in 1976, grants visual artists the right to collect a 5% royalty on the total sales price each time their works are resold in California or by a resident of California.⁷ The fate of the California Resale Royalty Act, however, currently rests with the U.S. Court of Appeals for the Ninth Circuit.⁸

Unfortunately for the artists who have sued eBay, Sotheby's and Christie's to collect royalties under the law, the California Resale Royalty Act violates the U.S. Constitution.⁹ The CRRA requires a 5% royalty to be withheld from the sales price for the artist of any work of art that is sold by a California resident, irrespective of where that sale takes place.¹⁰ Granting the auction houses' motion to dismiss, the District Court for the Central District of California ruled that the law exceeds the constitutional limitations on a state's ability to regulate transactions occurring outside its borders.¹¹ The California legislature recognized that "were the CRRA to apply *only* to sales occurring *in* California, the art market would surely have fled the state to avoid paying the 5% royalty."¹² Yet this extraterritorial feature of the CRRA has led to its undoing. State laws that reach beyond their borders to regulate sales in other states are subject to scrutiny under the Supreme Court's dormant commerce clause jurisprudence.¹³ As the California governor and legislature were warned before signing the bill into law, the CRRA's extraterritorial reach is an affront to the U.S. Constitution.¹⁴

On the other hand, all hope is not lost for an American *droit de suite*. Perhaps recognizing the futility of state-level legislation, the Copyright Office recently retreated from its prior disapproval of federal *droit de suite* legislation.¹⁵ The Copyright Office now "believe[s] that Congress may want to consider a resale royalty," and has issued a comprehensive report with a succinct list of practical

6. U.S. COPYRIGHT OFFICE, RESALE ROYALTIES: AN UPDATED ANALYSIS, app. E (2013), available at <http://www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf> (hereinafter "2013 Report").

7. See CAL. CIV. CODE § 986 (West 2014).

8. Estate of Graham v. Sotheby's, 860 F. Supp. 2d 1117 (C.D. Cal. 2012), appeal docketed, No. 12-56077 (9th Cir. June 8, 2012). For a discussion of the practice of commenting on forthcoming rulings, see William J. Ledbetter, *Propriety of Law Review Comment on Pending Cases*, 7 WASH. & LEE L. REV. 35 (1950); *With the Editors*, 84 HARV. L. REV. vii, viii (1970) ("Instead of avoiding currently open questions, we believe it is in these uncharted areas especially that we should seek to find legal guideposts.").

9. See *Estate of Graham*, 860 F. Supp. 2d at 1124.

10. See CAL. CIV. CODE § 986(a). The statute also imposes the royalty on any sale that takes place in California, regardless of the seller's residency. *Id.*

11. *Estate of Graham*, 860 F. Supp. 2d at 1126.

12. *Id.*

13. See *infra* Part II.C.

14. *Id.*

15. See U.S. COPYRIGHT OFFICE, *DROIT DE SUITE: THE ARTIST'S RESALE ROYALTY* (1992), available at http://www.copyright.gov/history/droit_de_suite.pdf (hereinafter "1992 Report"); Shira Perlmutter, *Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report*, 16 COLUM.-VLA J.L. & ARTS 395 (1992).

recommendations for effective implementation and enforcement.¹⁶ Although artists may have lost the battle with the CRRA, the Copyright Office's report indicates that they may yet be able to win the war for a resale royalty.

**I. "WHEN HIS ~~BOOK~~[ART] IS POPULAR, HE IS ENRICHED"—THE
DROIT DE SUITE REMEDIES COPYRIGHT'S INFERIOR TREATMENT
OF VISUAL ARTISTS**

A resale royalty has long been supported as a measure to place visual artists (including painters, illustrators, sculptors and photographers) on equal footing with other creative authors, who have traditionally enjoyed more complete protection under copyright law.¹⁷ The U.S. Copyright Office recognizes that visual artists—unlike authors, composers and performers, who exploit their work primarily through *reproduction*—receive compensation primarily for the initial sale of their *original* works.¹⁸ Without a resale royalty, visual artists have no access to the secondary market where their original works of art are resold, often at prices astronomically higher than the original purchase price.¹⁹

Unlike other creative products, works of visual art often derive their value from the original physical embodiment of the artists' efforts.²⁰ The unique object created by an artist—which is treated as a tangible chattel—is considered valuable simply because nothing else is quite like an original. Sculptors, for example, create value only in the original works they produce; they are largely unable to profit from mass reproductions or the distribution of copies.²¹ Without a resale royalty, the only opportunity to exploit a work of visual art is upon its initial sale.

The value of a writer's manuscript or a composer's sheet music does not lie in the original physical creation, but rather in the ability to recreate and perform the ideas embodied by the physical work.²² As a result, the vast majority of copyrightable works are commercially exploited through mass reproduction.²³ Copyright law incentivizes authors such that "when his book is popular, he is enriched."²⁴ Without the *droit de suite*, visual artists have no way to directly

16. 2013 Report, *supra* note 6, at 3 (Cover Letter from Maria A. Pallante to The Honorable Jerrold Nadler).

17. See NIMMER, *supra* note 5, § 8C.04[A][1].

18. Perlmutter, *supra* note 15, at 400 ("Unlike other works, their value lies in the uniqueness of the original physical embodiment, the painting or sculpture itself."); see also 2013 Report, *supra* note 6, at 1 n.2.

19. See, e.g., Carol Vogel, "The Scream" Is Auctioned for a Record \$119.9 Million, N.Y. TIMES (May 2, 2012), <http://www.nytimes.com/2012/05/03/arts/design/the-scream-sells-for-nearly-120-million-at-sothebys-auction.html>.

20. See Hauser, *supra* note 4, at 15–16.

21. Cf. U.S. COPYRIGHT OFFICE, CIRCULAR 40: COPYRIGHT REGISTRATION FOR PICTORIAL, GRAPHIC, AND SCULPTURAL WORKS 2 (2013), available at <http://www.copyright.gov/circs/circ40.pdf> ("Copyright does not protect the mechanical or utilitarian aspects of such works of craftsmanship.")

22. *Id.* at 1.

23. *Id.*

24. Monroe E. Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite*, 77 YALE L.J. 1333, 1343 (1968) ("The copyright statute permits the author to reap continuing benefits from the sale of his books so that his prosperity rides with the times: when his book

exploit the increasing popularity of a work. The goal of the resale royalty is to give visual artists a lasting economic interest in their works.

Proponents of the *droit de suite* argue that recognizing such a right would encourage the creation of more works of art.²⁵ Incentivizing innovation is the constitutional justification for copyright law in the United States,²⁶ the basic idea being that “increased remuneration for the creator leads to more creation.”²⁷ A resale royalty would not only ensure artists greater compensation for the works they create, but would also incentivize artists to improve their overall reputations, which would indirectly increase the value of their royalty interest in prior works. It has also been suggested that a “*post mortem* resale royalt[y]” would encourage living artists to create art to support their heirs after their death.²⁸

The doctrine of reciprocity is another major benefit of *droit de suite* legislation. Article 14ter of the Berne Convention requires a country to recognize the royalty right of an artist from a foreign country only when mutuality exists, that is, when both nations recognize the *droit de suite*.²⁹ As a result, American artists are unable to claim relevant royalties when their art is sold in many foreign jurisdictions. American artists selling works in Australia, for instance, have relinquished royalties on approximately \$2.7 million in sales (10.4% of all sales by foreign artists in Australia) because the United States’ failure to satisfy mutuality.³⁰

II. THE CALIFORNIA RESELL ROYALTY ACT CANNOT STAND

In the late 1960s, academics published a number of prominent law review articles on the subject of the *droit de suite* and its popularity in Europe.³¹ Around

is popular, he is enriched; when sales lag, he can wait. A painter or sculptor, it is commonly thought, has no such luxury.”).

25. See Maryam Dilmaghani, *Visual Artists’ Resale Royalty: An Application of the Principal and Agent Model*, 5 REV. ECON. RES. COPYRIGHT ISSUES 37, 39 (2008); Sam Ricketson, *Moral Rights and the Droit de Suite: International Conditions and Australian Obligations*, 3 ENT. L. REV. 78, 85–86 (1990).

26. U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

27. Perlmutter, *supra* note 15, at 406; see also *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526–27 (1994) (citing *Twentieth Cent. Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

28. 2013 Report, *supra* note 6, at 37.

29. Berne Convention for the Protection of Literary and Artistic Works art. 14ter, § 1, Sept. 9, 1886, revised July 24, 1971, 828 U.N.T.S. 221. The Berne Convention is an international agreement aimed at equalizing the treatment of copyrighted works among its signatories. Although the United States initially declined to become a party to the Convention, the Senate ratified the treaty by enacting the U.S. Berne Convention Implementation Act of 1988. 17 U.S.C. § 101 (1988); see also 1 SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND* (2d ed. 2006).

30. See COPYRIGHT AGENCY & VISCOPY, *SUBMISSION TO US COPYRIGHT OFFICE ON ARTISTS’ RESELL ROYALTY RIGHT 5* (2012), available at http://www.copyright.gov/docs/resaleroyalty/comments/77fr58175/Copyright_Agency_Viscopy.pdf (“Our research shows that between 2007 and 2011, works by a total of 47 American artists have generated sales of USD 2,606,343 at Australian auctions.”).

31. See, e.g., Price, *supra* note 24; Schulder, *supra* note 1; see also RICKETSON & GINSBURG, *supra* note 2929. As is often the case with new developments in the art world, the genesis of the resale

the same time, the infamous auction of Rauschenberg's *Thaw* sparked a serious attempt to pass federal *droit de suite* legislation in the United States.³² Early in his career, famed artist Robert Rauschenberg sold a painting, entitled *Thaw*, to a collector, Robert Scull, for a humble \$900.³³ But when Scull resold the painting at a Sotheby's Auction for \$85,000, Rauschenberg became furious.³⁴ He famously complained, "I've been working my ass off for you to make all that profit!"³⁵

This incident, combined with the contemporaneous scholarly work, led to the drafting of multiple bills with resale royalty provisions, both in state legislatures and in Congress.³⁶ These efforts all proved fruitless, however, and the CRRA is still the only *droit de suite* law in the United States.³⁷ Legislative interest has since waned as other states have waited to see if the California law will prove a useful model. Although as many as fifteen other states have considered *droit de suite*

royalty right for visual artists took place in France. Starting in 1893, advocates of artists began calling for a resale right to be recognized by the French government. In 1920, mounting public pressure led the French legislature to adopt a resale royalty right for artists. Literally meaning "follow up right," the *droit de suite* granted French visual artists a 3% royalty upon resale of their works. See Hauser, *supra* note 4, at 1, 3-4. Other countries soon followed the example set by the French. By 1941, the governments of Italy, Czechoslovakia, Poland, Uruguay and Belgium had all enacted *droit de suite* legislation. See Jeffrey C. Wu, *Art Resale Rights and the Art Resale Market: A Follow-Up Study*, 46 J. COPYRIGHT SOC'Y U.S.A. 531, 535 (1999) (citing Schulder, *supra* note 1, at 22 n.13). When the Berne Convention was revised in 1971, the revisers added a new provision encouraging member states to codify "the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work." See Robert Plaisant, *Droit de Suite and Droit Moral Under the Berne Convention*, 11 COLUM.-VLA J.L. & ARTS 157, 157 (1987). In 2001, the European Union adopted a Directive requiring all member states to enact *droit de suite* legislation that satisfies specific guidelines. See Council Directive 2001/84, Resale Right for the Benefit of the Author of an Original Work of Art, 2001 O.J. (L 272) 32 (EC).

32. John Henry Merryman, *The Wrath of Robert Rauschenberg*, 40 J. COPYRIGHT SOC'Y U.S.A. 241, 247 (1993).

33. *Id.*

34. *Id.*

35. *Id.* Since the well-publicized encounter, Rauschenberg has worked to implement *droit de suite* legislation, even sparking a film about the sale and his subsequent efforts. *Id.*; see generally Baruch D. Kirschenbaum, *The Scull Auction and the Scull Film*, 39 ART J. 50 (1979).

36. See, e.g., H.B. 808, 112th Gen. Assembly, Reg. Sess., §§ 3379.10-23 (Ohio 1977); Elizabeth S. Weaver, *Artists' Resale Royalties Legislation: Ohio House Bill 808 and a Proposed Alternative*, 9 U. TOL. L. REV. 366, 367 (1978) ("On the federal level, forty-two bills providing artists' rights in thirty-six areas in addition to resale royalties are currently pending in Congress."); 2013 Report, *supra* note 6, at 6. Starting in the 1960s and continuing every decade since, there have been repeated efforts in Congress to implement some form of a resale royalty. In 1978, Congressman Henry Waxman of California's Thirty-Third District (which includes much of Los Angeles County) introduced the Visual Artists Residual Rights Act, which would have guaranteed a 5% royalty to artists for works resold at over \$1000. See Visual Artists' Residual Rights Act of 1978, H.R. 11403, 95th Cong. (1978). Representative Waxman's bill would have created a new administrative body under the Department of the Treasury tasked with enforcing the right and collecting the royalty. *Id.* In 1987, Senator Edward Kennedy and Representative Edward Markey of Massachusetts jointly introduced legislation which would have granted visual artists certain moral rights as well as a 7% royalty on the difference between the purchase price and the resale price, above a minimum threshold. See, e.g., Visual Artists Rights Amendment of 1986, S. 2796, 99th Cong. (1986); Visual Artists Rights Act of 1987, S. 1618, 100th Cong. § 3 (1987). The Kennedy-Markey Bill would have conditioned eligibility on registration with the Copyright Office. Visual Artists Rights Act of 1987, S. 1618, 100th Cong. § 3 (1987).

37. CAL. CIV. CODE § 986 (West 2014).

legislation,³⁸ the constitutional, administrative and economic barriers discussed in this Comment have likely served as deterrents to implementation.³⁹

This Comment demonstrates why some observers are correct to assert that *droit de suite* legislation can only be successful if implemented at the federal level.⁴⁰ The following sections discuss the challenges to the CRRA on appeal in the Ninth Circuit.

Although the Copyright Office issued a report in 1992 advising Congress against *droit de suite* implementation,⁴¹ an updated report recommends the adoption of a federal resale royalty.⁴² This Comment concludes that the updated report provides the blueprint for a robust federal resale royalty that avoids the constitutional and administrative concerns of state-level implementation.

A. THE CRRA

The California Resale Royalty Act was enacted in 1976. The CRRA requires payment to American artists⁴³ “[w]hen a work of fine art is sold at auction or by a gallery, dealer, broker, museum” and “the seller resides in California or the sale takes place in California.”⁴⁴ Fine art is defined as “an original painting, sculpture, or drawing or an original work of art in glass.”⁴⁵ Unless the right is waived or assigned away in writing, the CRRA obligates either the seller or his agent to pay a 5% royalty of the total sales price to the artist.⁴⁶ Anytime an auction house, gallery, dealer, broker, museum or other person acting as the seller’s agent sells a work of art, that entity “shall withhold 5 percent of the amount of the sale, locate the artist and pay the artist.”⁴⁷ Upon the death of the artist, the right transfers to the artist’s heirs for a period of twenty years.⁴⁸ The CRRA also provides for a collection agency, the California Arts Council, to collect and hold royalties on behalf of the artist until he or she is located.⁴⁹ Although the original act rendered the right effectively unwaivable, an amendment enacted in 1982 allowed artists to

38. Joint Opening Brief for Sotheby’s and Christie’s, *Estate of Graham v. Sotheby’s*, No. 12-56077 (9th Cir. June 8, 2012) [hereinafter “Auction Houses’ Brief”].

39. In New York, for example, *droit de suite* legislation has been considered and rejected on over ten different occasions. *Id.* at 6.

40. See, e.g., NIMMER, *supra* note 5, § 8C.04[C][2] (2012) (“[A]ny such right, if enacted at all, must be on the federal level.”); Jay B. Johnson, Comment, *Copyright: Droit de Suite: An Artist Is Entitled to Royalties Even After He’s Sold His Soul to the Devil*, 45 OKLA. L. REV. 493, 498 (1992) (arguing for the adoption of a federal resale royalty given “obvious disadvantages of leaving control of the resale royalty right to the individual states”).

41. See generally 1992 Report, *supra* note 15.

42. See generally 2013 Report, *supra* note 6.

43. The CRRA defines “artist” as anyone who, “at the time of resale, is a citizen of the United States, or a resident of the state who has resided in the state for a minimum of two years.” CAL. CIV. CODE § 986(c)(1) (West 2014).

44. *Id.* § 986(a).

45. *Id.* § 986(c)(2).

46. *Id.* § 986(a).

47. *Id.* § 986(a)(1).

48. *Id.* § 986(a)(7).

49. *Id.* § 986(a)(2).

assign away the right to collect the royalty.⁵⁰

Throughout its history, the CRRA has experienced rampant under-enforcement.⁵¹ In 1987, over a decade after implementation, the president of Sotheby's testified that the CRRA had garnered only \$15,000 in royalties.⁵² In making its ruling, the district court noted that, to date, around 400 artists have secured as little as \$328,000 total in royalties under the CRRA.⁵³ The administrative body in charge of collecting and distributing the royalties lacks funding and enforcement rights,⁵⁴ and the law has been criticized for placing too high a burden on the seller—or more likely the auction house, dealer, broker or museum acting as the seller's agent—to locate the artist and deliver the royalty.⁵⁵ Interestingly, California uses criminal law to promote transparency in the art market: it is a misdemeanor in California to make “a false statement as to the price obtained for any property consigned or entrusted for sale.”⁵⁶ Even so, prosecution seems unlikely, and the law has little value as a tool for artists attempting to collect royalties.⁵⁷ As one dealer noted, “nobody's paid, nobody's sued, [and] everybody's avoiding it.”⁵⁸

50. *Id.* § 986(a) (amended 1982); see also NIMMER, *supra* note 5, at § 8C.04 [B][6] (“Presumably, the intent is that the seller who is obligated to pay the royalty may not also be the assignee of the artist's royalty right.”).

51. See William A. Carleton, III, Note, *Copyright Royalties for Visual Artists: A Display-Based Alternative to the Droit de Suite*, 76 CORNELL L. REV. 510, 532 (1991) (“The little evidence available indicates that the [California] Act is ineffective and practically unenforceable.”); Mara Grumbo, Note, *Accepting Droit de Suite as an Equal and Fair Measure Under Intellectual Property Law and Contemplation of Its Implementation in the United States Post Passage of the EU Directive*, 30 HASTINGS COMM. & ENT. L.J. 357, 368 (2008) (“There appears to be a general consensus that the [California] Act is at best ineffective and at worst disastrous.”); see also Stephanie B. Turner, *The Artist's Resale Royalty Right: Overcoming the Information Problem*, 19 UCLA ENT. L. REV. 329, 363 (2012).

52. *Visual Artists Rights Act of 1987: Hearing on S. 1619 Before the S. Judiciary Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary*, 100th Cong. 304 (1987) (statement of Michael L. Ainslie, President and Chief Executive Officer, Sotheby's Holdings, Inc.).

53. *Estate of Graham v. Sotheby's*, 860 F. Supp. 2d 1117, 1121 n.3 (C.D. Cal. 2012), *appeal docketed*, No. 12-56077 (9th Cir. June 8, 2012) (“[E]nforcement of the CRRA has been spotty. The *New York Times* recently reported that, since the CRRA was passed in 1977, approximately 400 artists have received a total of \$328,000 in resale royalties.” (citing Patricia Cohen, *Artists File Lawsuits, Seeking Royalties*, N.Y. TIMES (Nov. 1, 2011), <http://www.nytimes.com/2011/11/02/arts/design/artists-file-suit-against-sothebys-christies-and-ebay.html>)); see also Jori Finkel, *Lessons of California's Droit de Suite Debacle*, THEARTNEWSPAPER (Feb. 16, 2014), <http://www.theartnewspaper.com/blogs/Lessons-of-Californias-droit-de-suite-debacle/31771>.

54. See CLARE MCANDREW & LORNA DALLAS-CONTE, IMPLEMENTING DROIT DE SUITE (ARTISTS' RESALE RIGHT) IN ENGLAND 44 (2002), available at <http://www.artscouncil.org.uk/media/uploads/documents/publications/325.pdf>.

55. Toni Mione, Note, *Resale Royalties for Visual Artists: The United States Taking Cues From Europe*, 21 CARDOZO J. OF INT'L & COMP. LAW 461, 469 (2013).

56. CAL. PENAL CODE § 536 (West 2014).

57. A 1986 survey of artists conducted by the Bay Area Lawyers for the Arts found that 32% of respondents “said dealers had refused to give them the name or address of the buyer or even the resale price, despite their right under the [CRRA] to assign collection of the royalty to another.” *Estate of Graham*, 860 F. Supp. 2d at 1121 n.3 (quoting 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, 523 (1995)).

58. See Carleton, *supra* note 51, at 532.

More critically, it had long been suspected—even by the drafters of the CRRA—that the law was an impermissible encroachment on the U.S. Constitution.⁵⁹ An invalidation of the CRRA on the basis federal copyright preemption and the dormant commerce clause would likely prevent any other state from implementing an effective resale royalty. Although it is possible that *droit de suite* legislation could be fashioned as a permissible state regulatory or tax law, any law that was so circumscribed would lack both scope and efficacy.

When a consortium of artists and artists' estates sued auctioneers Sotheby's, Christie's and eBay in 2011 for disregarding the California law,⁶⁰ the defendants expressed confidence in their defenses based on federal copyright preemption and the dormant commerce clause.⁶¹ In May 2012, the District Court for the Central District of California dismissed the artists' lawsuit on the grounds that the California Resale Royalties Act indeed violated the dormant commerce clause.⁶² Although the artists have appealed to the Ninth Circuit with the support of multiple amicus briefs,⁶³ the CRRA is likely to be struck down in whole, or at minimum crippled beyond repair. While the questions of federal preemption and dormant commerce clause are both at issue, the dormant commerce clause argument presents the most compelling and potent challenge to the CRRA. The Ninth Circuit will almost certainly find that the law impermissibly encroaches on the federal government's sole right to regulate interstate commerce.

B. THE RESELL ROYALTY WILL LIKELY SURVIVE FEDERAL COPYRIGHT PREEMPTION

While the Ninth Circuit previously held that the Copyright Act of 1909 did not preempt the CRRA,⁶⁴ the panel hearing *Estate of Graham v. Sotheby's* will have

59. See Auction Houses' Brief, *supra* note 38, at 5–6 (discussing letters to California legislators stating concerns the CRRA “would constitute an undue burden on interstate commerce in contravention of the Federal Constitution in its application to sales which occur outside the State of California”).

60. See, e.g., *Visual Artists Rights Act of 1987: Hearing on S. 1619 Before the S. Judiciary Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary*, 100th Cong. 304 (1987) (statement of Michael L. Ainslie, President and Chief Executive Officer, Sotheby's Holdings, Inc.). Testifying before a 1987 Senate subcommittee hearing, then-President and CEO of Sotheby's Michael Ainslie admitted that Sotheby's compliance with the California Resale Royalty Act had been “virtually nonexistent.” In the first decade after the CRRA was passed, Sotheby's set aside a mere \$15,000 in royalties. To provide context, Ainslie testified that Sotheby's had most recently conducted \$1.3 billion in annual sales. *Id.* at 1.

61. Priscilla Frank, *Artists Sue Auction Houses Over Royalties Law*, HUFFINGTON POST (Oct. 20, 2011), http://www.huffingtonpost.com/2011/10/20/artists-sue-auction-house_0_n_1023126.html (quoting Sotheby's: “We believe that we have meaningful defenses to the claims asserted and they will be vigorously defended.”).

62. *Estate of Graham v. Sotheby's*, 860 F. Supp. 2d 1117, 1124 (C.D. Cal. 2012), *appeal docketed*, No. 12-56077 (9th Cir. June 8, 2012).

63. See, e.g., Brief of Amicus Curiae Artists Rights Society, Inc., *Estate of Graham v. Sotheby's*, 860 F. Supp. 2d 1117, *appeal docketed*, No. 12-56067 (9th Cir. Mar. 7, 2013); Brief of Amici Curiae California Lawyers for the Arts et al., *Estate of Graham v. Sotheby's*, 860 F. Supp. 2d 1117, *appeal docketed*, No. 12-56067 (9th Cir. Mar. 7, 2013).

64. See *Morseburg v. Baylon*, 621 F.2d 972 (9th Cir. 1980). Because the transactions at issue took place prior to the enactment of the Copyright Act of 1976, the Ninth Circuit expressly declined to

the first opportunity to determine whether the Copyright Act of 1976 preempts a state law claim for payment of resale royalties.⁶⁵ Although legislative history suggests that Congress did not intend for the Copyright Act of 1976 to preempt “a right to a resale royalty,”⁶⁶ numerous commentators have suggested that the CRRA may nonetheless be preempted by either the first sale doctrine enunciated in § 109 of the Copyright Act, or the exclusive distribution rights granted by § 106.⁶⁷ In its 1992 Report, the Copyright Office “firmly suggest[ed] that any state *droit de suite* provision would be preempted under U.S. Copyright Law.”⁶⁸

Professor Nimmer explains the preemption provision of the Copyright Act of 1976 as follows:

[T]he Copyright Act pre-empts state law provided the following two elements coalesce: (1) the rights created under state law must be “equivalent” to one or more of the rights contained in the Copyright Act; and (2) such rights under state law must be applicable to works that constitute “works of authorship” within the subject matter of the Copyright Act.⁶⁹

To escape federal copyright preemption, a “state claim must have an extra element which changes the nature of the action.”⁷⁰ However, merely adding an element is insufficient if the state right is “part and parcel of the copyright claim.”⁷¹

On appeal, the auction houses have argued that resale royalties for works of visual art are equivalent to the exclusive distribution rights granted in § 106. In a separate, earlier decision also concerning the constitutionality of the CRRA, Judge Nguyen rejected this argument on a number of grounds.⁷² First, she found that legislative history belied the argument that resale royalties are equivalent to federal copyright’s exclusive distribution rights.⁷³ Judge Nguyen further reasoned that an artist may elect to give up his exclusive rights by transferring his copyright ownership, but will still retain the so-called *extra* right to a 5% resale royalty.⁷⁴ For example, in *Durgom v. Janowiak*, a California court held that the “state law right to receive royalties pursuant to a contract is not equivalent to any of the exclusive rights secured by a federal copyright.”⁷⁵ The exclusive distribution rights granted by federal copyright “function harmoniously rather than discordantly” with

address § 301(a) preemption. *Id.* at 975.

65. *Cf. Baby Moose Drawings, Inc. v. Valentine*, 2011 WL 1258529 (C.D. Cal. Apr. 1, 2011) (holding that the CRRA is not preempted by the 1976 Copyright Act).

66. *Id.* at *9–10.

67. *See* NIMMER, *supra* note 5, § 8C.04; 2 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 1129 n.235 (1994); Mione, *supra* note 55, at 474–75.

68. 2013 Report, *supra* note 6, at 20 n.129 (citing the 1992 Report, *supra* note 15).

69. NIMMER, *supra* note 5, § 8C.04[C].

70. *Laws v. Sony Music Entm’t, Inc.*, 448 F.3d 1134, 1143 (9th Cir. 2006).

71. *Id.* at 1144.

72. *Baby Moose Drawings v. Valentine*, 2011 WL 1258529 (C.D. Cal. 2011) (Nguyen, J.).

73. *Id.* at *3 (“State artists’ rights laws that grant rights not equivalent to those accorded under the proposed law are not preempted, even when they relate to works covered by [the Copyright Act]. For example, *the law will not preempt a cause of action for . . . a violation of a right to a resale royalty.*” (citing H.R. 514, 101st Cong. (1990)).

74. *See id.*

75. *Durgom v. Janowiak*, 74 Cal. App. 4th 178, 186–87 (1999).

the right to collect a resale royalty.⁷⁶ A resale royalty adds an additional incentive to the one created by the exclusive distribution rights granted by federal copyright. “[W]here Congress determines that neither federal protection nor freedom from restraint is required by national interest, the States remain free to promote originality and creativity in their own domains.”⁷⁷

The auction houses have also argued that California’s resale royalty conflicts with the objectives of the first sale doctrine, which precludes a copyright owner from controlling the resale of his work once he has initially transferred title.⁷⁸ A resale royalty functions by affecting downstream sales of works of visual art, which are certainly within the subject matter of copyright. Yet, this argument is also unlikely to succeed. The Ninth Circuit previously held in *Morseburg v. Balyon* that the CRRA was not preempted by the first sale doctrine as enunciated in the Copyright Act of 1909.⁷⁹ Critically, the Ninth Circuit has also held that the first sale doctrine in the 1909 and 1976 copyrights acts are “substantively identical,”⁸⁰ suggesting that if the 1909 Act did not preempt the CRRA, neither will the 1976 Act.

More fundamentally, while the first sale doctrine prevents a seller from exerting downstream pressure through his capacity as a *copyright owner*, the CRRA permits such downstream pressure through a seller’s capacity as the *artist*. *Droit de suite* legislation occupies a vacuum created by federal copyright—the resale royalty is a recognition that “[c]opyright law has discriminated . . . against artists for centuries.”⁸¹ The very reason that visual artists require a resale royalty is because the first sale doctrine fails to account for their unique needs.⁸² State laws such as the CRRA grant certain rights that are independent of copyright ownership, and thus do not upset the balance of incentives created by federal law.⁸³ And while copyright law prevents a copyright holder from influencing downstream sales, it does not prohibit some other source of state law—such as contract law, or as here, the CRRA—from regulating goods and products after their initial sale.

C. THE DORMANT COMMERCE CLAUSE PROHIBITS CALIFORNIA FROM REGULATING EXTRATERRITORIAL ART SALES

While federal law should not preempt the CRRA, the Ninth Circuit is

76. *Morseburg v. Balyon*, 621 F.2d 972, 978 (9th Cir. 1980).

77. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 165 (1989).

78. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1358 (2013).

79. *Morseburg*, 621 F.2d at 977.

80. *UMG Recordings, Inc. v. Augusto*, 628 F.3d at 1182 n.7.

81. Katreina Eden, Comment, *Fine Artists’ Resale Royalty Right Should Be Enacted in the United States*, 18 N.Y. INT’L L. REV. 121, 140 (2005).

82. Cary T. Platkin, *In Search of a Compromise to the Music Industry’s Used CD Dilemma*, 29 U.S.F. L. REV. 509, 522 (1995) (noting “the injustice built into the federal Copyright Act as a result of the first sale doctrine”).

83. *Cf.* Paul Heald, *Federal Intellectual Property Law and the Economics of Preemption*, 76 IOWA L. REV. 959, 1002 (1991) (concluding that “as the ‘Fine Art’ protected by the California Statute is subject to the rights and remedies of the Copyright Act, only Congress has the power to evaluate the data and establish a *Droit de Suite*”).

nonetheless likely to uphold the district court's ruling that the CRRA violates the dormant commerce clause. The drafters of the CRRA themselves originally expressed doubts regarding whether the law satisfied the dormant commerce clause, and this critical piece of legislative history will bear on the severability of the impermissible portion of the CRRA. But even a partially successful challenge based on the dormant commerce clause would likely devastate any hope for the CRRA or any other state-level implementation.

The Commerce Clause grants Congress exclusive authority to regulate interstate commerce, and by negative implication, prohibits regulation of interstate commerce by the states.⁸⁴ After some early uncertainty, the Supreme Court interpreted the Commerce Clause to allow states to regulate commerce of a local character, even if it had interstate effects.⁸⁵ Even then, the Supreme Court has historically struck down state laws that “favor in-state economic interests over out-of-state interests.”⁸⁶ “[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature.”⁸⁷

The auction houses argued that the CRRA marked an attempt by California to impermissibly regulate sales occurring outside its borders.⁸⁸ Sitting by designation on the district court, Judge Nguyen agreed and explained that “the CRRA explicitly regulates applicable sales of fine art occurring wholly outside California,” and that “the [law] regulates transactions occurring anywhere in the United States, so long as the seller resides in California.”⁸⁹ As such, the district court held that the CRRA impermissibly aims to regulate an area that is exclusively reserved for Congress.⁹⁰

The district court’s decision to strike down the CRRA on the basis of the dormant commerce clause was perhaps long overdue. In 1976, Stanford Professor John Merryman sent a letter to California legislators warning them not to extend the effect of the CRRA outside of California.⁹¹ A few months later, Legislative Counsel George Murphy advised both the legislators and the governor in a detailed memorandum that the extraterritorial reach of the bill “would constitute an undue burden on interstate commerce in contravention of the Federal Constitution in its application to sales which occur outside the State of California.”⁹² The decision to preserve the extraterritorial reach of the law persuaded the district court that the

84. U.S. CONST. art. I, § 8, cl. 3; *see also* ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 419 (3d ed. 2006) (discussing the dormant commerce clause).

85. *Compare* Gibbons v. Ogden, 22 U.S. 1 (1824) (in the wake of steamboat navigation, struggling with whether Congress and state legislatures had concurrent power to regulate interstate commerce), *with* Cooley v. Bd. of Wardens, 53 U.S. 299 (1851) (holding that subjects that are national in nature or that require a uniform system or plan of regulation are exclusively for Congress to regulate).

86. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986); *see also* *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994).

87. *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989).

88. *Estate of Graham v. Sotheby’s*, 860 F. Supp. 2d 1117, 1120 (C.D. Cal. May 17, 2012).

89. *Id.* at 1123–24.

90. *Id.* at 1124.

91. *See* Auction Houses’ Brief, *supra* note 38, at *5–6.

92. *Id.* at 6.

legislature had made “an obvious attempt to prevent the art market from fleeing the state to avoid the royalty.”⁹³ That the CRRA has survived for nearly four decades, notwithstanding this early recognition of its constitutional defects, is perhaps only a testament to the law’s negligible effect on the California art market.

The artists argue on appeal that the CRRA burdens only California residents, and not interstate commerce.⁹⁴ The Supreme Court has been clear that the dormant commerce clause serves not only to invalidate protectionist state legislation, but also to prevent states from directly regulating interstate commerce.⁹⁵ The fact that the law is not protectionist does not preclude the Ninth Circuit from finding that the CRRA directly regulates extraterritorial transactions and the nonresident agents of sellers—typically an auction house, broker, dealer, museum or some other person that facilitates the sale. The CRRA is not directed at local concerns, with only incidental effects on interstate commerce,⁹⁶ rather, it explicitly and directly regulates transactions and actors outside of California.

Consider the example given by Judge Nguyen: “Assume a California resident places a painting by a New York artist up for auction at Sotheby’s in New York, and at the auction a New York resident purchases the painting for \$1,000,000.”⁹⁷ As Judge Nguyen noted, the California resident is not the only party burdened by the CRRA; the CRRA also places affirmative responsibilities on Sotheby’s, a resident of New York:⁹⁸

[The CRRA] regulates the transaction by mandating that Sotheby’s (1) withhold \$50,000 (i.e., 5% of the auction sale price); (2) locate the artist; and (3) remit the \$50,000 to the New York artist. Should Sotheby’s in New York fail to comply, the New York artist may bring a legal action under [the CRRA] to recover the applicable royalty.⁹⁹

Because the CRRA not only regulates transactions occurring outside its borders, but also regulates sellers’ agents (California residents or not), it is clearly not true that the law only regulates commerce of a local nature. No state may regulate the extraterritorial conduct of a nonresident in this fashion.¹⁰⁰

93. Mione, *supra* note 55, at 472 (citing *Estate of Graham*, 860 F. Supp. 2d at 1126).

94. See generally Opposition of Motion to Dismiss, *Estate of Graham v. Sotheby’s*, No. 12-56077 (9th Cir. June 8, 2012).

95. See, e.g., *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986) (“When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.”).

96. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (holding that constitutionality of local law turns on whether the law is “directed to legitimate local concerns, with effects upon interstate commerce that are only incidental”).

97. *Estate of Graham*, 860 F. Supp. 2d at 1124.

98. *Id.*

99. *Id.*

100. See, e.g., *Brown-Forman Distillers Corp.*, 476 U.S. at 573–74 (invalidating a New York statute that regulated extraterritorial transactions involving interstate wholesale liquor distillers).

D. THE CRRA CANNOT BE UPHeld AS A TAX LAW

On appeal, the artists have portrayed the resale royalty as a state tax to fashion a constitutional argument not raised in the district court.¹⁰¹ The Supreme Court's dormant commerce clause jurisprudence allows state governments to impose nondiscriminatory and fairly apportioned taxes on activities that physically take place outside of the state.¹⁰² Rather than treating the royalty as a commercial regulation, the artists have instead characterized it as a use tax, or alternatively, as a tax on the gross receipts of the California seller. While the characterization of the resale royalty as a tax is itself suspect, even if accepted as such, the law would still violate the dormant commerce clause.

1. The CRRA Is Not a Tax Law

The artists' argue that the CRRA places a burden, or tax, on the seller or the seller's agent to collect the royalty and deliver it to the artist. The auction houses have responded that a resale royalty is fundamentally not a tax, because the "essential feature of any tax" is that "it produces some revenue for the Government."¹⁰³ The CRRA is clear that the royalty is paid directly from the "seller or the seller's agent . . . to the artist of such work of fine art or to such artist's agent."¹⁰⁴ According to the Supreme Court "[a] tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the government [and] has never been thought to connote the expropriation of money from one group for the benefit of another."¹⁰⁵

In addition, the legislative history of the CRRA expressly contradicts treatment of the royalty as a tax. The CRRA had originally provided for the State Board of Equalization, California's collector of sales and use taxes, to administer the resale royalty. The government agency objected that its "tax collecting authority [was] not applicable" to the CRRA because "it is inappropriate to mix the enforcement of private rights with the administration of the tax laws."¹⁰⁶ The artists argue that the difference between a private right and a tax is merely semantic, and would seem to admit that the CRRA grants artists a cause of action against sellers and their agents for "tax" evasion.¹⁰⁷

The Ninth Circuit could easily rule that the dormant commerce clause jurisprudence applicable to state taxes does not apply here because the California resale royalty is simply not a tax, but rather an impermissible commercial regulation of interstate commerce. The court may nonetheless address the artists'

101. See Appellee's Motion to Strike, *Estate of Graham*, No. 12-56077 (9th Cir. Jan. 28, 2014).

102. See generally *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

103. Auction Houses' Brief, *supra* note 38, at 33 (citing *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2594 (2012)).

104. CAL. CIV. CODE § 986(a) (West 2014).

105. *United States v. Butler*, 297 U.S. 1, 61 (1936).

106. Auction Houses' Brief, *supra* note 38, at 34.

107. See Appellants' Opening Brief, *Estate of Graham v. Sotheby's*, No. 12-56077 (9th Cir. Feb. 28, 2013).

substantive arguments, because even if treated a tax, the royalty could still violate the dormant commerce clause. It would not be impossible for another state to implement a resale royalty that actually functions as a tax, with the state collecting levies on art sales and using the revenue to directly or indirectly compensate artists. A Ninth Circuit ruling addressing the merits of the artists' tax arguments would indicate to other states whether a resale royalty can be implemented under the states' authority to collect revenue.

2. The CRRA Is Not a Constitutional Use Tax

In *Complete Auto Transit v. Brady*, the United States Supreme Court held that states were permitted to tax activity occurring beyond their physical borders, as long as the tax satisfied certain conditions.¹⁰⁸ As the California Supreme Court explained in a different case:

[A use tax is] intended to reach property purchased for use and storage in the taxing jurisdiction from retailers who, being outside such jurisdiction, are not subject to its laws. It also seeks to reach such property where the taxable event of a sales tax, i.e., the sale, occurs outside of this state or where such property is immune from the sales tax because of the commerce clause.¹⁰⁹

In order to tax such extraterritorial activity, four conditions must be met: (1) the tax must be applied to an activity with a substantial nexus to the taxing state; (2) the tax must be fairly apportioned; (3) the tax must not discriminate against interstate commerce and (4) the tax must fairly relate to the services provided by the state.¹¹⁰

The artists supporting the CRRA have argued that California can reach beyond its borders to impose a use tax in the form of a resale royalty on art sold by California residents. But as the auction houses have argued, the 5% royalty fails to satisfy three of the four requirements of the *Complete Auto* test.¹¹¹

First, the CRRA does not satisfy the requirement that the taxed activity have a substantial nexus with California. There is no requirement in the CRRA that the work of art for sale ever have been located in California, or that the sale of the art be in any way connected to California outside of its seller's residency. Indeed, the royalty must be collected even when the *only* nexus to California is the seller's residency.¹¹² But "in the case of a tax on an activity there must be a connection to

108. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

109. *Rivera v. Fresno*, 490 P.2d 793, 796 (Cal. 1971).

110. *Complete Auto*, 430 U.S. at 279.

111. Auction Houses' Brief, *supra* note 38, at 34.

112. Section 17014(a) of the California Revenue and Taxation Code defines a "resident" as either "every individual domiciled in this state who is outside the state for a temporary or transitory purpose" or "every individual who is in this state for other than a temporary or transitory purpose." See *Noble v. Franchise Tax Bd.*, 118 Cal. App. 4th 560, 566 (2004) (holding that California residents were subject to tax on sale of securities notwithstanding their intention to move to Colorado). There is a statutory presumption that a person who spends nine months or more in California is a California resident, but this presumption is rebuttable. See CAL. REV. & TAX CODE § 17016 (West 2014).

the activity itself, *rather than a connection only to the actor the States seeks to tax.*¹¹³ The auction houses point out that allowing the substantial nexus to be satisfied solely by the seller's residency would lead to absurd results—for example, “a Californian who opens a New York restaurant may be taxed by California on meals sold there.”¹¹⁴ When California's only connection is to the “actor it seeks to tax,” and not the “activity itself,” the extraterritorial reach of a statute must be struck down.

The artists point out that each of the defendants have physical presences in California and rely on *Quill Corp. v. North Dakota*, a case about upholding a use tax on nonresident mail-order retailers, for the proposition that an out-of-state merchant satisfies the substantial nexus merely by having a physical presence in the state.¹¹⁵ However, Justice Stevens made clear in *Quill* that physical presence is only a necessary condition of the “fair relation” requirement, not a sufficient condition.¹¹⁶ More importantly, the physical presence must be related to the taxed activity.¹¹⁷ The Supreme Court has never held that the fair relation requirement can be satisfied by a physical presence that is completely unrelated to the taxed activity. Such a rule would allow states to impose a use tax on activities conducted outside its borders, merely because the party conducting the activity had an unrelated physical presence within the state.

The question of whether the tax is fairly related to the services provided by the state is “closely connected to the first prong of the *Complete Auto* test.”¹¹⁸ Again, the CRRA does not require that the California seller ever stored or displayed the work of art in California, or that the seller's art collection has any connection to California. For example, imagine a California resident who purchases a work of art in New York while on vacation, and then displays it at her brother's home in Brooklyn. Five years later, the work of art is sold at a Sotheby's auction. Any services provided by California were in no way connected to the 5% resale royalty that the CRRA requires the seller or Sotheby's to withhold from the purchase price. Once again, the statute's application is solely dependent on the *actor*, not the *activity* as required by the Supreme Court in *Complete Auto*. Although the threshold for this requirement is admittedly low,¹¹⁹ the statute simply requires no connection between the extraterritorial art sales and services provided by the state of California. That Sotheby's has a presence in California is irrelevant: “any

113. *Allied Signal, Inc. v. Director*, 504 U.S. 768, 778 (1992) (citing *Quill Corp. v. North Dakota*, 504 U.S. 298, 306–08 (1992) (emphasis added)).

114. Auction Houses' Brief, *supra* note 38, at 46.

115. Appellants' Reply Brief at 25, *Estate of Graham v. Sotheby's* (9th Cir. Dec. 16, 2013) (No. 12-56077) (citing *Quill Corp.*, 504 U.S. at 313).

116. *Quill Corp.*, 504 U.S. at 313.

117. *Id.* at 302.

118. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 625–26 (1981).

119. See *Commonwealth Edison*, 453 U.S. at 624 (holding that a use tax could be imposed on “activity connected to interstate commerce to contribute to the general cost of providing governmental services, as distinct from those costs attributable to the taxed activity, [such as] the cost of providing police and fire protection, the benefit of a trained work force, and the advantages of a civilized society” (internal quotations omitted)).

benefit the Auction House[] receive[s] from California is unrelated to the out-of-state collection of royalties for artists.”¹²⁰

The most critical restraint in the *Complete Auto* test is the requirement that a use tax be fairly apportioned, evaluated by internal and external consistency tests.¹²¹ The CRRA is neither internally consistent—the requirement that “if every State were to impose an identical tax, no multiple taxation would result”—nor externally consistent—the requirement that only that portion of the revenues from the interstate activity which reasonably reflect the in-state component of the activity is being taxed.¹²²

If either “the seller resides in California or the sale takes place in California,” the CRRA states that sellers or their agents “shall pay . . . 5 percent of the amount of [a] sale,” regardless of whether other states are also collecting resale royalties.¹²³ Unlike California’s state income tax, which expressly avoids double taxation by allowing credits for income taxes paid to other states, the CRRA is not apportioned to tax only activity that is connected to California.¹²⁴ Thus, “if every State were to impose an identical tax,” double taxation would occur when both the seller’s state of residence and the state in which the sale takes place require a 5% royalty, resulting in a total exaction of 10% of the total sales price.¹²⁵ The CRRA thus fails an internal consistency test.

The CRRA is not externally consistent because the 5% royalty in no way reflects any in-state component of the activity. As pointed out above in the substantial nexus discussion, the statute does not require any in-state element before taxing extraterritorial art sales. Both tests make clear that even if the CRRA is considered a use tax, the burden imposed is unapportioned and unconstitutional.

3. The CRRA Is Not a Constitutional Tax on Gross Income

The artists have alternatively argued that a resale royalty is a tax on the seller’s gross profitable receipts. However, this characterization is misleading and relies on a tortured reading of the statute. The CRRA treats the royalty as an exaction on the total sales price, and makes no mention of the sellers’ gross receipts. Moreover, while the CRRA only applies to transactions where the sales price exceeds the seller’s original purchase price, there is no requirement that the seller still be profitable after paying expenses associated with the resale, including sales commissions, legal fees, shipping, insurance and marketing.

This distinction is critical, because if the resale royalty is a tax on gross receipts instead of on net profits, it does not meet the apportionment test articulated in

120. Auction Houses’ Brief, *supra* note 38, at 51.

121. *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983).

122. *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989) (citing *Container Corp.*, 463 U.S. at 169).

123. *Id.*

124. *Noble v. Franchise Tax Bd.*, 118 Cal. App. 4th 560, 566 (2004) (citing CAL. REV. & TAX CODE § 18001 (West 2014)).

125. *Goldberg*, 488 U.S. at 261 (citing *Container Corp.*, 463 U.S. at 169); see Auction Houses’ Brief, *supra* note 38, at 48–49 (discussing double taxation under hypothetical “NYRRA”).

Complete Auto.¹²⁶ In “considering the constitutionality of a gross receipts tax . . . only the receipts generated from the in-state component of the underlying activity” are taxable by the state.¹²⁷ As discussed at length above, the CRRA is not “apportioned to reflect the location of the various interstate activities by which it was earned” and therefore violates the dormant commerce clause.¹²⁸ No portion of the seller’s gross receipts from an extraterritorial sale is attributable to any in-state component, much less a 5% royalty on the total sales price.

E. SEVERANCE WON’T SAVE CALIFORNIA’S RESALE ROYALTY

The future looks grim for the California Resale Royalty Act. The Ninth Circuit is not likely to allow the CRRA, either as a regulation on local commerce or as a fairly apportioned tax. Constitutional rulings of this nature would indicate to other states that any *droit de suite* legislation could only apply to in-state sales. Of course, such a law would likely destroy the state’s art market. Such reasoning was at the heart of the district court’s decision to strike down the entire CRRA rather than preserve the in-state effect of the law.¹²⁹

The Ninth Circuit is likely to closely scrutinize the district court’s decision that the out-of-state sales provision is not severable. While the provision imposing a royalty on in-state sales surely passes constitutional muster, the district court found that the legislature viewed the out-of-state sales provision as indispensable and would not have passed the act without it.¹³⁰ Judge Nguyen reasoned that without the out-of-state provisions, the California art market would suffer, an effect the CRRA’s drafters surely hoped to avoid.¹³¹ Applying the volitional severability doctrine,¹³² Judge Nguyen ruled that that the severance provision did not apply, despite its explicit instruction that “if any provision . . . is held invalid for any reason . . . such invalidity shall not affect any other provisions . . . and to this end the provisions of this section are severable.”¹³³

On appeal, the artists have used this same legislative history to argue in favor of severance. They argue the severance provision was included to address the precise

126. *Oklahoma Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 190 (1995).

127. Auction Houses’ Brief at 51 (citing *Northwood Constr. Co. v. Township of Upper Moreland*, 579 Pa. 463 (2004)).

128. *Id.*

129. *Estate of Graham v. Sotheby’s*, 860 F. Supp. 2d 1117, 1125 (C.D. Cal. May 17, 2012).

130. *Id.* at 1126.

131. *Id.*

132. “Severability is of course a matter of state law.” *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). Under California law, an invalid portion of a statute “can be severed if, and only if, it is grammatically, functionally and volitionally separable.” *Hotel Emps. & Restaurant Emps. Int’l Union v. Davis*, 981 P.2d 990, 1009 (Cal. 1999) (quoting *Calfarm Ins. Co. v. Deukmejian*, 771 P.2d 1247, 1256 (Cal. 1989)). “[I]t is ‘volitionally separable if it was not of critical importance to the measure’s enactment.’” *Id.* Severance is not appropriate if “[the court] cannot be certain that the Legislature would have enacted the measure without the [offending] requirement.” *Cnty. of Sonoma v. Superior Court*, 173 Cal. App. 4th 322, 352 (2009).

133. *Estate of Graham*, 860 F. Supp. 2d at 1126 (citing CAL. CIV. CODE § 986(e) (West 2014)).

concerns raised by Merryman and Murphy.¹³⁴ Given the uncertain fate of the California sellers provision, the artists argue that the legislature included the severance provision to preserve the in-state reach of the statute even if the out-of-state reach was struck down. They argue that the legislative history does not establish conclusively that the out-of-state sales provision was considered indispensable.¹³⁵ They further point out that, without citing any evidence, the district court assumed that the drafters were concerned about a potential negative market effect.¹³⁶ In truth, the drafters may have recognized that hampering the California art market may have been a necessary evil in bestowing the benefits of the *droit de suite* on California artists.

The artists likely have the better argument here, and only the extraterritorial reach of the law should be struck if it is judged unconstitutional. The problem, however, is that if the CRRA is unable to reach California sellers, the law will almost certainly damage the California art market. The CRRA would discourage sellers from conducting transactions inside California, at least as long as the cost of moving does not exceed 5% of the total sales price. The larger the sale, the greater the incentive to conduct the transaction outside of California's borders. While it is unclear if the CRRA as it currently stands has harmed the California art market,¹³⁷ the CRRA would doubtlessly drive art sales out of the state if stripped of its extraterritorial reach.

III. RECENT DEVELOPMENTS: THE EQUITY FOR VISUAL ARTISTS ACT AND THE COPYRIGHT OFFICE'S 2013 UPDATED REPORT ON THE RESELL ROYALTY

Even as the CRRA faces elimination, artists may yet benefit from the birth of a federal resale royalty right. In December 2011, Representative Jerrold Nadler of New York and Senator Herb Kohl of Wisconsin jointly introduced *droit de suite* legislation in Congress.¹³⁸ The Equity for Visual Artists Act of 2011 seeks "[t]o amend the copyright law to secure the rights of artists of works of visual art to provide for royalties."¹³⁹ Although the bill died in committee,¹⁴⁰ it should find renewed strength and support in the Copyright Office's most recent study of the resale royalty. In the report, Register Maria Pallante reversed the Copyright Office's prior position and recommended that Congress consider a resale royalty to place visual artists on equal footing with other artists.¹⁴¹

134. See Appellants' Opening Brief, *supra* note 107, at 47–57.

135. See *id.*

136. *Id.*

137. See 2013 Report, *supra* note 6, at 22 n.149.

138. Equity for Visual Artists Act of 2011, S. 2000, 112th Cong. (2011); Equity for Visual Artists Act of 2011, H.R. 3688, 112th Cong. (2011).

139. Equity for Visual Artists Act of 2011, H.R. 3688, 112th Cong. (2011).

140. Tracy Zwick, *Battle Heats Up Over Resale Royalties for Artists*, ART IN AMERICA MAGAZINE (May 7, 2013), <http://www.artinamericamagazine.com/news-features/news/battle-heats-up-over-resale-royalties-for-artists>.

141. 2013 Report, *supra* note 6, at 1.

The Copyright Office made the following observations and recommendations in its report:

- Although visual artists possess the same exclusive rights under copyright law as other authors, they are disadvantaged as a practical matter by certain factors endemic to the creation of works that are produced in singular form (or in very limited copies) and are valued for their scarcity. There are sound policy reasons to address this inequity, including the constitutionally-rooted objective to incentivize the creation and dissemination of artistic works.
- While a resale royalty could be one of many factors affecting the location of auctions and other art sales, there is no evidence to conclusively establish that it would harm the U.S. visual art market. Studies produced since this Office last examined the issue in 1992 belie earlier assumptions that a resale royalty would substantially reduce prices in the primary art market or shift the secondary art market away from the United States.
- Although adoption of a resale royalty right is one option to address the disparate treatment of artists under the law, it is not the only option, and more deliberation is necessary to determine if it is the best option. The Office's 1992 report highlighted the fact that resale royalties appear to benefit only an extremely small number of artists. Current studies and reports remain consistent with this view. In light of the potentially limited benefits, the costs of the law (e.g., administration and enforcement), while not insurmountable, suggest that Congress should approach this issue with some caution.
- Should Congress wish to adopt a resale royalty right in the United States, the Office recommends that the legislation: [a]pply to sales of works of visual art by auction houses, galleries, private dealers, and other persons and entities engaged in the business of selling visual art; [i]nclude a relatively low threshold value to ensure that the royalty benefits as many artists as possible; [e]stablish a royalty rate of 3 percent to 5 percent of the work's gross resale price (*i.e.*, a range generally in line with royalty rates in several other countries) for those works that have increased in value; [i]nclude a cap on the royalty payment available from each sale; [a]pply prospectively to the resale of works acquired after the law takes effect; [p]rovide for collective management by private collecting societies, with general oversight by the U.S. Copyright Office; [r]equire copyright registration as a prerequisite to receiving royalties; [l]imit remedies to a specified monetary payment rather than actual or statutory damages; [a]t least initially, apply only for a term of the life of the artist; and [r]equire a Copyright Office study of the effect of the royalty on artists and the art market within a reasonable time after enactment.¹⁴²

The relatively successful foreign implementation of resale royalty rights over the last two decades has clearly encouraged the Copyright Office to reconsider its previous position that the primary or secondary art market would be harmed by a resale royalty. Indeed, the report reviewed *droit de suite* legislation in 79 jurisdictions, with special attention to the effect of the royalty in the United Kingdom and the European Union.¹⁴³

142. *Id.* at 3–4.

143. *Id.* at 48–51. The Copyright Office noted that “there is certainly no conclusive proof that the

The report also noted that the People's Republic of China may consider *droit de suite* legislation, which would alleviate fears that a federal resale royalty would shift art transactions out of the United States.¹⁴⁴ As the California legislature was all too aware, the portability of the art market poses a serious threat to implementation of a resale royalty. A coherent latticework of federal and foreign legislation would make it much more difficult for sellers to move to a resale royalty-free jurisdiction.

The Copyright Office Report also provides practical suggestions for crafting a resale royalty that will be far more effective than California's royalty. The report calls for mandatory registration requirements, oversight by the Copyright Office and administrative fees paid to private collection societies—all to help “mitigate the administrative and transactional costs associated with a resale royalty scheme,” particularly one that applies to both public and private sales.¹⁴⁵

CONCLUSION

The CRRA suffers from constitutional and administrative infirmities that would plague any state-level implementation of *droit de suite* legislation. The California law impermissibly restricts interstate commerce and cannot be saved by characterizing the resale royalty as a tax. A dormant commerce clause ruling would likely prevent any other state from crafting a resale royalty that would not destroy that state's local art market.

Federal resale royalty legislation can reach where California cannot. A federal resale royalty would not only avoid problematic constitutional issues and reduce concerns about sellers fleeing, but could also offer a far more successful enforcement scheme by relying on the Copyright Office's experience keeping track of creative works through the registration system. The Ninth Circuit may soon decide the fate of the California Resale Royalty Act, but Congress will have the last word on whether all American artists can benefit from the *droit de suite*.

U.K or EU markets have suffered (or, for that matter, benefitted), directly or indirectly from the resale royalty.” *Id.* at 50.

144. *Id.* at 19–20. The Chinese secondary market has recently exploded, putting China on par with the United States with respect to market share. The People's Republic of China is currently revising its copyright laws, and recent media outlets have reported that the latest draft includes a resale royalty provision. *See, e.g., id.* at 19 (citing Katie Hunt, *China Debates Droit de Suite*, THE ART NEWSPAPER (Feb. 18, 2013), <http://www.theartnewspaper.com/articles/China-debates-droit-de-suite/28565>; Will *Droit de Suite Be Established in China?*, ART MEDIA AGENCY (Feb. 20, 2013), <http://www.artmediaagency.com/en/61427/will-droit-de-suite-be-established-in-china>).

145. *Id.* at 80.