

COVINGTON & BURLING LLP

ONE FRONT STREET
SAN FRANCISCO, CA 94111-5356
TEL 415.591.6000
FAX 415.591.6091
WWW.COV.COM

BEIJING
BRUSSELS
LONDON
NEW YORK
SAN DIEGO
SAN FRANCISCO
SILICON VALLEY
WASHINGTON

SIMON J. FRANKEL
TEL 415.591.7052
FAX 415.955.6552
SFRANKEL@COV.COM

December 5, 2012

Via Electronic Submission

Maria Pallante
Register of Copyrights
United States Copyright Office
Library of Congress
101 Independence Avenue, S.E.
Washington, D.C. 20559-6003

Re: *Comments of Sotheby's, Inc. and Christie's Inc. in Response to
Copyright Office's Notice of Inquiry re Resale Royalty Right,
Docket No. 2012-10, 77 Fed. Reg. 58175 (Sept. 19, 2012)*

Dear Ms. Pallante:

I am writing on behalf of Sotheby's, Inc. and Christie's Inc. (together, the "Auction Houses") in response to the Copyright Office's Notice of Inquiry dated September 13, 2012, published in the *Federal Register* on September 19, 2012, 77 Fed. Reg. 58175 ("Notice of Inquiry"). The Notice of Inquiry sought comment on "the means by which visual artists exploit their works under existing law as well as the issues and obstacles that may be encountered when considering a federal resale royalty right in the United States." *Id.* at 58175. The Auction Houses welcome the opportunity to respond to the questions raised in the Notice of Inquiry.

I. Introduction and Summary

Sotheby's, headquartered in New York, and Christie's, headquartered in London, are the world's two largest auction houses. Together, the Auction Houses employ more than 1,300 people in the United States and account for nearly \$4 billion in sales in this country. In keeping with the international nature of the art market, the businesses of the Auction Houses are highly globalized, with a large percentage of transactions involving sellers and buyers from around the world, and each of the Auction Houses conducts auctions in many locations outside of the U.S., including Europe, China, and the Middle East. At the same time, the Auction Houses recognize that their long-term success depends in part on the existence of a thriving primary market for living artists. For these reasons, the Auction Houses have a strong interest in the continued success of the U.S. art market and are well positioned to assess the many factors that can add to, or detract from, that success.

Maria Pallante
December 5, 2012
Page 2

The Auction Houses believe that there is no reason to adopt a federal resale royalty right in the United States and many important reasons not to.¹ As an initial matter, the concept of a resale royalty does not fit within the framework of U.S. copyright law, as discussed in detail in the separate comments submitted on behalf of the Auction Houses by Paul Clement of Bancroft PLLC. In Europe—where the resale royalty right, or *droit de suite* (“the right to follow”), originated in the early 1900s—copyright is treated as an extension of the author’s personality. Copyright in the United States, however, is primarily economic in nature, grounded in the constitutional mandate “[t]o promote the progress of science and the useful arts.” U.S. CONST., Art. 1, § 8, Cl. 8. Under the U.S. model, copyright law seeks to balance the author’s incentive to create new works against the public interest in accessing and using such works. A resale royalty right would upset this balance by likely reducing the prices paid to artists in the primary market for their works, as discussed below, while providing artists with little or no additional incentive to create. In particular, it would interfere with the first sale doctrine, codified at 17 U.S.C. § 109(a), which allows the purchaser of a physical object embodying a copyrighted work to freely dispose of that object while ensuring that the author retains copyright in the underlying work. A resale royalty right would give artists a perpetual ownership interest in the object as well, contrary to traditional notions of property rights under U.S. law.

In addition to the doctrinal difficulties it presents, the resale royalty right offers no practical benefits. As explained in detail below, proposals for resale royalty legislation are an attempt to solve a problem that does not exist. U.S. copyright law already enables artists to exploit the full value of their works—even when some of those works are later resold by a collector or investor—through the primary art market for first sales, with the possibility of additional income from licensed reproductions such as prints and merchandise. Further, because only a tiny percentage of artworks are ever resold, the vast majority of artists would gain nothing from a resale royalty, which would instead provide a new stream of revenue to already very successful artists.

¹ The Auction Houses are not alone in reaching this conclusion. As noted below, numerous prominent artists in Europe have opposed the right precisely because of its unequal and ineffective impact. And of the fifteen states in this country to consider the issue, including Florida, New York, Nevada, Ohio, and Texas, only one—California—has adopted a resale royalty, with little success even before the law was recently held unconstitutional. *See* Gilbert S. Edelson, *The Case Against an American Droit de Suite*, 7 *CARDOZO ARTS & ENT. L.J.* 260, 266 (1989) (“The California Resale Proceeds Right Law, enacted in 1976, was followed by an immediate down-turn in the local art market. It is well known that the law has been widely evaded over the years, allowing the California art market to recover to a great extent, particularly in Los Angeles. Nonetheless, actual damage did result from California’s Resale Royalty law.”); *see also Graham v. Sotheby’s, Inc.*, 860 F. Supp. 2d 1117 (C.D. Cal. 2012) (holding California resale royalty statute violates Commerce Clause).

Maria Pallante
December 5, 2012
Page 3

Yet not only would a resale royalty right fail to solve any problems, it would also create several new ones. The economic effect of a resale royalty would likely be to depress the prices that buyers are willing to pay for a work when it is first sold. This means that the vast majority of artists, whose works are never resold and tend to decline in value after initial sale, would lose money on first sales of their works that they would be unable to recover later through resales. Depressed sale prices and increased administrative costs would in turn lead to reduced investment in young, unproven artists—the very artists that the resale royalty is intended to benefit. And by imposing what is in effect a tax on art resale transactions, U.S. resale royalty legislation would likely drive those sales, especially sales of the highest-profile works, to countries that do not impose the same restrictions (or impose less onerous restrictions), with negative implications for the local and national economies.

These are the same conclusions that the Copyright Office reached twenty years ago in its 1992 report, in which it found insufficient “economic and copyright policy justification” to establish a resale royalty in the United States. Copyright Office, *DROIT DE SUITE: THE ARTIST’S RESALE ROYALTY* 149 (1992) (“1992 Report”). Nothing since 1992 has changed that would now support the implementation of the resale royalty. Rather, the only major development has been the European Union’s decision in 2001 to harmonize resale royalty legislation implementing the right across all EU member countries. *See* Council Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the Resale for the Benefit of the Author of an Original Work of Art, art 1, 2001 O.J. (L 272) 32-36. Data from the implementation of the EU directive—particularly in the United Kingdom, which, like the U.S., had previously studied and rejected the resale royalty right, and which also opposed the EU directive—confirms the 1992 Report’s findings: a resale royalty does not offer benefits that justify its burdens. The Copyright Office should therefore renew its recommendation to Congress not to enact resale royalty legislation in any form.

II. Resale Royalty Legislation Is a Solution in Search of a Problem

A. Artists and the Primary Art Market

An understanding of how fine art is typically marketed and sold helps to understand why the resale royalty does not (and need not) have a role in U.S. law. Speaking simply, the art market consists of two main components: the primary market and the secondary market. In the primary market, an artist sells her work directly to a buyer, often with the assistance of an intermediary such as a dealer (to whom the work will typically be consigned for sale to potential buyers). In the secondary market, the person who initially bought the work from the artist has the opportunity to resell that work to a secondary buyer. Auction houses are only one part of the secondary market, which also includes substantial private sales by dealers. *See, e.g.,* Alexandra Peers, *Qatar Purchases Cézanne’s The Card Players for More Than \$250 Million, Highest Price Ever for a Work of Art*, VANITY FAIR, Feb. 2, 2012, <http://www.vanityfair.com/culture/2012/02/qatar-buys-cezanne-card-players-201202> (reported

Maria Pallante
December 5, 2012
Page 4

private sale); *Sonnabend estate sold for \$600m*, THE ART NEWSPAPER, May 1, 2008, <http://theartnewspaper.com/articles/Sonnabend-estate-sold-for-600m/8510> (artworks in estate of late art dealer Ileana Sonnabend reportedly sold in two private transactions for \$600 million).

The primary market is the main or exclusive source of income for almost all American artists, and it is how most art is distributed in the United States. The secondary market, by contrast, revolves around the works of only a very small group of elite artists. A study from 1999 estimated that only 357 out of a projected 233,000 American artists—approximately 0.15 percent—had seen one of their works resold at a price of \$1,000 or more. 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, 543-44 (1999). This small group was dominated by the most successful artists of the time, including Willem De Kooning, Jasper Johns, and Roy Lichtenstein. *Id.* The resale market remains just as heavily skewed today: In 2010, the works of 831 artists of any nationality were sold at auction in the United States, and at most 380 of them were American. See Clare McAndrew, THE GLOBAL ART MARKET IN 2010: CRISIS AND RECOVERY 112-125 (TEFAF 2011) (“2011 TEFAF Report”). For the vast majority of individuals who regard themselves as full-time artists—more than 99.8 percent, according to the 1999 study—the secondary market holds little significance.

The lack of a secondary market has not prevented average American artists from supporting themselves financially. Indeed, the notion of the “starving artist” has long been discredited. A 1986 study found that, based on an analysis of census data, “there is no basis for concluding that artists earn any less on average than they would in other jobs.” Randall K. Filer, *The “Starving Artist”—Myth or Reality? Earnings of Artists in the United States*, 94 J. POL. ECON. 56, 73 (1986). There is no reason to think that the economic situation of American fine artists has declined. Recent statistics from the Bureau of Labor Statistics estimate that in 2010 the median annual wage for jobs for fine artists, including painters, sculptors, and illustrators, was \$44,850; by comparison, the median annual wage for all occupations in the United States was \$33,840. See Bureau of Labor Statistics, National Employment Matrix, Selected Occupational Projections Data, available at <http://data.bls.gov/oepl/oepl?Action=empoccp>.

Thus, as the Copyright Office recognized in its 1992 Report, “[t]he notion of starving artists being exploited by wealthy, savvy investors does not do justice to reality.” 1992 Report at 140. And with the secondary market restricted to only the most well-known (and already very well-compensated) artists, few—if any—artists are in the position where their works are being resold for large profits yet they themselves are struggling to make ends meet. Accordingly, there is no basis to conclude that most American artists are in need of, or would benefit from, a resale royalty.

Maria Pallante
December 5, 2012
Page 5

B. Fairness of the Copyright Act to Visual Artists

Another broad rationale often advanced for a resale royalty right—that it is necessary to put visual artists on equal footing under the Copyright Act, *see* S. 2000, 112th Cong. (2011) (referred to as the “*Equity for Visual Artists Act of 2011*”)—also does not survive serious scrutiny. Visual artists already receive equitable treatment under the law as compared to other authors entitled to copyright protection. For all creators, U.S. copyright law applies the same basic trade-off: Under the first sale doctrine, codified in Section 109(a) of the Copyright Act, once the author of a work sells a piece that embodies the work, he or she is not entitled to further compensation should that piece be sold again, yet the author generally retains copyright in the underlying work. *See* 17 U.S.C. § 202.

That said, the very nature of different forms of creative work supports different types of business models. For example, a playwright earns money mainly from performances of her play, although she might also sell a few printed copies of the script. In contrast, a novelist’s primary source of income is selling hardcover, paperback, or e-book copies of his novel, although he might also be able to license that novel to be adapted for stage or screen. Meanwhile, as described above, the painter makes most of her money from the sale of her original painting, which, as a unique object, will likely sell for more than a copy of a novel, or than a reproduction of the painting. However, because the artist ordinarily continues to hold the copyright in the image of her painting, she might *also* license the work for use in limited-edition prints, merchandise, and other commercial reproductions, if there is a market for such uses. Indeed, some contemporary visual artists (consider the graphic works of Barbara Kruger, combining photographs with blocks of words) might make much of their income from sales of reproductions of their works.

None of these models is inherently more lucrative—or fair—than the others. As the Notice of Inquiry observes, a novelist has “numerous opportunities . . . to earn income from the original novel without having to write another book or restrict the number of books available for purchase in the marketplace.” Notice of Inquiry at 58176. Such opportunities, however, will prove valuable only if there is sufficient demand for that novel. The same is true of a painting—the only difference is that, as the 1992 Report found, “the value of works of art is determined by scarcity,” so “works of fine art do not require the same level of demand to secure a living for the artist.” 1992 Report at 130. What matters is not whether the painter has the same opportunities to sell reproductions, but whether there is demand for the work itself. And because the level of demand necessary to support a painter is lower than for the author of a mass-reproduced novel, “it may be argued nevertheless that the copyright scheme, in fact, favors these artists.” *Id.*

There is therefore nothing unfair, or even unique, about the circumstances of visual artists under U.S. copyright law. After all, visual artists are not the only copyright holders whose ability to sell multiples of their works is limited. Architects work within similar constraints, as their works (architectural drawings) are embodied in physical objects (buildings),

Maria Pallante
December 5, 2012
Page 6

neither of which is likely to have a market for reproductions. At the same time, many visual artists whose works might be covered by resale royalty legislation, such as sculptors and photographers, *are* able to sell multiples of their works. If they choose not to do so (or to do so only sparingly), it is because they believe they will benefit from such scarcity—that is, they have decided they will earn more money by selling fewer copies at a higher price than they would by selling a greater number of copies at a lower price. Put another way, the unsuccessful songwriter is no better off than the unsuccessful sculptor; the songwriter does not benefit from being able to sell multiple copies of a song if few want to buy it. Similarly, the successful painter is much better off than the unsuccessful novelist, even if the latter has, in theory, a convenient market for multiples.

Visual art is also not unique in that its value derives from its scarcity. The Notice of Inquiry suggests that, because “the value of [a work of art] is based on its originality and scarcity,” “it may be a collector or other downstream entity that will derive the most financial benefit” from the sale of that original. Notice of Inquiry at 58176. This may be true, but it is equally true of a manuscript (or first edition) of a famous book, or the original sheet music of a famous symphony. In each scenario, the physical object that embodies the copyrighted work is valuable precisely because so few of its kind exist and there is sufficient demand for the “original.”

Hence, copyright law provides all authors with the same bundle of rights, but the varying business models most appropriate for different forms of expression—books, songs, paintings, etc.—may mean that certain rights under Section 106 of the Copyright Act will have greater or lesser value depending on the category of work. Granting the authors of works of visual art *additional* rights would not remedy an inequity, but create a new one.

C. Creating and Capturing the Value of an Artist’s Work

For these reasons, artists are already able to fully exploit the value of their works without the intervention of a resale royalty. Because most works are never resold, as discussed above, in the majority of cases the first sale *is* the full value of the work. Indeed, “it is an economic reality that most art depreciates in value,” 1992 Report at 137, so the first sale typically represents the highest price that anyone will be willing to pay for the work—and that payment goes to the artist.

Artists (and their estates) often supplement this first sale income by licensing their works for limited-edition prints, merchandise, and other commercial reproductions. Popular websites like Ebay and Etsy have created additional opportunities for artists of all kinds to develop a market for derivative uses of their work. *See, e.g.*, eBay, Prints: 2000-Now, http://www.ebay.com/sch/Prints-/360/i.html?_dmppt=Art_Prints&Date%2520of%2520Creation=2000%252DNow&rt=nc; Etsy, Digital Illustrations, http://www.etsy.com/browse/art/drawing-illustration/digital?h=826a65c6&lid=112962511&ref=cat_subcat_tile_4.

Maria Pallante
December 5, 2012
Page 7

And in those rare instances when an artist's work is resold in the secondary market, the resale also inures to the benefit of the artist. Contrary to the Notice of Inquiry's suggestion, the collector or investor who resells a work for a profit does not "benefit exclusively" from the resale. *See* Notice of Inquiry at 58176. Rather, as the 1992 Report recognized, successful artists "secure ever increasing prices as their reputations grow and they sell successive works." 1992 Report at 144. This is because the resale of one piece helps establish the market value for that artist's work more broadly, and the artist is able to capitalize on this increase by charging higher prices both for new works and for unsold earlier works. *See* John Henry Merryman, Albert E. Elsen, and Stephen K. Urice, *LAW, ETHICS AND THE VISUAL ARTS* 604-05 (5th ed. 2007) (after 1973 auction at which Robert Rauschenberg's painting *Thaw* was resold for \$85,000 after originally being sold for \$900, the artist, who "still held a number of earlier paintings of the same period" "raised sharply [the prices for the earlier works] the day after the auction," as "[t]he widely-publicized sale . . . meant that Rauschenberg's new work immediately commanded much higher prices on the primary market").² Thus, successful artists "continue to maintain a connection with their body of work, albeit not the specific work resold, even after sale, undercutting one of the primary arguments supporting the royalty." 1992 Report at 144.

Finally, it is important to recognize the role played by others in the art world—including dealers, auction houses, online brokers, critics, and museums—in establishing and increasing the value of an artist's work. As crucial as the artist's contributions are to the calculus, "[t]he value of a work of art is not just the result of the artist's genius and its intrinsic merits." Simon Stokes, *ARTIST'S RESALE RIGHT (DROIT DE SUITE): UK LAW AND PRACTICE* 6 (Institute of Art and Law 2012). Rather, as the Copyright Office recognized in 1992, a range of factors contribute to the market value of an artist's work, including

the premature death of the artist, his failure to live up to earlier promise, and any reduction in supply of an artist's work or inclusion in a well-known collection, as well as inflation in the art market generally. The price of art, like other commodities, varies with supply and demand, and the artist is only one of the many factors that impact price.

1992 Report at 137. Other key factors can include a dealer's efforts to promote the artist early in the artist's career, a critic's positive review of the artist's work, or a museum's decision to display the artist's work in a career retrospective. *See* John Henry Merryman, *The Wrath of*

² In fact, the success of certain artists in the secondary market has allowed them to bypass the traditional artist-dealer relationship altogether and sell their new works directly to the highest bidder: "Primary sales by artists at auction have also become more common, with some artists availing themselves of the greater publicity this affords. Many dealers cited Damian Hirst's *Beautiful Inside My Head Forever* straight-from-the-studio solo auction at Sotheby's in September 2008 as a clear example of the phenomenon . . ." 2011 TEFAF Report at 115.

Maria Pallante
December 5, 2012
Page 8

Robert Rauschenberg, 41 AM. J. COMP. L. 103, 108-09 (1993). Without intending to diminish in any way the tremendous talents of so many artists, the Auction Houses respectfully suggest that the concept of the resale royalty underestimates, if not altogether disregards, the significance of forces that are outside the artist's control and that contribute to both the recognition of particular artists' works over time and the existence of a secondary market for those works.

III. National Resale Royalty Legislation Would Not Benefit Artists or the Public

A. To Those Who Have, More Will Be Given

Supporters of the resale royalty often argue that the royalty is necessary because, without it, the struggling artist "shares none of the gain, if his work is resold for a large profit." Donald M. Millinger, *Copyright and the Fine Artist*, 48 GEO. WASH. L. REV. 354, 376 (1980). As explained above, this reasoning is faulty on several levels, given that the works of most American artists are not being resold in the secondary market, and that when their works are resold, the artists tend to share indirectly in any appreciation their works have enjoyed.

Yet, even if there were other reasons to implement a resale royalty, such legislation still would not have the desired effect, as the royalty would end up helping only the most successful artists, while leaving lesser-known artists in essentially the same position they were in before. The Copyright Office recognized this in its 1992 Report when it cited evidence showing that "as few as one percent of artists will qualify for the royalty." 1992 Report at 145. As suggested above, subsequent analysis of the U.S. art market has confirmed this disparity, which is likely even wider than originally believed. See Wu, *Art Resale Rights and the Art Resale Market*, at 543-44 (1999 study finding that only approximately 0.15 percent of U.S. artists have works that have resold for \$1,000 or more).

Many prominent European artists recognized this feature of a resale royalty right and opposed its adoption across the EU precisely because a resale royalty "was designed to benefit artists, but instead creates a shameful inequality between famous artists on the one hand and struggling artists on the other." *Artists criticise royalties deal*, CNN.COM, July 3, 2001, <http://edition.cnn.com/2001/WORLD/europe/07/03/artists.royalties/> (internal quotation marks omitted) (quoting statement of group Artists Against Droit de Suite); see also Henry Lydiate, *Copyright & Resale Right*, ARTQUEST (2001), <http://www.artquest.org.uk/articles/view/copyright-resale-right1> (listing Karel Appel, Georg Baselitz, Anthony Caro, David Hockney, and Sigmar Polke as among established artists opposing EU resale royalty directive).

The EU's experience over the past several years has confirmed that resale royalties primarily, if not exclusively, benefit those artists who need help the least. For example, prior to adoption of the resale royalty in the UK, a Member of Parliament who supported the resale royalty predicted that at least half of the approximately 85,000 to 95,000 working fine artists in Britain would receive some amount of royalty payment under the new regime. In fact,

Maria Pallante
December 5, 2012
Page 9

according to an independent 2008 study sponsored by the publication *Antiques Trade Gazette*, only 568 British artists received resale royalty payments during the first eighteen months that the resale royalty law was in effect in the UK. Toby Froschauer, *THE IMPACT OF ARTIST RESALE RIGHTS ON THE ART MARKET IN THE UNITED KINGDOM* 16 (2008).

Just as striking was the lopsided distribution in the UK of funds among this already elite group. The same 2008 study found that 80 percent of the money collected went to just the top 10 percent of artists who earned royalties, and that the top twenty artists alone received a full 40 percent of the total collected. *Id.* at 17. This top twenty included some of the UK's most famous contemporary artists, such as Damien Hirst, David Hockney, Lucian Freud, and Banksy. *Id.*; see also Katy Graddy, Noah Horowitz, and Stefan Szymanski, *A STUDY INTO THE EFFECT ON THE UK ART MARKET OF THE INTRODUCTION OF THE ARTIST'S RESALE RIGHT* 32 (IP Institute 2008) (finding that “around 70% of artists receiving [resale royalties] would classify themselves in the top two quintiles [of national household income] while a relatively small fraction would be likely to appear in the lowest quintile”). This imbalance is likely to prove even greater under a system that imposes a royalty on only high-price resales, such as in the proposed bill before Congress. See S. 2000, 112th Cong. (2011) (applying royalty to auction resales of \$10,000 or greater).

Available data for the entire EU confirms the narrow and lopsided benefit conferred by a resale royalty. In all, based on a conservative estimate of the total number of artists currently working in the EU, 97 percent of living artists in the EU—and likely even more—have not earned any money from the introduction of the resale royalty. See 2011 TEFAF Report at 123 (works by only 5,072 living European artists resold at auction in 2010, out of 168,232 total “sculptors, painters, and related artists” according to the *Eurostat Labour Force Survey*, which does not account for unemployed artists or artists who earn their income primarily from another job). Rather, most of the royalties paid in the EU do not benefit living artists at all. Instead, the main beneficiaries of the EU directive have been the heirs of deceased artists (receiving 74 percent of all royalties collected)³ and collecting societies (which on average retained 20 percent of the funds collected). Arts Economics, *RESPONSE TO THE CONSULTATION ON THE IMPLEMENTATION AND EFFECTS OF THE RESALE RIGHTS DIRECTIVE (2001/84/EC)* (The European Coalition of Art Market Organisations 2011). A mere 6 percent of resale royalties paid went to living artists, and, as discussed above, nearly all of that amount went to already well-known and well-compensated artists. *Id.*

³ These statistics represent all EU countries except for the UK, whose resale royalty legislation was just recently extended to cover the works of deceased artists.

Maria Pallante
December 5, 2012
Page 10

B. No Additional Incentive to Create New Works

The concentrated effect of the resale royalty also means that few artists would have additional incentive to create new works if a resale royalty was put in place. As U.S. copyright law is grounded in the constitutional mandate “[t]o promote the progress of science and the useful arts,” U.S. CONST., Art. 1, § 8, Cl. 8, the role of copyright is to “motivate[] creativity, while encouraging the broad public dissemination of works to the public. Thus, in contemplating changes to the copyright law . . . this constitutional framework serves as a logical matrix for balancing creator and user rights.” 1992 Report at 127-28.

To begin, there is no reason to believe additional incentive is required to stimulate the creation of new works, as the U.S. art scene continues to flourish. *See, e.g.,* Rachel Corbett, *Miami’s Art Gamble Has Paid Off—Can Atlantic City Follow Suit?*, ARTINFO.COM, Nov. 27, 2012, <http://www.artinfo.com/news/story/843431/miamis-art-gamble-has-paid-off-can-atlantic-city-follow-suit> (reporting that Art Basel Miami Beach is “America’s biggest art fair,” bringing Miami “an estimated \$500-million economic boost each year”); Roberta Smith, *Like Watching Paint Thrive: In Five Chelsea Galleries, the State of Painting*, N.Y. TIMES, June 28, 2012, <http://www.nytimes.com/2012/06/29/arts/design/in-five-chelsea-galleries-the-state-of-painting.html>; Molly Glentzer, *Fair Shows Houston Thriving as Fine Art Market*, HOUS. CHRON., Sept. 14, 2012, <http://www.chron.com/news/article/Fair-shows-Houston-thriving-as-fine-art-market-3866890.php>.

And even if additional incentive were needed, a resale royalty right is not the solution because so few artists would benefit. Rather, the parties who would benefit from the royalty are very successful living artists, who already have sufficient incentive to continue producing art, and entities that do not create new works—the estates of successful deceased artists as well as collecting societies. In fact, economic analysis suggests that a resale royalty would *reduce* artists’ incentive to create new works. *See* William M. Landes & Richard A. Posner, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 38 (2003). As discussed in more detail below, where it has been adopted, the resale royalty right is typically made non-waivable, so that an artist always holds the right to collect royalties, even if he does not wish to. In this way, the artist is “prevent[ed] from shifting risk” to a buyer “because he cannot contract away his right of reclamation.” *Id.* As the buyer “must share any future speculative gains” in the work with the artist, economic analysis suggests that the buyer “will pay him less for the work, so the risky component of the [artist]’s expected remuneration will increase relative to the certain component.” *Id.*

From this perspective, the resale royalty right does not fit within the boundaries of U.S. copyright law, as it does not stimulate the creation of new works and might serve to dampen artists’ productivity.

Maria Pallante
December 5, 2012
Page 11

IV. National Resale Royalty Legislation Will Likely Harm U.S. Artists and the U.S. Art Market

A. Negative Impact on Art Prices

In addition to doing nothing to benefit most U.S. artists, the resale royalty threatens to harm those same artists as well as the U.S. art market more broadly. A likely effect of the resale royalty would be to drive down the prices that buyers are willing to pay for works of art. The Copyright Office recognized this in its 1992 Report, noting that “decreased prices for works of visual art in the primary market” are “the consequence of the later royalties.” 1992 Report at 128. Economic analysis explains that this decrease is the result of the artist’s continued ownership interest in the work even after its sale:

Rather than the full bundle of property rights passing over to the new owner at the first sale, the artist still retains certain rights, and this lowers the value of the work. The decrease will obviously depend on the amount of the resale right, on the expectations the artist and his client have about future resale values, on the way they both value risk, and on their time preference, but the resulting effect is clear: there will be a decrease and the artist will earn less. In competitive markets, the rebate on the price of the new artwork will exactly represent the expected discounted value of the future resale right.

Victor Ginsburgh, *The Economic Consequences of Droit de Suite in the European Union*, 35 *ECON. ANALYSIS & POLICY* 61, 62 (2005).⁴

⁴ In practice, attempts to quantify the effect of the resale royalty on art sales prices have proven inconclusive to date. See, e.g., Chanont Banterngansa & Kathryn Graddy, *The Impact of the Droit de Suite in the UK: An Empirical Analysis* (Sept. 10, 2010), <http://people.brandeis.edu/~kgraddy/published%20papers/BanterngansaGraddyJCE2011.pdf>. The UK is by far the biggest market to have recently adopted the resale royalty and so is ideally positioned for an analysis of how the legislation is likely to affect art markets around the world. However, the full impact of the resale royalty in the UK will not be known until experts have studied the effects of its application to both living artists and the heirs of deceased artists for up to seventy years after the artist’s death (and the latter, as noted in the text, represents the lion’s share of affected sales). See *id.* at 34. As this expansion of the right to deceased artists took place less than a year ago, in January 2012, more time is needed to gather and analyze data. See *Report on the Implementation and Effect of the Resale Right Directive (2001/84/EC)*, at 10, COM (2011) 878 final (Dec. 14, 2011), http://ec.europa.eu/internal_market/copyright/docs/resale/report_en.pdf (acknowledging “pressures on European art markets, in all price ranges, and for both the auction and dealer sectors” and noting that the scope of UK resale right would be “significantly expanded” in 2012). Finally, it is important to note that royalties paid under the EU directive are capped (at €12,500), so the effect on U.S. art prices could be even greater if the U.S. were to enact legislation that does not limit royalty amounts, as with the bill currently before Congress.

Maria Pallante
December 5, 2012
Page 12

Of course, an artist might be able to counteract this negative effect if she had the option to waive the resale royalty by contract when selling her work: the artist could then negotiate a higher first sale price for her work in exchange for transferring to the buyer her complete set of property rights. However, as set out in the Berne Convention and as implemented in the EU and elsewhere, the resale royalty right has been typically made inalienable. *See* 1992 Report at 128 n.13 (citing Berne Convention Article 14^{ter} (1)). Artists thus have no option to waive the right to a resale royalty, even if they would prefer to forego the possibility of such income in the future in exchange for the certainty of a higher sale price in the present.

A decrease in first-sale prices is especially problematic for the large majority of artists whose works do not increase in value and are never resold. As noted in the Copyright Office's 1992 Report, "except for well-established artists, who might ultimately benefit from royalties despite the initial price decrease, most artists' works do not increase substantially in value and the resale royalty will not make up for the initial deficiency." 1992 Report at 128 n.15. Nothing has changed since 1992 that would alter this outcome. Rather than offering artists a realistic chance of increased earnings from the secondary market, the resale royalty would in fact jeopardize the money they are presently able to earn through the primary market.

B. Reduced Investment in Young Artists

Another risk of the resale royalty right is that it would make it more difficult for young, unestablished artists to find the support they need to succeed in the market—an obviously problematic result for a law aimed at helping such artists. Again, the Copyright Office predicted this outcome in its 1992 Report, noting, for example, that because "the works of young artists are not immediately profitable and need to be subsidized by more successful, established artists," "the resale royalty could reduce the number of unprofitable exhibitions of inexperienced artists," particularly in smaller art galleries. 1992 Report at 133.

The EU's experience has borne out the 1992 Report's prediction. A survey of art dealers in the UK found that the resale royalty "discouraged [dealers] from investing over longer periods of time in younger emerging artists" and made them "less likely to purchase works outright from artists at the start of their careers." Froschauer, *THE IMPACT OF ARTIST RESALE RIGHTS*, at 19. In fact, according to the study, "[m]any smaller dealers exhibited a tendency to move away from living European artists altogether as a result of the administrative burden and impact on their profit margins." *Id.* at 21. These dealers are precisely the people most likely to support and promote the careers of artists who need time and guidance to develop a market for their artwork. By discouraging these critical early investments, the resale royalty could impede the progress of the very artists it seeks to help.

Maria Pallante
December 5, 2012
Page 13

C. Driving Art Sales to Other Countries

Artists are not the only ones likely to suffer as a result of the resale royalty. Adopting resale royalty legislation in the United States could drive art sales—especially sales of the highest-profile works—out of this country and to other markets that do not impose the same restrictions.

The global art market has made a strong recovery since the financial crisis of 2008-2009, growing 7 percent in 2011 to a total of €46.1 billion, or approximately \$59 billion based on current exchange rates. *See* Clare McAndrew, *THE INTERNATIONAL ART MARKET IN 2011: OBSERVATIONS ON THE ART TRADE OVER 25 YEARS 19 (TEFAF 2012)* (“2012 TEFAF Report”). The U.S. has played an important role in the recovery, accounting for 29 percent of global art sales in 2011. *Id.* at 23. Yet the U.S., once the dominant player, has lost ground in recent years; in 2006, for example, it controlled 46 percent of the market. *Id.* In 2011, for the first time in recent history, the U.S. ceded its number one ranking to China, which accounted for a 30 percent share of the overall market, a dramatic increase over China’s 8 percent share of just five years ago. *Id.* at 23. Likewise, in the markets for both Contemporary art (artists born after 1945) and Modern art (artists born between 1875 and 1945)—the two sectors of the art market that would be most directly affected by a resale royalty right—the U.S. recently fell to second place in terms of sales by value. *Id.* at 45-46, 48-49.

In a competitive international market, many factors can influence where a seller decides to bring its business—including whether a given jurisdiction collects resale royalties. This was true in 1976 when California enacted its resale royalty legislation, as prominent auction houses, including Sotheby’s, moved their contemporary art auctions out of Los Angeles, to the benefit of the New York art market. *See* Merryman, *The Wrath of Robert Rauschenberg*, at 116-117. And this remains true today. The European Commission recently reported that one effect of the EU’s resale royalty has been to increase the likelihood that sales of higher-priced works are diverted “to markets where transaction costs overall are lower, even taking account of transportation costs”:

In this vein, auction houses have noted cases of clients choosing to re-locate sales to New York, citing the resale right as a cost factor in that decision. The dealer sector has noted a tendency to shift transactions to one of the burgeoning international art fairs, with Art Basel [in Switzerland, which does not impose a resale royalty,] being cited as a case in point. In summary, sellers will rationally move to do business in those markets where the transaction will be most beneficial, and the resale right is one in a number of factors that play a role in the choice of sales location.

Maria Pallante
December 5, 2012
Page 14

Report on the Implementation and Effect of the Resale Right Directive (2001/84/EC), at 7; *see also* 2011 TEFAF Report at 75 (finding that introduction of resale royalty “into the EU alone has effectively replaced an internal trade distortion with an international one, to the general disadvantage of the EU’s art market”).

If the U.S. were to adopt resale royalty legislation, the share of the market that has recently been redirected from Europe to New York to avoid higher costs could once again be rerouted, this time to China, Switzerland, and other markets that do not levy a royalty on resales. This result is made even more likely by the increasing role of online auctions and telephone bidding, both of which help resellers move the physical location of an auction without significantly reducing the number of participating bidders. At the Auction Houses’ major sales of Impressionist, Modern, and Contemporary artworks, for example, typically substantially more than half the bidding is conducted through the submission of written bids, telephone bids, or internet bids. *See also* 2012 TEFAF Report at 102 (“The growth of the internet and use of the online channel has changed the infrastructure of the market, its accessibility to both buyers and sellers, and has dramatically altered the way business is conducted within the art trade.”). In fact, depending on the size of the royalty enacted in the U.S., some U.S. sales might even move back to London or other EU markets if those markets’ royalty rates are perceived as less onerous. *Compare* S. 2000, 112th Cong. (2011) (proposing flat 7 percent royalty on all works sold at auction in the United States for at least \$10,000), *with* Artist’s Resale Right Legislation, 2006, Sch. 1 (UK) (setting regressive royalty rates according to price range, with highest rate of 4 percent for sales up to €50,000).

Further, if art sales leave the U.S., it will affect not only those in the art industry, like dealers and auction houses, but also the economies of the communities in which they are located. In total, the U.S. art market includes an estimated 71,260 businesses, which last year generated more than \$17 billion. *See* 2012 TEFAF Report at 83, 185. Further, a recent study found that, in 2005, New York City art galleries and auction houses alone made \$659 million in direct expenditures within the city, including wages and benefits, rent, printing and publishing, shipping, and other fees. Alliance for the Arts, *ARTS AS AN INDUSTRY: THEIR ECONOMIC IMPACT ON NEW YORK CITY AND NEW YORK STATE* 44 (2006). With a multiplier effect of 2.12—meaning that an additional \$1.12 was generated in the city for each dollar of direct spending by the galleries and auction houses—these expenditures had a total economic impact of \$1.4 billion. *Id.* at 46. Fewer art sales in New York and other markets as a result of a resale royalty would mean reduced spending in the U.S. and, overall, a reduced economic impact of the art market on the U.S. economy.

D. Decreased Transparency in the Art Market

Implementing resale royalty legislation could have the further unintended consequence of reducing the public’s access to information about art sales in the secondary market. Were the royalty selectively applied to only certain portions of the art market like

Maria Pallante
December 5, 2012
Page 15

auction houses, as is true under the bill currently pending before Congress, it would likely drive a greater number of art sales to less public (and less publicly documented) venues, such as galleries, private dealers, and internet sales. See Shane Ferro, *Four Things to Know About the Nutty New Droit de Suite Bill Introduced in Congress Last Week*, ARTINFO, Dec. 21, 2011, <http://www.artinfo.com/print/node/754023>.⁵ For the small portion of artists who have a secondary market, a reduction in sales at public auction would deprive them of a critical tool for establishing a public record of their work's value, which, as described above, could in turn reduce their ability to demand higher prices on the primary market. This shift away from public auctions would also effectively bury critical information about a work's provenance—that is, the complete history of ownership of a particular work—thus hindering the important work of art scholars and historians.

V. Conclusion

The Auction Houses believe in—and, in the long term, thrive on—a robust market for emerging artists. However, as discussed above, a resale royalty does nothing to help this market and actually stifles it. Absent identification of an actual problem in the art market to be addressed and compelling evidence that a resale royalty will do so, there are no good reasons to enact a federal resale royalty right in the country, and many reasons not to do so. As the Copyright Office concluded in 1992, there may be ways that Congress can meaningfully help artists selling in the primary market, but a resale royalty right is not one of them. See 1992 Report at 151.

The Auction Houses appreciate the opportunity to provide these comments in response to the Notice of Inquiry and would be happy to provide additional information or testimony if that might be useful to the Copyright Office.

Very truly yours,



Simon J. Frankel

⁵ Applying the resale royalty to auction houses and not other sectors of the art market is not only counterproductive—it is anti-competitive and distorts the market. The European Commission recognized this when it rejected the French model of *droit de suite*, which was imposed on auction houses only, and insisted that the royalty must be applied to *all* resellers. See *Proposal for a European Parliament and Council Directive on the resale right for the benefit of the author of an original work of art*, at 21, 26, COM (1996) 97 final (Mar. 13, 1996).

COVINGTON & BURLING LLP

Maria Pallante
December 5, 2012
Page 16

cc: Karyn Temple Claggett, United States Copyright Office (via email)
Jason Okai, United States Copyright Office (via email)

Jonathan Olsoff, Sotheby, Inc. (via email)
Sandra L. Cobden, Christie's, Inc. (via email)