The Roundtable convened in the
Copyright Office Hearing Room, LM-408, Madison
Building, 101 Independence Avenue, S.E.,
Washington, D.C., at 1:00 p.m., Karyn Temple
Claggett, Associate Register of Copyrights,
presiding.

PRESENT
MARIA PALLANTE, Register of Copyrights
KARYN TEMPLE CLAGGETT, Associate Register of
Copyrights
JASON OKAI, Counsel for Policy and
International Affairs
CHRISTOPHER REED, Senior Advisor for Policy
and Special Projects, Office of the
Register
HONORABLE JERROLD NADLER, U.S. House of
Representatives
PANEL I: Changing Legal Landscape, Portability of the Art Market

TERRENCE BROWN, Society of Illustrators (1984 - 2008)
MARIE-ANNE FERRY-FALL, Societe des Auteurs dans les Arts Graphiques et Plastiques (ADAGP)
KAREN GRAY, Christie's, Inc.
JANET HICKS, One Mile Gallery
JANE A. LEVINE, Sotheby's Inc.
CLARE McANDREW, Art Economics
ROBERT PANZER, VAGA
GERHARD PFENNIG, VG Bild-Kunst
TANIA SPRIGGENS, Design and Artists Copyright Society (DACS)
IRINA TARSIS, ESQ., Center for Art Law
CYNTHIA TURNER, American Society of Illustrators Partnership

PANEL II: Incentive to Create New Work, Visual Artists and Sales
JOSEPH AZAR, Illustrators Club of DC, MD, & VA
SANDRA COBDEN, Christie's, Inc.
ANITA DIFANIS, Association of Art Museum Directors (AAMD)
SIMON FRANKEL, Sotheby's, Inc.
BRAD HOLLAND, American Society of Illustrators Partnership
CLARE McANDREW, Art Economics
ROBERT PANZER, VAGA
VICTOR S. PERLMAN, American Society of Media Photographers (ASMP)
MORGAN SPANGLE, Dedalus Foundation, Inc.
TANIA SPRIGGENS, Design and Artists Copyright Society (DACS)
FRANK STELLA, Conseil International des Createurs des Arts Graphiques, Plastiques et Photographiques (CIAGP)
QUINN STINE, Intergalactic Enterprises, LLC

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202-234-4433
PANEL III: First Sale/Free Alienability of Property, Constitutional Issues

JOSEPH AZAR, Illustrators Club of DC, MD, & VA
PAUL CLEMENT, ESQ, Christie's Inc.,
ANNE COLLINS GOODYEAR, College Art Association
THEODORE FEDER, Artists Rights Society
SIMON FRANKEL, Sotheby's, Inc.
JANET HICKS, One Mile Gallery
BRUCE LEHMAN, Visual Artists Rights Coalition (VARC)
ANDREW SHORE, Owners' Rights Initiative
QUINN STINE, Intergalactic Enterprises, LLC

PANEL IV: Equity for Visual Artists Act of 2011 (EVAA)

TERRENCE BROWN, Society of Illustrators (1984 - 2008)
SANDRA COBDEN, Christie's Inc.
ANITA DIFANIS, Association of Art Museum Directors (AAMD)
THEODORE FEDER, Artists Rights Society
ANNE COLLINS GOODYEAR, College Art Association
BRAD HOLLAND, American Society of Illustrators Partnership
BRUCE LEHMAN, Visual Artists Rights Coalition

JANE A. LEVINE, Sotheby's Inc.
PHILIPPA LOENGARD, Kernochan Center for Law, Media & the Arts
RALPH OMAN, The George Washington University School Law School
VICTOR S. PERLMAN, American Society of Media Photographers (ASMP)

IRINA TARSIS, ESQ, Center for Art Law
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MS. CLAGGETT: Good afternoon. My name is Karyn Temple Claggett and I'm the Associate Register of Copyrights and Director of Policy and International Affairs. Thank you all for coming to the Resale Royalty Public Roundtable. Today we plan to discuss, in some detail, issues relating to the consideration of a federal resale royalty right in the United States.

A resale royalty or a droit de suite, as it is often called in Europe, provides visual artists with an opportunity to benefit from the increased value of their work over time by granting them a percentage of the proceeds from the resale of the original works of art.

As many of you know, in 1992, the U.S. Copyright Office issued a comprehensive 750-page report on the issue. At that time, the office concluded that there was
insufficient economic and copyright policy justification for enacting and resale royalty right in the United States, but noted that Congress may wish to review the issue if the European community extended resale royalty rights to all of its members.

Since our initial report in 1992, now, more than 60 countries around the world, including the European Union, through a 2001 directive, have a resale royalty right in their national laws. Other countries, such as China, are currently considering such a right.

In the U.S., we have a California state law, and Representative Nadler and Senator Kohl introduced resale royalty legislation in the last Congress. Today, we will explore pros and cons of such a right and provisions we may wish to add to any future legislation on this issue.

Before we begin, I'd like to go over some brief logistics, but first, I will open it up to Maria Pallante, Register of
Copyrights, who will just give brief welcoming remarks.

REGISTER PALLANTE: Thank you, Karyn. Good afternoon, everybody. Thank you for coming. I have no doubt this afternoon will be exciting, and riveting, and controversial, and complex because we're talking about copyright law. And I really appreciate your participation. As we say on almost every issue, our record is only as good as the participation of the folks who come in and share with us, their interests and their client's interests.

So, on this particular issue, we have an open mind. We haven't done a study, and I apologize if Karyn said this already, since 1991. That's a dated study. There is a lot of interest and there's a lot of interest internationally in terms of what the U.S. next steps might be.

So I'll personally be in and out today, but again, thanks and we look forward.
to the discussion.

MS. CLAGGETT: Great. Thank you, Maria. So in terms of the logistics on how we're going to run the panels today, as mentioned, when we first listed our notice, we will not have opening statements, but we will ask for everyone to just briefly introduce themselves and the organization that they may be representing.

I will start, first, with my Copyright Office colleagues and then we'll go around the table for everyone to introduce themselves. Also, we do have a court reporter today taking down all of our comments and input, so when you do make comments in response to questions, if you could, again, briefly identify yourself for the record.

We will start with questions for the panelists, but if time permits, we will also elicit questions, and responses, and comments from the audience. Given time constraints, we have about an hour for each
panel. We will limit responses from each
panelist to about two to five minutes, so I
apologize in advance because we will cut you
off if you end up going over that time period.

At the close of the session, we
will, again, have brief remarks from Register
Pallante and Representative Jerry Nadler. If
you have any comments in addition to the
comments that participants are providing to us
today, the Copyright Office always has an
open-door policy, so we are happy to meet with
participants after this session as well.

Are there any questions before we
begin in terms of the logistics? Okay. Well,
I will ask my colleagues to introduce
themselves briefly, and then we'll go around
the table with everyone else.

MR. OKAI: I'm Jason Okai with the
Copyright Office, Counsel for Policy and
International Affairs.

MR. REED: And I'm Chris Reed,
also with the Copyright Office, Senior Advisor
for Policy and Special Projects in the Office
of the Register.

MS. CLAGGETT: We'll start with
Terrence Brown.

MR. BROWN: I am Terrence Brown.

I was the Director of the Society of
Illustrators for many, many years. An
organization founded in 1901. They have a
beautiful carriage house in Manhattan as their
museum headquarters, and I've been teaching,
also, the History of American Illustration at
the School of Visual Arts, and online, since
1995.

MS. CLAGGETT: Thank you. Should
we use the mics? And you can just speak into
the mics. They're all on.

MS. HICKS: They are? My name is
Janet Hicks. I work for One Mile Gallery. I
represent artists, emerging artists,
contemporary artists, and we're a gallery in
New York.

MS. SPRIGGENS: My name is Tania
Spriggens. I'm the Director of Communications from DACS, the Design and Artists Copyright Society. We're the leading U.K. collecting society managing the resale royalty. We're based in London.

MS. GRAY: My name is Karen Gray. I'm General Counsel and Chief Administrative Officer of Christy's Inc., the auction house.

MS. LEVINE: My name is Jane Levine and I am the Chief Global Compliance and Ethics lawyer at Sotheby's, the auction house.

MS. MCANDREW: I'm Clare McAndrew and I'm the founder and managing director of Arts Economics, and we're an independent economic research firm that specializes in the fine and decorative arts.

MS. CLAGGETT: You might need to lean in a little bit for the microphone.

MS. TARSIS: Irina Tarsis. I'm the founder of Center for Art Law.

MR. PANZER: I'm Robert Panzer.
I'm the executive director of VAGA. We represent about 10,000 artists and estates of artists for copyright and other intellectual property matters. And as a copyright collective, we clear rights on their behalf for the reproduction of their work. And of course, we would like to add resale royalty to one of our responsibilities.

MS. FERRY-FALL: I am Marie-Anne Ferry-Fall, the CEO of ADAGP, the French collective society for visual artists and we presently represent 1000 authors and we manage the resale rights since 60 years.

MR. PFENNIG: My name is Gerhard Pfennig. I was, until the end of 2011, managing director of the society Bild-Kunst in Germany, which introduced resale royalty and administered it since the '80s. Now I am a lawyer and I'm advising Bild-Kunst on this matter.

MS. TURNER: My name is Cynthia Turner. I've been a practicing medical
illustrator for 29 years. I'm co-chair of the
American Society of Illustrators Partnership,
which brings together 13 illustration
organizations representing medical
illustrators, natural science illustrators,
regular commercial illustrators, architectural
illustrators, cartoonists, et cetera.

MS. CLAGGETT: Thank you all.
Once again, thank you to all the participants.
As you all were able to hear, we truly have,
I think, a very experienced panel as well as
a varied panel that will be able to provide
the office with a number of different
perspectives.

The first panel that we're going
to discuss today is the changing legal
landscape and the portability of the art
market. We'll begin with the questions that
we listed in our second inquiry of notice and
follow-up with any additional questions that
we might have based on the comments that we
received.
As an overview, the issue that we're hoping to explore on this panel is how a resale royalty right might affect the overall art market and what other factors may affect the art market in addition to the possibility of a resale royalty right.

I will, generally, just open it up for panelists, so I won't call on specific people, but anybody who wants to participate, or provide a response to the question, or follow questions, feel free to do so. So first, in terms of the changing legal landscape, I just wanted to open it up and ask whether there have been specific changes that people want to highlight.

In addition to some of the changes that I highlighted before, for example, in terms of EU harmonizing its resale royalty legislation, that has either supported, or will support, or undermine the implementation of a resale royalty right in the United States, what particular legal changes have
there been that people would like us to know about in terms of our review of this issue; if any?

MR. PANZER: Obviously, the major change that's taken place has occurred internationally. I think there's close to 50 countries in the world that now have the resale royalty. So obviously, it's an idea that's of interest to quite a few jurisdictions, including, of course, the EC, which has mandated it.

And I think it's important for us, as members of the Berne Convention, to recognize the importance of having reciprocal relationships so we have an even balance of trade in the areas of copyright and intellectual property in general.

I think it's important for us to look at what's happening, in particular, in New York, and look towards harmonization, to some degree. We don't have to necessarily follow every move that's made there, but I
think we can learn from their experiences.

And I think we have a particularly good opportunity now because, in 1992, there wasn't much to look at, and so I think the Copyright Office itself was somewhat let's wait and see, but now, we've had a chance to see, and it's been pretty successful.

And some of the things that people feared most, such as movement of the market, really hasn't played out that way, or at least not to a degree that's recognizable statistically.

And so I think we really must use the European situation as a way to clearly analyze what might make sense for us here in the U.S.

MS. CLAGGETT: Thank you. Anybody else?

MS. SPRIGGENS: Since I have been part of the European situation, perhaps I can expand on that a little and say, certainly, ahead of implementation in the U.K., the first
stage implementation was in 2006, just to
living artists, that was extended to include
the heirs and beneficiaries of deceased
artists from the 1st of January last year,
there was a lot of concern from sectors of the
art trade that sales would be diverted to the
U.S. and to other countries that did not have
a resale royalty.

Certainly, studies conducted by
the government since then have indicated
there's been no negative effect on the art
market. We certainly haven't seen it. The
art market has fluctuated enormously since
2006. In fact, in 2007, it grew
astronomically huge. There was a massive
bubble, which subsequently burst, that was
nothing to do with the resale right.

And all the evidence we've seen is
that, lots of factors affect the art market,
not the resale right.

MS. MCANDREW: I'd like to come in
there because I do a lot of statistical
research and I know a lot of my statistics
have been used in the comments, so I would
like to, just for the sake of the Copyright
Office, just clarify a couple of things.

We need to look at the sectors
that are affected by artists' resale
royalties. We need to make sure that we're
concentrating on the sectors that are affected
by the directive, and that is, post-war, and
contemporary, and modern. They're the sectors
that are included, and that's about 74
percent, at the moment, of the global art
market, so just to hone in on the sectors that
are of interest.

In Europe, it covers auction and
dealer sales. They decided that, on the basis
of evidence from some people here in the panel
that it had the potential to displace sales.
This is why it was introduced in the first
place. And the evidence since then is that
Europe is losing marketshare.

If you look at 2006 to 2012,
Europe has lost marketshare in this area. The U.S. lost share as well, so China is definitely a factor. But what we've seen is that Europe has grown much slower than the U.S. The European Commission carried out a study in 2011, consulting all the interested parties, and they did not find that there was no evidence of effects on the market, but found there was no clear pattern and decided they would revisit it again.

They were worried about displacement of sales and they're going to revisit the study again in 2014 and 2015. But what they did accept in their report is that it could be one contributory factor.

So what I found, on the basis of completely independent analysis, is that there is correlation between the artists' resale right being introduced and Europe losing marketshare. Now, what I cannot say, or anybody can say, is the causality. So I'm not saying that one caused the other, and there's
a lot of factors that cause markets to shift, but the resale royalty is likely to be a contributory factor.

If you look at sectors of the market, for example, that are not affected, where the right isn't applied, like Old Masters, Europe has done much better in retaining share in those sectors, but it's this highly valuable and highly mobile post-war and contemporary sector that has seen the most movement over that period.

And what we really need to look at as well, in terms of this displacement of sales is that, has it done any good? I mean, the reason it was brought in was to create a level playing field. It was introduced in Europe as it was felt it was anti-competitive in the Single Market.

And what we found is, it hasn't created a level playing field. If anything, the U.K. has gained more share over that period, so it hasn't done what it was set out
to do, which was make it a level playing field in Europe, and Europe has lost share.

    Now, whether it's the sole factor, nobody can say it is or it isn't. We just don't have enough evidence, and I don't know if we ever will, but we need to look at the longest period we can to see what the effects are. I think some studies have looked at 2006 to 2008, and I saw in a few people's comments, they looked at the difference in the market between 2010 and 2011, and I'm not sure what the relevance of those was.

    This thing will play out over time, so we just need to look at the broad trends.

    MS. CLAGGETT: Thank you on that, and I will let you all speak next. Just, in order to drill down on that a little bit more, that is one of the things that we really did want to focus in this panel in the sense that, as we reviewed the comments we were kind of getting conflicting reports in terms of what
the effect on the art market is.

It may be that we need to drill down into particular sectors of the art market, as you mentioned, but we have some comments that cited economic studies that said there was no effect at all and then there were some comments that either cited the same study to say that there was a detrimental effect, or a possible detrimental effect, so we really wanted to get an insight into what real effect is there and what specific evidence of the effect.

Are there studies that we should particularly take a look at in terms of our analysis as to what the effect would be? And if you cannot identify, for example, specifically, that the resale royalty right might be the cause of either an increase or a decrease in the art market in the specific jurisdiction, what other factors are there out there that will need to be taken into account as well?
But I'll turn it over to Karen.

MS. GRAY: You know, we've been speaking about Europe, and obviously, we'll speak about Europe a lot today, but I also thought worthwhile to raise what's been happening in the United States, which is not a lot on this issue. You know, this has come before a few state legislatures. It has not been passed. There was a federal bill that has not been passed. I don't believe it actually received any sponsorship.

And also, you know, as we know, California's law was struck down. So Europe, I love Europe, very important countries, however, in the United States, which is where we are all today, this has not been an issue that has seen a great deal of positive or successful take-up.

MS. CLAGGETT: Did you want to make a comment?

MS. LEVINE: No. You know, I concur with that and just, you know, you
asked, at the beginning, what has changed, and
just to echo what Karen was saying, I think in
the United States, nothing, really, has
changed in the legal landscape since the 1992
report.

And all the, sort of, cogent
reasons that were articulated there, still
apply here under our legal system and under
the facts.

MS. CLAGGETT: I'll take Tania,
then Terrence, and then Janet.

MS. SPRIGGENS: Just quickly. The
research I referred to in respect of saying
the U.K. market has not been negatively
affected was Stefan Szymanski's report in 2008
conducted by the U.K. Government.

MS. MCANDREW: Well, I think,
obviously, 2006 to 2008 is much too soon to
see any effects.

MS. CLAGGETT: Could you just hold
on and just let her finish?

MS. SPRIGGENS: Yes, I just want
to make it clear that that was the study I was referring to that said there was no negative impact that could be seen. Granted, the right has only just been extended to include deceased artists, in the last year or so, so I agree, we have to wait and see, over an extended period of time, the impact.

However, I would firmly say that, considering the high-level of feelings around this right in the U.K., if there had been clear examples and evidence of sales being diverted to other jurisdictions, we would have heard about it, because those who were against the right would have made it very clear, that examples would have been put forward, and none of those examples have been forthcoming.

MS. CLAGGETT: Terrence?

MR. BROWN: Two things. First, you mention 1992, and I'd like to speak to, you know, the illustrator's world in that, in 1992, there as no market whatsoever for the physical art creator for books, magazines, et
cetera, beyond the circle. And then someone said, let's look at specific parts of the market.

Well, one of the new markets right now is illustration. You know, Heritage's, down in Dallas, sold $4.4 million. Swan, in New York, has now picked up. They're doing an illustration auction. You good folks at Sotheby put Norman Rockwell on the cover of your 2006 catalog; sold for $4.7 million.

Do you know that Norman Rockwell left this in the office of the art director, who took it home? So there is this market where these people who had no market for their work, gave it away, art directors took it, and now it's being sold for sig amounts of money. So that's a kind of market that I think the resale royalty would really advance those people and those states.

And the contemporary artist is selling because they never had this market before, they were never rewarded for the star
power that Rockwell brought that made him on
the cover of Sotheby's.

MS. CLAGGETT: Janet?

MS. HICKS: I was just going to
add one point about the changing legal
landscape. We did, in 1997, of course,
harmonize with the Berne Convention in
extending the copyright term to 70 years. So
I think that advancement towards that general
harmonization with Berne is a good move
forward in so far as getting the U.S. to be on
par with Berne, as we should be.

MR. PFENNIG: The first thing I
think we should do, we should point out, droit
de suite resale royalty gives more chances in
the market to one group of players who had
very little chances in this exploding market.
The artists as a group who takes less progress
and profit out of this explosion of the
market, which has many reasons.

New buyers develop in Asia and
other groups of people, for other reasons, are
buying art now. Capital investment has exploded and has changed the market.

Secondly, after the harmonization, or during the harmonization, process in Europe we have often heard the argument that sales would be shifted to other countries, to United States or Switzerland, to Great Britain.

The experience shows that even galleries from Switzerland, where there is no resale royalty, moved to London. The big gallery Hauser and Wirth, from Zurich, moved to London and I think they opened the fourth place in London, recently, which shows that resale royalty, which they have to pay in London, doesn't have any affect on these business developments because the buyers come to London.

This is the effect in Europe, most of the market goes to London, because there are the buyers. And nevertheless, the market is growing in France, and in Germany, and in other countries, so resale royalty has no
negative effect on the markets as far as we found out in our experience in Germany.

MS. FERRY-FALL: Thank you. I'm sorry for my English. I'm not so English literate, so I'll speak slowly.

MS. CLAGGETT: We're happy that you're here.

MS. FERRY-FALL: Regarding the figure. I would like to highlight, let's say, Clare McAndrew, but the European Commission report for December 2011, and she's expressed that there is no detrimental effect of resale right on the European art market.

And in this way, I can add, on the European Fine Art Foundation, the report on 2011, that between 1998 and 2008, ten years, the art market was growing more than 17 percent in France, more than 23 percent in Germany, with resale right legislation.

And in the U.K., with just a partial project sweep just for living artists, for more than 50 percent in ten years. But in
countries during this period without resale royalty legislation, like, in the U.S., the art market grows just 14 percent. It's less than in Germany or France.

And in Switzerland, a decrease of 3 percent. And in China, we know that more than 100 percent. It shows that there is no link between resale royalty legislation or art market growth. And that's underlined too by the President of Christie's Europe, François Curiel. He was previously in Paris.

And in an interview in a newspaper published in January 2012, he expressly said on the Web site, artinfo.com, that resale right have no effect on the place where the works are sold are not, even in Hong Kong or Seoul. The resale right in France represents between 0.15 to 0.23 percent of the art market turnover for the piece of art.

So it can't have any effect on the art market --

MS. CLAGGETT: I'm going to just
actually say, Clare and then Karen.

MS. MCANDREW: Just to clarify a few points. First of all, 1998 to 2008, U.K. didn't have resale royalties in most of that. So it's not an accurate way to, kind of, compare, because the U.K. is the main market in Europe. Just to very quickly clear up what the European Union have said, they said there's no clear pattern, so they didn't say it doesn't have a detrimental effect.

You can access that report. It's easy enough to clarify that. One thing just for Gerhard, just to come back on your comment --

MS. CLAGGETT: Can you just speak into the --

MS. MCANDREW: Sorry. If you're saying it doesn't have any effect on displacing sales, but this was the very reason it was introduce in Europe. It was seen as anti-competitive in the internal market. It gave some states advantages over others and it
was brought in because it would displace sales to markets that didn't have it.

This was the reason it was lobbied for and introduced. And I think it was probably your research that showed why it should be introduced, or the Ifo Institute showed it does have the power to displace sales. So now you're saying it's not doing that. It does have the power to displace sales, according to the first round of research.

And I suppose the main thing is that, we all are here, everybody on the panel and everybody in the audience is here to make sure that artists are the ones that gain from this. I started out working for the Arts Council of England on this issue, and that's one of the main things we're looking for was ways to help artists.

It's not the subject of this panel, but it does get back to how this helps artists. But unfortunately, it gives back to
those artists that are least in need of financial help and does nothing to help the bulk of artists working in the primary market and actually might damage sales in the market.

MS. CLAGGETT: And that is something that we're going to explore, I think, in the next panel. Karen, did you have something?

MS. GRAY: Yes, I mean, I would just say quickly that, I have a great deal of respect for my colleague Francois Curiel in Hong Kong, but one thing he is not is an economist and I can assure you that he has not done research into this issue, so I just wanted to put that comment in context.

The other thing I might ask, and I understand Mr. Brown's point, and without commenting on any specific sale or situation, whether there is not another way to address the issues that are being raised here besides a resale royalty. So I would say, perhaps an issue where a publisher walks away with
something, there's a different way to address that than after the fact of resale royalty.

MS. SPRIGGENS: I just want to make it clear that in the U.K., Christie's and Sotheby's don't pay the royalty. The cost of that royalty is passed on to the buyer of the art work. So the limit of the impact of the royalty on the major auction houses, which cover 75 percent of the resale royalties we collect in the U.K., is administration, which would be marginal, because they don't pay the resale royalty. They pass that cost to the buyer of the work.

In addition, they recently increased their buyer's premiums. So clearly, they still see that there's a bit more give in that market, that the market will still carry some more charges, so to speak.

MR. PFENNIG: Just one comment to what Clare was saying. The art market in France and Germany, they required harmonization in Europe because they wanted
same conditions for the British dealers, and
the artists, the European artists, who saw
their works being auctioned in London wanted
to gain their revenue from the British sales.

But what I was saying was, the
effect was not negative for the market. The
British have fought a lot, and you were part
of that fight. They said art works would be
shifted to New York, and Zurich, and to other
places, this did not come into effect. The
numbers shows that.

For this reason, harmonization is
justified. Harmonization with the United
States would also be for the benefit of the
artists because then the American artists
would profit from the European market and the
European artists would profit from the
American market, where a number of works are
sold but for different reasons.

You find a lot of sales of big,
big collections who are divided between London
and New York, because people reflect which
kind of buyers are going to London and who is
going to buy in New York. These are strategic
deliberations and have nothing to do with
resale royalty.

MS. FERRY-FALL: I just wanted to
have another argument. It also is right
because resale right is a right, is a charge
for whom has to pay it. And it's the case,
even in publishing, even in music, and even in
all the fields of creative industry. And
resale right is very low and I think that we
have figures that show that there is no
detrimental effect in income.

I can give you the European
report, and it's clear inside, but the
question is to, is that fair that visual
artists receive, or not, something for the art
market for this big industry, from
auctioneers, and perhaps, galleries? And in
France, we have a big debate on that, even the
last years, and everybody, even the Cultural
Ministry said yes, because the visual artists
don't receive so many author right for the
reproduction right and so.

And only way for them to receive
author's right is to have the resale right.
In France, it's the highest author's right and
it's very, very important for an artist to
follow the career of their works and to
receive something for the auctioneers which
make money, and that's a good thing, but they
make money with their works and artists must
benefit of it.

MS. HICKS: I just want to
comment. Speaking as a gallerist, and a
regional gallerist, there's tens of thousands
of us in the U.S., and speaking to the point
that the only artists that would benefit from
this resale right would be the big name
artists, I mean, I, for one, represent an
artists who, you know, is under the definition
of starving artist, a term that was bandied
about in many people's reports, that there is
no such thing as a starving artist.
I represent one. He lives in a trailer. I have to drive him everywhere. You know, and he is with my gallery because he does not want to be with a larger gallery, even though we have interests from larger galleries. And what's happening, and it's happening all the time is, they're purchasing his work and they're reselling it.

I'm sure that it's happened many times over and I don't know anything about it, and he's not benefitting from it, and he should, because his work will flourish in a larger market, and I, unfortunately, don't have the resources to give him that larger market.

And, you know, I think a lot of our colleagues here in Europe can give statistics about the fact that many mid-level artists, many artists that are selling for much less, are still reaping the benefits from the resale royalty.

MS. CLAGGETT: And thank you for
that comment, and I will do just a quick reminder that we are going to explore that in much more detail in the next panel, so limit your comments and response to Janet's comments to the focus of this particular panel.

I think, Jane, you wanted to make a comment?

MS. GRAY: I was going to, I think, address the comments that are probably --

MS. CLAGGETT: I have a few other questions for this panel, so definitely, if you have something to respond to in terms of the particular panel, and then we can definitely explore, in more detail, who is impacted by resale royalty right in terms of the types of artists, as well, in the next panel. Karen?

MS. GRAY: I can just respond to the point about buyer's premium, yes. You raised a buyer's premium, but I don't think that's really the question here. I don't
think that's the U.S. model, you can charge more, therefore you must share it. And again, I think there are other ways to deal with this issue rather than taking profits and pushing them out.

And again, I think there's a difference between how things happen in the U.K. and things happen in the U.S., and this is a U.S. question, and I'm stuck.

MS. CLAGGETT: And I wanted to just ask a follow-up question. I'm still getting, I think, two different opinions on this issue in terms of some saying there's no effect and some saying that there is an effect, but I wanted to expand the conversation a little bit in terms of what other factors that you think do effect the portability of the art market.

For example, I think, in some comments, it was noted that China for the first time became the first in the world in terms of the art market and replaced the
United States. Neither China nor the United States actually have a resale royalty right.

So what might have attributed to that change and what other factors are actually contributing to the actual portability of the art market?

MS. SPRIGGENS: Yes, I was looking at artprice.com's review of the 2012, they do an annual review of the art market, and they've just published their 2012 report. And they have identified that about over 50 percent of the market in China is down to traditional Chinese painting and calligraphy, so it's not the part of the market that would attract a resale royalty.

But what it does represent is a huge growing middle-class in China. We can't ignore the fact that it's a massively growing economy, and as such, the middle classes start to invest in art, and they generally start investing in art from that country to, you know, repatriate their cultural goods, so
that's what it is.

China is a huge country, a hugely growing economy, and they're developing a huge art market. They're not yet, well, they are, to be fair, starting to attract markets. You know, is it Sotheby's that's opening in China? Yes. Christie's. Oh, they're both opening in China and there's new art there, so it's definitely a massively growing market.

But that has not anything to do with the resale right. I completely agree with Clare. You know, time will tell the impact of it, but there is no causation, no proof that there's a cause for anything. There are numerous factors that effect the art market; fashion, where the buyers are, local taxes, the cost of transacting in terms of shipping, insurance, et cetera, and what's trendy at the time and where the art is.

And China is a burgeoning market and that's irrelevant to this discussion in many respects.
MS. CLAGGETT: Yes, and I would follow-up on that, just in terms of anybody else's comments, but we will definitely say that the movement to China would have supported the argument that a resale royalty right in the European Union had an effect.

If it was definitely moved to either China or the United States, actually, or stayed in the United States, but the United States doesn't have a resale royalty right either. So if you look at China, which didn't have a right, as opposed to actually creating a growth in the U.S. market.

So the argument could be that it almost had to be something else since both the United States and China actually don't have a right. I think Robert was first and then Clare.

MR. PANZER: I think it comes down to actual numbers. When you're talking about art, these other factors that Tania just brought up have a big impact on how much
you're going to get when you're selling a work
of art at auction. How many people selling
a work for $20 million, or $10 million, are
thinking about what the cap is in England --
12,000 euros, or pounds?

It's not part of the equation
because it's chump change in these
transactions, and it's chump change even on
the small transactions. The biggest factor,
for which, there really is no control in the
market, is actually what the auction houses
take from both the buyer and the seller. This
is a very interesting concept that they're
brokers and they charge a commission both
buyer and seller, which is very untypical, I
think, in most transactions.

And so that's where, if there was
any difference in the market, which there
isn't, since all auction houses work the same
way, people would probably shop. But they're
not going to shop to save 12,000 euros, which
is what it's going to cost them to send this
$20 million work of art, or insure this work of art, over to another country.

And when we're talking about China, the clear reason why China has become an art market is because it's become a rich market. There's tremendous wealth because of the development of China, industrially, and in the world economy since it's opened up from the Communist regime.

But it's clear, this is common sense. We don't really need to sit here and focus on statistics if you just look at the numbers and how much money is involved. That really tells you the story. The resale royalty is not part of the equation. You can talk to any collector, you will not find a collector who said, gee, I'm going to send this over to Sotheby's in New York because I'm going to lose $5000 on this deal in England. It just doesn't work that way.

And to pretend it works that way and to focus on the statistics is to be
completely ignorant of how the art market works. And it's your jobs, your jobs, to become expert in that market and not rely on the interested parties. So if you become an expert in that market and talk to the collectors, talk to the dealers, talk to all the parties, you will find out that resale royalty is a non-issue.

And that's your job to do that, and you'll learn that. If you understand the art market --

MS. CLAGGETT: And we are taking that job very seriously, by having the public roundtables today, and I will, again, offer anybody who wants to meet with us after the roundtables, we have an open-door policy and would love to hear more on that. I think Clare was next and then Gerhard.

MS. MCANDREW: I'll just be very brief, because I want to give everyone a chance to speak, but, obviously, this charge on sales is an issue. I've talked to
collectors and I've talked to dealers, and everybody, since 2009, particularly, when the market's become a lot more difficult, people are extremely price sensitive at the moment.

There is a lot more cautious buying. The market's become completely polarized. There's a very narrow group of artists doing extremely well and the rest of the middle market and lower market is doing extremely poorly. That's one of the biggest trends over the last few years globally.

And the high end of the contemporary market has shifted to New York. If you look at, where were the Rothkos, and the other highest priced sales, they were all in New York over the last year or two, so it's become a polarized market and it has shifted. And it's certainly just one of a number of factors.

There's a basic assumption that if you put a transaction charge in A and not in B, when it's a highly mobile, portable, asset,
you don't need to be an economist to realize
that there is this tendency to shift. This is
the basic assumption and the statistics have
shown evidence of it, and I would completely
dispute that it's an irrelevant cost, because
I poll 7000 dealers every year, and I talk to
a lot of collectors, and this is a significant
cost when margins are so tight.

It's been one of the things that,
it's pushing people into bankruptcy in some
cases.

MS. CLAGGETT: Gerhard, and then
Cynthia after that.

MR. PFENNIG: Just one question,
to what you are saying, we heard that one of
the auction houses is taking the resale
royalty from the buyer, so why should a seller
care about droit de suite when he knows that
the buyer is charged for that? Why shouldn't
he go to a country if he has nothing to pay
because the buyer is paying?

And secondly, your argument with
China, I think in these market, people are buying their own artists. Twenty years ago, Chinese artists had to go to Europe to sell their work because, in their own country, the market was focused on traditional art. But contemporary artists developed their own way of expressing themselves. They went to Europe to sell it.

Now, artists from their own countries with a developing market sell in their own countries, so in Russia, so in India. People in those countries are no longer just buying contemporary European art or American Art, but they're buying their own cultural art, and this has nothing to do with resale royalty. But on the other hand, these artists move all over the world and these artists want to participate in the resales of their works in the exploding international market through the resale right.

That's why artists in China require a legislation, which is on the table,
to introduce resale royalty. I think they wouldn't do it if they were anxious to lose anything. They want to participate like the others and they want to come on the same level.

For this reason I think it is not justified to mention the rapid development in other continents as a proof for a negative effect of the introduction of resale royalty in EU - Europe, or in Australia, or in other countries of the world.

MS. CLAGGETT: Thank you. I think Cynthia was next, and then Irina, and then Terrence.

MS. TURNER: Well, going back to what has changed since 1992 and what has not changed since 1992, is that the visual artist in the United States is not receiving the benefits of copyright law to the extent that it was intended. And we're seeing this across many different sectors for many different reasons, but a generation of resale royalties
has been lost to American artists and the
reciprocity that should have been sent
overseas to all of the artists internationally
that have participated in resale royalty.

And I think that if it's part of
our copyright law that an adequate incentive
is provided to allow artists to participate in
the economic growth and value that they bring
to the market, and the downstream benefits
that are provided to every single participant
in that art market, except the visual artist.

The resale royalty was designed
specifically to address that inequity, and I
think it's time that we adopted, not only for
American visual artists, but to reciprocity as
well. Reciprocity with our international
colleagues. Thank you.

MS. CLAGGETT: And Irina and then
Terrence, and then June.

MS. TARSIS: Well, the question
you were asking of this panel is, what is the
portability of the art market? And if we say
we see, some don't see, the fact that once you pass a law similar to the one in the United Kingdom, and China does the same, these three being the biggest art markets, there will be, well, kind of, nowhere else to go.

And so there will be a balance re-calibrated. I think that one of the ways of addressing the issue, well, if you have a high end artist and if you only transact in these very expensive works, then you have a big chunk of money going to that individual.

I don't think the bill that's been proposed actually puts a cap on how much can be taken from the buyer or from the seller, but that's one way of protecting that kind of transaction. And maybe offering more help to the middle tier and the starving artist.

Australia, as I understand, has a $1000 triggering mechanism. So if the work sells for a $1000 or more, then they start collecting the royalty resale rights. So maybe we should lower the $15,000 proposed to
something less, but then put a cap on how much
in total can be collected to protect these
margins.

MS. CLAGGETT: And I will just put
a reminder, yes, that is definitely an issue
in terms of the thresholds that we want to
explore. The ending panel today will give an
opportunity to really explore in detail what
provisions or changes we might want to make if
we actually assume that we should have a
resale royalty right in the United States.

Should there be additional
provisions that are incorporated, or changes
that are incorporated, in the bill that was
introduced last Congress? I think it's
Terrence and then Jane.

MR. BROWN: Very interesting first
panel to start off the day. No one's really
defined what this thing is. It's been called
chump change. It's been called a fee. It's
called profit to be shared. I don't think
it's any of those things. I think it's a very
common sense, fair play notice to those who buy art that somebody actually sat down and made this thing.

Someone toiled at school, worked hard, got a startup gallery, finally made it at 38, 40, 57, but yes, someone actually had to do this. So I hope as we go forward, there'll be a, you know, sense of recognition that it's not a business we're talking about. We're talking about people who sit down and make this stuff, and sometimes successfully, and sometimes not.

And I know your last panel will talk about caps and all, and, you know, make some very interesting comments, see how that plays out, but let's get back to the basics of what this thing is. It's not chump change. It's not a fee. It's not profit. It's recognition that someone had to actually make this stuff and make a living at it.

MS. CLAGGETT: Yes. And, Jane, you had a comment?
MS. LEVINE: Yes. I know you're going to hear a lot more about this in the other panels, but, you know, since we opened the door to what are we talking about, I think one thing we have to remember when we're talking about the resale market is, for the overwhelming majority of markets, the primary market is the only market.

And so when we're talking about this resale royalty, I think we have to keep in mind, and the record shows, you know, you opened the day by asking, you know, what has changed, and I think you can look at the record in Europe and see that the entire resale royalty, what has been seen, you know, has only benefitted a really tiny number of the very elite artists who make it into the resale market of Sotheby's or Christie's.

And so I think the statistics show that, and I know you'll be hearing more about that, but just to address the issue of the portability of the market and whether the
royalty has an impact that makes the market move to one place or another, you know, I can speak for our business, people care about costs.

And an extra cost imposed on a transaction does have an impact on where people sell. And the market is incredibly global and portable. Some of the things that are different today from 1992, you can be anywhere on the globe and buy and sell art from anywhere; the Internet, online, phone bidding. It's really not that difficult to establish a new market someplace in the world that doesn't have a royalty.

And I think we're having a big debate about whether there is economic evidence for a flow in the market. I think, clearly, it's a factor. Whether there's a causal link, it remains to be seen, but certainly, the capability of the market to move to someplace, many jurisdictions out there that would be very attractive for a
market that don't impose this cost, and that possibility is definitely there.

MS. CLAGGETT: And I actually wanted to follow-up, so I'll follow that question. I think somebody previously mentioned that the art market is a highly portable, and I think you alluded to some of the factors that make the art market portable in terms of being able to sell anywhere.

And so I don't know if anyone else wants to comment on the overall premise or suggestion that the art market itself is highly portable and specific factors that might actually support that proposition. Cynthia first and then anybody else who wants to respond to that question.

MS. TURNER: I just wanted to say, the resale royalty is intended to benefit those artists, allow those artists to participate in the economic success of their works. And categorizing them as elite, or rich, or dead, is really, kind of, offensive
to me because, a book author is very much the same.

Anyone who copyright, those previous copyrighted works, benefits in the economic success of their work. If it is not economically successful, they do not benefit. The resale royalty is a means of addressing that in the case of visual artists who sell original works.

Anyone want to just discuss, generally, and at a high level, I think, Jenny, you actually talked about some of the factors, but just overall, about how the art market works, because I think that that might help us as we address this issue. I think Janet and then Terrence.

MS. HICKS: Well, I was just going to speak about the portability of the market. I just read an article in the Guardian that came out in October of last year after you, in the U.K., had had droit de suite to deceased artists, where major galleries in New York
were moving satellite offices to London to attract those clientele that they craved, which were the ones with the money; the ones that were wanting to purchase in London because they felt more comfortable to purchase in London.

So clearly, the market, again, this is another example of how the market moves to where the buyers are.

MS. CLAGGETT: Terrence, did you want to add anything?

MR. BROWN: Clare, didn't have a statistic about the, like, 74 percent of the art market in the U.S. is in New York? Wasn't it a number like that?

MS. MCANDREW: No, I had said earlier that 74 percent of the fine art market by value is post-war contemporary and modern. That was the 74 percent.

MR. BROWN: I thought you said New York, but would you see it moving to Somalia if that was the place that had the least tax?
MS. MCANDREW: No. It doesn't have to be that exotic. There's lots of other destinations. I mean, we've seen a lot of places opening up to the art market, like Singapore, and, you know, Hong Kong, obviously, a lot of sales have moved there. You know, it's very uncertain what's happening in China regarding this directive.

And one thing is for sure, it won't be the same as the proposals here or in Europe, and there's some debate whether it'll be in Hong Kong. At the moment, I believe it won't be in Hong Kong.

MS. CLAGGETT: Yes, and that was actually going to be a follow-up question I had as well. So, as a final question, and I think we'll then go around to those who have comments and open it up to the audience.

But if China actually adopts, as they're considering, a resale royalty right, how does that affect our view, or should that affect our view, here in the United States as
to what impact a resale royalty in the United States might have in terms of where the art market would go and whether it would then go to China if China also has a resale royalty right as well.

I think it was Tania and then Jane.

MS. SPRIGGENS: I guess I completely agree that the art market is extremely portable. And if the resale right was a negative effect, then I'm assuming the art market would have packed up and left London, but it just hasn't done that. I think there's multiple factors, as I've said before.

I think if China introduces a resale royalty, I think U.S. will be out of the cool kids, they'll be out of the gang, so I think you should obviously consider introducing a resale royalty so that you can be a part of the team, because I think, genuinely, and we come on to this in panel two, an important part of the art market we
aren't focusing on is the art and where the
art comes from.

And the art comes from the artists
and if we fail to financially incentivize our
artists, which the resale right does do, and
I'll talk about that in the next panel, then
we won't have an art market. It will just
sort of die off. So I think, you know, you
should join the gang and I think if China --

MS. CLAGGETT: I will just say the
U.S. doesn't often worry about not being part
of the gang, for those of you who have been
advocating for a public performance right for
sound recordings.

MS. SPRIGGENS: To be fair, that's
a good point.

MS. CLAGGETT: We will certainly
take that into account. Gerhard.

MR. PFENNIG: There's an argument,
I mean, in Europe, we just have a discussion
about tax havens. And some country was saying
we are not changing our tax laws because we
attract money from other countries, other states, because we are very discreet. This has since changed substantially because the United States put a lot of pressure, for example, on Switzerland.

So what I'm saying is, you can't just follow the easiest way of the market and say we will let the market have its easiest way by avoiding introducing something which makes it a little more difficult for sellers. I mean, this is a reform which is justified by the moral interests of artists.

And I think this should be the substance of copyright legislation. And if you say, okay, we don't introduce this because we're going to help the market. We don't care about the artists. They will suffer anyway. I think that's not the right way to address the issue.

I mean, I'm not going to advise you about tax things, and so on, but I think this is not the only approach to look why and
whether resale royalty is really having an impact on markets or changing of sellers, because that has been said by many participants, there is no evidence that it even happened. It is not a good argument.

And if I may say one additional thing, it was said resale royalty is only for the benefit of a certain group of successful artists. This is no longer true. We have a very successful and a wonderful artists, Frank Stella, in the room, one of the best artists of the world, who is selling throughout his career, but most of the artists have a very limited career right now.

They have a career of ten years and then they are no longer in the focus of the primary market, but their work of these ten years are resold in the resale market. And we have to think about these changes in artistic and artists' careers, and just, droit de suite gives a justification for those people whose works remain attractive, or those
that primary production loses attraction,
because they are not Frank Stella, and they
are not so impressive and outstanding as he
is.

MS. CLAGGETT: Are there any final
comments, not closing statements, but final
comments in response to the last question for
the panelists, and then, with the last five
minutes, I'll open it up to the audience to
see if there are any questions or comments?
Karen.

MS. GRAY: Sorry, I was just going
to, you know, we were starting to have
discussions about whether the artists as well
now, you know, what happens to art in the
United States, and then if I truly believe
that our failure to pass a resale royalty in
the United States would lead to the death of
art in the U.S., I would feel differently
about this, but I don't believe that'll lead
to the death of art in the U.S.

I think it's the flip argument.
Many people are saying, we don't believe that it's going to be the lock of the art market in the U.S. I also don't think artists are going to start moving to Somalia or China, let's just say, and suddenly start producing art where they won't in the U.S.

I also just want to clarify, because we're starting to get a little bit of a dichotomy between resale, all the money goes to somebody other than the artists. For living artists, there is a benefit to resale, because as things resell, then the next piece of art they create, they can make more money on.

So the artist's creativity, of course, is incredibly important, but the market forces are allowing the artists to sell their next item of creative work at a higher price.

MS. CLAGGETT: Thank you. And I'll let Irina close the panel and I think that's a good point, because that's going to
be some of the conversation that we have at
the next panel. So I'll let Irina close in
terms of the panelists and then I'll open it
up to the audience.

MS. TARSIS: I have a feeling you
want answers, but I think there are certain
questions that you will answer for yourself.
So I think there are questions that you will
probably have to answer as you bring up your
opinions. We're not talking about illicit
market, so it's unlikely that collectors are
interested in buying something at a cheapest
price possible, and stashing it, and never
selling it.

There's a big cache about actually
turning up for the auction or a gallery
opening, and so it's unlikely that just the
price point will drive collectors away, or the
market will, you know, shift to a different
place other than London, New York, Hong Kong.

It's not such a realistic threat.

The fact that, if there's an art work that
sells well of a living artist, it's not a
given that another work created by the same
artist will rise in price immediately. It's
not a given that the works of art will
appreciate with death of artist. We think it
might happen, but it's not a given.
Collectors are fickle.

And so you should think about what
is actually happening present time rather than
predict towards the future.

MS. CLAGGETT: Thank you. And I
also think that that actually is another kind
of point that is definitely something that we
want to explore on the next panel. But before
we begin the next panel, I just wanted to open
it up to the audience to see if there are any
questions that the audience has.

We have a microphone in the back.
We just have one microphone right there. I'm
going to ask Jason if he can help --

(Off the Record Comments)

MR. STINE: Hi. I'm Quinn Stine.
I'm with Intergalactic Enterprises, LLC, and I just want to make a comment about the changing legal landscape. As far as I can tell, there's only four states that have ever enacted a resale royalty right, like Georgia, South Dakota, California, and then, I guess, Puerto Rico, the Commonwealth.

Puerto Rico recently repealed their statute and left it up to the artist to contract for it. And both South Dakota and Georgia only deal with the resale royalty right in the state contracts with art in state buildings, and that only gives them the right to contract for it with the state.

And also, California's law was recently declared unconstitutional by a district court in the 9th Circuit.

MS. CLAGGETT: Thank you.

MR. FEDER: Just a quick note about the California law. That's under review. It's not the final word on that. It's under appeal. Two quick points. One
with regard to one of the whether the adoption
and the --

MS. CLAGGETT: Ted, could you give
your name, please, and information?

MR. FEDER: Ted Feder. With
regard to the British adoption and whether
it's damaged the market, there was an article
in the Huffington Post, I referred you to it,
September 25th, 2012. It was titled, "U.K.
Resale Rate Didn't Damage the Artwork Despite
All the Claims". It goes on to say that,
"Sales have reached record levels in the
United Kingdom and exceed those before
adoption of the resale royalty."

The other point about people who
might benefit in terms of being heirs, I have
a note from Rosalyn Drexler, a rather
prominent artist, who did not experience
success early on, she says, "I have nothing to
leave my son but my work when I die. Much of
it has been sold at bargain rates, most of it
my best work. I have worked to do my art. I
won't last forever. I'm 86, but the paintings will go on a lot longer than I will."

"It is very important for me to be able to know that I've taken care of my son who suffers from disability. This resale royalty thing is not only about money, it is about love and being able to give it. It is about legacy." Thank you.

MS. CLAGGETT: Thank you. I think there's a person right behind you. Thank you.

MS. LAVENDUSKY: Hi. My name is Wendy Lavendusky. I'm a law student at the University of Maryland and I actually have a question for the panel regarding the harmonization efforts in Europe and the eventual effect on the Berne Convention, 14 bis is a, currently, optional provision. The resale royalty is optional under the Berne Convention. How does harmonization affect the optional nature of that provision and would it benefit the United States to get out in front of the issue early?
MS. CLAGGETT: Anybody from the panel want to address that question?

MS. SPRIGGENS: Only to say that the harmonization in Europe was more about the European Community than it was about Berne. We identified various IP laws that weren't harmonized across the community and this was one of them. And that was the reason why it first came up as a directive, well, Gerhard will know about this more than me, back in the '90s, but it really wasn't to do with Berne. Although, as I said before, I think the U.S. should adopt a resale royalty, but I'm biased.

MS. CLAGGETT: Thank you.

Gerhard.

MR. PFENNIG: One word. Berne was addressed in this process, but in the sense that Berne should be encouraged. Berne should be made obligatory in this part in order to oblige more countries in the world to introduce reciprocity, and to introduce resale
royalty.

I mean the European Commission after harmonizing resale royalty in Europe tries to develop the Berne Convention in this sense and to make Art 14ter obligatory for the member states of the Berne Union. So far not with much success, but it is the right way to help introduce the resale royalty in more countries.

MS. CLAGGETT: And I'll let Mary-Anne have the last word on this.

MS. FERRY-FALL: Thank you. Now, there is more than 65 countries in all the world which recognize a resale right. And because of the principle of the reciprocity, if the U.S. enforced resale rights, the American artists will benefit off it in all these countries. So it can be a good thing for all the world for your artists.

MS. CLAGGETT: Thank you very much. Before we close, Jason or Chris, did you guys have any questions for the panelists
that weren't explored? All right. Well, I
want to thank all of the panelists for the
first panel. You definitely gave us a lot of
information.

I don't know if we've conclusively
determined whether it has an affect or not,
but we will certainly be following it very
closely as well as the various statistics and
studies that you referred to, and then, now,
I will ask the panelists from panel two to
come up to the table.

MR. REED: All right. Let's go
ahead and get started with panel number two.
Our topic for this hour is the impact of the
resale royalty on the incentive to create new
works and the impact on visual artists and
sales of their visual art works, or put
differently, the extent to which the resale
royalty advances, or perhaps, constrains the
constitutional underpinnings of copyright law.

And broadly speaking, I think this
topic sort of falls into three broad buckets.
One is the impact on the primary art market. We've heard, in some of the comments, that the knowledge of a downstream resale royalty right will depress, artificially, the prices of artworks in the primary market.

And then the other two buckets are the flatout incentive to create because of the existence of a resale royalty and to what extent that impacts individual creators and their decision to create. And then the third is the impact that has on the heirs of creators and to what extent the impact on the heirs is considered by the creators.

And so with that, I'd like to start with just a very broad question, again, following from the notice of inquiry announcing this hearing, which was, what effect, if any, does the adoption or presence of a resale royalty have on the primary art market? What information is out there to suggest, or what do we know about the impact of a resale royalty on prices in the primary market?
market, and that sort of thing?

So with that, I'll open it up, or actually, I'm sorry, before that, if I could have everybody just announce their names for the record. We'll start with Vick over from the AMSP.

MR. PERLMAN: Victor Perlman,
American Society of Media Photographers, and please excuse the casual dress.

MS. DIFANIS: Anita Difanis,
Association of Art Museum Directors.

MR. STELLA: Frank Stella,
notorious artist.

MR. PANZER: Robert Panzer, VAGA.

MR. SPANGLE: Morgan Spangle,
Dedalus Foundation.

MS. MCANDREW: Clare McAndrew, Art Economics.

MR. FRANKEL: Simon Frankel. I'm here for Sotheby's and Covington & Burling, and teach art law at Stanford Law School.

MS. COBDEN: I'm Sandy Cobden with
Christie's. I'm general counsel of dispute resolution and public legal affairs.

MS. SPRIGGENS: Tania Spriggens, DACS.

MR. HOLLAND: I'm Brad Holland. I'm a freelance artist. I've worked for the New York Times, for Vanity Fair, for the New Yorker, for Playboy, Time magazine, so on, and I've been a chair of the American Society of Illustrators Partnership, which is a collection of 12 popular art organizations that have been trying to create a collecting society for graphic artists.

MR. AZAR: I'm Joe Azar with the Illustrator's Club of Washington, D.C., Maryland, and Virginia. We're a small trade association here, but we've been around since 1986, representing a few hundred professional illustrators, and I'm an illustrator myself, and I'm also an officer in the organization.

MR. STINE: I'm Quinn Stine. I'm general IP counsel for Intergalactic
Enterprises, a small startup, I'll call it.

MR. REED: Thank you. And so with that, I will now open it up for comments on my first question, which was the impact of a resale royalty on the primary art market. Are there any thoughts on that? Yes, Clare, then Morgan.

MS. MCANDREW: Yes, unfortunately, just from my perspective as someone who gathers these statistics, there's not much you can -- we haven't been able to distinguish the primary sales versus those in the secondary resale market when I'm doing my polling of galleries and things like that. So when I came into this first, I looked at the economic arguments.

And from an economist's point of view, obviously, if you put a levy, or a fee, on a sale if a seller knows that they have to pay that, they might reduce the price they're willing to pay, another problem regarding primary market sales is that the royalty is
based on the increase in sales price rather than profit.

When somebody takes the risk, and takes a punt, and supports an artist when they're starting off, if they sell that work in the future, and they sell it at a loss, they still have to pay the artist back. So the whole structure of it, in various ways, from an economic point of view, is flawed.

But I can also say, more anecdotally, from talking to dealers and collectors, that they have noticed that it is a disincentive for sales in the primary market -- it's kind of souring the relationship between some collectors and artists because they're being asked to take a hit twice. They're being asked to invest their money into an artist when they're starting off, and they, perhaps, don't have other income and they need that money, and then down the road, when they resell it and the artist might have gone up in value, or
down, a lot of them do go down, they don't all
go up, they're still being asked to pay back
to the artist.

So it's flawed from an economic
perspective, and certainly, the anecdotal
evidence is that it is souring the
relationship between artists and collectors,
and dealers have said that as well. A lot of
dealers buy works from artists when they're
starting out in their career, and some of them
buy outright instead of working on commission,
and a lot more dealers are not doing that
anymore because they will have to pay more
when they resell it.

So a lot of them are just working
as agents, working on a commission basis, and
that makes it difficult for the artist. The
dealers used to act as, kind of, collector
dealers, if you know what I mean. Now, a lot
more of them are working on an agency basis
for commission, so it has reduced the
liquidity and made it more difficult for
artists at the start of their career.

MR. REED: Morgan?

MR. SPANGLE: Yes. I was an art
dealer for 20 years before I started in the
foundation, started working for the Dedalus
Foundation, which is a 501(c)(3) non-profit,
ten years ago. And I worked on a pretty high
level. I was a director at Leo Castelli
Gallery for a decade and I was also a vice
president of contemporary art at Christie's in
the contemporary department, and so I've
interacted with artists, with dealers, with
collectors.

And I find it very hard to believe

that any artist, any dealer, any collector

that is really interested in buying a young
artist would take into a consideration, as Bob
Panzer pointed out, peanuts when they're
thinking about buying art that has a huge
upside potential. That's why they're doing
it. That's why they want to do it.

They're supporting the artist,
that's one other big reason, and that wouldn't have any -- you know, therefore, the resale royalty wouldn't have any influence on that decision, but if they're really buying for the upside, like a dealer would, I know that, in my career as a dealer, even though the resale royalty wasn't in place, other than in California, where it never affected my business, I wouldn't have thought twice about such a small percentage of the commission.

MS. SPRIGGENS: In the U.K. regulations there is an exception for first transactions, so let me explain that. The first resale, if it occurs within three years of the original purchase, and for less than 10,000 euros, is exempt from a resale royalty.

Now, considering the ArtPrice, statistics say that 80 percent of works change hands for less than $5000, I can assume that that can only but cover an enormous portion of art sales that go through that initial point. So the reason the exception was introduced
into the directive was to protect that primary
market relationship between the artist and
their dealer, so that the dealer is not
disincentivized from purchasing this work, as
Clare says, at a risk, and purchasing that,
and can confidently resell it.

And it is, you know, let's be
honest, only in exceptional cases at that
first starting out of an artist's career,
their work will achieve more than 10,000
euros. If it does go on to achieve more than
10,000 euros, then in my mind, it is only fair
that an artist takes their share of that
return. It's a substantial price for a work
of art the early start of an artist's career.

We have not anecdotally heard
that, certainly, the primary dealers we deal
with, and we deal with a lot. We haven't had
an indication that their relationships with
artists have been damaged. In fact, the
majority of primary galleries that we deal
with support a resale right, because they have
a direct connection with an artist.

They see, even more importantly,
even more, how important a resale royalty is
to their artists, because they have that
direct relationship. And so often, we are
working with primary dealers who, in fact,
support a resale right.

MR. FRANKEL: We've been talking
about whether it's chump change, or peanuts,
or someone's livelihood, but it's money. And
as a matter of economics, the prospect of a
resale royalty is going to lower the prices
paid to artists in a primary market. And it
may not be a lot, but it's going to be
something.

And the critical point to me is
that it's going to lower primary market prices
for all artists, even though only a tiny
fraction of artists will ever receive any kind
of resale royalties on secondary sales. And
that's exactly what the Copyright Office found
in the 1992 report.
Nothing in the art market economics has changed that would change the fact that the resale royalty would reduce funds available for collectors to purchase works of art in the primary markets generally. And there's a quotation from David Hockney in the AAMD comments that the office has which says just that, the royalty will discourage art dealers from buying work of emerging artists.

And the 2008 Antiques Trade Gazette report, which, granted, is early on in the institution of the resale royalty in Britain, it found exactly that. It found, and I think this goes back to what Clare said, dealers are less willing to purchase works outright from artists, and dealers are being discouraged from investing in emerging artists.

And so I don't think it can be denied, it may be an effect that the office decides is worth it, but you can't really deny
it.

MR. STELLA: I'd be happy to deny it. I mean, I'd be unbelievably unrealistic and naive. I mean, the primary art market for the artist, at least from the point of view of the artist, is simply that. It's the primary market. He struggles to sell and it doesn't matter what happens; either he sells or he doesn't, and nothing is going to affect it.

I mean, the collector is either going to like his work or he's not going to like it. And no collector buys any work of art -- I mean, it's actually been forgotten here that some collectors and people who buy art actually like what they buy, and they don't actually get the idea to resell it until some other time.

And also, in the primary market, those people who like to speculate don't have anything to do with the primary market. They don't buy until the art -- they only buy artists that are established and are fluid, or
what do you call in economic terms? Anyway, they're above water.

Anyway, so that's the basic issue there. And there's another thing, too, just want to say one last thing and then we can move on, which is, the problem with the resale right is real, but the resale right is beside the point. It's not about the resale right. It's about the actual image, the physical image, that the artist makes.

And we have some protection under copyright law for the reuse, for the reproduction, for the use of reproduction of the images, but the protections for the actual physical work itself are not good. It's not really protected here until recently, a little bit, but mainly, there's no way that it relates to what the real economy is in the art world as it functions.

And what you have to have is, you can call it a resale royalty, you can call it anything you want, but you have to have a
transfer tax, a function, levy, whatever you want to call it, every time a work changes hands, up or down, and that's the way it has to go.

You have to give a small amount to the artist as his creative fee. He made the object that continues to function in the economy, whether you want to say it's doing the economy any good or whether you want to say it's a drag on the economy, because people have to take care of it and they're burdened by works of art that are dragging them down, you can look at it any way you want, but still, the physical object has to be recorded, it has to be registered, it has to be taken care, and the fee is paid every time it's transferred, as I say, up or down; a small fee.

MR. REED: So you said a lot there, actually, and the issue of whether this is fairly characterized as a transfer tax or a resale royalty, I think we'll get into in
the next panel a little bit when work on constitutional issues. But one thing I did want to sort of highlight and follow-up on is, you had mentioned this distinction between selling the original work versus selling reproductions of the works, which is the common distribution method in many other copyright industries.

And we've heard a lot in the comments about how, you know, on the one hand, a resale royalty will allow visual artists to, sort of, get the same benefit out of copyright that other creators are currently able to enjoy. And the rebuttal to that is that we're talking about reproductions versus originals, and that copyright law is not the appropriate vehicle to be, sort of, elevating one type of creativity over another.

And so on that point, I'm just wondering, are there any views about how the office should consider those issues and those conflicting viewpoints? Simon?
MR. FRANKEL: Sure. As a copyright lawyer, I find this notion that copyright law is unfair to visual artists puzzling, because for all authors, the Copyright Act provides a tradeoff. You sell the work, you retain the copyright, and Sections 109 and 202 make that basic distinction.

106 provides certain rights to all authors and the value of those rights differs depending upon the business model that may appeal, or may be available, for a given work. But none of these business models are more inherently fair or more lucrative than the others.

The critical issue for all authors is going to be, is there a demand for their work, whether in an original or in copies? And an unsuccessful sculptor is no worse off than an unsuccessful songwriter, even though the songwriter may have a great deal of rights available under the Act that don't apply to a
sculptor.

And a successful painter is much better off than an unsuccessful novelist, even though the novelist has an easier prospect of selling in multiples. And there are visual artists who create multiples and sell multiples, and we've heard some about that today, and one of the things we heard in the last panel was about illustrators who sell in multiples.

And there's a sort of a tension here because, on the one hand, the resale royalty is advanced by those who say, well, single-copy visual art is somehow disadvantaged, but on the other hand, there's a number of comments that the office received that said, well, obviously, the right should apply to works sold in multiples, and I don't think those are consistent.

But copyright law gives all authors the same bundle of rights and they can have different values for different categories.
of works, but I don't think it's the role of copyright law to intervene in markets to give more rights to certain creators.

Creating a new right here is not going to solve an inequity. It's going to create another one. And just one thing to add, something that has changed in the last 20 years is, it has become a lot easier, technologically, for visual artists to market their works and to market their works in multiples over the Internet, and this is actually a point made in DACS comments to the office, that artists are able to exploit their multiple rights, and so there's that available.

And I'll just add one other point, which I think has to be considered here, which is, if you are saying that the artist should share in the success of their work, you have to ask the question, why should the artist be paid every time a work is sold even if the price is declining?
And we can talk about that more, and the office may want to talk about in panel four, but it is a puzzle of the resale royalty, is why it is one-sided.

MR. REED: Okay. I saw a lot of hands in response to that. I'm going to go around the room in the order I saw them, so, Robert?

MR. PANZER: We have to go back to the underpinnings of copyright. The constitutional right was made to create an incentive. So we do have to recognize that there are different markets, because we wanted to create more equal incentives. So certainly, when we're thinking about music, the written word, you know, they're distributed as copies.

The way these media take advantage of copyright is the very essence of their business. When we're talking about fine art in particular, it's about the unique work. And so even though there's a little market for
reproduction rights, it's a very small market. The reality is that the way the copyright law is written there is little incentive to create unique works.

And so as a society, which goes back to the concept of the Constitution, for the good of society, if we value art as much as we value music and as much as we value the written word, if we think they're all good things and all equally valuable to our society, then copyright law isn't creating any incentives to create unique works if we're just relying purely on the market.

If you're purely relying on the market, you don't even need copyright law, right? So copyright law is, in essence, a way to find a balance between constituencies which have different levels of power and it's created to make an incentive.

Copyright law is not creating a good incentive. I can't think of any artist who said, I want to be an artist because I'm
going to sell posters, or I'm going to put my
art on book covers, maybe this is true for
illustrators to some extent, but it's not even
about reproduction for illustrators. It's
really about the original use on the cover,
which happens to get made into multiples, but
in this case it's the book that's the
multiple.

So what I'm getting at is that,
what resale royalty does is, it doesn't solve
the problem, but it adds to the solution. It
gives another incentive. Is it a huge
incentive? Of course not, but it's something.
It's something to create a little more
motivation for, perhaps, somebody to become an
artist knowing that -- you know, if you say to
somebody, a high schooler, I want to be an
artist when I grow up, what do you think most
parents are going to say?

MR. STELLA: Good idea.

MR. PANZER: Great idea, but
difficult to make a living as an artist, then
still get that accounting degree. And, as a
society, don't we want to encourage people to
be creators? If the business model is such
that it's pretty difficult let's fulfill the
mission of the Constitution, because we've
decided, as a country, that what we want is
creativity.

And so we've carved out this
little niche to motivate people to create, so
let's live up to it.

MR. REED: Thank you. Sandra?

MS. COBDEN: So to build on what
Simon was saying, if we give artists a right
to a resale royalty, we are creating something
new and different, in fact, from what
musicians and authors have, and you do run
into that slippery slope problem, because the
analogy really doesn't hold, but it does hold
to other categories of "artists".

For instance, architects, Frank
Lloyd Wright. I think most of us would say he
creates works of art. They're original.
Should his estate get a resale royalty? Is that how the Copyright Office is going to view the expansion from visual artists, then, to architects? What about jewelers?

Christie's has a jewelry department. We sell many original works of jewelry. Should that be another area where, like visual artists, we should expand and cut more holes into the first sales doctrine to allow for jewelers who create original works of art? What about bespoke furniture makers? We also sell that, or rug makers who are making original works of art?

Do we expand to include them?

This becomes a deep and big slippery slope for the Copyright Office to consider.

MR. REED: Okay. I saw Quinn next, then Tania, then Brad.

MR. STINE: Well, I was, kind of, just going to synthesize both Frank Stella's and Simon's into one. I think that you're right, that a lot of artists, they are only
concerned about the primary market and just want to get in it. They want to sell their piece and the move on.

MR. STELLA: Can I just say one last, and then I won't interrupt, there are even some artists who just want to make something that's really good to look at and don't care whether they sell it or not. They're the primary audience as well as the first collector.

MR. STINE: But on that, there's also that they don't actually -- I don't think a lot of artists, new artists anyway, don't actually understand the rights that they already are given; the ability to make duplications, and such, like that.

I mean, what Intergalactic Enterprises is trying to do is setup relationships with artists so that they help them take advantage of that. I know not everybody wants to put their art on a book cover or a poster, but at least, then, they're
taking advantage of all the rights that they
already have.

I think that a resale royalty
right, in a lot of ways, besides many of its
other problems, duplicates rights already
given to the artist. I mean, the personal
connection with the artist is, I mean, well,
that's VARA, that's moral rights, I mean,
we're talking about economic rights and I
think that, at least in the United States,
those two are separate; statutorily.

And also, let's see, the artists,
there's a really good article that I read that
talked about how many Master's of Fine Arts
degrees are people entering into these schools
to go, I mean, that's not declining. That's
actually growing.

So I think there's plenty of
people out there who are incentivized already
to become artists.

MS. SPRIGGENS: I think the points
being raised about whether this introduces a
new type of right ignores the fact that creators operate under different business models and the fine artist's business model is completely different to the business model of the musician.

And therefore, the IP approach to this needs to reflect that. The artist survives on the sale of the original. Let's be honest, the reproduction rights it enjoys generates a tiny portion of their income. Compare that to the careers of musicians where a majority of their income is generated from the reproduction of their music and the sale of those reproductions.

So we have to respect that they are different business models and in order to support these different types of creators, different intellectual property frameworks need to be considered. I also want to point out and comment about the position in the U.S., but certainly in the U.K., unique works of jewelry, unique works of furniture, rug
making, all attract a resale royalty because they are considered to be works of art. And we would assume or encourage the U.S. to consider them to be works of art as well. I also want to point out that we surveyed our artists a couple years ago ahead of the European Commission's inquiry into the resale right and asked them whether they felt that their market had been negatively affected by the introduction of the resale right, they should know, they are the generators and the instigators of their primary market by creating the work, and 99 percent of artists came back and said they felt that their market had not been negatively impacted. Furthermore, 70 percent of them were incentivized by the royalties that they had received. And I take great offense on behalf of my artists that the assumption that small sums of money of these small royalties being paid to them is not important enough and does not incentivize them.
We hear very personally from our artists that the 40 pound royalties that we send them mean an enormous amount to them, not just for the financial recognition, but for the moral recognition that it tells them that their work is moving through the art market, that it rewards them for their effort.

So anyone who sits here and tells me that small royalties don't make a difference to artists do not speak to those artists and we hear that message all the time.

MR. REED: Okay. Brad.

MR. HOLLAND: Yes, I'd like to address some of the comments made over here by Ms. Cobden and Mr. Frankel. The first question is, really, not whether someone would have to pay a resale royalty every time a Frank Lloyd Wright house is purchased, but if one of the auction houses were to get a copy of the original drawings for Falling Water, those drawings would be treated as works of fine art, would they not?
In which case, then, a resale royalty would be applicable. And as for the suggestion that artists or the illustrators sell multiples, I'm not sure how that is supposed to work. If I do a cover for Time magazine, I don't get a resale royalty every time somebody buys a copy of Time magazine.

But if I sell the original that I did, then a resale royalty could, theoretically, apply.

MR. PERLMAN: We're trying to talk about impacts of incentives and with all due respect to everything that's been said, I don't believe we can ever determine causality in this area. I mean, there's no way to conduct a controlled experiment and use scientific method. All we have is some anecdotal information and statistics.

And I believe that, here, statistics are purely a Rorschach Test. Everybody is looking at the statistics and seeing what it is that they want to see.
Ultimately, this is an unusual issue for ASMP because normally, when we're involved in an issue it's because the overwhelming majority of our members are affected.

In this case, the overwhelming majority are not affected, but there is some percentage of membership for whom the impact could potentially be enormous. And ultimately, where I come down to is, money is money and if you can make enough money to stay in business creating, then you're going to stay in business creating.

And any additional money that you can add to that pool is going to increase the likelihood that you will be able to be incentivized and be able to exist.

MR. REED: Before I continue with our list, you've actually touched on something that I wanted to address and just ask a follow-up, do you have any sense, either among your membership, and this is for everyone, or the art market generally? Sort of, what
percentage of artists are primarily driving
their revenues from the sale of originals
versus reproductions?

And I assume it's very different
in different areas, for example,
photographers, I think, the business model is
largely licensing; whereas, in sculpture, for
example, I assume it's mostly selling the
original.

MR. PERLMAN: It depends on the
specified market of photography. People who
are doing the advertising and corporate work,
and P.R. work, there we're talking about a
licensing model and the original itself is not
likely to have a unique value other than that
it's the vehicle in which the work can be
monetized.

On the other hand, a large number
of our members do sell works of fine art.
Typically, and not necessarily in limited
number and signed consecutive editions, but
they are selling originals that do have the
kind of values that we're talking about here.

MR. REED: Okay. Does anyone have any follow-up on that specific point before we get back to the broader discussion? Robert?

MR. PANZER: VAGA represents, primarily, fine artists, sculptors, painters, some print makers, but the majority are artists like Frank Stella. And, you know, if I took our top artists, I'm not going to give any numbers here, but if I took our top artists and told you how much we pay them in licensing royalties per year, that top artist can sell one print and make more than that.

For reproduction rights, when you're dealing with fine art, really, the vast majority of that money goes to 20 artists in the entire world, and then everybody falls away after that. That's not where the money's made. In fact, most artists who become members of VAGA, or ARS, or many of the other societies which deal with primary rights, they do it because they don't have the time to
clear rights themselves.

They don't know what to sign when a publisher sends them a request asking to put that image on a cover of a book, they don't want to sign away the rights. So they're not really members to make money, they're members to keep control of what happens with their art and make sure they don't get taken advantage of.

So this issue is not up for debate. Reproduction rights for fine artists are really a very, very, very minor aspect of their careers. But what's important here with the resale royalty issue, which goes back to something else you said is, you have all kinds of situations with artists with primary and secondary markets.

So for instance, we'll represent an estate, which might have a bunch of works in their collection, and they could make money selling those works, or it can be an estate which has nothing left to sell. And in fact,
the only way that the estate can do what it
wants to do, like put out a catalogue
raisonne, or try to make a catalog of what's
gone on with that artist's career and keep the
legacy going, is to rely on sources of money
other than the sale of works.

And that's when things like
licensing for copyright can add a little bit,
and that's when something like the resale
royalty can have a huge impact for an estate
to keep the artist's name alive.

I think Morgan can talk a little
bit more about that, he represents the Dedelus
Foundation, which controls the estate of
Robert Motherwell, a very important American
artist, and you can speak better than I about
how important any money is to your mission.

MR. SPANGLE: That's true. That's
why I want to respond to this was because
Dedelus Foundation was founded by Robert
Motherwell, who was an important American
abstract expressionist artist and he was very
successful in his career. However, as Bob pointed out, the amount of money that comes in from reproduction rights, which, for us, is handled by VAGA, is a very, very, very small amount of money.

It still helps us, there's no doubt about it, we use it towards the good works that the Foundation does, but, you know, it's a tiny, tiny amount of money. We sell works to museums, we sell works to private collectors, that we inherited from Robert Motherwell, when he died, for that very purpose.

You know, he gave it to us so that we would do that to raise funds to do good works to promote public education about modernism and modern art. So I think that what Bob was talking about is a really, really important aspect.

Another aspect that we get actually asked all the time in our grant-

making process is by artists' estates who
don't have any money. In fact, when we started, we had no money. Motherwell left us 100s of works, original works, 1000s of prints, but he left the Foundation no money. We actually had to go and find a bank loan.

Now, thankfully, Motherwell was a successful artist and a bank would look at the collection that we inherited and say, okay, we'll lend you money against this, but lots of artist's foundations, or lots of artist's estates, aren't in that position.

And so suddenly, the heirs of that artist have the responsibility of maintaining, cataloging, conserving, what is often times a lifetime's body of work. And I think that the Resale Royalty Act would just be really significant in those kinds of situations where people could sell into the market, gain, you know, from the resale of the artist's works, and I think that that would be an enormous help for non-profits.

MR. REED: Thank you. Simon, I
think you had your hand up earlier.

MR. FRANKEL: Thank you. I'll try to address a few of the comments, starting with Mr. Stella's. I think it is right that artists are primarily focused on the primary market as for most artists, the vast majority of them it is the only market they have, the original sale of their works.

And I think that has important implications for the question you posed, the second question you posed, of incentive to create and the constitutional underpinnings of copyright law, because we have to remember, we have that constitutional underpinning which does distinguish our framework from that in most of Europe, certainly, beyond the U.K.

And so I think it's very difficult to say, and I think this was the point Mr. Perlman made, that a resale royalty gives any incentive to artists beyond that the copyright gives them already to create more or better works and to disseminate them. And that's in
the ASMP's comments that it's speculative, at best, what effect would have, but I would suggest it's hard to see why it would have any effect.

I entirely accept what Ms. Spriggens said in terms of her reports that artists have told her that they appreciate these payments and they are an incentive, but you have to ask, is that the actual incentive that the Constitution is focused on, an incentive that comes after the creation of the work at issue and makes them feel good about it, or is it a framework that encourages artists, initially, to create works?

And I just find it hard to believe that a resale royalty adds to the incentives that artists would have. And I think that's important when you come back to this point about the primary market because so few artists have a secondary market. And we're talking about from the statistics that are available, and I won't cite them because I
I think they're all in the record before you, but they are in the range of 2 to 3 percent have a market.

And then you have on top of that, this tremendous concentration in the E.U. experience of the resale royalties that are paid at the high-end of the market. Just as an example, of the royalties paid in the first 18 months of the U.K. resale royalty, the top 10 percent of artists received 80 percent of what was paid.

And on top of this, you have to consider, is there reason to think the art market here is not flourishing? Mr. Panzer said there is no incentive for artists to create as it is. Well, he said that they need incentive. I think the primary market in this country had flourished, even through the recession, has come back, and it's there.

And I think if you're going to have a royalty, applying it to works that have already been sold doesn't actually help. And
the final question I have, and this is really
a, sort of, theoretical question, is helping
estates of artists who are no longer creating
works, to administer those estates, is that
within the constitutional underpinnings of
copyright? I'm not sure it is. Thank you.

MS. CLAGGETT: And I actually had
a follow-up question to what you said and
would like to hear from the other panelists on
that issue, and that is, we did receive, in
the comments, a number of references to the
number of artists that actually benefit from
a resale royalty right in the U.K. and
elsewhere, and I think that some of the
comments referenced that fewer than 1 percent
of artists actually would benefit from a
resale royalty.

So I guess my question to that
would be, does that actually, then, provide an
incentive? If so, even with the lower
threshold that the U.K. has in terms of who
would be covered. There's so few artists that
actually benefit. Does that actually provide an overall incentive for artists to create works?

And as a follow-up, again, to something that Mr. Frankel had mentioned, in terms of the heirs, I think in the E.U., it also now applies to the heirs, does that also incentivize in terms of the creation of works of art, which is the focus of the constitutional underpinnings?

MS. SPRIGGENS: Firstly, I have to question some of the art market studies about where they think royalties are going, because we can't publish our statistics and figures about individual payments to artists because that's private information about monies into individual artists. So I realize that it's probably taken from public sales and auction houses, but it's not the full picture.

And so let's put that to one side, and I would also say that, let's face it, it's a royalty system that rewards success. You're
always going to get it favoring the top end of the market. It's not pretending to be anything else. However, when the European directive was introduced, a couple of mechanisms were included in order to bring greater benefit to artists at the start of their career.

And those mechanisms are the tiered royalty rates that start at 4 percent and decrease as the value of the work increases, that way, artists selling at the lower end of the market receive, proportionately, a higher royalty than those selling at the top end of the market, therefore favoring and incentivizing, or bringing greater benefit to artists at the lower end of the market.

Secondly, was introducing a lower royalty rate, and that lower -- sorry, lower threshold rate of a 1000 euros going up to 3000 euros, the U.K. has a 1000 euro threshold, and that was to ensure that a
greater number of artists selling at lower prices could receive a resale royalty.

And it is those mechanisms that the directive recognizes as a way of ensuring that it isn't just the rich artists. And besides which point, I don't mind if it's just the rich artists. This is a moral principle that an artist should see a return for the success of their work as it moves through the market.

I think it's a faulty argument. We don't complain about Paul McCartney getting royalties. We don't complain about J.K. Rowling getting royalties. Why are we complaining about other artists getting royalties? So that's my first point on that.

DACS has paid 3000 artists, to date, resale royalties since it was introduced. Predominantly, we have paid living artists, obviously, the right has only been enforced for deceased artists from the beginning of 2012. Last year, 60 percent of
the royalties we paid were to living artists. That figure is likely to change, but that's all I've got so far until it stays in line for a little bit longer.

The reality is, money will go to estates and beneficiaries, and it will be a lot of money. That money is very important. It has regenerated and invested back into the art market. In our submission to the European Commission, we found a study that looked at the value that a catalogue raisonné adds to the market value of a work when it hits auction, and that was recognized to be 3 percent.

So let's look at this. You have an estate, they have no money, they are pouring their lives, I have an estate who's selling their house in order to support the development of this catalogue raisonné. That catalogue raisonné automatically adds 3 percent value to any of his art works when they re-hit the auction.
There you go. There's your economic cycle of investment back into the art market that directly benefits Sotheby's, and Christie's, and other auction houses and dealers. So it's just as important to incentivize young, up and coming artists as it is to ensure that your cultural heritage is protected and sustained, and not forced into selling because the estate has run out of money to manage it, or identify fakes, or the multitudes of other jobs that these organizations do.

MR. REED: All right. Clare's been patiently waiting for several cycles now, so I'd like to give her an opportunity. That's all right? Thank you.

MS. MCANDREW: Thank you. I just wanted to say that we shouldn't gloss over the point that, you're saying these things are to help artists early in their career, but I know the point's been made time and again, but artists early in their career do not make any
resales, so we should all be sitting around here talking about what ways we can promote the primary market, because that is where artists are in most need.

I started looking at this a decade ago at the Arts Council of England, looking at ways we can increase artist's incomes, and the best way you can do that is to provide a healthy market, a healthy primary market, a healthy secondary market, an active market, and the worst way you can do that is to put a levy, or a fee, whether the buyer pays it, or the seller pays it, that's the worst way you can interfere with a market.

Just to give you some context, and this is the last statistic I'm sure I'll get any chance to say, but I looked at the number of artists that would benefit in the U.S. The U.S. is proposing to put this just on auction sales, not like the European Union has done it on auction and dealer sales, they're just looking at auction sales, looking at the
number of eligible living artists in the U.S. that sell at auction versus the number of artists there is in the U.S.

And 0.4 percent of artists in the U.S. will benefit from this, so that is the accurate figure. That's based on the census statistics, which probably underestimates the amount of artists, because not all artists register on the census, so that is the accurate figure for the U.S. that you can use.

MS. DIFANIS: I think one of the premises here is, does this incentivize living artists and emerging artists, which, you know, the art museum community takes very seriously. But I think one of the statistics that jumped out at us as we were preparing remarks some time ago was the one from 2010, and they may be Clare's statistics, about where the European royalty went, and 74 percent went to heirs, and sort of follows what Tania is saying, and there is no reason that people shouldn't be successful.
20 percent went to the collecting agencies, but only 6 percent went to living artists. It's hard to believe, then, that this is going to incentivize anybody to keep creating. So that system, I'm not sure is going to work for us.

MS. SPRIGGENS: Just to come back on that, those are continental Europe figures and they didn't include any U.K. figures. Well, when they were written in the paper it said continental Europe.

MS. MCANDREW: No.

MS. SPRIGGENS: Yes, so I assume they didn't include us because we're not continental Europe.

MS. MCANDREW: The only thing that might not be fair on DACS is that you charge a lower percentage.

MS. SPRIGGENS: We do charge a lower percentage.

MS. MCANDREW: So you charge 15 percent rather than 20 percent.
MS. SPRIGGENS: Yes.

MS. MCANDREW: I took 20 percent as an average of the collecting societies, because at the time, some collecting societies in Europe charge more than 20 percent, so that's the only thing it probably does overstate. And I have to say, some collecting societies do publish their figures, like the French Society, I just read it on the plane on the way over, 75 percent does go to heirs and some collecting societies do actually publish where the money goes as well.

MS. SPRIGGENS: Yes, well, we said 60 percent of ours went to living artists last year. What we don't publish is how much X artist received because that's private income. And I would also point out, that 1 percent of artists, I'm really sorry, but I have not yet found any statistics in the U.K. that conclusively tells me how many artists are in the U.K., and if someone has them, there's no category for artists in the census, and it
also ignores the fact that artists --

MS. MCANDREW: It's in the

European Labor Force Survey.

MS. SPRIGGENS: -- teach and --

MR. REED: We only have a few

minutes left. I'm sorry. I'd like to just

move on to some other comments. We can take

a look at that study later. Brad.

MR. HOLLAND: Yes, I'd like to

backup what Tania said, because I'm not sure,

I mean, it would be nice if you had a system

that rewarded all kinds of artists with resale

royalties, but what if you didn't? What if

you just didn't reward a few at the top? So

what? I mean, even successful artists

probably started out struggling, probably had

to give their work away, and if they're --

lots of people along the way are going to make

hundreds of thousands or millions of dollars

reselling their work, why shouldn't they get

a cut of the action as well?

MS. COBDEN: Okay, but we are

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looking at this from the position of the United States where we have not had a resale royalty, where we have had our common law courts are now federal court in California, numerous state legislators for 15 different states reject a resale royalty numerous times.

So if we are now going to consider one, we want it to achieve the goals that the copyright law is promoting, and that is to, in part, incentivize art. And what we're finding, when you look at the statistics here, is that, frankly, most artists don't get resale royalties.

And I think that this is Dr. McAndrew's study that showed, in 2010, only 3 percent of the E.U. living artists had eligible sales. If 97 percent of the artists weren't going to be benefitted by this resale royalty system, then is that something we want to impose over 60 years of resistance in the United States?

We also just question, it's very
nice that the heirs get the benefit of resale royalties when the artist dies, but that's not going to incentivize new art. No matter how many royalties you pay to the heirs, the artist is dead. There's no more art coming from that artist. So if you are looking to incentivize art, this may not be on a practical level, the way to do it.

I would also point out that the resale royalty system, at its best, provides intermittent, uncontrollable, and unpredictable resale royalties because that's the way the art market works. So an artist could get it a lot for three months and then nothing for two years. What kind of incentive is that, that sort of intermittent reinforcement?

MR. REED: I see Mr. Stine's hand and he hasn't spoken too much, and then we'll come back around.

MR. STINE: Well, I just wanted to reiterate that, yes, we want to incentivate
new art and so we should be concentrating on
the new artists. And new artists, they don't
suffer from a lack of a resale royalty, what
they really suffer from are student loan debt
and, you know, lack of market exposure, an
oversupply of artists, people with degrees
that claim to be artists, and just, generally,
an inability to relate to the primary market
on how to sell.

I think the best way to
incentivate artists is to educate them on the
rights they already have, hence, copyright.

MR. REED: Okay. We have five
minutes left. I want to go to Morgan, then to
Robert, and then Simon, briefly, and then we
will take some comments from the audience if
there are any.

MR. SPANGLE: I think artists are
incentivized to make art because they're
artists. I mean, I think Frank Stella said it
best, you know, they would just be making are
art no matter what. But I do think that, and
I've known plenty of successful artists who feel this way, that they want to have some measure of control if they are successful. I mean, you know, you go and buy a lottery ticket, right, because you think you're going to be successful, and if you're successful, fantastic. So, you know, if you're an artist and you're successful, you want to have some measure of control and some measure of reward for that success.

And I don't think that it's any different, like Tania said about Paul McCartney, we don't resent Paul McCartney being paid for his music. I don't think, you know, that artists that are successful should be resented or precluded from participating in the upside of their market if that should happen.

MR. REED: Thank you. Robert.

MR. PANZER: Going back to this incentive idea, you know, in one way, I think we're missing a big point. Copyright is not
the incentive for the initial creation.

Nobody becomes a writer because they think they're going to sell a lot of books. They become a writer because they want to become a writer, they want to become a painter, they want to become a musician, and then they try to figure out how they can make a living from it because they really enjoy it and like it.

The incentives for copyright as compared to, let's say, patents, are to be able to help creators stay in the business. In other words, how do we keep you in the business? You've got to make money somehow. And so if we look at copyright or the resale royalty right, it's a way to keep you in the business. It's not the spur of the business. Copyright doesn't do that.

Nobody says, I'm going to be a copyright guy. I'm going to make all my money from copyright. And so once you recognize that copyright is not the spur, but rather, the thing that keeps it going, then it's very
easy to look at copyright in a broader way, such as how do we make copyright do what it was intended to do, which was to encourage continued creation. That's really how it works. It's continued creation.

The other point I wanted to make was that one of the reasons you don't see, in the European countries, as much money being distributed to as many people as possible is because the laws are compromised by all the parties involved. In other words, if the laws work the way, copyrights aside, or artists would like them to be, there'd be a hell of a lot more people making money.

There'd be lower thresholds. It would apply to every single sector of society, first sale, private sales, it would be more robust. So the more robust you make it, the more open it is to all kinds of sales, the more money there's going to be. So the fact that it's not getting to everybody is a reflection of the laws being compromised to
make the market smaller for the resale royalty.

MR. REED: Thank you. And Simon.

MR. FRANKEL: Two quick points. The first is in terms of reward and incentive. I think the numbers show, I think it is the case, that not only does a resale royalty go to the very, primarily, a top group of artists who are already thriving, but those artists already have a thriving multiple market through outlets like VAGA.

And so it, again, comes back to this initial argument that there's some kind of inequity in the copyright law that needs to be remedied. I don't think there is; there's no need. And the other is, I just want to come back to a point we made very briefly in the first panel, which is, resales in the secondary market do benefit artists creating works because those resales lift the primary market for those artists.

And we all know the story of the
1973 Scull auction, Robert Rauschenberg, and we all should know the impact it had in sharply raising the primary prices for Rauschenberg's works. And I just think it's worth keeping in mind that there is that benefit.

And a resale royalty doesn't give an artist like Robert Rauschenberg an incentive to create more works, but the rise in the prices in the artist's primary market may do that.

MR. REED: Okay. Thank you very much. We have a couple minutes left. Are there any thoughts or questions from the audience?

MR. STELLA: I just want to say one thing about this, the incentive thing is a problem, but the idea here is that, because copyright is not seen to have any particularly worthwhile effect incentivizing people, we're not looking at the problem for what copyright can do.
And as I said, I think it's not just the issue of reproduction, there's something about here, two things, one, in the United States, we have to have more protection, through a fee, a levy, whatever you want, for the actual object, something has to happen where the artist gets a creative fee for making the object. It has to be attached to that object and that object, you can't say that it's copyrighted, but that object has a value.

And as it circulates, there's a percentage, or a piece, coming back to the artist, and that's the only way that it's going to make a difference, and it has to be across the board; for everyone.

MR. REED: Thank you very much. Are there any thoughts from the audience? We have, again, just a couple of minutes, so very briefly, please.

MR. FEDER: I've got a couple of quick points, with regard to the U.K., it
should be pointed out that a 100 percent of
everything that they distributed, and
collected, and sold at auction went to living
artists until January 1, 2012, when the law
allowed for heirs to receive the monies.

The other point, if only 0.4
percent of U.S. artists would benefit from an
incentive, I dispute that figure, but let's
accept it, then why are the auction houses so
adamantly opposed to creating this right?

With regard to Frank Lloyd Wright, I represent
his estate in terms of his copyrights, and we
do protect his drawings, his elevations, his
plans, and so on.

And lastly, we said it's easy to
sell reproductions on the Internet. That's
very true, but most of the time, and too
often, these are not originals. These are not
done by the artists in question. It's very
easy to ripoff an artist on the Internet. I
represent about 50,000 artists and we fight
this every day.
MR. REED: Thank you. Go ahead.

MS. COBDEN: I want to just say, though, again, the analogy to the architects, we're not protecting their houses. They are in that way, very much like the visual artists here, and this is something that the Copyright Office needs to consider when they're considering how far this can expand and whether or not they want it to take that step.

MR. STELLA: But there's a point when the society steps in and the architect's work is deemed to have to be preserved, for example. Now, how do you deal with that? You're making an exception to your idea.

MR. REED: I think we'll have to make that a rhetorical question and have the last comment from the audience.

MR. PFENNIG: I want to make a comment on the number of artists who can profit on resale royalties --

MS. CLAGGETT: Oh, wait. Can we just stop you one time. Could you just come
MR. PFENNIG: I'd like to point out the number of artists who can profit. I give you an example. In Germany, we have 15,000 artists who are a member of the professional association. Maybe overall, we have 25,000 artists. 5 percent, not more, make a living out of their works they are creating. The rest, 95 percent, they are dreaming, they are hoping, they are in, they are out. This is reality. I think this is perhaps also the reality in this country. And when 3 percent are earning from a resale royalty, this is more than 50 percent of this 5 percent who are really efficiently working in their profession. And so it is misleading to use such numbers as 0.5 % of the artist's population who participate from the resale royalty.

Yes, but only 5 percent are really making a living as artists and you have to put
these numbers in relation and not 100 percent, or 0.25 percent. And this is reality in all these countries. People who want to be artists, they are artists, and they create, not because they want to make their profits out of the resale royalty, but as Frank Stella said, they want to do something for the others.

They want to make them a pleasure to give them something to think about, but not to earn in copyright remunerations or in resale royalty. But this is an award they get later on when it turns out that their work has been successful. But please don't believe the numbers of artists in countries.

MS. MCANDREW: Sorry. Can I just clarify, because it is my statistic, just as a very last note, just to show how I derived it. There were 830 living artists who had eligible auction sales in the U.S., and that was numerator, the denominator was the number of artists according to the NEA and the
census, which is over 200,000. So that's how the figure is derived. There's no mystery.

MR. REED: Thank you. And I understand, Anne-Marie, who came all the way from France, has one more comment, so we'll give her the absolute last word.

MS. FERRY-FALL: I'd like some figure between the deceased artist and the living one, more or less, year by year, it's around 60 percent of the deceased artist who's having resale right, 60 percent are deceased and 40 percent are living artists. And year by year, we see that, in the top ten, there is, more or less, three living artists and seven deceased artists, so resale right is for living and deceased artists, not just for deceased.

MR. REED: All right. Thank you very much. Thank you to all our panelists. It was a very interesting conversation. I just want to reiterate what Karyn said about us having an open-door policy. I know we had
only an hour to discuss a very expansive topic, and so, obviously, we'll continue the conversation here in about ten minutes, but if anybody has thoughts on this particular panel or this particular topic, don't hesitate to reach out to us. We would love to continue the conversation.

(Whereupon, the foregoing matter went off the record at 3:06 p.m. and went back on the record at 3:18 p.m.)

MS. CLAGGETT: I do want to apologize for the heat in the room. It seems like it's actually very hot in here, so we are trying to work on seeing if our air conditioning can be increased, but I hope that you all will indulge us for a minute in terms of the heat. As soon as everyone takes their seats, we will get started with the third panel.

MR. REED: Okay. It looks like our panel is all assembled. Thank you all for coming back. This is panel number three of
our Resale Royalty Rights Roundtable Public Meeting. Panels three's topic is First Sale and the Free Alienability of Property and Constitutional Issues Associated with Resale Royalty Proposals.

Broadly speaking, some are saying that the resale royalty right is inconsistent with the First Sale doctrine, which of course, is a foundational principle of the U.S. copyright law. Others have characterized it, simply, as a transfer tax, and so we're interested in delving into that issue.

We also have heard some comments that suggested that it raises issues under the takings clause of the Constitution, and also, that it limits the free alienation of pre-existing works and that retroactivity may be an issue if this is applied to works that have already been created and it applies moving forward.

And then finally, it raises issues regarding the current bill, which we'll get
into more in the next panel, although it raises constitutional issues, which is whether the bill is drafted would apply only to a handful of organizations and whether that raises bill of attainder issues.

And so with that, will get started, just broadly, with the first question, which is, to what extent is the First Sale doctrine compatible or incompatible with the resale rights royalty? And before we get to answering that, though, I'd appreciate it if we could just go around the room and have the everyone introduce themselves and their affiliation for the record, please. Ms. Goodyear.

MS. GOODYEAR: Yes, absolutely. I'm Anne Collins Goodyear. I'm Curator of Prints and Drawings at the National Portrait Gallery, and I'm here in my capacity as President of the College Art Association. Thank you.

MR. REED: Thank you.
MR. LEHMAN: I'm Bruce Lehman. I'm counsel for the Visual Artists Rights Coalition.

MR. CLEMENT: I'm Paul Clement from Bancroft. I'm here representing Christie's.

MR. REED: Thank you.

MR. FRANKEL: Simon Frankel for Sotheby's.

MR. SHORE: Andrew Shore with the Owners Rights Initiative. We're a coalition of about 20 companies and trade associations.

MR. FEDER: Ted Feder. Head of Artists Rights Society. It represents more than 50,000 artists.

MS. HICKS: I'm Janey Hicks at One Mile Gallery, a New York art gallery.

MR. AZAR: Joe Azar. Illustrators Club of Washington, D.C., Maryland, and Virginia, and several hundred artists and professional illustrators since 1986.

MR. STINE: Quinn Stine, I.P.
counsel for Intergalactic Enterprises.

MR. REED: Okay. So again, I think we'll just start with a very broad, basic question and kind of work our way to the issues from there, and we should begin, you know, to what extent a resale royalty scheme would be compatible with the U.S. First Sale doctrine. Mr. Feder?

MR. FEDER: It's important to note that this issue, this precise issue, has been considered by the California courts, and in the famous case of Morseberg against Baylon the court rejected the claim that the First Sale doctrine preempts the Resale Royalty Act. The courts held that the royalty simply required a payment, but does not limit the ability of the sellers to rent or sell the work to whomever they wish, so that's very important.

And that's a smaller limitation on the first sale doctrine than the two exceptions which have been written into
section 109, which is the First Sale doctrine in the Copyright Act, and that is the Record Rental Amendment of 1984, limited the ways in which owners could rent or sell their phono records.

And the same was true with Computer Software Rental Amendment in 1990. Both limit the ability to dispose in the case of phono records and also in computer software. Both are, therefore, limitations on what you might call the First Sale doctrine, but it's something which has been recognized.

And as was said by Joe Laird, who introduced a submission to the Copyright Office, and federal law already recognizes that owning a fine art is different from owning other objects. Thank you.

MR. REED: Mr. Stine?

MR. STINE: Well, I guess I was going to bring up Kirtsaeng v. John Wiley, because I guess that is the newest and most directly impacts the resale royalty right.
The Supreme Court quoted Bobbs-Merrill v. Straus and they said, copyright was not intended to permit the right holder to fasten a restriction upon subsequent alienation of the subject matter in copyright after the owner had parted title with one who had acquired full dominion over it.

The resale royalty right does that. It fastens a restriction on the subsequent alienation of the original work of art.

MR. REED: Ms. Goodyear.

MS. GOODYEAR: I think that the College Art Association would agree with Mr. Feder that, of course, on federal regulations already recognized, that art is a different asset. And of course, VARA, arguably, already imposes some constrictions, or restrictions, on what we might associate with the First Sale doctrine in terms of preventing, obviously, the wilful destruction or damage of a work of art.
However, there's one question that we would want to pose, I think, with respect to thinking about the First Sale doctrine, and that is whether the imposition of a resale royalty could potentially put right holders in a position to influence parties to whom a work of art could be sold, or whether it could put rights holders in a position to influence or impose restrictions upon the exhibitions of works of art.

So that would be one potential consequence of a resale royalty that we would just want to see considered if we were to go that direction.

MR. REED: Mr. Frankel.

MR. FRANKEL: I think as a general theoretical matter, there is an inconsistency between a resale royalty and the First Sale doctrine in Section 109. That section codifies an American rejection, in general, of restraints on alienation, with the concept that, once an author has sold a copy, the
author doesn't retain an interest.

And I think there's a commonality between a restriction that a new owner can only sell it for a certain price and the new owner can only sell it if they pay a certain percentage of the price to the original creator. And I think it's also, there's an inconsistency with Section 202, which distinguishes between the copyrighted work and objects in which the copyrighted work is embodied.

And I think I'll just say this, this tension, this inconsistency, was recognized appropriately in the 1992 report.

MR. REED: Mr. Clement.

MR. CLEMENT: Yes, I mean, we obviously submitted some comments on some of these issues, and I think the most significant thing that's happened since we've submitted the comments, as was already mentioned, was the Kirtsaeng decision, and everybody, maybe, has their favorite part of that decision, but
Justice Breyer, right in 5th Court, talked
about the impeccable historical pedigree of
the First Sale doctrine, and went on to quote
Lord Cook about the restraints on the
inalienability of chattles and how that was,
kind of, a bedrock principle of American law.

And so I think in thinking about
the First Sale doctrine and the consistency
with the resale royalty, it's important to,
sort of, kind of, ask, essentially, two
questions. One would be whether Congress has
the power to create an exception to the First
Sale doctrine, and we'll eventually talk about
the Constitution, but for purposes of the
statutory analysis, I'll assume they can.

And I think that's why it's not
that significant that a state court might
recognize that a state law isn't preempted by
the First Sale doctrine. Those are really,
you know, usually, the question on preemption
is whether there's a complete incompatibility
between the federal statute and the state
And there is, maybe not a complete incompatibility, but I think there's substantial tension. I mean, if you just, sort of, say resale royalty, and say First Sale doctrine, I think you recognize that, you know, the idea that you're trying to, sort of, attach rights to the original author on the resale is in substantial tension with the First Sale doctrine.

And the only thing I would say -- well, I guess I would say one other thing, which is, so in some ways, the thing that I've heard in response to that argument that seems superficial to most of the places is, it's just a tax and it's just a specialized tax.

And I don't think there really is any analog to a tax where the beneficiary of the tax isn't the Treasury, it's, essentially, the author or the prior owner. And maybe I'll return to this when we talk about the Constitutional issues, but I think the fact
that the beneficiary of the resale royalty is
the prior owner really does make it clear that
this is not just a tax, it's a restriction on
what has been sold to somebody down the
ownership stream.

MS. HICKS: Thank you. Mr. Lehman.

MR. LEHMAN: Well, I think that
Mr. Clement really touched on, really, what is
one of the central points here. There really
are only two issues, really, two legal --
there's really only one legal issue that
really has to be considered. The others are
policy issues.

Does Congress have the power to
enact this statute or does it not? And he
just acknowledged that it does. And really,
that's, more or less, the end of the story if
you accept the policy justifications behind
this proposal. You know, I read the
submissions that were made and I find them
filled with references to traditions, tensions
with doctrines, so on and so forth.

   By the way, in many cases,

tensions with common law doctrine, which don't have anything to do, whatsoever, with a federal constitutional power under Article 1 Section 8, and I want to make it perfectly clear that we are not talking about a tax. We're talking about legislation that would be enacted by Congress as part of its ability to make copyright law.

   And Congress has extended the subject matter of copyright over the course of the last 200 years to adjust for new business circumstances, to adjust for new industries, to adjust for new business models in industries, and it continues to do so to this very minute. In fact, hardly a single Congress goes by where there is not such an adjustment.

   Section 109, the two restrictions on the First Sale doctrine of Section 109 were referred to. That's not something to be taken
lightly. Those were very significant restrictions. And by the way, to read some of these papers, you would think that you were literally stopping someone's ability to use the work once they had physically purchased it.

Nothing in the concept of droit de suite does that. All we are talking about is the simple right to receive a royalty upon changing hands of the work. Now, we have that all over the copyright law. What is Section 111 in the compulsory license for cable television? That was a situation in which a business model evolved which took advantage of copyrighted broadcasts, the creators were not receiving compensation, and so Congress adjusted the law to deal with those changing circumstances.

This is a situation where the business model of the existing copyright rights does not fit the visual arts world. You know, I did a little analysis, and I think
this is way out of date, several years ago. And I found that the sales of, you know, these statistics are published, the sales of art works, resale at auction, and they're all highly transparent statistics, about four or five years ago, that's the last I looked, were about $13 billion worldwide.

Now, I think that figure is probably way low. That is just about the same amount of money for the same year as the total revenues, which know because of SESAC and their reporting, of the music collecting societies. So the music collecting societies have a business model in which, by the way, rightful authors receive 100 percent, after the administrative fees are taken away, of the collections.

The same amount of money is being created off the business of selling the works of a creator and they're getting nothing. And even under the most generous terms that EVAA has, they would get 3.5 percent. So I think
the only question, again, is, this is a policy question, should Congress do this? I don't think there's any question that Congress has the constitutional authority to do this.

MR. REED: Thank you. Mr. Shore?

MR. SHORE: Yes. So if the question is, should Congress do this? In the last Congress there was exactly one co-sponsor of the bill; one. Four hundred and thirty-five members of Congress, one co-sponsor.

MR. FEDER: Two.

MR. SHORE: Two. Two? Not according to the Library of Congress, but okay, two. We'll concede that you all made a mistake on the Web site. And it would be our position that if you wanted to leave this in the hands of the policymakers, the vast majority, 433, or 34, members have said, this is not something that they support at this time.

So Congress has spoken by its inaction and said, this is not a good idea.
MR. REED: Mr. Feder.

MR. FEDER: I must say, in all fairness, the other members have not been solicited on the issue. Senator Kohl retired at the end of the last session and we're now seeking other Senators and a much more vigorous method is going to be undertaken to obtain the support of other Senators and Congressmen.

This is the beginning, relatively the beginning, of our efforts, not the end of them.

REGISTER PALLANTE: Let me just say, Mr. Nadler, who was one of the two sponsors, will be here at the end of the day to talk, and I think what he would say, and you can ask him directly, is that, he agreed to do a study. And so I think the question of who else is interested and where they might be on the issue, probably hasn't been vetted yet, in fairness to the sponsor.

MR. SHORE: No, but in fairness,
and like many people in this room, I spent a
large part of my career on Capitol Hill, any
bill that sits in the hopper for any extended
period of time will gather at least a small
handful of co-sponsors, particularly a bill
that, you know, has such strong support among
so many constituencies out in the hinterlands.
So to not even have one more co-sponsor in the
House, or five, or ten, I mean, that has to say something. That has to speak to
something.

If it speaks to nothing, then --

REGISTER PALLANTE: But nonetheless, we're going to do the study, the
Copyright Office has to do it, and that's why we're here today.

MS. CLAGGETT: Comments made today have been that they knew that we were likely
to do a study and they, obviously, like to hear what the Copyright Office is able to
solicit in terms of views from the multiple
different parties. So obviously, that could
change as Register Pallante had mentioned.

Mr. Lehman.

MR. LEHMAN: Here again, just like
the references to traditions, doctrines,
common law doctrines, that don't have anything
to do with the constitutional powers, so this
comment is absolutely irrelevant. Legislation
hasn't been introduced. The Copyright Office
was asked and it is now, indeed, studying this
matter, as they did, by the way, in 1992, and
that is really the issue.

When the Copyright Office makes
its report, and after Congress has had the
chance, finally, to consider this, and the
constituent groups have been able to talk to
more members of Congress, I would suspect that
there would be many, many more people
interested in sponsoring this bill, but that
is utterly irrelevant to this proceeding
today.

You know, we're talking about a
study by the Copyright Office revisiting its
1992 report. And by the way, I've heard a lot of references this afternoon to the 1992 report. And to hear those references, you would think that the 1992 report was 150 pages of reasons why we should not enact a droit de suite statute in the United States.

In fact, it's quite the opposite. It, for the most part, is about 140 pages, at least, of detailed examination of the issue, history of the issue, the California law, the European law, the status of things in the rest of world, makes no judgements, to the extent that a judgement is made in the report, if you read it, the judgement is that artists have a real hard time, had a hard time in 1992, getting paid like other copyright holders, and that that was a problem.

But the 1992 report concluded that it was premature to adopt droit de suite as a solution and it proposed, I think, about four other things that Congress should pursue, and including, by the way, I think a fee on
museums, and said the National Endowment for the Arts should give people more money, has any of those things happened in 20 years? No.

The one thing that the Copyright Office report in 1992 said that was very dispositive today, is that Congress ought to wait until the Europeans have acted. That has happened now. And so now we see, I think, not only a good justification, but the necessity.

You know, we heard a lot about, in the first panel, you know, the international art market and our people making more money or not. First of all, when we're considering whether the art market is growing or not, what is that art market? To a large extent, it's simply the market in speculation in works of art created by authors in which authors receive no compensation at the moment whatsoever.

Now, what really should happen is that the United States should join the community of nations about the droit de suite
itself and I would suggest we not adopt the
European model, that we do something better,
and that then, when other countries have done
the same thing, that we then have an
international harmonization where we have a
universal droit de suite which is no longer a
voluntary part of the Berne Convention, but is
indeed, the part of a new international
treaty, just exactly as we have done in the
digital universe with the WIPO copyrights and
Phonographs Treaties, and as we are currently
in the process of doing now with regard to the
rights of visually impaired people.

MR. REED: Thank you very much.

And I wanted to follow-up with Ms. Goodyear in
a point that you had made earlier, if you
could expand upon a little bit. You, I think,
had suggested that this resale royalty regime
might allow an artist to, sort of, restrain an
exhibition or hinder an exhibition of his or
her works. Could you please expand on that a
little bit?
MS. GOODYEAR: Well, I think that one of the things we want to consider with respect to the doctrine of First Sale is exactly what type of constraints might we be looking at if such a resale royalty were to be adopted. And of course, I think VARA makes a very good point that we recognize that art does have moral power, that it is not appropriate for an owner to destroy or to wilfully damage something, which obviously, puts a restriction on what a lawful owner can do to this particular asset.

I think in terms of thinking downstream about the disposition of those works of art, I think we want to be very cautious about what it does mean to, and perhaps, impose certain requirements upon a legal owner. I'm not sure that the doctrine of First Sale is constitutionally indoctrinated. I think that there are other sorts of limitations that we put upon it.

To my mind, it's not obvious that
it is necessarily unfair to impose a royalty of this nature. However, I think what we want to look at is the possibility of the law of unintended consequences. And so I think as we begin to look at what a resale royalty might look like, is there any scenario in which a royalty recipient might be in a position to influence a sale or to prevent a sale, possibly, for moral reasons, other sorts of reasons. Is that something that we would want to take into account in developing legislation around this?

I was also very interested to look at what the museums had filed in the case of Kirtsaeng v. Wiley and some of the concerns and considerations they brought up around the doctrine of First Sale there. I think we want to make sure that, in no way, would a royalty, or the expectation of a royalty, have any sort of implication for the ability of an owner to loan that work of art.

That the College Art Association
is less here to propose specific legislative
solutions and more here to raise questions
that might be important to consider precisely
as we explore the myriad implications what we
all acknowledge is an extremely thorny and
complex set of questions.

I was very interested to see that
the Library of Congress at the U.S. Copyright
Office raised very strongly, in its notice of
inquiry, the question of perceived fairness.
And I think we need to grapple with that very
strongly. I think we can certainly document
among a community of makers, that there are
real concerns about the degree to which
artists are fairly compensated for their
activities, precisely when we see evidence of
rise of value of their work.

And so at any rate, I think,
certainly, we want to address that, and in
thinking through those solutions, to think
through the implications of them is extremely
significant.
MR. REED: Are you aware of any circumstances in Europe, for instance, where a regime such as this exists where there have been those sorts of unintended consequences that have been detrimental to museums, or archives, or libraries?

MS. GOODYEAR: I am not aware of those off the top of my head. The College Art Association would be very, very happy to work with the U.S. Copyright Office in researching those types of issues, and indeed, in surveying a community of makers around those sorts of questions. And I think it would be worth investigating those.

MR. REED: Okay. Thank you very much.

MS. GOODYEAR: Thank you.

MR. REED: Mr. Feder.

MR. FEDER: I have looked into that issue.

MS. GOODYEAR: Great. Thank you.

MR. FEDER: And it's fully
reported on and vetted around the world. And I know of absolutely no instance in which the resale right, I'm sorry, the display right, has, in any way, been affected by this. There are no consequential results of the type that you have indicated. And also, I would suggest, this is not as complicated a piece of legislation as some have presented it to be. It's a fairly straightforward one.

With regard to whether artists are sufficiently compensated given that they are creators of works, you know, composers and lyricists collect royalties, actors collect the equivalent of residuals, playwrights or screenwriters get public performance rights, but visual artists are the only members of the creative community in the United States who do not realize a penny from the later residual or royalty payments.

And that's, I think, what we're addressing here. So they are a special category, but they're a special category,
which in many ways, have suffered and been discriminated against.

MR. SHORE: But when I go see a movie, I don't pay a royalty to an actor. I buy a ticket. And so the next time I see a movie, I don't then pay a royalty. What you're asking to do is, you're asking to impose on each successive purchaser of a good, a royalty that they then have to go all the way back and find the original artist.

I think the two scenarios are totally inconsistent.

MR. FEDER: But an analogy to what you're saying is that we've asked everybody who saw a work of art in a gallery to pay a royalty. That's not what we're asking. We're talking, simply, about secondary and tertiary sales.

MR. SHORE: Right. I'm asking you to point out to me where is the consistency, where is the analogy, between the successive purchase of a piece of art and its return
royalty back to the original artist and a
movie? Like, I don't see the parallel.

MR. FEDER: Well, directors, and
certain actors, receive royalties from the
sale of their movies.

MR. SHORE: But not when I buy a
DVD and then sell it, you know, go to Eastern
Market and resell it. They don't, then, get
a royalty from that sale.

MR. FEDER: We hope you don't sell
that because there are regulations in 109(a)
which --

MR. SHORE: Not on a DVD.

MR. FEDER: -- limits certain
phono records and their manifestations. But
the fact is that, the further realization of
profit on the part of composers, lyricists,
many actors, directors of plays, are a result
of the later display of a performance, is a
better word, of their work, and they benefit
from that.

The point being that, visual
artists do not benefit whatever, and that's what we're trying to correct.

MR. REED: Okay. I want to get some other folks here. I saw Mr. Frankel first, then Mr. Clement, then Mr. Lehman.

MR. FRANKEL: I think this is sort of taking us back a little to the prior panel in terms of the purposes of copyright law, and I think, again, this emphasis on how lyricists and songwriters are compensated, and visual artists aren't, and this is the point that they are compensated when their work is copied or performed. And if a visual artist's work is copied, they are compensated.

And, for example, the estate of Andy Warhol receives significant licensing revenues on reproductions. The reason is, there's demand for them and it goes back to the point that, it all depends on what works are successful in the market as to different rights. And the purpose of the copyright law is to foster the creation and dissemination of
creative works.

It's not to guarantee revenue streams to different types of authors, and I think, in the most part, it's not to intervene in market conditions. It's to create those circumstances for appropriate encouragement.

Coming back to this question of the First Sale doctrine, I think it would be a unique feature in American law to have a rule that a person who owns property free and clear is required to pay, not to the government, but to a person, a payment every time it's sold, and this is not a property interest that would only operate one time.

If a work is resold three, four, five times in the secondary market, this would always be a property interest that the artist would retain and that would affect the disposition of the work.

MR. REED: Thank you. Mr. Clement.

MR. CLEMENT: Yes, I just want to
clarify a couple of things. I mean, I think there are two issues here. One is really, the consistency with the First Sale doctrine, which I took to be something of a policy inquiry, and then there is the separate question of whether it's constitutional. I certainly didn't want to be heard as suggesting there weren't constitutional difficulties with this. I think they're separate.

And what I'd like to, sort of, reaffirm is that, in a policy level, I think the question of whether this is consistent with the First Sale doctrine is an important question to ask, even though it doesn't determine a constitutional question, because it does seem, if the conclusion is, well, yes, this is inconsistent with the First Sale doctrine, it may or may not be that Congress has the power to do it nonetheless, but the fact that it's inconsistent with such a bedrock principle of the copyright law, is a
reason, it's at least a yellow flag, that you don't want to go down this route and be inconsistent with such a bedrock doctrine.

And for that reason, you know, in the various submissions, it is quite relevant that there is material, and copious material if you want to see it, about the traditions of the First Sale doctrine and how it goes back to an even older tradition about not having restrictions on the alienability of chattels.

And it's precisely because, even the Supreme Court, and Kirtsaeng is a great example, finds those kind of traditions and material relevant when they're interpreting the Copyright Act. And it seems to me, by the same token, it's quite relevant to take those into account in trying to figure out whether there's something we should change here.

Just two other very minor points, one is, Mr. Frankel's point, I think, is very well taken, which is, not only would this be inconsistent with the First Sale doctrine, but
it would be inconsistent with the Second Sale, or the Third Sale doctrine. I mean, it really is an incumbrance on the chattel that really is quite significant and quite unusual.

And the other thing to say, just to agree with Mr. Lehman that, when I say it's not a tax, I mean, I think that actually adds -- I mean, I certainly agree it's not a tax, and I'll come back to it, but my point was just, I think, for purposes of thinking about whether this is consistent with the First Sale doctrine, the most beguiling way to say, well, maybe it's not inconsistent is to think of it only as a specialized sales tax.

So I actually appreciate the fact that we agree that it's not an ordinary tax, because a tax just, generally, doesn't endure to the benefit of a former owner. That makes it quite different, I think.

MR. REED: Mr. Lehman.

MR. LEHMAN: If I took, literally, all the comments that have gone previously, I
would think that, when one purchased any work of creative authorship, if I had bought a copy of a book, if I acquired a copy of a screenplay, or a score to music, that somehow or other, boy, I'd acquired everything. It was mine. I owned it. I would own it forever. And yet, we all know that the bedrock idea of copyright law is that that is not true.

In fact, you do not own the right to do whatever you wish to do with it. You cannot -- well, speaking of motion pictures, I think that Hollywood would be a little surprised to hear that the sales of tickets in movies don't have very much to do with copyright law. They have everything to do with copyright law. The film is licensed to a theater under a contract which is based on copyright.

And fees are paid, various people that participate in the making of a motion picture receive fees based on those
copyrights, some of them, by the way, are direct copyrights themselves.

For example, the screenwriter has a copyright right. Of course, the playwright, not the playwright, but I mean the actors, don't have a copyright, but they do receive residuals by virtue of collective bargaining.

And so we have a system supported by the copyright law that fits the business model of music and providers for a very healthy, robust industry that keeps up with the times.

The issue here is that we do not have that with regard to the visual arts. So we are not stopping somebody from doing virtually anything they want when they buy a painting or a sculpture. They can take it to Tibet if they want. They can put it in a closet and never show it to anybody else if they want. They can sell it to whomever they wish if they want.

They only would be required to pay a statutory royalty. And by the way, if that
sounds so terrible, well, why is it that public television stations, by the way, under Section 118, have to pay a statutory royalty? Why do we have the statutory mechanical right royalty then? Why do we have all these other statutory royalties?

There's absolutely nothing unusual about Congress extending the scope of copyright and then Congress creating circumstances, in this case, very limited rights where there is, in effect, a statutory license accompanying the right and very strict limitations on the compensation that may be received and how it may be received.

MR. REED: All right. Thank you. Mr. Shore, and then I'd like to move on to some of the constitutional issues here.

MR. SHORE: I feel like we're confusing ownership with a license. And if we want to have a discussion about, you know, granting people a license and then, yes, in that case, you don't own something when you,
you know, as it currently stands in most
situation, download a movie, you don't own it.
You own a license.

    But what we're talking about now
is a physical good whose ownership is
transferred from person to person, and that
the first purchaser of the good gives up their
rights to it when it's sold to the second
person, and so on, and so on, and so on.

    And we're sort of muddying license
and ownership, and I don't think that's where
we want to go.

    MR. REED: I just wanted to
follow-up one question for the panel, which
is, does it change things under the bill and
under some of the proposed regimes that the
penalty for not paying the royalty would
subject you to copyright infringement
liability? Does that change the picture at
all? Ms. Goodyear?

    MS. GOODYEAR: I think one of the
important this raises, actually, is the
practicality of how we implement this. If we are to imagine a scenario in which this resale royalty were to be accepted and were to go through, if we talk about principles of fairness and so forth, what does it mean to collect this royalty, particularly on works that may not have clear rights holders; orphan works, for example.

And I think you raise a very important question, does that put a purchaser into a situation of infringement? What do we do if there's nobody who is recognized as the rights holder? And that's certainly a question that I'd like to explore.

And then, Mr. Feder, you raised a very important question, I think, of, what does it mean to compensate an artist for sale of his or her work for increased value of that work over time? Of course, we know that the legislation that was proposed back in late-2011 was relatively limited to a very small segment of the market; sales of $10,000 or
above at auction houses that were doing significant business of $25 million or more.

And I know we'll have a chance to look at some of those issues during the next panel, but I think a question that we would also want to take into account, and this is where I'm thinking about the thorniness, or the muddiness, of some of this is, what does it mean to collect those sorts of royalties, how does that, how is it distributed, how do we assess what's fair in that regard?

MS. CLAGGETT: Yes, and as you said, I think some of those points are going to be --

MS. GOODYEAR: Sure. Thank you.

By all means.

MS. CLAGGETT: -- discussed, things that we'll talk about, in the next panel.

MS. GOODYEAR: Terrific.

MR. FEDER: We could say that, or I could just briefly answer, there's a system
in place, it's international in scope, of some
40 artists' rights societies around the world
who exist under the umbrella of a group called
CISAC, which is based in Paris, and what they
do is vetted, first, by their own ministries
of culture, and then by CISAC.

The bill in question before us
does call for oversight by the Copyright
Office. It's not as if the collecting
societies would just simply run amuck with it.

On another question, if the First Sale
doctrine is so inviolate, as you seem to
imply, how do you account for the record
rental amendment, which also, by the way,
focuses on owners. It doesn't talk about
licenses, per se.

It says, and this is something the
Copyright Office approved of, this is the
language of the statute, "The owner may not,
for purposes of direct or indirect advantage,
dispose of or authorize the disposal of the
possession of that phonorecord by rental,
lease, or license."

The bill does not keep you from disposing of the work in any way. It's simply a small sum that you would have to pay for the benefit of the artist. What's happening, these exceptions to the First Sale Doctrine with regard to phonorecords and computer software, are much more draconian than what we're talking about. And those are existing statutory exceptions to the First Sale rule.

MR. REED: I just want to stop you there for a second, because I think I'm having some trouble understanding, or perhaps I just missed it, why the First Sale doctrine issue was not a problem in Europe when this was implemented?

MR. FEDER: No, I'm saying it's not necessarily not an issue, but I'm saying that there are precedence for dealing with it, and I've cited what happened with the phonograph amendment and also with the computer software amendment, both of which are
exceptions to the First Sale rule, and to inhibit the first sales.

MR. REED: Okay. Mr. Lehman.

MR. LEHMAN: I just wanted to answer the first question, and maybe now, your second question. Your first question had to do with infringement as a remedy.

MR. REED: Right.

MR. LEHMAN: Infringement actions are the primary remedy under the Copyright Act and they work differently in different situations. I think that a good analogy here is the Digital Millennium Copyright Act and its anti-circumvention provisions. You know, that, basically, permits an infringement lawsuit. And, you know, what does that have to do with a classical infringement?

It was molding the copyright law to deal, in that case, with a far more dramatic restriction, change, et cetera, on activity than this. So I don't think there's any problem. If the DMCA can survive that
criticism, I certainly think this could.

Then finally, you asked about Europe. Of course, I am not aware of any of the European countries, I'm not familiar with all their Constitutions, for whom this is fundamentally constitutional doctrine or constitutional power. But the concept of author's rights, of course, is very well established, and a very old principle, actually, it's sort of constitutional, and it goes back to the French Revolution in Europe, and it's a copyright principle.

And that's one reason, by the way, why it was recognized in the Berne Convention, which started out, by the way, as a European convention. The U.S. wasn't a part of it. So from the get-go, it was really a part of the European's concept of copyright. And that really, is sort of the beginning and the end of the, sort of, basic fundamental law justification, I think, in most European countries, for this right.
There's a very strong tradition of author's rights and Parliaments in Europe, now, for centuries, ever since the French Revolution, have been embodying that right in various statutes as times, and circumstances, and conditions have changed, and have promoted those changes in international treaties, which they did in the Berne Convention. I don't know, this goes back to at least the '30s, I think, it was first put in the Berne Convention.

MR. REED: All right. Thank you. We only have 20 minutes left and I do want to get into some of the constitutional regimes because there are later considerations for us and for Congress. So as I mentioned earlier, there are really three major issues. There's due process, the takings clause, and to a lesser degree, bills of attainder.

And for the panelists, if somebody could please comment on the resale royalty right in view of the takings clause and how
that would apply in the context preexisting works and whether that's an issue. Mr. Clement?

MR. CLEMENT: Yes, I'd be happy to start us off. You know, I think one thing is just to maybe think about analogy, and you can imagine a state, you know, being concerned that, over the past ten years, housing prices really took off in a way that nobody anticipated, and you might have some people who sold their house, previously, when the market was low, who really didn't get the benefit of the fact that there was this enormous runup in the value of real estate.

And you can imagine a well-meaning state then imposing a law that basically said, okay, everybody, when they next sell their house, they have to give, sort of, 10 percent of the capital gain they make to the prior owner of the house. I think you could justify that as a policy measure as being, sort of, equity and fair thing.
I don't have much doubt that the Supreme Court would think that that was a taking of property because you are -- and then that's why I think the fact that this isn't a pure tax. I mean, I think if the Federal Government increases the capital gains tax, it might feel, from the perspective of the current owner, very much the same, but I think the constitutional analysis would be quite different.

And that's why I think the fact that this reserves a right for the prior owner and gives the money back to the prior owner, it's very much like, sort of, precluding the transfer of one of the sticks in the bundle of property rights. And I do think the Supreme Court would have a very negative reaction to that.

I will say that I think that the reaction is going to be, especially when we take the analogy and it's only that to the copyright world, I think the impact is going
to be much different to the extent that it
purports to be retroactive, because, surely,
Congress has some authority to shape
prospective copyrights and what that bundle of
rights is.

But to go back to somebody and
basically say that something that they've
already bought, they thought, free and clear,
now has this additional incumbrance on it, and
it's an incumbrance on a chattel, I think
that's going to raise a very serious takings
issue.

MR. REED: Mr. Feder?

MR. FEDER: Yes, retroactivity
might be a way of describing this if this bill
was meant to capture sales that occurred
before enactment. It's only going to apply to
sales that occur prospective to the effective
date of the bill, so that's an important fact.
There have been so-called restoration and
retroactive measures which have been enacted
in the copyright law; the restoration
provisions of the TRIPS Accords in 1996 is a case in point.

MR. REED: Mr. Clement and then Mr. Lehman.

MR. CLEMENT: Yes, I just wanted to respond to the retroactivity point. I mean, there's a lot of Supreme Court cases that deal with, what's the relevant event for retroactivity purposes? I would think, for purposes of, at least what I was saying, I think the relevant is the point of the prior sale, because that's where the owner is really going to be affected.

I mean, it's not really, and not to simply say, as with my analogy, that, okay, this is only going to affect people who have their houses now, we're not going to go back and, sort of, impose this on people who bought their house a year ago. I think the fact that it affects the value and what somebody thought that they had purchased.

They thought they had purchased
the house and they thought they had purchased
the artwork, they thought they had purchased
it free and clear. Now they're being told
that, no, whenever they bought that, however
long in the past, that that's not the case.
There's an imposition on it.

And I think if you think about it,
I mean, I apologize, I haven't been here for
all of the policy discussions, but I would
assume that in an efficient market, you know,
if you have this kind of resale, it's going to
have some effect on the price; the immediate
price that's charged. And in that sense, it's
the fact that, all right, I was willing to pay
so much for my house five years ago knowing
full well that when I sold it, I was going to
get the full benefit of any capital gains.

If you now tell me that, no,
that's not the case, the prior owner is, in
fact, going to get 10 percent of that, I think
it would certainly feel like it's an
imposition on me, a retroactive imposition on
me, and I think from the perspective of the
seller, it's going to feel like it's something
of a windfall. And I think that's what the
court's cases tend to look for.

MR. REED: Mr. Lehman?

MR. LEHMAN: Well, there are a lot
of people who feel imposed upon by the
copyright laws. The Register knows it a great
deal, she hears a lot from them, and people in
Congress who agree with that. Sometimes they
have to face criminal prosecution that they
think is unfair, so I think this a pretty mild
situation by contrast.

I wanted to refer to the takings
clause problem. Here again, we can talk about
all this nice, you know, traditions, takings
clause, et cetera, et cetera, it's a very
simple proposition. Does Congress have the
power under Article 1 Section 8 to enact a
statute like this?

If it doesn't, because of the
takings clause, then I'm not sure that it has
the power to enact any copyright law of any type, which is a very significant restriction on property rights. And by the way, not just some kind of abstract restriction, a restriction on what you can do with a physical chattel. The entire copyright law is all about that.

It used to be, before we had the principle of copyrights, you know, we didn't always have copyright and we always had a lot of creativity. Creativity will take place no matter what and there will be business models that ultimately support creativity. Prior to the development of the copyright system, it was called patronage.

And if you were Mozart, you had to get a Grand Duke, or a King, to, you know, pay for you and be your patron. Maybe we should go back to that system. Copyright is a system that is based on equity to the creator themselves. And indeed, it is a restriction, just as copyright is a restriction on the
descendants of the European aristocracy today who might buy paintings at Sotheby's, or buy other works, have music created, for example, for them.

It's a restriction and it's a restriction on physical chattels.

MR. REED: Mr. Stine.

MR. STINE: I was just going to say that, I believe the copyright is not about chattels, but about the expression contained within them. That's all. The expression, dichotomy, that you can do whatever you want with chattel, but it's how the expression inside that chattel. That's the limit, not the chattel.

MR. REED: Mr. Clement?

MR. CLEMENT: Yes, I mean, I hate to, you know, sort of burden you with hypotheticals, but I think it's actually helpful to think about the issue here, which is to say that, I mean, again, the dichotomy between the policy issue and the
constitutional issue. It is probably true
that, within certain broad contours, the
federal Congress can either have or not have
the First Sale doctrine.

But I think if Congress, tomorrow,
passed a statute that basically said, we're
going to repeal the First Sale doctrine and
we're going to do it retroactively. So
everybody who's purchased books in the past
thinking that they had the right to free
alienability to sell it to whomever they
wanted, we're going to take that away and
we're going to either impose a royalty or
we're going to impose an imposition that you
can't.

I would think that that would be
viewed very differently by the courts above
the takings, and perhaps, the due process
standpoint than if Congress tried to do the
same thing prospectively and said, okay, we've
had 225 years to fool around with the First
Sale doctrine, you know, it's got some pluses
and some minuses, we've decided we're going to move on, we're not going to have the First Sale doctrine prospectively.

    I think that's very, very different from Congress basically trying to effect the, sort of, burdens on, and, you know, I think the right term is chattels, that people possess, and right now, they think they possess them because they bought them free and clear informed by the First Sale doctrine, to change that retroactively, I do think raises a very serious constitutional issue.

    MR. REED: So if a resale royalty regime would be implemented on a going-forward basis only, would that change that analysis?

    MR. CLEMENT: I think it would. I don't think that it would become entirely free from constitutional doubt. I think you could still make the arguments, but I do think from the perspective of the constitutional arguments, that, sort of, prospectively only versus a retrospective effect on existing
chattels is a very big difference.

MS. CLAGGETT: And just to
clarify, on a going-forward basis, that is,
works that were created after the effective
date of the Act as opposed to looking at the
sale as the trigger.

MR. REED: Mr. Feder and then Mr.
Lehman.

MR. FEDER: This would wreak havoc
with the international system, which has a
resale royalty applied to works as long as
they're in copyright. So whether or not the
works were made prior to the passage of the
bill or after, they are going to be subject to
the resale royalty. That's important. That's
the way it's done across the board.

As has been mentioned, American
artists do not benefit from the sales of any
of their works in Europe. There are plenty of
such sales. They don't because we don't have
reciprocity and do not collect the droit de
suite for foreign artists because we don't
recognize resale royalty.

I would like to ask a question to the gentleman. The fact that you're so much for prospectivity, does this mean you'd be in favor of the resale royalty if it was prospective? If so, I welcome you part way towards where we stand.

MR. CLEMENT: Yes, you know, in fairness, I'm really here to talk about the constitutional issues. I mean, others from Christie's have talked about the policy issues. I just really want to highlight, if I can, for the group that, from a constitutional perspective, there's a huge difference between doing it prospectively and doing it retrospectively.

MR. FEDER: You appear to be opposed regardless of whether it's prospective or retrospective?

MR. CLEMENT: Again, I'm here to talk about the constitutional issues. I think there are some constitutional issues if it's
done prospectively. I think there are very significant constitutional issues.

MR. REED: Mr. Lehman?

MR. LEHMAN: I'm not really aware of statutory changes that have occurred in our copyright law that have expanded rights of copyright owners that haven't really applied, for the most part, to existing copyrights, no matter when the copyright is created. For example, you know, the Section 111 compulsory license, which I mentioned, I mean, it wasn't all of a sudden that that applied only to the, you know, television programming that was created after Section 111.

No, it applied to the works under copyright. If we were talking about taking something that was not copyrighted and making it copyrighted, now, that might be a different situation. But we are talking about works, presumably, which have legitimately been under copyright, so it's simply a question of what are the scope of rights in that copyright?
And in fact, I think we have a case where the facts are a lot worse than this, in the Golan case, recently, and the Supreme Court has spoken on that issue. So I think if they can handle Golan, I can't imagine how they wouldn't handle this.

MR. REED: All right. I think that, well, Mr. Frankel very quickly, and then I'd like to open it up to the audience as we have the past couple of panels.

MR. FRANKEL: Just to go back to what Ms. Goodyear raised, which is the orphan works, I think that's something for the office to consider because it further complicates what has been a challenging issue for the office and for everyone. But as of now, a resale is one of the few things you can do with an orphan work that does not create potential liability.

And if you had a resale royalty and apply it retroactively, that would be something to deal with. I think that also
goes to your question, Mr. Reed, about, should it be a copyright infringement suit? And that, I think, is a very difficult question because it implicates a lot of the remedies that are in the Copyright Act, not only for liability without any showing of intent or fault, but also, statutory damages and potential fees.

And you also have the question of, then, do you make an exception to the registration requirement, as I think the EVAA draft does, and if so, why? And so I think there's a lot of difficult issues here.

And the last thing I'd say is, there's been a lot of references to statutes where Congress has enlarged copyright over the years. I think, in general, those have been reactions, at least over the past few decades, to new technologies and new kinds of works. And sometimes it's taking Congress a little while to get to it, but they have usually been reactions to new technologies.
And certainly, the DMCA, which Mr. Lehman mentioned, is a good example, in that it didn't create infringement in Section 512, for example, it actually provided safe harbors. As to the anti-circumvention, it recognized that there were certain protections needed for circumvention of protections for access to copyrighted work.

And so it's in dealing with new technologies. And so I think for something that is as old as painting, sculpture, you would need some kind of evidence of a market failure or some reason that it's not working, which I don't think we've heard today, but I think you'd need that from a policy point of view and not from a constitutional point of view, although, perhaps that too, to really support it.

MR. REED: All right. Thank you.

And we have just a couple minutes left, but we have previously elected to see if there are any questions and comments from the audience.
as well. John has a microphone there. If you could also come forward to ensure that our court reporter can hear.

MR. BROWN: Thank you. I sure hope that the question of the orphan works does not get too deep into this discussion.

MR. REED: Would you mind just stating your name and affiliation for the record, please?

MR. BROWN: Terry Brown, Society of Illustrators. I'm quite sure that our friends here from Sotheby's, and Christie's, and their curators could give you statistics of the very small number of paintings in auction that they sell as artist unknown. Art is bought, especially at a grand and up, because there's a name attached, whether you like the artist, the artist is tracked, so I do hope you don't get mired down in orphan works because it's not, I don't think, part of this discussion.

I also like the concept in

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1 bringing in the movies. If I had purchased
2 Peter Benchley's latest book in the summer of
3 '74, would I have bought, by purchasing that
4 paperback, the right to sell that cover to
5 Random House for Christmas '74, and then back
6 at Warner Books for summer '75, and then to
7 Steven Spielberg for a major motion picture?
8 I don't think so, just by buying the
9 paperback. Thank you.
10 MR. REED: Thank you.
11 MR. BROWN: It's called Jaws, by
12 the way.
13 MS. COBDEN: Hi. Sandy Cobden
14 from Christie's. I don't think we quite got
15 to all the constitutional issues, in
16 particular, the bill of attainder, and I was
17 wondering if we could have the panel address
18 those issues because they are certain of
19 concern to some of our panel members.
20 MR. REED: Sure. Yes, if we could
21 keep our remarks to just a few minutes if we
22 could, please.
MR. CLEMENT: Sure, I mean, I'll try to briefly address it. I mean, the wholly apart from the takings and due process issue, there really is the bill of attainder issue. And the bill of attainder doctrine, basically, just says that, in general, you have to legislate on a basis that's general.

And so, you know, the classic example of sort of a general imposition would be an imposition that's imposed on every taxpayer, or every citizen, or something like that, and that raises no concerns. As you get narrower and narrower in the class of people to whom a particular disability applies, then I think that starts to raise the concerns.

And if you get to the point where you're imposing it on a single entity, or one or two entities, you raise very serious concerns. And then the intermediate step is, if there are a variety of people that have the same characteristics, so logically, the imposition should be on all of them, and then
you pick out a subset of that group for the imposition, I think that also starts to raise the bill of attainder concerns because Congress will get some deference when they say, well, but we didn't impose this on everybody because not everybody sells artwork. But if you get to the universe of entities that sell artwork, and it's only a subset of those, then that puts, sort of, a heightened burden on Congress.

MR. REED: Okay. I'm afraid, because of time, we're going to have to have that be the last word, but thank you to all of our panelists for participating. It's some very interesting issues and we will now assemble panel four.

MS. CLAGGETT: I think that we now have all of the panelists and so we're going to go on to panel four, which is, The Equity for Visual Artists Act of 2011, and I know, actually, there are a number of issues that we asked about in our notice of inquiry leading
up to this specific roundtable, and we don't have a lot of time, so again, we'll open it up afterwards if you all want to come in to talk to us about any specific issues that we weren't able to cover.

But with this panel, we want to, basically, assume for a second that all of the policy issues that we so vigorously debated earlier, have them resolved and in fact, the United States does want to institute a federal resale royalty right.

If that is the case, the Equity for Visual Artists Rights Act is one model that we can look at, but as we consider further legislation, we want to see whether there are areas, or provisions, or recommendations that could improve the concerns that have been raised.

For example, in terms of the amount of artists, or the number of artists, that would be affected, should the threshold be changed so that we could actually involve
more artists, and who might be able to participate in actually receiving the federal resale royalty right?

So I want to start off there, and as I said, I have a list of various provisions in the Equity for Visual Artists Rights Act that I want to go through, but I want to assume that we've addressed all the policy reasons for or against adopting a resale royalty right and actually get more into the details; how should a resale royalty right, if we actually were able to get one, how should it look in the United States?

So I want to first start with transaction types, and so my initial question for the panel is, what sorts of transactions should be subject to the resale royalty right? And this, I think, was alluded to, actually, in the prior panel in terms of whether there would be constitutional issues, for example, if you limit it to just auction houses.

So do other resale royalty regimes
across the world beyond just auction houses
and should we do so in the U.S. law or does
the current Equity for Visual Artists Rights
Act provide the appropriate scope in terms of
the transaction types that should be subject
to a resale royalty right? Mr. Feder.

MR. FEDER: We are reviewing the
text of this bill. It's in flux, and is being
studied in Committee. There's a strong
possibility that the number of potential
beneficiaries will be increased by lowering
the threshold below $10,000, thus capturing a
lot of less costly sale.

MS. CLAGGETT: Any specific
questions, though, in terms of the transaction
types and whether it should just be, again,
limited to auction houses, so sales at auction
houses, or whether it should be expanded to
private sales, to gallery sales, to art market
professionals more generally? Ms. Levine and
then Bill.

MS. LEVINE: No, first, we just
heard a discussion about some of the
constitutional issues, the bill of attainder
problem, which I think is really substantial,
the bill as it's written -- first of all, let
me just say that, I think it's hard for me to
accept the premise that there will be such a
bill because I think there are no ways to make
it better.

MS. CLAGGETT: Well, it's
hypothetical for purposes of the conversation.

MS. LEVINE: Right. Well, I guess
to make it less destructive and less unfair,
if that's possible, but the bill would affect
something like five companies in the United
States, only the major auction houses with
revenues above $25 million, at least as
proposed, and so it's not covering a huge,
perhaps, majority of the art market;
galleries, private sales.

And I think what that is likely to
do is to drive sales from auction into those
other non-covered forms, which, I think, has
additional negative effects in addition to all
the negative effects that have been discussed
about the bill. You know, the auction process
creates a public record for an artist's work.
There's significant benefit to all kinds of
artists from the public auction market, so to
put the incentive to drive that into more
private sales, or other types of sales,
reduces that availability.

That is, you know, very likely to
drive the market elsewhere. And I think --
yes, let me leave that comment at that.

MS. CLAGGETT: Okay. I think
we're going to go to Phillipa next and Ms.
Cobden after that.

MS. LOENGARD: Hi. Phillipa
Loengard from the Kernochan Center at Columbia
Law School, and I'm not an auction house, and
I don't represent the auction houses, nor do
I represent any individual group, so I'm
looking at this from a fairly distant
perspective, and I think that the issue with
the EVAA, and it targeting auction houses, is indicative of the issues with the resale royalty right in general.

Certainly, going through the auction houses is the easiest way to go. The auction houses provide a public record, they are easily tracked, there is incentive to collect, et cetera. However, because it's not fair to just target one group, it seems that it should apply to all kinds of sales, but that then creates the problem of creating a way to record all visual art sales, which is quite an endeavor.

I think I also just want to expound and what Ms. Levine said, which is, if we start driving things from public auction to private sale in order to evade, is a rather easy way, if you don't mind me saying, to evade paying the resale royalty, then the people who are left at public auction are places like museums, who use public auction because it's the most transparent way, if they
want to deaccession a work, it's the best way
for them to raise money and there are great
benefits to them from using the public auction
process.

But if they are one of the few
groups left at the public auction prices,
public auction prices will go down and they
will not receive the money that they might
have otherwise in a robust auction market, and
we are penalizing those organizations that
this very bill purports to help through other
portions of the bill, which will end up with
negative effects.

So I think one needs to think
about all these things when thinking of who
should be responsible for payment.

MS. CLAGGETT: Thank you. I think
we're going to go to Ms. Cobden, and then
Vick, and then Mr. Lehman.

MS. COBDEN: To build on what is
said here, I do think you have a big bill of
attainder problem with this bill that targets,
be it four or five, auction houses out of the entire art market is an unconstitutional and unfair burden. However, it also disregards the way the art market is changing. For instance, Christie's does online auctions too. Because we're an auction house, we would be subject to a resale royalty on those auction.

Yet, eBay or any of the other, Gagosian is moving into doing online sales. There are a number of other entities who are doing eCommerce auctions. Those would be exempt. So this bill, even besides just targeting one portion, it targets it unfairly.

Now, understand why that's done because it will create a lot more opposition to the bill if you bring in the dealers, and if you bring in eBay, and some of the other eCommerce entities. So by limiting it to auction houses, you limit your opposition. You also have the problem, and it's a big problem, and we know it from Europe, of enforcement and accountability.
And once you leave the auction houses, not so much on the eCommerce side, but on the dealer side, you're going to have a big problem with, how do you account for these sales that are private?

And this bill does nothing, nothing, to address that issue, other than to try and avoid it by focusing, simply, on the auction houses. You know, when I think about that, I think about the analogy to collecting taxes. The government doesn't generally use the argument of, we're not going to tax this side of the room because we're not sure we can collect from them, we're only going to collect from this side of the room because we're sure that we can collect from them.

That's just inherently unfair, and yet, that is exactly what this bill does.

MS. CLAGGETT: Thank you. Vick, and then Anita, and then Andy.

MR. PERLMAN: Surprisingly, I find myself agreeing a lot with a lot of what's
been said by the auction houses. I really
echo what Phillipa said, by the hypothetical,
we have assumed that there is a problem and
that we are trying to find the solution. If
you're going to find the solution, why would
you want only a very limited partial solution?

The problem is that, once you
start expanding the coverage to all kinds of
other venues, how do you possibly track
enforcement without creating a bureaucratic
entity that is likely not to be user friendly?
You know, the cure becomes worse than the ill.

I'm not sure if it's relevant at
this point in the discussion, but to me, the
even more important question is, why would you
limit the scope, not in connection with the
venue, but in connection with the types of
works of art, to sign number limited editions?

There are lots of other forms in
which artworks are sold, become popular,
become collectible, or become valuable.

MS. CLAGGETT: And actually, that
was going to be my next question, so I think
that we can go around to the people who raised
their hands in the first question to respond
to that, the initial transaction-type
question, and then if anybody wants to add
anything in terms of the scope of the type of
artwork that should be covered by any resale
royalty, you can kind of do that as well.
Anita.

MS. DIFANIS: I think in the
question of driving sales to the private
market has a real impact on museums because,
as has been said, the auction houses are
transparent, you know where the works are
going, you know who the owners are. Being
able to follow that ownership, is critically
important to museums that are, downstream,
going to buy these works, maybe from several
different galleries -- or from a private
dealer where they have already changed private
hands several times, you've lost a certain
ownership history.
MS. CLAGGETT: So I think we're
going to go with Ted, Bruce, and Ms. Levine,
and then Ms. --

MR. FEDER: There's an easy
solution to this problem and I pointed out
that the bill is being studied, it's in
evolution now, the solution would be to
broaden the base of it. And that would
include galleries as well as auction houses,
auction houses of smaller dimension than
Christie's and Sotheby's, it would diminish
the bill of attainder problem, it would not
solve private sales, but that is something
that's always been a problem.

I take it that Sotheby's and
Christie's do not ever engage in private sales
themselves --

MS. COBDEN: Actually, we do.

MR. FEDER: That's what I thought.

MS. COBDEN: We engage in a number
of --

MR. FEDER: I assume that you did
in spite of the fact that there's no resale royalty.

MS. CLAGGETT: Actually, just to make it easier for myself because I don't remember which order it is, I'm just going to go this way, so Ms. Levine and then Mr. Lehman.

MS. LEVINE: Just a quick point about the impact of driving sales from auction, privately, Sotheby's does private sales, and I think private sales have a very important place in the art market. I'm not suggesting that they're bad, but I think there's also an impact on the artists of the flow from auction to private that should be considered.

The auction market in public and transparent is the place where you have a reliable, you said a reliable benchmark for prices paid for artist's works. And that benefits artists in the resale market because if they're successful and those high reported
prices are made known, as they often are, that increases the value of the artist's other works, which is how the artist's who are commercially successful become that way.

And when you eliminate that source of information, because the private sales are less transparent, for very good valid reasons, you don't have such a trustworthy benchmark, and I think that has an impact on artists, which is palpable, which should be considered.

MS. CLAGGETT: Mr. Lehman.

MR. LEHMAN: I'd like to answer your question by basically talking a little bit about why I believe the legislation is structured the way it is. Number one, with regard to the question of auction sales only, you know, the reason is very simple, these are very transparent transactions that are very easy to track, they're easy to enforce, the legislation is drafted to attempt to put as little burden as possible on the art business, and at the same time, be equitable to artists.
And so this seemed to be the best way of doing that; very transparent, very easy to track, very easy to enforce system with minimal bureaucracy involved.

I want to just say a little bit more about the whole structure of the Act, because I think that relates to this, and maybe a little bit about the genesis of the definition. You know, this really goes back, originally, the first legislation droit de suite bill that was introduced in the United States was introduce by Senator Kennedy back, I think, in the 1980s.

And this legislation is very much patterned after his bill. It's different, but that was very much the, you know, idea of the structure. And there were several things about that bill that were very important. One was, by the way, keep in mind that that was the original visual artists rights pact, and what happened is that it had two pieces, two titles; it had the droit de suite piece and it
1 had the moral rights piece.

2 Well, the droit de suite piece got
made into a study at the Copyright Office, and
then the moral rights part passed in 1992, I
guess. And so we already have a Visual
Artists Rights Act. We've already singled
out, by the way, and that's very, very
important because I think it informs a lot of
the other issues that you might consider in
the next great Copyright Act, and that is,
probably, there really is a need for a special
visual arts title in the copyright law, and we
already have the makings of that.

And so questions of definition,
and so on, all go back, really, to the
existing visual arts rights provisions in the
statute, and they all go back into the Kennedy
Bill. There was another feature in the
Kennedy Bill that was very important, and that
is, under the Kennedy Bill, not all the money
collected went to the artists.

In the way Senator Kennedy setup
this bill, that only happened if the artists
were living. For all the deceased artists in
the States, basically, there was, then, the
money went to the National Endowment for the
Arts for the purpose of a fund to give
stipends to artists.

Well, this bill copies that
concept, but changes it. It doesn't make a
distinction, because it's based on copyright,
between whether you're a live copyright owner
or a dead copyright owner, it applies to
everything, but it does keep that provision in
the Kennedy Bill of taking part of the royalty
revenue and using it to support younger
artists earlier in their career, even though
there's nothing copyright law, as we know,
that says that, you know, a 100 percent can't
just go to rich people and that happens in a
lot of industries and in a lot of businesses.

Nevertheless, just as a matter of
fairness, and this is supposed to be about

fairness, the provisions in the bill which
give half the royalties to, basically, an
endowment for the purpose of purchasing new
works of art is really attempting to address
that very issue that we heard about so much
this morning.

And so, really, that is, in a
nutshell, kind of why the bill is structured
the way it is. It's an attempt to be as
simple as possible and as transparent. And
the one final thing, I think that there may
well be a price point at which sales would be
driven away from auction houses, and we talked
about this before, but this gets to what Bob
Panzer said this morning; what is that price
point?

We certainly know that, right now,
by far, far, far, the largest amount of money
and burden on an auction sales transaction are
the buyers' and sellers' commissions that
these very well heeled and very prosperous
auction houses charge, none of which is, of
course, shared with a single creator.
And even at a 7 percent royalty, only half of which goes to the artist, that's still vastly lower than even, in most cases, just one of the two sides of the buyer's premiums.

MS. CLAGGETT: Thank you. And that is actually going to be one of the questions that I get to next, but I wanted to see if there were any comments on this side in terms of transaction types; auction houses versus expanding to other art market professionals. Mr. Oman.

MR. OMAN: Just briefly. Mr. Lehman has given the history that I was going to give, but he omitted the fact that Senator Kennedy himself was a very renowned amateur painter and at the hearing on his bill, he said that he had many artist friends and he said all of his artist friends urged him to spend more time on Senate business and all of his Senate colleagues urged him to spend more time painting pictures.
But the point I wanted to make was that we do have distinctions in law fairly frequently; small business exemptions allow the laws to focus on the large corporations and exempt small businesses. I think we could probably fashion a provision in this bill that captures the major auction houses, and captures eBay, but exempts the small galleries and other that would mess up the bookkeeping operation thing.

MS. CLAGGETT: I think I'm going to go to Ms. Goodyear, Ms. Levine, Ms. Cobden, and Ms. Tarsis, and then move on to another question about specific provisions in the bill.

MS. GOODYEAR: Right. I just want to start by saying a quick word about the College Art Association itself, which has 14,000 members that include individual members, institutional members, and which actually grabs many of the constituencies that are represented here today; artists, art
historians, curators, dealers.

And I want to reiterate my previous comment that, as the Copyright Office continues to study this issue, we would be delighted to partner with you in any way we can. Along this question of the issue of fairness, I do want to come back to it, and just to reiterate that, as EVAA is currently structured, I think we've all acknowledged that it's really capturing a very small portion of the market.

And especially as we look across the ranks of the members of the College Art Association, and I should stress that the individual members are roughly half artists and half scholars, we recognize that only a very small portion of our members would be benefitted by the royalty as it is currently described by EVAA.

So it does seem as though, perhaps, if we're going to march forward, it makes sense to try to broaden that in some
fashion. I think that then raises a host of other questions that we would want to examine. Certainly, the question of how these royalties would be assessed, at what threshold, at what percentage, what would be the collecting mechanism, and so forth?

I think Mr. Oman has also raised another really interesting issue that we need to consider, and it may actually, in some sense, relate to the orphan works question that we were looking at earlier, and that is, what constitutes an author or an artist, in this case? How do we define who should be described as a professional artists? What criteria do we apply?

What do we do in terms of artists who may not traditionally have been recognized under this rubric, such as native artists? There are probably other categories as well, but this question of what we mean by fine art, I think, has to be looked at very closely.

And I know, of course, this is one of the
issues that the Copyright Office acknowledges
needs to be considered.

I think Mr. Perlman's question
about what constitutes a work of fine art,
also, is something that we need to look at.
I think as EVAA currently describes the
concept, it uses the phrase, the original
embodiment of the work of art, which
immediately raises questions, I think, for
anybody who's interested in things like
photography or digital works, which we
recognize are inherently multiple.
Digital work, in particular, is
not fixed, and in fact, really cannot be fixed
in order to survive. So I think this question
of how we describe art, particularly in an era
where increasingly hybrid forms are becoming
the norm rather than the exception, really has
to be scrutinized very carefully. Thank you.

MS. CLAGGETT: Thank you. And I
think we'll just go along this way.

MS. LEVINE: Thank you. I was
just going to make one quick point to respond
to the notion that the definition of who's
covered, you know, is akin to some kind of
reasonable, you know, targeted, you know,
exclusion of something like small businesses.
And I think it's sort of really important that
we understand the way the art market works.

The type of galleries that we're
talking about are, by no means, small
businesses. They are, and I think Sandy
Cobden would agree with me here, our huge
competitors. The volume of art sales that
they do rivals ours. These are not, you know,
I don't want to mention too many names, but I
don't think anyone here would say, you know,
Larry Gagosian is running a small business.

They are very, very lethal
competitors of ours, and so to exclude them
from the definition of who's covered is really
targeting one slice of the market, and is
really interfering with the fair competition
that goes on in the market. So I just wanted
to make that comment.

MS. CLAGGETT: Thank you. And I think we'll just have time for, maybe, one or two comments on this.

MS. COBDEN: Okay. I find it interesting because there is an obvious answer as to how to solve this problem, and indeed, address many of the issues raised by the European groups who spoke today. And that would be to amend the Berne Convention itself and make resale royalty mandatory. That would make for globalization and do many other things.

Now, we know the answer as to why that's not being suggested by anyone here, because it has a snowball's chance in that warm place underground of actually happening. So the thing that would fix this issue, and actually be your solution, is the one there is no consensus on.

The global community is not going to agree to it, and frankly, I don't think the
United States would agree to it. There is significant opposition, both in the courts in California, in the 15 states that have refused to ratify this, and in the fact that the, at least, initial attempt to introduce a resale royalty bill died with barely a whisper in committee.

For all those reasons, maybe instead of thinking about doing legislation here, we want to think about letting this issue end.

MS. CLAGGETT: I was going to say, I thought you were going to say, maybe think about sending this to WIPO, and WIPO would let the issue end.

MR. FEDER: I think WIPO would be very pleased to hear from us. As a point of fact, there is an effort being made, spearheaded, in part, by the European visual art societies, to make 14ter obligatory. And I'll simply leave it as a voluntary aspect of Berne. Whether they'll succeed is another
question, I quite agree.

MS. CLAGGETT: We have a number of topics on the agenda on that. Go ahead. I'll have Irina have the last word on this and then there are some other specific issues that I want to discuss.

MS. TARSIS: As our tax side was ignored a little bit, I found myself agreeing with auction houses, and then disagreeing with auction houses, I think auction houses alone should not be identified and effectively taxed. The description Mr. Lehman gave is the easiest cleanest way of handling resale royalty rights. That's not why, really, resale royalty right is intended to apply and give something back to the artists.

So the easy and clean is nice, but it's not always what should be done, so in my opinion, we need to include small auction houses, we need to include dealers, and the threshold of the amount will be, really, how you net who is in the bucket and who is
outside of the bucket.

One way to make it easier, there's an, sort of, equivalent. There's Art Loss Register, which deals with stolen property. They are for-profit, so they have their own agenda, but they look through all the catalogs of all auction houses, and when they can, in the ideal world, they alert auction houses, and dealers, that they have something questionable in their possession.

And that would be a way of dealing with, you know, the four, five that are visible and transparent as well as the smaller auction houses and dealers, and I think for the benefit of this exercise, we should expand the group expected to contribute.

MS. CLAGGETT: Thank you very much, and you actually mentioned the next issue that I wanted to talk about. Since we don't have a lot of time, I'm going to put three issues on the table for you to consider in terms of specific provisions dealing with
the federal resale royalty right, and that would be the threshold value.

As many of you know, the EVAA proposes a threshold value of $10,000 before the resale royalty would attach, and in the European Union, it's a lower threshold, so I wanted to hear from the panelists in terms of what would be an appropriate threshold to really address the issue, or the goal, of the resale royalty right, which would be to incentivize new works of art.

And then I also wanted to talk about the rate itself in terms of whether you think it should be higher or lower. The EVAA proposed a seven percent royalty rate, but I know that we talked earlier about how the European Union has considered their tiered rates. So we'd like to have information in terms of whether the resale royalty should be different.

And then, the final question will be duration, whether the resale royalty right
should apply for the copyright term or whether there should be a different duration given the somewhat unique system in terms of the resale royalty right. And I want to actually acknowledge and welcome, at this point, Representative Nadler, who is the sponsor of the EVAA, that was out and about. I just opened it out for questions.

REGISTER PALLANTE: Hi, everyone.

Let me just give a quick introduction, as Karyn said, Mr. Nadler sponsored legislation on this last year, was kind enough to give us this study to look at the issue thoroughly, which is why you're all here today. If you don't know him well, he is the Representative of the 10th District of New York.

I, as a former Manhattan person, will say, I lived in his District, which includes the West Village, and he will tell you exactly where his District goes, but it goes all the way up to, I think you said, 122nd, all the way down to where the Twin
Towers were, and I think, over to parts of Brooklyn, and in addition to being a member of the IP Subcommittee on the House Judiciary Committee, he is also a former chairman and now, ranking member of the constitutional Subcommittee.

So we couldn't have a more perfect meeting of IP and constitutional issues than this topic. And with that, I give you Representative Nadler.

CONGRESSMAN NADLER: Well, thank you very much. And let me just say, since you mentioned my District, it's the West Side of Manhattan, Lower Manhattan, and it goes up, now, to a 122nd Street, prior to this year, it went up to 89th Street, and part of Brooklyn.

I always used to say that it's an extremely diverse District. It goes from Nathans to Zabars, and I thought the country people would laugh, but I can no longer say that because I no longer have Coney Island, and therefore, Nathans, but it's still a very
In any event, good afternoon. I want to thank you for inviting me here to discuss the important issue of resale royalty rights. I want to thank you for your time and efforts to examine this issue, to hold today's public hearing, and to take the matter seriously. The issue affects thousands of American artists and concerns millions of dollars in revenues every year, which you all know.

My role in this began a couple of years ago when I first became aware of some of the unresolved issues around royalties and intellectual property in the arts. Representing many hardworking artists in my District, which includes neighbors like Chelsea, and Soho, Hell's Kitchen, and Redhook in New York City, it dawned on me that there's a serious lack of equity when it comes to the distribution of revenues generated by sales and resales of works of art.
In the last Congress, in the previous Congress, along with now retired Senator Herbert Kohl of Wisconsin, I introduced the bill that you've been discussing, the Equity for Visual Artists Rights Act, which is designed to let visual artists to share in revenues generated by the resale of their works.

And frankly, I'm not an expert in this field, but I just that by analogy to other copyrights, it made sense to do. Specifically, as you know, the bill has set aside a resale royalty of seven percent for resales over $10,000 at large auction houses, half of which would go to the visual artists and half to non-profit art museums.

Passage of the bill would effectively bring the U.S. artist resale royalty system into line with what many of our counterparts in Europe and elsewhere are doing. Unlike the composers, lyricists, playwrights, and screenwriters, the primary
means by which visual artists support themselves is through their first sale of a physical work of art.

A visual artist receives no further compensation no matter how much earn from subsequent sales of their works. As a result, many visual artists receive little compensation for works which may not be commercially valuable until later in life, or even until years after their death. This bill would end, what I would call, this unfairness.

The bottom-line, I believe, is that visual artists deserve a share in the resales of their creative works. We need to ensure that artists are fairly compensated, all the more so in difficult economic times, and normal channels of support for artists are less dependable.

I do plan to reintroduce the legislation soon. It may not be the same legislation. It may not be seven percent, it may not be $10,000, all these questions are
open and, frankly, somewhat arbitrary; obviously. And the outcome of today's hearing of the Copyright Office's forthcoming report will have a great deal of bearing, probably, on the bill's contents and maybe on subsequent amendments, and certainly, on the future success.

So I want to thank all of you for your time and attention to this issue, I think it is an important issue, and I think that it's really being opened up for the first time in a long time, and I have been in the legislative office a long time. My 21st year in Congress. I was in the State Legislature in New York for 16 years.

In fact, I will tell you that, one day, when I was talking to then Governor Spitzer, and he asked me what I had done before I was elected to Congress, and I said I was in the State Assembly for 16 years, and he said, well, it's good you got out of there; in just that tone.
But my legislative experience
tells me that when a subject is opened up, and
the people pursue it, it is quite likely that
eventually something will be done, maybe not
exactly what they proposed initially, but
something. So I think it's important and this
seems, to me, an issue, and to other people.
We will get more sponsors on the bill, we'll
hold hearings in the committee, and the
subcommittee, and ultimately, either we'll
pass something or it'll become an ongoing
issue, and eventually, something will happen.

So it's very important that we get
as much information and informed opinion as
possible, so I thank all of you, and I thank
the office for doing this.

I will be the first to admit that
I do not start this as an expert in the issue,
but simply as someone who is looking at it and
who thinks that there is some equity shortfall
here, and the equity shortfalls ought not to
be tolerated, but ought to be dealt with, and
that's where we're coming from. Thank you.

REGISTER PALLANTE: You are welcome to stay and listen to people debate your bill.

CONGRESSMAN NADLER: Well, I'm going to stay just a little while. I got another thing.

REGISTER PALLANTE: Sure.

CONGRESSMAN NADLER: Thank you.

MS. COBDEN: Is the Congressman open to answering questions about the bill?

CONGRESSMAN NADLER: Sure.

MS. COBDEN: Yes?

MS. CLAGGETT: Yes, and once again, thank you very much for joining us. Some of the issues, actually, that you just raised were the issues that I had actually, just opened up to the panel, which was if this is reintroduced, we might have further discussion and debate in terms of the particulars about the threshold requirements of an actual royalty rate, whether seven
percent is appropriate, or it should be a
difference, what the duration should be, and
so that was actually the specific question
that we asked when you just arrived.

CONGRESSMAN NADLER: All I can say
is that, all of that is open for discussion at
this point. When you introduce a bill
sometimes, especially if you're not an expert
in it, you pick arbitrary numbers and you get
discussion started, especially if you're not
completely certain the bill is going to pass
immediately, so you don't have to worry, is
seven percent right, or maybe it should be
eight or six, or whatever.

So this is all open and we're
looking for informed opinion, we're looking
for consensus, if consensus can be achieved,
or conflict narrowed; we'll see.

MS. CLAGGETT: So with that, I
would open up to the panel in terms of if you
had any questions or comments, rather, on
those three issues; the threshold amount, the
royalty rate, and the duration. And I'm going
to go around, starting with Vick.

MR. PERLMAN: From the perspective
of photographers, by putting that $10,000
threshold, you're automatically carving out a
huge part of the collectible photograph and
art segment. And obviously, for my people, I
would want to see that threshold significantly
lowered.

MS. CLAGGETT: Thank you. Ms.
Goodyear.

MS. GOODYEAR: Thank you very much
for being with us. I represent the College
Art Association. And really, one of the major
points we wanted to make was this question of
fairness and just how broadly does a threshold
of $10,000 at auction, at major auction
houses, really cover the market at large in
terms of the ability of a wide portion of
artists to be able to share in this resale
revenue, so thank you very much.

MS. CLAGGETT: Mr. Oman.
MR. OMAN: Dr. Samuel Johnson told us that the chief glory of any nation are its writers. And I want to add, fine artists to that short list. And you represent most of them, Mr. Nadler. The strategy going forward in dealing with the issues that you raised are difficult, and I would urge that we start modestly and see how it works our for a number of years, and then expand if it seems to work well.

We did that with, for instance, jukebox royalty. We started out at $8 a year, which the jukebox industry said it was going to shut them down overnight, and now they're paying $250 a jukebox.

CONGRESSMAN NADLER: When you say start out modestly, you mean a high threshold, a low reimbursement rate? I mean, what are you saying?

MR. OMAN: I will say a high threshold, get those artists that are well-established, but a low enough threshold so it
captures some of the struggling artists that you represent in Soho. We have to frame this bill in terms of what we're doing to help the struggling artists. If it's just going to be a dispute between rich artists, rich art collectors, and the rich corporations that act as intermediaries, it's going to be dead on arrival.

It's like the Fashion Bill. The Fashion Bill is seen by Congress as an argument between rich women and rich designers, and Senator Schumer, to his great credit, has re-framed the issue in terms of what we can do to help struggling, beginning designers break into a cutthroat market.

And that's what we've got to do in this case, and if we can do that, if we can convince Sotheby's and Christie's that this will serve their interests as well as everyone else's, we will be home free. I was going to suggest that we might want to consider a provision that would require the artist to
personally collect the resale royalty from the collector, so it would be a kick for both of them, for the person that bought the painting to meet the artist, and for the artist who created the painting to say thank you to the collector.

MS. CLAGGETT: Certainly, a unique approach to that.

CONGRESSMAN NADLER: I hope you wouldn't run into the same problems as we've run into in child support collections.

MR. OMAN: I was going to suggest that we make it optional on the purchaser.

MR. LEHMAN: I think you asked, really, three questions. First of all, with regard to the threshold level, you know, that's a pretty arbitrary figure. Obviously, that can be adjusted. Obviously, you don't start from scratch with anything, so there's sort of a model as to how this sort of thing would work.

Now, we already have systems, as
you know, in place elsewhere. But in our
country, we have a very strong system of
distribution of royalties to creators in the
music collecting societies, and this would
create a system much like that for visual
artists, because they don’t have any kind of
statutory limit on what level of sales, or use
of your music, are you entitled to get a check
from ASCAP or BMI.

But as a practical matter, what
happens is that, ASCAP and BMI only distribute
royalties, I think, if the amount is at least
$300 a year, or $400. Now, of course, that
means that the sales, or the air play, has to
be, you know, since the royalty rate isn’t
that huge, to be much larger.

But there is, I think, in most
working systems, some kind of a, sort of,
cutoff rate that you at least have to meet to
make the system work. And so that’s where
this idea of a threshold came from, is that
concept.
With regard to some of the other features about the other question was -- the other two questions were?

MS. CLAGGETT: I think resale royalty --

MR. OMAN: Oh, yes. The resale royalty. Well, the resale royalty of seven percent came from Senator Kennedy's bill, and one of the -- you know, it sounded like a good amount. And historically, the rates in Europe were, generally, not that high. I think in Germany, maybe six percent.

The way the bill is drafted at the present time, of course, the artist only gets half that, that's 3-1/2 percent, and the other 3-1/2 percent goes to, basically, an endowment where museums can purchase works of living American artists, and as I said, that's designed to deal with this problem of inequity so that, you know, there's a way for younger artists, college artists, for example, could, you know, sell their works under this fund.
So, you know, that's, you know, where that came from, and I think the issue is, obviously, the lower the royalty, probably, presumably, would be easier to pass, I don't know, but I think that it has to be, if it's going to be meaningful, and particularly if it's going to include that other feature. Now, if you take that out, then you can lower it a lot.

I think also, you have to look ahead at potential harmonization. You know, Europeans don't have a bad royalty system, the problem is, it caps out at, I think, a maximum of, what, 10,000 euro payment, or something like that, and of course, that was done for one simple reason, and that is because, in order to harmonize, the British, some of the same people at the table had some influence over that, insisted on dragging down the other European countries in order to get something done.

If we proceed, we're not, you
know, a small European country, we are the
United States of America, to do something
along this, it probably is much more likely to
become the world standard, and by the way,
then lead to harmonization efforts, re-
visitation of Berne, et cetera, et cetera.

So anyway, that was that question
and I shouldn't say more, probably, you had a
third one, but those are the rationale.

MS. CLAGGETT: Thank you. Now,
I'll move on to Ms. Levine.

MS. LEVINE: Thank you. I guess,
let me start by saying that, I think we, at
Sotheby's, couldn't agree more that helping
artists, and incentivizing creation of new art
is a good thing, but respectfully, I have to
say, I have not been able to see how this bill
accomplishes that goal.

And we had some discussion before
you came in, Representative Nadler, about the
definition of who's covered within the bill
applying only to a very small number of major
auction houses how that raises serious constitutional bill of attainder issues, is patently unfair, and would drive a significant portion of the market away from the transparent auction realm into the private sale realm where there would be no public record of prices paid for artist's work, which I think substantially harms artist's interests in establishing resale value for their other works.

We're talking now about the proposed threshold value of $10,000 that, you know, would exclude sales under $10,000, and that appears designed to benefit only the most commercially successful artists. Those are the people and those estates who will receive the lion's share of this royalty.

And the disconnect between that money going to that very successful group of artists and the idea of helping new emerging artists who are not even participating at all in the resale market.
CONGRESSMAN NADLER: So we should make the threshold much lower.

MS. LEVINE: Well, you could go to that conclusion, and then to that I would say, let's look at Europe, where there is a much lower threshold, and a tiered system, and the data there, which we discussed earlier in the afternoon, I think, shows the same thing happens.

All the data that I've seen, and I haven't seen any data to counter this, but it shows the same thing happens. The royalties that are collected are going to a very small number of highly commercially successful artists. The bulk of that money is not going to the population.

CONGRESSMAN NADLER: How would you change that?

MS. LEVINE: How would I change that? I don't think a resale royalty can be fixed. I think there are many creative ways we could come up with as a matter of policy
that would be much more beneficial to artists, to the people, you know, who are looking to get into a primary market.

I think the resale royalty has a lot of surface emotional appeal, and it's very fun, and I'm often, I mean, that I work at Sotheby's, you know, the bad guy in the room, a big change from when I used to work for the United States Government, but I think it's that we --

CONGRESSMAN NADLER: A lot of people think they're the bad guys.

MS. LEVINE: But I think we have to look at the real data to see, and I think that's really an important part of this. The rate, seven percent rate, in the bill is higher than anywhere in the world. That will disadvantage the U.S. market. There's been a lot of talk about how it's small, I wrote down, some people called it chump change, or peanuts, and it's big.

A seven percent royalty is a cost
and if it's not imposed in another market, or it's a lot less, it's going to drive the market somewhere else. And, you know, again, I think the fixes that we've seen in the E.U. don't really fix this problem, that it doesn't really benefit the population of artists that we all would like to benefit.

MS. CLAGGETT: Ms. Cobden.

MS. COBDEN: First, I would just, Congressman Nadler, like to say thank you. It's lovely to see you here and have you listen to our comments, and be available for questions. To build on what Jane says, and I'm from Christie's, the other big auction house, we have many concerns about this bill. We have a concern that it targets about four of us out of what is a very large art market. But I also have an overall concern about the practicalities of, is this a working and successful model? I believe the data we're seeing from the E.U. says no. Part of what Jane was referring to is, the recent
data from the E.U. shows that only three percent of the living artists in the E.U. had eligible sales, and they have a lower threshold than we do; three percent.

Why would we consider a model for legislation that had only a three percent --

CONGRESSMAN NADLER: Why is there only three percent?

MS. COBDEN: Because the way we resale royalty schemes work, they benefit the very successful artist, or frankly, often, the heirs of dead artists. The other statistic I would share with you that we've learned from the Europeans is that, 74 percent of the resale royalties in the E.U. are paid out to the heirs of deceased artists.

Now, that's very nice for those families, but to the extent we're trying to incentivize the creation of new art, that's not going to work. So I'm concerned that this mechanism that we're thinking about just doesn't achieve the goals that we are setting
for it, and that there might be other better
mechanisms that would do so.

And I was wondering if you'd had
the opportunity yet to look at those
statistics and consider them.

CONGRESSMAN NADLER: No. As I
said, we just started getting into this last
year, really, and we have not had a chance to
go into all that. Some of the problems you
both raise are interesting problems. The one,
except for the bill of attainder, I don't see
how you can call this a bill of attainder,
takings maybe, bill of attainder, I don't
think, is a problem.

But that aside, I mean, these are
questions that we have to look at. I
certainly do not want a bill that only targets
two institutions, and that's why I said, we
ought to broaden it, perhaps, in different
ways. But we have to deal with --

MR. LEHMAN: Congressman, I just
want to say that these figures that you're
hearing are disputed. We had the German
society here earlier who gave a much different
picture.

CONGRESSMAN NADLER: I take
nothing as gospel.

MS. LEVINE: No, we invite you to
look at them for sure.

CONGRESSMAN NADLER: Yes, and
that's why we've asked the Library to do the
study of this.

MS. LEVINE: And one other
comment, you asked a good question, why is
that, when Ms. Cobden said only three percent.
I think another important statistic, or
feature, of the art market that needs to be
taken into account is, for most live artists,
for most artists, the primary market is the
only market.

CONGRESSMAN NADLER: Is what?

MS. LEVINE: Is the only market.
The resale market is already taking us into a
very narrow slice.
MS. CLAGGETT: Thank you. I think there were some questions or comments, sorry to butt-in, but moving over on this side.

MS. LOENGARD: High.

Representative Nadler, you are my Representative, so thank you and I appreciate your email that I can't go to the White House. I just got it yesterday, but I appreciate your effort. So there's a couple of things that have struck me throughout the day's discussion. The first is, and this goes to the whole idea of the nitty-gritty of the bill and the broader purpose.

The idea that we want equity, and certainly, equity is a good thing, and certainly we would want everyone, to the best of the state's ability, to be treated the same.

I just want to make the point that, certainly, while there's not a reason not to search for benefits for one group because you can't serve all, while
screenwriters may get a benefit, there are
tens of thousands of people who work on movies
every day as work-for-hire who get no benefit
from royalties or anything like that.

There are tons of photographers
who got shutout of registration because the
registration procedures are difficult.
There's only so much in the creative process
that can get fair reward, and it's rotten, and
sometimes it's really unfair, but sometimes
the way to make things fair just doesn't work.

So I'm not suggesting, you know,
that it can't be. I'm just tossing that out
there that, fair isn't always possible, as I
tell my children.

MS. CLAGGETT: And I know that
Representative Nadler who has kindly, not only
given remarks, but also has been able to stay
a little bit to hear your remarks and comments
as well, has to leave very soon, so we're
going to just have the last three comments
here, very, very quickly, and I think we have
a couple of comments here, and he has to leave
in about five minutes, so I want to make sure
that he has an opportunity to hear those.

MS. LOENGARD: I would suggest
that we follow the previously discussed
European rules for when setting times of value
and rate, and duration. And so that we don't
disadvantage the North American markets. And
I also would just make sure that the resale
royalty payment follows the artist and not the
copyright holder.

MS. CLAGGETT: Thank you. Mr.
Feder.

MR. FEDER: We said a lot about
prosperous or well-off successful artists. We
haven't said very much, in all fairness, about
successful auction houses. And again, in the
submission of Joe Laird, who had been vice
president of Christie's, she said, "The
struggling or starving artist is nowhere in
sight."

That's akin to my maintaining that
the prosperous auction house is nowhere in sight. It makes no sense. As far as your disapproval of the seven percent royalty. Can I deduce from that that you favor the much lower European system? That's something for you to consider, apparently, even that would not be acceptable to you.

MS. LEVINE: It's based on the data.

MR. FEDER: What's that?

MS. LEVINE: It's based on the data; it does not work.

MR. FEDER: Well, no, you have data, and we have data, and the Europeans are in this room, and they have data which entirely contradicts the data that you have, and so do I, as a matter of fact.

MS. CLAGGETT: We will certainly look at all of it at our office.

MR. FEDER: And lastly, on the three issues of changing it, I'm in favor of lowering the threshold, broadening its
application to galleries, yes, and then the royalty could be lowered. I think these are all things that we're going to find out in committee and in the studies that Congressman Nadler is undertaking now, and that we're doing ourselves as well.

MS. CLAGGETT: Thank you very much.

MR. HOLLAND: Congressman, several of us here represent American illustrators and comic book artists and cartoonists, and they, in turn, represent a market that's just beginning to be represented in galleries, and museums, and in auction houses. For example, I did about a 150 different works of art for Playboy magazine over a period of ten years that the magazine owns under the old Copyright Act, and which they are now releasing through galleries, including one of the auction houses that one of these ladies represents.

Now, if this bill had been in effect back when Senator Kennedy introduced
it, I would probably be able to benefit from it now, and I'm neither a rich artist nor a dead one. So I can stand as testimony that it would actually constitute an incentive because I was just barely out of high school when I started doing this work, and I was doing it for very little money at the time.

So on behalf of all those artists whose work is just beginning to appear in the market, I think this is something that should be looked at, I think the people who've introduced this, Mr. Lehman, Mr. Feder, Mr. Panzer, and the others, have done a remarkable service on behalf of artists, and I wish you had been here to listen to the testimony of some of the European collecting societies earlier, because they were speaking from experience and not from hypotheticals.

MS. CLAGGETT: Thank you very much. Mr. Brown.

MR. BROWN: I'd like to echo what Ted said about rates and the duration, et
cetera. I think one of the problems that the
auction houses have, of course, seven percent
does sound high. I'm not in big favor of that
three and a half percent that goes to a fund
for museums, et cetera, to buy new works. I
ran the Society of Illustrators Museum for 20
years and I think a museum needs to earn its
money and not be given it.

What they acquire too easily, they
cherish too lightly, so I would say that's an
opportunity to lower the fee, which assuages
your concerns about the seven percent. I
don't think that's an important part of
raising the benefit to existing artists.

We talked a lot about starving
artists and emerging artists, they going to
get to the middle or they're not. We should
be helping the people in the middle, as Vick
said, to stay in business.

MS. CLAGGETT: Thank you very
much. Ms. Tarsis.

MS. TARSIS: Very few comments.
Seven percent, in my opinion, needs to be capped because otherwise, you are looking at not astronomical, but very high amounts, and really, your goal is not to tax auction houses, or tax buyers, or tax artists. Your goal is to provide fairness and equity, so there should be a cap, similar to the systems that are in place in Europe and Australia.

In addition, the 50/50 split of the 7% with one half earmarked to help museums collect American artists, I understand, is arbitrary, similar to the $10,000 starting point. Given that, in my opinion, the $10,000 should be reduced to provide more for the starting and starving artists, but in addition to helping museums collect American artists, maybe you should consider, if you wish to keep this interesting bucket of money, maybe helping young artists pay for their college debts.

We did have somebody comment on that being one of the holding back mechanisms,
so that's a way to directly assist artists.
And I think that's it. Thank you.

MS. CLAGGETT: Well, I'm going to
have to cutoff comments right now, and again,
thank you so much, Mr. Nadler, for attending.
We actually are out of time right now. We've
gone about 12 minutes over our time. I will,
if there are any burning, burning questions
from the audience, give two minutes to anyone
who might want to speak from the audience, and
Mr. Oman, you can close it out for the
panelists.

MR. OMAN: Just a short question,
I'm surprised to hear people complaining about
the 3.5 percent to the museums. This is the
political reality. You've got to get as many
people onboard as possible, and you should be
willing to recognize that and accept the
compromise that this master legislator here,
former Commissioner Lehman, has put together
in an effort to get this through after 20
years of thinking about it.
MS. CLAGGETT: Thank you very much. Any last burning comments from the audience.

MS. TARSIS: Can I quickly comment that there should be a mechanism in place to make sure that the entity that collects and distribute the royalty in such a manner that there is very little, actually, kept for operational and logistical pieces.

MS. CLAGGETT: Thank you very much. And that was, actually, on our long list of questions, but we didn't get a chance to address it. Okay. We can maybe do that separately, but right now we're going to have to ask for a last comment from the audience.

MS. SPRIGGENS: I very quickly want to say, in the U.K., the resale royalties are paid, or due, on sales, or transactions with an art market professional; an auction house, a gallery, or an art dealer. Sales between two private individuals are excluded, that means, sales that are transacted over
eBay by art market professional on other online platforms, all art market professionals and sales are transacted, then that royalty is collected.

Administratively, it isn't a problem. We've done it for six years. My colleagues from France and Germany have done it for far longer. It isn't a problem. We can do it very efficiently, we try and keep costs as low as possible, the system of collective management is designed to do that, so I think expanding it to incorporate a greater portion to avoid any constitutional issues is a brilliant idea. And administratively, it isn't an issue. That's what collecting societies do. That's what we're good at.

MS. CLAGGETT: Thank you very much. I think at that, I'm going to, actually, have to close it out. I wanted to thank all the panelists who've been here all afternoon on all of the different panels. We
certainly received a lot of interesting
information for the office to consider as we
conduct our review.

As I said, we are going to comb
through the transcript very closely, and if we
have any additional questions, we might,
perhaps, do an additional inquiry, although we
don't have plans for that right now, but if
there is any information that you were not
able to convey to us, given the time
constraints, again, we are definitely open and
willing to meet with you all individually to
hear some further information, both from your
perspectives or from any other perspectives
that you would like to share with us.

Once again, thank you for
attending.

(Whereupon, the meeting in the
above-entitled matter was concluded at 5:24
p.m.)
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CERTIFICATE

This is to certify that the foregoing transcript

In the matter of: Resale Royalty Public Roundtable


Date: 04-23-13

Place: Washington, DC

was duly recorded and accurately transcribed under
my direction; further, that said transcript is a
true and accurate record of the proceedings.

[Signature]
Court Reporter

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