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RESALE ROYALTY PUBLIC ROUNDTABLE

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TUESDAY

APRIL 23, 2013

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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

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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(1:01 p.m.)

1
2
3 MS. CLAGGETT: Good afternoon. My
4 name is Karyn Temple Claggett and I'm the
5 Associate Register of Copyrights and Director
6 of Policy and International Affairs. Thank
7 you all for coming to the Resale Royalty
8 Public Roundtable. Today we plan to discuss,
9 in some detail, issues relating to the
10 consideration of a federal resale royalty
11 right in the United States.

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

19 As many of you know, in 1992, the
20 U.S. Copyright Office issued a comprehensive
21 750-page report on the issue. At that time,
22 the office concluded that there was

1 insufficient economic and copyright policy
2 justification for enacting and resale royalty
3 right in the United States, but noted that
4 Congress may wish to review the issue if the
5 European community extended resale royalty
6 rights to all of its members.

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

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

20 Before we begin, I'd like to go
21 over some brief logistics, but first, I will
22 open it up to Maria Pallante, Register of

1 Copyrights, who will just give brief welcoming
2 remarks.

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

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

21 So I'll personally be in and out
22 today, but again, thanks and we look forward

1 to the discussion.

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

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

18 We will start with questions for
19 the panelists, but if time permits, we will
20 also elicit questions, and responses, and
21 comments from the audience. Given time
22 constraints, we have about an hour for each

1 panel. We will limit responses from each
2 panelist to about two to five minutes, so I
3 apologize in advance because we will cut you
4 off if you end up going over that time period.

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

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

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

21 MR. REED: And I'm Chris Reed,
22 also with the Copyright Office, Senior Advisor

1 for Policy and Special Projects in the Office
2 of the Register.

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

5 MR. BROWN: I am Terrence Brown.
6 I was the Director of the Society of
7 Illustrators for many, many years. An
8 organization founded in 1901. They have a
9 beautiful carriage house in Manhattan as their
10 museum headquarters, and I've been teaching,
11 also, the History of American Illustration at
12 the School of Visual Arts, and online, since
13 1995.

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

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

22 MS. SPRIGGENS: My name is Tania

1 Spriggens. I'm the Director of Communications
2 from DACS, the Design and Artists Copyright
3 Society. We're the leading U.K. collecting
4 society managing the resale royalty. We're
5 based in London.

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

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

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

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

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

22 MR. PANZER: I'm Robert Panzer.

1 I'm the executive director of VAGA. We
2 represent about 10,000 artists and estates of
3 artists for copyright and other intellectual
4 property matters. And as a copyright
5 collective, we clear rights on their behalf
6 for the reproduction of their work. And of
7 course, we would like to add resale royalty to
8 one of our responsibilities.

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

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

21 MS. TURNER: My name is Cynthia
22 Turner. I've been a practicing medical

1 illustrator for 29 years. I'm co-chair of the
2 American Society of Illustrators Partnership,
3 which brings together 13 illustration
4 organizations representing medical
5 illustrators, natural science illustrators,
6 regular commercial illustrators, architectural
7 illustrators, cartoonists, et cetera.

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

15 The first panel that we're going
16 to discuss today is the changing legal
17 landscape and the portability of the art
18 market. We'll begin with the questions that
19 we listed in our second inquiry of notice and
20 follow-up with any additional questions that
21 we might have based on the comments that we
22 received.

1 As an overview, the issue that
2 we're hoping to explore on this panel is how
3 a resale royalty right might affect the
4 overall art market and what other factors may
5 affect the art market in addition to the
6 possibility of a resale royalty right.

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

16 In addition to some of the changes
17 that I highlighted before, for example, in
18 terms of EU harmonizing its resale royalty
19 legislation, that has either supported, or
20 will support, or undermine the implementation
21 of a resale royalty right in the United
22 States, what particular legal changes have

1 there been that people would like us to know
2 about in terms of our review of this issue; if
3 any?

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

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

18 I think it's important for us to
19 look at what's happening, in particular, in
20 New York, and look towards harmonization, to
21 some degree. We don't have to necessarily
22 follow every move that's made there, but I

1 think we can learn from their experiences.

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

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

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

17 MS. CLAGGETT: Thank you. Anybody
18 else?

19 MS. SPRIGGENS: Since I have been
20 part of the European situation, perhaps I can
21 expand on that a little and say, certainly,
22 ahead of implementation in the U.K., the first

1 stage implementation was in 2006, just to
2 living artists, that was extended to include
3 the heirs and beneficiaries of deceased
4 artists from the 1st of January last year,
5 there was a lot of concern from sectors of the
6 art trade that sales would be diverted to the
7 U.S. and to other countries that did not have
8 a resale royalty.

9 Certainly, studies conducted by
10 the government since then have indicated
11 there's been no negative effect on the art
12 market. We certainly haven't seen it. The
13 art market has fluctuated enormously since
14 2006. In fact, in 2007, it grew
15 astronomically huge. There was a massive
16 bubble, which subsequently burst, that was
17 nothing to do with the resale right.

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

21 MS. MCANDREW: I'd like to come in
22 there because I do a lot of statistical

1 research and I know a lot of my statistics
2 have been used in the comments, so I would
3 like to, just for the sake of the Copyright
4 Office, just clarify a couple of things.

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

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

22 If you look at 2006 to 2012,

1 Europe has lost marketshare in this area. The
2 U.S. lost share as well, so China is
3 definitely a factor. But what we've seen is
4 that Europe has grown much slower than the
5 U.S. The European Commission carried out a
6 study in 2011, consulting all the interested
7 parties, and they did not find that there was
8 no evidence of effects on the market, but
9 found there was no clear pattern and decided
10 they would revisit it again.

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

16 So what I found, on the basis of
17 completely independent analysis, is that there
18 is correlation between the artists' resale
19 right being introduced and Europe losing
20 marketshare. Now, what I cannot say, or
21 anybody can say, is the causality. So I'm not
22 saying that one caused the other, and there's

1 a lot of factors that cause markets to shift,
2 but the resale royalty is likely to be a
3 contributory factor.

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

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

19 And what we found is, it hasn't
20 created a level playing field. If anything,
21 the U.K. has gained more share over that
22 period, so it hasn't done what it was set out

1 to do, which was make it a level playing field
2 in Europe, and Europe has lost share.

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

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

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

1 the effect on the art market is.

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

13 Are there studies that we should
14 particularly take a look at in terms of our
15 analysis as to what the effect would be? And
16 if you cannot identify, for example,
17 specifically, that the resale royalty right
18 might be the cause of either an increase or a
19 decrease in the art market in the specific
20 jurisdiction, what other factors are there out
21 there that will need to be taken into account
22 as well?

1 But I'll turn it over to Karen.

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

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

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

21 MS. LEVINE: No. You know, I
22 concur with that and just, you know, you

1 asked, at the beginning, what has changed, and
2 just to echo what Karen was saying, I think in
3 the United States, nothing, really, has
4 changed in the legal landscape since the 1992
5 report.

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

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

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

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

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

22 MS. SPRIGGENS: Yes, I just want

1 to make it clear that that was the study I was
2 referring to that said there was no negative
3 impact that could be seen. Granted, the right
4 has only just been extended to include
5 deceased artists, in the last year or so, so
6 I agree, we have to wait and see, over an
7 extended period of time, the impact.

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

17 MS. CLAGGETT: Terrence?

18 MR. BROWN: Two things. First,
19 you mention 1992, and I'd like to speak to,
20 you know, the illustrator's world in that, in
21 1992, there as no market whatsoever for the
22 physical art creator for books, magazines, et

1 cetera, beyond the circle. And then someone
2 said, let's look at specific parts of the
3 market.

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

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

20 And the contemporary artist is
21 selling because they never had this market
22 before, they were never rewarded for the star

1 power that Rockwell brought that made him on
2 the cover of Sotheby's.

3 MS. CLAGGETT: Janet?

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

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

21 New buyers develop in Asia and
22 other groups of people, for other reasons, are

1 buying art now. Capital investment has
2 exploded and has changed the market.
3 Secondly, after the harmonization, or during
4 the harmonization, process in Europe we have
5 often heard the argument that sales would be
6 shifted to other countries, to United States
7 or Switzerland, to Great Britain.

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

18 This is the effect in Europe, most
19 of the market goes to London, because there
20 are the buyers. And nevertheless, the market
21 is growing in France, and in Germany, and in
22 other countries, so resale royalty has no

1 negative effect on the markets as far as we
2 found out in our experience in Germany.

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

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

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

14 And in this way, I can add, on the
15 European Fine Art Foundation, the report on
16 2011, that between 1998 and 2008, ten years,
17 the art market was growing more than 17
18 percent in France, more than 23 percent in
19 Germany, with resale right legislation.

20 And in the U.K., with just a
21 partial project sweep just for living artists,
22 for more than 50 percent in ten years. But in

1 countries during this period without resale
2 royalty legislation, like, in the U.S., the
3 art market grows just 14 percent. It's less
4 than in Germany or France.

5 And in Switzerland, a decrease of
6 3 percent. And in China, we know that more
7 than 100 percent. It shows that there is no
8 link between resale royalty legislation or art
9 market growth. And that's underlined too by
10 the President of Christie's Europe, Francois
11 Curiel. He was previously in Paris.

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

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

22 MS. CLAGGETT: I'm going to just

1 actually say, Clare and then Karen.

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

11 You can access that report. It's
12 easy enough to clarify that. One thing just
13 for Gerhard, just to come back on your comment
14 --

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

17 MS. MCANDREW: Sorry. If you're
18 saying it doesn't have any effect on
19 displacing sales, but this was the very reason
20 it was introduced in Europe. It was seen as
21 anti-competitive in the internal market. It
22 gave some states advantages over others and it

1 was brought in because it would displace sales
2 to markets that didn't have it.

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

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

20 It's not the subject of this
21 panel, but it does get back to how this helps
22 artists. But unfortunately, it gives back to

1 those artists that are least in need of
2 financial help and does nothing to help the
3 bulk of artists working in the primary market
4 and actually might damage sales in the market.

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

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

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

1 something, there's a different way to address
2 that than after the fact of resale royalty.

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

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

19 MR. PFENNIG: Just one comment to
20 what Clare was saying. The art market in
21 France and Germany, they required
22 harmonization in Europe because they wanted

1 same conditions for the British dealers, and
2 the artists, the European artists, who saw
3 their works being auctioned in London wanted
4 to gain their revenue from the British sales.

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

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

20 You find a lot of sales of big,
21 big collections who are divided between London
22 and New York, because people reflect which

1 kind of buyers are going to London and who is
2 going to buy in New York. These are strategic
3 deliberations and have nothing to do with
4 resale royalty.

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

14 I can give you the European
15 report, and it's clear inside, but the
16 question is to, is that fair that visual
17 artists receive, or not, something for the art
18 market for this big industry, from
19 auctioneers, and perhaps, galleries? And in
20 France, we have a big debate on that, even the
21 last years, and everybody, even the Cultural
22 Ministry said yes, because the visual artists

1 don't receive so many author right for the
2 reproduction right and so.

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

12 MS. HICKS: I just want to
13 comment. Speaking as a gallerist, and a
14 regional gallerist, there's tens of thousands
15 of us in the U.S., and speaking to the point
16 that the only artists that would benefit from
17 this resale right would be the big name
18 artists, I mean, I, for one, represent an
19 artists who, you know, is under the definition
20 of starving artist, a term that was bandied
21 about in many people's reports, that there is
22 no such thing as a starving artist.

1 I represent one. He lives in a
2 trailer. I have to drive him everywhere. You
3 know, and he is with my gallery because he
4 does not want to be with a larger gallery,
5 even though we have interests from larger
6 galleries. And what's happening, and it's
7 happening all the time is, they're purchasing
8 his work and they're reselling it.

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

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

22 MS. CLAGGETT: And thank you for

1 that comment, and I will do just a quick
2 reminder that we are going to explore that in
3 much more detail in the next panel, so limit
4 your comments and response to Janet's comments
5 to the focus of this particular panel.

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

8 MS. GRAY: I was going to, I
9 think, address the comments that are probably
10 --

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

19 MS. GRAY: I can just respond to
20 the point about buyer's premium, yes. You
21 raised a buyer's premium, but I don't think
22 that's really the question here. I don't

1 think that's the U.S. model, you can charge
2 more, therefore you must share it. And again,
3 I think there are other ways to deal with this
4 issue rather than taking profits and pushing
5 them out.

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

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

19 For example, I think, in some
20 comments, it was noted that China for the
21 first time became the first in the world in
22 terms of the art market and replaced the

1 United States. Neither China nor the United
2 States actually have a resale royalty right.

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

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

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

1 that's what it is.

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

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

20 And China is a burgeoning market
21 and that's irrelevant to this discussion in
22 many respects.

1 MS. CLAGGETT: Yes, and I would
2 follow-up on that, just in terms of anybody
3 else's comments, but we will definitely say
4 that the movement to China would have
5 supported the argument that a resale royalty
6 right in the European Union had an effect.

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

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

19 MR. PANZER: I think it comes down
20 to actual numbers. When you're talking about
21 art, these other factors that Tania just
22 brought up have a big impact on how much

1 you're going to get when you're selling a work
2 of art at auction. How many people selling
3 a work for \$20 million, or \$10 million, are
4 thinking about what the cap is in England --
5 12,000 euros, or pounds?

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

17 And so that's where, if there was
18 any difference in the market, which there
19 isn't, since all auction houses work the same
20 way, people would probably shop. But they're
21 not going to shop to save 12,000 euros, which
22 is what it's going to cost them to send this

1 \$20 million work of art, or insure this work
2 of art, over to another country.

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

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

21 And to pretend it works that way
22 and to focus on the statistics is to be

1 completely ignorant of how the art market
2 works. And it's your jobs, your jobs, to
3 become expert in that market and not rely on
4 the interested parties. So if you become an
5 expert in that market and talk to the
6 collectors, talk to the dealers, talk to all
7 the parties, you will find out that resale
8 royalty is a non-issue.

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

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

19 MS. MCANDREW: I'll just be very
20 brief, because I want to give everyone a
21 chance to speak, but, obviously, this charge
22 on sales is an issue. I've talked to

1 collectors and I've talked to dealers, and
2 everybody, since 2009, particularly, when the
3 market's become a lot more difficult, people
4 are extremely price sensitive at the moment.

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

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

20 There's a basic assumption that if
21 you put a transaction charge in A and not in
22 B, when it's a highly mobile, portable, asset,

1 you don't need to be an economist to realize
2 that there is this tendency to shift. This is
3 the basic assumption and the statistics have
4 shown evidence of it, and I would completely
5 dispute that it's an irrelevant cost, because
6 I poll 7000 dealers every year, and I talk to
7 a lot of collectors, and this is a significant
8 cost when margins are so tight.

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

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

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

22 And secondly, your argument with

1 China, I think in these market, people are
2 buying their own artists. Twenty years ago,
3 Chinese artists had to go to Europe to sell
4 their work because, in their own country, the
5 market was focused on traditional art. But
6 contemporary artists developed their own way
7 of expressing themselves. They went to Europe
8 to sell it.

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

21 That's why artists in China
22 require a legislation, which is on the table,

1 to introduce resale royalty. I think they
2 wouldn't do it if they were anxious to lose
3 anything. They want to participate like the
4 others and they want to come on the same
5 level.

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

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

15 MS. TURNER: Well, going back to
16 what has changed since 1992 and what has not
17 changed since 1992, is that the visual artist
18 in the United States is not receiving the
19 benefits of copyright law to the extent that
20 it was intended. And we're seeing this across
21 many different sectors for many different
22 reasons, but a generation of resale royalties

1 has been lost to American artists and the
2 reciprocity that should have been sent
3 overseas to all of the artists internationally
4 that have participated in resale royalty.

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

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

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

20 MS. TARSIS: Well, the question
21 you were asking of this panel is, what is the
22 portability of the art market? And if we say

1 we see, some don't see, the fact that once you
2 pass a law similar to the one in the United
3 Kingdom, and China does the same, these three
4 being the biggest art markets, there will be,
5 well, kind of, nowhere else to go.

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

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

18 Australia, as I understand, has a
19 \$1000 triggering mechanism. So if the work
20 sells for a \$1000 or more, then they start
21 collecting the royalty resale rights. So
22 maybe we should lower the \$15,000 proposed to

1 something less, but then put a cap on how much
2 in total can be collected to protect these
3 margins.

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

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

17 MR. BROWN: Very interesting first
18 panel to start off the day. No one's really
19 defined what this thing is. It's been called
20 chump change. It's been called a fee. It's
21 called profit to be shared. I don't think
22 it's any of those things. I think it's a very

1 common sense, fair play notice to those who
2 buy art that somebody actually sat down and
3 made this thing.

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

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

21 MS. CLAGGETT: Yes. And, Jane,
22 you had a comment?

1 MS. LEVINE: Yes. I know you're
2 going to hear a lot more about this in the
3 other panels, but, you know, since we opened
4 the door to what are we talking about, I think
5 one thing we have to remember when we're
6 talking about the resale market is, for the
7 overwhelming majority of markets, the primary
8 market is the only market.

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

19 And so I think the statistics show
20 that, and I know you'll be hearing more about
21 that, but just to address the issue of the
22 portability of the market and whether the

1 royalty has an impact that makes the market
2 move to one place or another, you know, I can
3 speak for our business, people care about
4 costs.

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

15 And I think we're having a big
16 debate about whether there is economic
17 evidence for a flow in the market. I think,
18 clearly, it's a factor. Whether there's a
19 causal link, it remains to be seen, but
20 certainly, the capability of the market to
21 move to someplace, many jurisdictions out
22 there that would be very attractive for a

1 market that don't impose this cost, and that
2 possibility is definitely there.

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

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

17 MS. TURNER: I just wanted to say,
18 the resale royalty is intended to benefit
19 those artists, allow those artists to
20 participate in the economic success of their
21 works. And categorizing them as elite, or
22 rich, or dead, is really, kind of, offensive

1 to me because, a book author is very much the
2 same.

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

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

17 MS. HICKS: Well, I was just going
18 to speak about the portability of the market.
19 I just read an article in the Guardian that
20 came out in October of last year after you, in
21 the U.K., had had droit de suite to deceased
22 artists, where major galleries in New York

1 were moving satellite offices to London to
2 attract those clientele that they craved,
3 which were the ones with the money; the ones
4 that were wanting to purchase in London
5 because they felt more comfortable to purchase
6 in London.

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

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

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

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

20 MR. BROWN: I thought you said New
21 York, but would you see it moving to Somalia
22 if that was the place that had the least tax?

1 MS. MCANDREW: No. It doesn't
2 have to be that exotic. There's lots of other
3 destinations. I mean, we've seen a lot of
4 places opening up to the art market, like
5 Singapore, and, you know, Hong Kong,
6 obviously, a lot of sales have moved there.
7 You know, it's very uncertain what's happening
8 in China regarding this directive.

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

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

19 But if China actually adopts, as
20 they're considering, a resale royalty right,
21 how does that affect our view, or should that
22 affect our view, here in the United States as

1 to what impact a resale royalty in the United
2 States might have in terms of where the art
3 market would go and whether it would then go
4 to China if China also has a resale royalty
5 right as well.

6 I think it was Tania and then
7 Jane.

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

15 I think if China introduces a
16 resale royalty, I think U.S. will be out of
17 the cool kids, they'll be out of the gang, so
18 I think you should obviously consider
19 introducing a resale royalty so that you can
20 be a part of the team, because I think,
21 genuinely, and we come on to this in panel
22 two, an important part of the art market we

1 aren't focusing on is the art and where the
2 art comes from.

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

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

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

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

19 MR. PFENNIG: There's an argument,
20 I mean, in Europe, we just have a discussion
21 about tax havens. And some country was saying
22 we are not changing our tax laws because we

1 attract money from other countries, other
2 states, because we are very discreet. This
3 has since changed substantially because the
4 United States put a lot of pressure, for
5 example, on Switzerland.

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

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

20 I mean, I'm not going to advise
21 you about tax things, and so on, but I think
22 this is not the only approach to look why and

1 whether resale royalty is really having an
2 impact on markets or changing of sellers,
3 because that has been said by many
4 participants, there is no evidence that it
5 even happened. It is not a good argument.

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

15 They have a career of ten years
16 and then they are no longer in the focus of
17 the primary market, but their work of these
18 ten years are resold in the resale market.
19 And we have to think about these changes in
20 artistic and artists' careers, and just, droit
21 de suite gives a justification for those
22 people whose works remain attractive, or those

1 that primary production loses attraction,
2 because they are not Frank Stella, and they
3 are not so impressive and outstanding as he
4 is.

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

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

22 I think it's the flip argument.

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

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

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

20 MS. CLAGGETT: Thank you. And
21 I'll let Irina close the panel and I think
22 that's a good point, because that's going to

1 be some of the conversation that we have at
2 the next panel. So I'll let Irina close in
3 terms of the panelists and then I'll open it
4 up to the audience.

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

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

21 It's not such a realistic threat.
22 The fact that, if there's an art work that

1 sells well of a living artist, it's not a
2 given that another work created by the same
3 artist will rise in price immediately. It's
4 not a given that the works of art will
5 appreciate with death of artist. We think it
6 might happen, but it's not a given.
7 Collectors are fickle.

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

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

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

21 (Off the Record Comments)

22 MR. STINE: Hi. I'm Quinn Stine.

1 I'm with Intergalactic Enterprises, LLC, and
2 I just want to make a comment about the
3 changing legal landscape. As far as I can
4 tell, there's only four states that have ever
5 enacted a resale royalty right, like Georgia,
6 South Dakota, California, and then, I guess,
7 Puerto Rico, the Commonwealth.

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

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

18 MS. CLAGGETT: Thank you.

19 MR. FEDER: Just a quick note
20 about the California law. That's under
21 review. It's not the final word on that.
22 It's under appeal. Two quick points. One

1 with regard to one of the whether the adoption
2 and the --

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

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

15 The other point about people who
16 might benefit in terms of being heirs, I have
17 a note from Rosalyn Drexler, a rather
18 prominent artist, who did not experience
19 success early on, she says, "I have nothing to
20 leave my son but my work when I die. Much of
21 it has been sold at bargain rates, most of it
22 my best work. I have worked to do my art. I

1 won't last forever. I'm 86, but the paintings
2 will go on a lot longer than I will."

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

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

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

1 MS. CLAGGETT: Anybody from the
2 panel want to address that question?

3 MS. SPRIGGENS: Only to say that
4 the harmonization in Europe was more about the
5 European Community than it was about Berne.
6 We identified various IP laws that weren't
7 harmonized across the community and this was
8 one of them. And that was the reason why it
9 first came up as a directive, well, Gerhard
10 will know about this more than me, back in the
11 '90s, but it really wasn't to do with Berne.

12 Although, as I said before, I
13 think the U.S. should adopt a resale royalty,
14 but I'm biased.

15 MS. CLAGGETT: Thank you.
16 Gerhard.

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

1 royalty.

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

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

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

20 MS. CLAGGETT: Thank you very
21 much. Before we close, Jason or Chris, did
22 you guys have any questions for the panelists

1 that weren't explored? All right. Well, I
2 want to thank all of the panelists for the
3 first panel. You definitely gave us a lot of
4 information.

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

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

21 And broadly speaking, I think this
22 topic sort of falls into three broad buckets.

1 One is the impact on the primary art market.
2 We've heard, in some of the comments, that the
3 knowledge of a downstream resale royalty right
4 will depress, artificially, the prices of
5 artworks in the primary market.

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

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

1 market, and that sort of thing?

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

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

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

12 MR. STELLA: Frank Stella,
13 notorious artist.

14 MR. PANZER: Robert Panzer, VAGA.

15 MR. SPANGLE: Morgan Spangle,
16 Dedalus Foundation.

17 MS. MCANDREW: Clare McAndrew, Art
18 Economics.

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

22 MS. COBDEN: I'm Sandy Cobden with

1 Christie's. I'm general counsel of dispute
2 resolution and public legal affairs.

3 MS. SPRIGGENS: Tania Spriggens,
4 DACS.

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

14 MR. AZAR: I'm Joe Azar with the
15 Illustrator's Club of Washington, D.C.,
16 Maryland, and Virginia. We're a small trade
17 association here, but we've been around since
18 1986, representing a few hundred professional
19 illustrators, and I'm an illustrator myself,
20 and I'm also an officer in the organization.

21 MR. STINE: I'm Quinn Stine. I'm
22 general IP counsel for Intergalactic

1 Enterprises, a small startup, I'll call it.

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

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

17 And from an economist's point of
18 view, obviously, if you put a levy, or a fee,
19 on a sale if a seller knows that they have to
20 pay that, they might reduce the price they're
21 willing to pay, another problem regarding
22 primary market sales is that the royalty is

1 based on the increase in sales price rather
2 than profit.

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

10 But I can also say, more
11 anecdotally, from talking to dealers and
12 collectors, that they have noticed that it is
13 a disincentive for sales in the primary market
14 -- it's kind of souring the relationship
15 between some collectors and artists because
16 they're being asked to take a hit twice.

17 They're being asked to invest
18 their money into an artist when they're
19 starting off, and they, perhaps, don't have
20 other income and they need that money, and
21 then down the road, when they resell it and
22 the artist might have gone up in value, or

1 down, a lot of them do go down, they don't all
2 go up, they're still being asked to pay back
3 to the artist.

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

15 So a lot of them are just working
16 as agents, working on a commission basis, and
17 that makes it difficult for the artist. The
18 dealers used to act as, kind of, collector
19 dealers, if you know what I mean. Now, a lot
20 more of them are working on an agency basis
21 for commission, so it has reduced the
22 liquidity and made it more difficult for

1 artists at the start of their career.

2 MR. REED: Morgan?

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

14 And I find it very hard to believe
15 that any artist, any dealer, any collector
16 that is really interested in buying a young
17 artist would take into a consideration, as Bob
18 Panzer pointed out, peanuts when they're
19 thinking about buying art that has a huge
20 upside potential. That's why they're doing
21 it. That's why they want to do it.

22 They're supporting the artist,

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

11 MS. SPRIGGENS: In the U.K.
12 regulations there is an exception for first
13 transactions, so let me explain that. The
14 first resale, if it occurs within three years
15 of the original purchase, and for less than
16 10,000 euros, is exempt from a resale royalty.

17 Now, considering the ArtPrice,
18 statistics say that 80 percent of works change
19 hands for less than \$5000, I can assume that
20 that can only but cover an enormous portion of
21 art sales that go through that initial point.
22 So the reason the exception was introduced

1 into the directive was to protect that primary
2 market relationship between the artist and
3 their dealer, so that the dealer is not
4 disincentivized from purchasing this work, as
5 Clare says, at a risk, and purchasing that,
6 and can confidently resell it.

7 And it is, you know, let's be
8 honest, only in exceptional cases at that
9 first starting out of an artist's career,
10 their work will achieve more than 10,000
11 euros. If it does go on to achieve more than
12 10,000 euros, then in my mind, it is only fair
13 that an artist takes their share of that
14 return. It's a substantial price for a work
15 of art the early start of an artist's career.

16 We have not anecdotally heard
17 that, certainly, the primary dealers we deal
18 with, and we deal with a lot. We haven't had
19 an indication that their relationships with
20 artists have been damaged. In fact, the
21 majority of primary galleries that we deal
22 with support a resale right, because they have

1 a direct connection with an artist.

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

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

16 And the critical point to me is
17 that it's going to lower primary market prices
18 for all artists, even though only a tiny
19 fraction of artists will ever receive any kind
20 of resale royalties on secondary sales. And
21 that's exactly what the Copyright Office found
22 in the 1992 report.

1 Nothing in the art market
2 economics has changed that would change the
3 fact that the resale royalty would reduce
4 funds available for collectors to purchase
5 works of art in the primary markets generally.
6 And there's a quotation from David Hockney in
7 the AAMD comments that the office has which
8 says just that, the royalty will discourage
9 art dealers from buying work of emerging
10 artists.

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

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

1 it.

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

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

18 And also, in the primary market,
19 those people who like to speculate don't have
20 anything to do with the primary market. They
21 don't buy until the art -- they only buy
22 artists that are established and are fluid, or

1 what do you call in economic terms? Anyway,
2 they're above water.

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

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

20 And what you have to have is, you
21 can call it a resale royalty, you can call it
22 anything you want, but you have to have a

1 transfer tax, a function, levy, whatever you
2 want to call it, every time a work changes
3 hands, up or down, and that's the way it has
4 to go.

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

19 MR. REED: So you said a lot
20 there, actually, and the issue of whether this
21 is fairly characterized as a transfer tax or
22 a resale royalty, I think we'll get into in

1 the next panel a little bit when work on
2 constitutional issues. But one thing I did
3 want to sort of highlight and follow-up on is,
4 you had mentioned this distinction between
5 selling the original work versus selling
6 reproductions of the works, which is the
7 common distribution method in many other
8 copyright industries.

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

19 And so on that point, I'm just
20 wondering, are there any views about how the
21 office should consider those issues and those
22 conflicting viewpoints? Simon?

1 MR. FRANKEL: Sure. As a
2 copyright lawyer, I find this notion that
3 copyright law is unfair to visual artists
4 puzzling, because for all authors, the
5 Copyright Act provides a tradeoff. You sell
6 the work, you retain the copyright, and
7 Sections 109 and 202 make that basic
8 distinction.

9 106 provides certain rights to all
10 authors and the value of those rights differs
11 depending upon the business model that may
12 appeal, or may be available, for a given work.
13 But none of these business models are more
14 inherently fair or more lucrative than the
15 others.

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

1 sculptor.

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

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

20 But copyright law gives all
21 authors the same bundle of rights and they can
22 have different values for different categories

1 of works, but I don't think it's the role of
2 copyright law to intervene in markets to give
3 more rights to certain creators.

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

16 And I'll just add one other point,
17 which I think has to be considered here, which
18 is, if you are saying that the artist should
19 share in the success of their work, you have
20 to ask the question, why should the artist be
21 paid every time a work is sold even if the
22 price is declining?

1 And we can talk about that more,
2 and the office may want to talk about in panel
3 four, but it is a puzzle of the resale
4 royalty, is why it is one-sided.

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

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

18 The way these media take advantage
19 of copyright is the very essence of their
20 business. When we're talking about fine art
21 in particular, it's about the unique work.
22 And so even though there's a little market for

1 reproduction rights, it's a very small market.
2 The reality is that the way the copyright law
3 is written there is little incentive to create
4 unique works.

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

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

20 Copyright law is not creating a
21 good incentive. I can't think of any artist
22 who said, I want to be an artist because I'm

1 going to sell posters, or I'm going to put my
2 art on book covers, maybe this is true for
3 illustrators to some extent, but it's not even
4 about reproduction for illustrators. It's
5 really about the original use on the cover,
6 which happens to get made into multiples, but
7 in this case it's the book that's the
8 multiple.

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

20 MR. STELLA: Good idea.

21 MR. PANZER: Great idea, but
22 difficult to make a living as an artist, then

1 still get that accounting degree. And, as a
2 society, don't we want to encourage people to
3 be creators? If the business model is such
4 that it's pretty difficult let's fulfill the
5 mission of the Constitution, because we've
6 decided, as a country, that what we want is
7 creativity.

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

11 MR. REED: Thank you. Sandra?

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

20 For instance, architects, Frank
21 Lloyd Wright. I think most of us would say he
22 creates works of art. They're original.

1 Should his estate get a resale royalty? Is
2 that how the Copyright Office is going to view
3 the expansion from visual artists, then, to
4 architects? What about jewelers?

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

14 Do we expand to include them?
15 This becomes a deep and big slippery slope for
16 the Copyright Office to consider.

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

19 MR. STINE: Well, I was, kind of,
20 just going to synthesize both Frank Stella's
21 and Simon's into one. I think that you're
22 right, that a lot of artists, they are only

1 concerned about the primary market and just
2 want to get in it. They want to sell their
3 piece and the move on.

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

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

17 I mean, what Intergalactic
18 Enterprises is trying to do is setup
19 relationships with artists so that they help
20 them take advantage of that. I know not
21 everybody wants to put their art on a book
22 cover or a poster, but at least, then, they're

1 taking advantage of all the rights that they
2 already have.

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

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

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

21 MS. SPRIGGENS: I think the points
22 being raised about whether this introduces a

1 new type of right ignores the fact that
2 creators operate under different business
3 models and the fine artist's business model is
4 completely different to the business model of
5 the musician.

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

15 So we have to respect that they
16 are different business models and in order to
17 support these different types of creators,
18 different intellectual property frameworks
19 need to be considered. I also want to point
20 out and comment about the position in the
21 U.S., but certainly in the U.K., unique works
22 of jewelry, unique works of furniture, rug

1 making, all attract a resale royalty because
2 they are considered to be works of art.

3 And we would assume or encourage
4 the U.S. to consider them to be works of art
5 as well. I also want to point out that we
6 surveyed our artists a couple years ago ahead
7 of the European Commission's inquiry into the
8 resale right and asked them whether they felt
9 that their market had been negatively affected
10 by the introduction of the resale right, they
11 should know, they are the generators and the
12 instigators of their primary market by
13 creating the work, and 99 percent of artists
14 came back and said they felt that their market
15 had not been negatively impacted.

16 Furthermore, 70 percent of them
17 were incentivized by the royalties that they
18 had received. And I take great offense on
19 behalf of my artists that the assumption that
20 small sums of money of these small royalties
21 being paid to them is not important enough and
22 does not incentivize them.

1 We hear very personally from our
2 artists that the 40 pound royalties that we
3 send them mean an enormous amount to them, not
4 just for the financial recognition, but for
5 the moral recognition that it tells them that
6 their work is moving through the art market,
7 that it rewards them for their effort.

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

12 MR. REED: Okay. Brad.

13 MR. HOLLAND: Yes, I'd like to
14 address some of the comments made over here by
15 Ms. Cobden and Mr. Frankel. The first
16 question is, really, not whether someone would
17 have to pay a resale royalty every time a
18 Frank Lloyd Wright house is purchased, but if
19 one of the auction houses were to get a copy
20 of the original drawings for Falling Water,
21 those drawings would be treated as works of
22 fine art, would they not?

1 In which case, then, a resale
2 royalty would be applicable. And as for the
3 suggestion that artists or the illustrators
4 sell multiples, I'm not sure how that is
5 supposed to work. If I do a cover for Time
6 magazine, I don't get a resale royalty every
7 time somebody buys a copy of Time magazine.

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

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

19 And I believe that, here,
20 statistics are purely a Rorschach Test.
21 Everybody is looking at the statistics and
22 seeing what it is that they want to see.

1 Ultimately, this is an unusual issue for ASMP
2 because normally, when we're involved in an
3 issue it's because the overwhelming majority
4 of our members are affected.

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

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

17 MR. REED: Before I continue with
18 our list, you've actually touched on something
19 that I wanted to address and just ask a
20 follow-up, do you have any sense, either among
21 your membership, and this is for everyone, or
22 the art market generally? Sort of, what

1 percentage of artists are primarily driving
2 their revenues from the sale of originals
3 versus reproductions?

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

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

18 On the other hand, a large number
19 of our members do sell works of fine art.
20 Typically, and not necessarily in limited
21 number and signed consecutive editions, but
22 they are selling originals that do have the

1 kind of values that we're talking about here.

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

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

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

1 clear rights themselves.

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

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

18 So for instance, we'll represent
19 an estate, which might have a bunch of works
20 in their collection, and they could make money
21 selling those works, or it can be an estate
22 which has nothing left to sell. And in fact,

1 the only way that the estate can do what it
2 wants to do, like put out a catalogue
3 raisonne, or try to make a catalog of what's
4 gone on with that artist's career and keep the
5 legacy going, is to rely on sources of money
6 other than the sale of works.

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

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

18 MR. SPANGLE: That's true. That's
19 why I want to respond to this was because
20 Dedelus Foundation was founded by Robert
21 Motherwell, who was an important American
22 abstract expressionist artist and he was very

1 successful in his career. However, as Bob
2 pointed out, the amount of money that comes in
3 from reproduction rights, which, for us, is
4 handled by VAGA, is a very, very, very small
5 amount of money.

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

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

20 Another aspect that we get
21 actually asked all the time in our grant-
22 making process is by artists' estates who

1 don't have any money. In fact, when we
2 started, we had no money. Motherwell left us
3 100s of works, original works, 1000s of
4 prints, but he left the Foundation no money.
5 We actually had to go and find a bank loan.

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

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

22 MR. REED: Thank you. Simon, I

1 think you had your hand up earlier.

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

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

17 And so I think it's very difficult
18 to say, and I think this was the point Mr.
19 Perlman made, that a resale royalty gives any
20 incentive to artists beyond that the copyright
21 gives them already to create more or better
22 works and to disseminate them. And that's in

1 the ASMP's comments that it's speculative, at
2 best, what effect would have, but I would
3 suggest it's hard to see why it would have any
4 effect.

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

15 And I just find it hard to believe
16 that a resale royalty adds to the incentives
17 that artists would have. And I think that's
18 important when you come back to this point
19 about the primary market because so few
20 artists have a secondary market. And we're
21 talking about from the statistics that are
22 available, and I won't cite them because I

1 think they're all in the record before you,
2 but they are in the range of 2 to 3 percent
3 have a market.

4 And then you have on top of that,
5 this tremendous concentration in the E.U.
6 experience of the resale royalties that are
7 paid at the high-end of the market. Just as
8 an example, of the royalties paid in the first
9 18 months of the U.K. resale royalty, the top
10 10 percent of artists received 80 percent of
11 what was paid.

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

20 And I think if you're going to
21 have a royalty, applying it to works that have
22 already been sold doesn't actually help. And

1 the final question I have, and this is really
2 a, sort of, theoretical question, is helping
3 estates of artists who are no longer creating
4 works, to administer those estates, is that
5 within the constitutional underpinnings of
6 copyright? I'm not sure it is. Thank you.

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

18 So I guess my question to that
19 would be, does that actually, then, provide an
20 incentive? If so, even with the lower
21 threshold that the U.K. has in terms of who
22 would be covered. There's so few artists that

1 actually benefit. Does that actually provide
2 an overall incentive for artists to create
3 works?

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

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

20 And so let's put that to one side,
21 and I would also say that, let's face it, it's
22 a royalty system that rewards success. You're

1 always going to get it favoring the top end of
2 the market. It's not pretending to be
3 anything else. However, when the European
4 directive was introduced, a couple of
5 mechanisms were included in order to bring
6 greater benefit to artists at the start of
7 their career.

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

18 Secondly, was introducing a lower
19 royalty rate, and that lower -- sorry, lower
20 threshold rate of a 1000 euros going up to
21 3000 euros, the U.K. has a 1000 euro
22 threshold, and that was to ensure that a

1 greater number of artists selling at lower
2 prices could receive a resale royalty.

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

11 I think it's a faulty argument.
12 We don't complain about Paul McCartney getting
13 royalties. We don't complain about J.K.
14 Rowling getting royalties. Why are we
15 complaining about other artists getting
16 royalties? So that's my first point on that.
17 DACS has paid 3000 artists, to date, resale
18 royalties since it was introduced.

19 Predominantly, we have paid living
20 artists, obviously, the right has only been
21 enforced for deceased artists from the
22 beginning of 2012. Last year, 60 percent of

1 the royalties we paid were to living artists.
2 That figure is likely to change, but that's
3 all I've got so far until it stays in line for
4 a little bit longer.

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

15 So let's look at this. You have
16 an estate, they have no money, they are
17 pouring their lives, I have an estate who's
18 selling their house in order to support the
19 development of this catalogue raisonne. That
20 catalogue raisonne automatically adds 3
21 percent value to any of his art works when
22 they re-hit the auction.

1 There you go. There's your
2 economic cycle of investment back into the art
3 market that directly benefits Sotheby's, and
4 Christie's, and other auction houses and
5 dealers. So it's just as important to
6 incentivize young, up and coming artists as it
7 is to ensure that your cultural heritage is
8 protected and sustained, and not forced into
9 selling because the estate has run out of
10 money to manage it, or identify fakes, or the
11 multitudes of other jobs that these
12 organizations do.

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

17 MS. MCANDREW: Thank you. I just
18 wanted to say that we shouldn't gloss over the
19 point that, you're saying these things are to
20 help artists early in their career, but I know
21 the point's been made time and again, but
22 artists early in their career do not make any

1 resales, so we should all be sitting around
2 here talking about what ways we can promote
3 the primary market, because that is where
4 artists are in most need.

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

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

1 number of eligible living artists in the U.S.
2 that sell at auction versus the number of
3 artists there is in the U.S.

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

11 MS. DIFANIS: I think one of the
12 premises here is, does this incentivize living
13 artists and emerging artists, which, you know,
14 the art museum community takes very seriously.
15 But I think one of the statistics that jumped
16 out at us as we were preparing remarks some
17 time ago was the one from 2010, and they may
18 be Clare's statistics, about where the
19 European royalty went, and 74 percent went to
20 heirs, and sort of follows what Tania is
21 saying, and there is no reason that people
22 shouldn't be successful.

1 20 percent went to the collecting
2 agencies, but only 6 percent went to living
3 artists. It's hard to believe, then, that
4 this is going to incentivize anybody to keep
5 creating. So that system, I'm not sure is
6 going to work for us.

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

12 MS. MCANDREW: No.

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

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

19 MS. SPRIGGENS: We do charge a
20 lower percentage.

21 MS. MCANDREW: So you charge 15
22 percent rather than 20 percent.

1 MS. SPRIGGENS: Yes.

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

13 MS. SPRIGGENS: Yes, well, we said
14 60 percent of ours went to living artists last
15 year. What we don't publish is how much X
16 artist received because that's private income.
17 And I would also point out, that 1 percent of
18 artists, I'm really sorry, but I have not yet
19 found any statistics in the U.K. that
20 conclusively tells me how many artists are in
21 the U.K., and if someone has them, there's no
22 category for artists in the census, and it

1 also ignores the fact that artists --

2 MS. MCANDREW: It's in the
3 European Labor Force Survey.

4 MS. SPRIGGENS: -- teach and --

5 MR. REED: We only have a few
6 minutes left. I'm sorry. I'd like to just
7 move on to some other comments. We can take
8 a look at that study later. Brad.

9 MR. HOLLAND: Yes, I'd like to
10 backup what Tania said, because I'm not sure,
11 I mean, it would be nice if you had a system
12 that rewarded all kinds of artists with resale
13 royalties, but what if you didn't? What if
14 you just didn't reward a few at the top? So
15 what? I mean, even successful artists
16 probably started out struggling, probably had
17 to give their work away, and if they're --
18 lots of people along the way are going to make
19 hundreds of thousands or millions of dollars
20 reselling their work, why shouldn't they get
21 a cut of the action as well?

22 MS. COBDEN: Okay, but we are

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

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

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

22 We also just question, it's very

1 nice that the heirs get the benefit of resale
2 royalties when the artist dies, but that's not
3 going to incentivize new art. No matter how
4 many royalties you pay to the heirs, the
5 artist is dead. There's no more art coming
6 from that artist. So if you are looking to
7 incentivize art, this may not be on a
8 practical level, the way to do it.

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

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

21 MR. STINE: Well, I just wanted to
22 reiterate that, yes, we want to incentivate

1 new art and so we should be concentrating on
2 the new artists. And new artists, they don't
3 suffer from a lack of a resale royalty, what
4 they really suffer from are student loan debt
5 and, you know, lack of market exposure, an
6 oversupply of artists, people with degrees
7 that claim to be artists, and just, generally,
8 an inability to relate to the primary market
9 on how to sell.

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

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

18 MR. SPANGLE: I think artists are
19 incentivized to make art because they're
20 artists. I mean, I think Frank Stella said it
21 best, you know, they would just be making art
22 art no matter what. But I do think that, and

1 I've known plenty of successful artists who
2 feel this way, that they want to have some
3 measure of control if they are successful.

4 I mean, you know, you go and buy a
5 lottery ticket, right, because you think
6 you're going to be successful, and if you're
7 successful, fantastic. So, you know, if
8 you're an artist and you're successful, you
9 want to have some measure of control and some
10 measure of reward for that success.

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

19 MR. REED: Thank you. Robert.

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

1 the incentive for the initial creation.
2 Nobody becomes a writer because they think
3 they're going to sell a lot of books. They
4 become a writer because they want to become a
5 writer, they want to become a painter, they
6 want to become a musician, and then they try
7 to figure out how they can make a living from
8 it because they really enjoy it and like it.

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

18 Nobody says, I'm going to be a
19 copyright guy. I'm going to make all my money
20 from copyright. And so once you recognize
21 that copyright is not the spur, but rather,
22 the thing that keeps it going, then it's very

1 easy to look at copyright in a broader way,
2 such as how do we make copyright do what it
3 was intended to do, which was to encourage
4 continued creation. That's really how it
5 works. It's continued creation.

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

15 There'd be lower thresholds. It
16 would apply to every single sector of society,
17 first sale, private sales, it would be more
18 robust. So the more robust you make it, the
19 more open it is to all kinds of sales, the
20 more money there's going to be. So the fact
21 that it's not getting to everybody is a
22 reflection of the laws being compromised to

1 make the market smaller for the resale
2 royalty.

3 MR. REED: Thank you. And Simon.

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

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

22 And we all know the story of the

1 1973 Scull auction, Robert Rauschenberg, and
2 we all should know the impact it had in
3 sharply raising the primary prices for
4 Rauschenberg's works. And I just think it's
5 worth keeping in mind that there is that
6 benefit.

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

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

16 MR. STELLA: I just want to say
17 one thing about this, the incentive thing is
18 a problem, but the idea here is that, because
19 copyright is not seen to have any particularly
20 worthwhile effect incentivizing people, we're
21 not looking at the problem for what copyright
22 can do.

1 And as I said, I think it's not
2 just the issue of reproduction, there's
3 something about here, two things, one, in the
4 United States, we have to have more
5 protection, through a fee, a levy, whatever
6 you want, for the actual object, something has
7 to happen where the artist gets a creative fee
8 for making the object. It has to be attached
9 to that object and that object, you can't say
10 that it's copyrighted, but that object has a
11 value.

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

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

21 MR. FEDER: I've got a couple of
22 quick points, with regard to the U.K., it

1 should be pointed out that a 100 percent of
2 everything that they distributed, and
3 collected, and sold at auction went to living
4 artists until January 1, 2012, when the law
5 allowed for heirs to receive the monies.

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

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

15 And lastly, we said it's easy to
16 sell reproductions on the Internet. That's
17 very true, but most of the time, and too
18 often, these are not originals. These are not
19 done by the artists in question. It's very
20 easy to ripoff an artist on the Internet. I
21 represent about 50,000 artists and we fight
22 this every day.

1 MR. REED: Thank you. Go ahead.

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

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

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

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

21 MS. CLAGGETT: Oh, wait. Can we
22 just stop you one time. Could you just come

1 a little forwards?

2 MR. PFENNIG: I'd like to point
3 out the number of artists who can profit. I
4 give you an example. In Germany, we have
5 15,000 artists who are a member of the
6 professional association. Maybe overall, we
7 have 25,000 artists. 5 percent, not more,
8 make a living out of their works they are
9 creating. The rest, 95 percent, they are
10 dreaming, they are hoping, they are in, they
11 are out. This is reality.

12 I think this is perhaps also the
13 reality in this country. And when 3 percent
14 are earning from a resale royalty, this is
15 more than 50 percent of this 5 percent who are
16 really efficiently working in their
17 profession. And so it is misleading to use
18 such numbers as 0.5 % of the artist's
19 population who participate from the resale
20 royalty.

21 Yes, but only 5 percent are really
22 making a living as artists and you have to put

1 these numbers in relation and not 100 percent,
2 or 0.25 percent. And this is reality in all
3 these countries. People who want to be
4 artists, they are artists, and they create,
5 not because they want to make their profits
6 out of the resale royalty, but as Frank Stella
7 said, they want to do something for the
8 others.

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

16 MS. MCANDREW: Sorry. Can I just
17 clarify, because it is my statistic, just as
18 a very last note, just to show how I derived
19 it. There were 830 living artists who had
20 eligible auction sales in the U.S., and that
21 was numerator, the denominator was the number
22 of artists according to the NEA and the

1 census, which is over 200,000. So that's how
2 the figure is derived. There's no mystery.

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

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

18 MR. REED: All right. Thank you
19 very much. Thank you to all our panelists.
20 It was a very interesting conversation. I
21 just want to reiterate what Karyn said about
22 us having an open-door policy. I know we had

1 only an hour to discuss a very expansive
2 topic, and so, obviously, we'll continue the
3 conversation here in about ten minutes, but if
4 anybody has thoughts on this particular panel
5 or this particular topic, don't hesitate to
6 reach out to us. We would love to continue
7 the conversation.

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

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

20 MR. REED: Okay. It looks like
21 our panel is all assembled. Thank you all for
22 coming back. This is panel number three of

1 our Resale Royalty Rights Roundtable Public
2 Meeting. Panels three's topic is First Sale
3 and the Free Alienability of Property and
4 Constitutional Issues Associated with Resale
5 Royalty Proposals.

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

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

21 And then finally, it raises issues
22 regarding the current bill, which we'll get

1 into more in the next panel, although it
2 raises constitutional issues, which is whether
3 the bill is drafted would apply only to a
4 handful of organizations and whether that
5 raises bill of attainder issues.

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

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

22 MR. REED: Thank you.

1 MR. LEHMAN: I'm Bruce Lehman.
2 I'm counsel for the Visual Artists Rights
3 Coalition.

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

7 MR. REED: Thank you.

8 MR. FRANKEL: Simon Frankel for
9 Sotheby's.

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

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

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

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

22 MR. STINE: Quinn Stine, I.P.

1 counsel for Intergalactic Enterprises.

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

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

20 And that's a smaller limitation on
21 the first sale doctrine than the two
22 exceptions which have been written into

1 section 109, which is the First Sale doctrine
2 in the Copyright Act, and that is the Record
3 Rental Amendment of 1984, limited the ways in
4 which owners could rent or sell their phono
5 records.

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

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

18 MR. REED: Mr. Stine?

19 MR. STINE: Well, I guess I was
20 going to bring up *Kirtsaeng v. John Wiley*,
21 because I guess that is the newest and most
22 directly impacts the resale royalty right.

1 The Supreme Court quoted *Bobbs-Merrill v.*
2 *Straus* and they said, copyright was not
3 intended to permit the right holder to fasten
4 a restriction upon subsequent alienation of
5 the subject matter in copyright after the
6 owner had parted title with one who had
7 acquired full dominion over it.

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

12 MR. REED: Ms. Goodyear.

13 MS. GOODYEAR: I think that the
14 College Art Association would agree with Mr.
15 Feder that, of course, on federal regulations
16 already recognized, that art is a different
17 asset. And of course, VARA, arguably, already
18 imposes some constrictions, or restrictions,
19 on what we might associate with the First Sale
20 doctrine in terms of preventing, obviously,
21 the wilful destruction or damage of a work of
22 art.

1 However, there's one question that
2 we would want to pose, I think, with respect
3 to thinking about the First Sale doctrine, and
4 that is whether the imposition of a resale
5 royalty could potentially put right holders in
6 a position to influence parties to whom a work
7 of art could be sold, or whether it could put
8 rights holders in a position to influence or
9 impose restrictions upon the exhibitions of
10 works of art.

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

15 MR. REED: Mr. Frankel.

16 MR. FRANKEL: I think as a general
17 theoretical matter, there is an inconsistency
18 between a resale royalty and the First Sale
19 doctrine in Section 109. That section
20 codifies an American rejection, in general, of
21 restraints on alienation, with the concept
22 that, once an author has sold a copy, the

1 author doesn't retain an interest.

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

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

15 MR. REED: Mr. Clement.

16 MR. CLEMENT: Yes, I mean, we
17 obviously submitted some comments on some of
18 these issues, and I think the most significant
19 thing that's happened since we've submitted
20 the comments, as was already mentioned, was
21 the Kirtsaeng decision, and everybody, maybe,
22 has their favorite part of that decision, but

1 Justice Breyer, right in 5th Court, talked
2 about the impeccable historical pedigree of
3 the First Sale doctrine, and went on to quote
4 Lord Cook about the restraints on the
5 inalienability of chattles and how that was,
6 kind of, a bedrock principle of American law.

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

16 And I think that's why it's not
17 that significant that a state court might
18 recognize that a state law isn't preempted by
19 the First Sale doctrine. Those are really,
20 you know, usually, the question on preemption
21 is whether there's a complete incompatibility
22 between the federal statute and the state

1 statute.

2 And there is, maybe not a complete
3 incompatibility, but I think there's
4 substantial tension. I mean, if you just,
5 sort of, say resale royalty, and say First
6 Sale doctrine, I think you recognize that, you
7 know, the idea that you're trying to, sort of,
8 attach rights to the original author on the
9 resale is in substantial tension with the
10 First Sale doctrine.

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

17 And I don't think there really is
18 any analog to a tax where the beneficiary of
19 the tax isn't the Treasury, it's, essentially,
20 the author or the prior owner. And maybe I'll
21 return to this when we talk about the
22 Constitutional issues, but I think the fact

1 that the beneficiary of the resale royalty is
2 the prior owner really does make it clear that
3 this is not just a tax, it's a restriction on
4 what has been sold to somebody down the
5 ownership stream.

6 MS. HICKS: Thank you. Mr.
7 Lehman.

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

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

1 with doctrines, so on and so forth.

2 By the way, in many cases,
3 tensions with common law doctrine, which don't
4 have anything to do, whatsoever, with a
5 federal constitutional power under Article 1
6 Section 8, and I want to make it perfectly
7 clear that we are not talking about a tax.
8 We're talking about legislation that would be
9 enacted by Congress as part of its ability to
10 make copyright law.

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

20 Section 109, the two restrictions
21 on the First Sale doctrine of Section 109 were
22 referred to. That's not something to be taken

1 lightly. Those were very significant
2 restrictions. And by the way, to read some of
3 these papers, you would think that you were
4 literally stopping someone's ability to use
5 the work once they had physically purchased
6 it.

7 Nothing in the concept of droit de
8 suite does that. All we are talking about is
9 the simple right to receive a royalty upon
10 changing hands of the work. Now, we have that
11 all over the copyright law. What is Section
12 111 in the compulsory license for cable
13 television? That was a situation in which a
14 business model evolved which took advantage of
15 copyrighted broadcasts, the creators were not
16 receiving compensation, and so Congress
17 adjusted the law to deal with those changing
18 circumstances.

19 This is a situation where the
20 business model of the existing copyright
21 rights does not fit the visual arts world.
22 You know, I did a little analysis, and I think

1 this is way out of date, several years ago.
2 And I found that the sales of, you know, these
3 statistics are published, the sales of art
4 works, resale at auction, and they're all
5 highly transparent statistics, about four or
6 five years ago, that's the last I looked, were
7 about \$13 billion worldwide.

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

18 The same amount of money is being
19 created off the business of selling the works
20 of a creator and they're getting nothing. And
21 even under the most generous terms that EVAA
22 has, they would get 3.5 percent. So I think

1 the only question, again, is, this is a policy
2 question, should Congress do this? I don't
3 think there's any question that Congress has
4 the constitutional authority to do this.

5 MR. REED: Thank you. Mr. Shore?

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

11 MR. FEDER: Two.

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

21 So Congress has spoken by its
22 inaction and said, this is not a good idea.

1 MR. REED: Mr. Feder.

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

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

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

22 MR. SHORE: No, but in fairness,

1 and like many people in this room, I spent a
2 large part of my career on Capitol Hill, any
3 bill that sits in the hopper for any extended
4 period of time will gather at least a small
5 handful of co-sponsors, particularly a bill
6 that, you know, has such strong support among
7 so many constituencies out in the hinterlands.
8 So to not even have one more co-sponsor in the
9 House, or five, or ten, I mean, that has to
10 say something. That has to speak to
11 something.

12 If it speaks to nothing, then --
13 REGISTER PALLANTE: But
14 nonetheless, we're going to do the study, the
15 Copyright Office has to do it, and that's why
16 we're here today.

17 MS. CLAGGETT: Comments made today
18 have been that they knew that we were likely
19 to do a study and they, obviously, like to
20 hear what the Copyright Office is able to
21 solicit in terms of views from the multiple
22 different parties. So obviously, that could

1 change as Register Pallante had mentioned.

2 Mr. Lehman.

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

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

21 You know, we're talking about a
22 study by the Copyright Office revisiting its

1 1992 report. And by the way, I've heard a lot
2 of references this afternoon to the 1992
3 report. And to hear those references, you
4 would think that the 1992 report was 150 pages
5 of reasons why we should not enact a droit de
6 suite statute in the United States.

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

18 But the 1992 report concluded that
19 it was premature to adopt droit de suite as a
20 solution and it proposed, I think, about four
21 other things that Congress should pursue, and
22 including, by the way, I think a fee on

1 museums, and said the National Endowment for
2 the Arts should give people more money, has
3 any of those things happened in 20 years? No.

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

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

20 Now, what really should happen is
21 that the United States should join the
22 community of nations about the droit de suite

1 itself and I would suggest we not adopt the
2 European model, that we do something better,
3 and that then, when other countries have done
4 the same thing, that we then have an
5 international harmonization where we have a
6 universal droit de suite which is no longer a
7 voluntary part of the Berne Convention, but is
8 indeed, the part of a new international
9 treaty, just exactly as we have done in the
10 digital universe with the WIPO copyrights and
11 Phonographs Treaties, and as we are currently
12 in the process of doing now with regard to the
13 rights of visually impaired people.

14 MR. REED: Thank you very much.

15 And I wanted to follow-up with Ms. Goodyear in
16 a point that you had made earlier, if you
17 could expand upon a little bit. You, I think,
18 had suggested that this resale royalty regime
19 might allow an artist to, sort of, restrain an
20 exhibition or hinder an exhibition of his or
21 her works. Could you please expand on that a
22 little bit?

1 MS. GOODYEAR: Well, I think that
2 one of the things we want to consider with
3 respect to the doctrine of First Sale is
4 exactly what type of constraints might we be
5 looking at if such a resale royalty were to be
6 adopted. And of course, I think VARA makes a
7 very good point that we recognize that art
8 does have moral power, that it is not
9 appropriate for an owner to destroy or to
10 wilfully damage something, which obviously,
11 puts a restriction on what a lawful owner can
12 do to this particular asset.

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

22 To my mind, it's not obvious that

1 it is necessarily unfair to impose a royalty
2 of this nature. However, I think what we want
3 to look at is the possibility of the law of
4 unintended consequences. And so I think as we
5 begin to look at what a resale royalty might
6 look like, is there any scenario in which a
7 royalty recipient might be in a position to
8 influence a sale or to prevent a sale,
9 possibly, for moral reasons, other sorts of
10 reasons. Is that something that we would want
11 to take into account in developing legislation
12 around this?

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

22 That the College Art Association

1 is less here to propose specific legislative
2 solutions and more here to raise questions
3 that might be important to consider precisely
4 as we explore the myriad implications what we
5 all acknowledge is an extremely thorny and
6 complex set of questions.

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

18 And so at any rate, I think,
19 certainly, we want to address that, and in
20 thinking through those solutions, to think
21 through the implications of them is extremely
22 significant.

1 MR. REED: Are you aware of any
2 circumstances in Europe, for instance, where
3 a regime such as this exists where there have
4 been those sorts of unintended consequences
5 that have been detrimental to museums, or
6 archives, or libraries?

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

15 MR. REED: Okay. Thank you very
16 much.

17 MS. GOODYEAR: Thank you.

18 MR. REED: Mr. Feder.

19 MR. FEDER: I have looked into
20 that issue.

21 MS. GOODYEAR: Great. Thank you.

22 MR. FEDER: And it's fully

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

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

20 And that's, I think, what we're
21 addressing here. So they are a special
22 category, but they're a special category,

1 which in many ways, have suffered and been
2 discriminated against.

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

11 I think the two scenarios are
12 totally inconsistent.

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

19 MR. SHORE: Right. I'm asking you
20 to point out to me where is the consistency,
21 where is the analogy, between the successive
22 purchase of a piece of art and its return

1 royalty back to the original artist and a
2 movie? Like, I don't see the parallel.

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

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

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

13 MR. SHORE: Not on a DVD.

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

22 The point being that, visual

1 artists do not benefit whatever, and that's
2 what we're trying to correct.

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

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

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

1 creative works.

2 It's not to guarantee revenue
3 streams to different types of authors, and I
4 think, in the most part, it's not to intervene
5 in market conditions. It's to create those
6 circumstances for appropriate encouragement.
7 Coming back to this question of the First Sale
8 doctrine, I think it would be a unique feature
9 in American law to have a rule that a person
10 who owns property free and clear is required
11 to pay, not to the government, but to a
12 person, a payment every time it's sold, and
13 this is not a property interest that would
14 only operate one time.

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

20 MR. REED: Thank you. Mr.
21 Clement.

22 MR. CLEMENT: Yes, I just want to

1 clarify a couple of things. I mean, I think
2 there are two issues here. One is really, the
3 consistency with the First Sale doctrine,
4 which I took to be something of a policy
5 inquiry, and then there is the separate
6 question of whether it's constitutional. I
7 certainly didn't want to be heard as
8 suggesting there weren't constitutional
9 difficulties with this. I think they're
10 separate.

11 And what I'd like to, sort of,
12 reaffirm is that, in a policy level, I think
13 the question of whether this is consistent
14 with the First Sale doctrine is an important
15 question to ask, even though it doesn't
16 determine a constitutional question, because
17 it does seem, if the conclusion is, well, yes,
18 this is inconsistent with the First Sale
19 doctrine, it may or may not be that Congress
20 has the power to do it nonetheless, but the
21 fact that it's inconsistent with such a
22 bedrock principle of the copyright law, is a

1 reason, it's at least a yellow flag, that you
2 don't want to go down this route and be
3 inconsistent with such a bedrock doctrine.

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

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

19 Just two other very minor points,
20 one is, Mr. Frankel's point, I think, is very
21 well taken, which is, not only would this be
22 inconsistent with the First Sale doctrine, but

1 it would be inconsistent with the Second Sale,
2 or the Third Sale doctrine. I mean, it really
3 is an incumbrance on the chattel that really
4 is quite significant and quite unusual.

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

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

20 MR. REED: Mr. Lehman.

21 MR. LEHMAN: If I took, literally,
22 all the comments that have gone previously, I

1 would think that, when one purchased any work
2 of creative authorship, if I had bought a copy
3 of a book, if I acquired a copy of a
4 screenplay, or a score to music, that somehow
5 or other, boy, I'd acquired everything. It
6 was mine. I owned it. I would own it
7 forever. And yet, we all know that the
8 bedrock idea of copyright law is that that is
9 not true.

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

20 And fees are paid, various people
21 that participate in the making of a motion
22 picture receive fees based on those

1 copyrights, some of them, by the way, are
2 direct copyrights themselves.

3 For example, the screenwriter has
4 a copyright right. Of course, the playwright,
5 not the playwright, but I mean the actors,
6 don't have a copyright, but they do receive
7 residuals by virtue of collective bargaining.
8 And so we have a system supported by the
9 copyright law that fits the business model of
10 music and providers for a very healthy, robust
11 industry that keeps up with the times.

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

21 They only would be required to pay
22 a statutory royalty. And by the way, if that

1 sounds so terrible, well, why is it that
2 public television stations, by the way, under
3 Section 118, have to pay a statutory royalty?
4 Why do we have the statutory mechanical right
5 royalty then? Why do we have all these other
6 statutory royalties?

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

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

18 MR. SHORE: I feel like we're
19 confusing ownership with a license. And if we
20 want to have a discussion about, you know,
21 granting people a license and then, yes, in
22 that case, you don't own something when you,

1 you know, as it currently stands in most
2 situation, download a movie, you don't own it.
3 You own a license.

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

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

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

21 MS. GOODYEAR: I think one of the
22 important this raises, actually, is the

1 practicality of how we implement this. If we
2 are to imagine a scenario in which this resale
3 royalty were to be accepted and were to go
4 through, if we talk about principles of
5 fairness and so forth, what does it mean to
6 collect this royalty, particularly on works
7 that may not have clear rights holders; orphan
8 works, for example.

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

15 And then, Mr. Feder, you raised a
16 very important question, I think, of, what
17 does it mean to compensate an artist for sale
18 of his or her work for increased value of that
19 work over time? Of course, we know that the
20 legislation that was proposed back in late-
21 2011 was relatively limited to a very small
22 segment of the market; sales of \$10,000 or

1 above at auction houses that were doing
2 significant business of \$25 million or more.

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

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

15 MS. GOODYEAR: Sure. Thank you.
16 By all means.

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

20 MS. GOODYEAR: Terrific.

21 MR. FEDER: We could say that, or
22 I could just briefly answer, there's a system

1 in place, it's international in scope, of some
2 40 artists' rights societies around the world
3 who exist under the umbrella of a group called
4 CISAC, which is based in Paris, and what they
5 do is vetted, first, by their own ministries
6 of culture, and then by CISAC.

7 The bill in question before us
8 does call for oversight by the Copyright
9 Office. It's not as if the collecting
10 societies would just simply run amuck with it.
11 On another question, if the First Sale
12 doctrine is so inviolate, as you seem to
13 imply, how do you account for the record
14 rental amendment, which also, by the way,
15 focuses on owners. It doesn't talk about
16 licenses, per se.

17 It says, and this is something the
18 Copyright Office approved of, this is the
19 language of the statute, "The owner may not,
20 for purposes of direct or indirect advantage,
21 dispose of or authorize the disposal of the
22 possession of that phonorecord by rental,

1 lease, or license."

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

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

17 MR. FEDER: No, I'm saying it's
18 not necessarily not an issue, but I'm saying
19 that there are precedence for dealing with it,
20 and I've cited what happened with the
21 phonograph amendment and also with the
22 computer software amendment, both of which are

1 exceptions to the First Sale rule, and to
2 inhibit the first sales.

3 MR. REED: Okay. Mr. Lehman.

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

8 MR. REED: Right.

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

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

1 criticism, I certainly think this could.

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

13 And that's one reason, by the way,
14 why it was recognized in the Berne Convention,
15 which started out, by the way, as a European
16 convention. The U.S. wasn't a part of it. So
17 from the get-go, it was really a part of the
18 European's concept of copyright. And that
19 really, is sort of the beginning and the end
20 of the, sort of, basic fundamental law
21 justification, I think, in most European
22 countries, for this right.

1 There's a very strong tradition of
2 author's rights and Parliaments in Europe,
3 now, for centuries, ever since the French
4 Revolution, have been embodying that right in
5 various statutes as times, and circumstances,
6 and conditions have changed, and have promoted
7 those changes in international treaties, which
8 they did in the Berne Convention. I don't
9 know, this goes back to at least the '30s, I
10 think, it was first put in the Berne
11 Convention.

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

20 And for the panelists, if somebody
21 could please comment on the resale royalty
22 right in view of the takings clause and how

1 that would apply in the context preexisting
2 works and whether that's an issue. Mr.
3 Clement?

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

15 And you can imagine a well-meaning
16 state then imposing a law that basically said,
17 okay, everybody, when they next sell their
18 house, they have to give, sort of, 10 percent
19 of the capital gain they make to the prior
20 owner of the house. I think you could justify
21 that as a policy measure as being, sort of,
22 equity and fair thing.

1 I don't have much doubt that the
2 Supreme Court would think that that was a
3 taking of property because you are -- and then
4 that's why I think the fact that this isn't a
5 pure tax. I mean, I think if the Federal
6 Government increases the capital gains tax, it
7 might feel, from the perspective of the
8 current owner, very much the same, but I think
9 the constitutional analysis would be quite
10 different.

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

19 I will say that I think that the
20 reaction is going to be, especially when we
21 take the analogy and it's only that to the
22 copyright world, I think the impact is going

1 to be much different to the extent that it
2 purports to be retroactive, because, surely,
3 Congress has some authority to shape
4 prospective copyrights and what that bundle of
5 rights is.

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

13 MR. REED: Mr. Feder?

14 MR. FEDER: Yes, retroactivity
15 might be a way of describing this if this bill
16 was meant to capture sales that occurred
17 before enactment. It's only going to apply to
18 sales that occur prospective to the effective
19 date of the bill, so that's an important fact.
20 There have been so-called restoration and
21 retroactive measures which have been enacted
22 in the copyright law; the restoration

1 provisions of the TRIPS Accords in 1996 is a
2 case in point.

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

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

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

22 They thought they had purchased

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

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

18 If you now tell me that, no,
19 that's not the case, the prior owner is, in
20 fact, going to get 10 percent of that, I think
21 it would certainly feel like it's an
22 imposition on me, a retroactive imposition on

1 me, and I think from the perspective of the
2 seller, it's going to feel like it's something
3 of a windfall. And I think that's what the
4 court's cases tend to look for.

5 MR. REED: Mr. Lehman?

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

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

21 If it doesn't, because of the
22 takings clause, then I'm not sure that it has

1 the power to enact any copyright law of any
2 type, which is a very significant restriction
3 on property rights. And by the way, not just
4 some kind of abstract restriction, a
5 restriction on what you can do with a physical
6 chattel. The entire copyright law is all
7 about that.

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

16 And if you were Mozart, you had to
17 get a Grand Duke, or a King, to, you know, pay
18 for you and be your patron. Maybe we should
19 go back to that system. Copyright is a system
20 that is based on equity to the creator
21 themselves. And indeed, it is a restriction,
22 just as copyright is a restriction on the

1 descendants of the European aristocracy today
2 who might buy paintings at Sotheby's, or buy
3 other works, have music created, for example,
4 for them.

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

7 MR. REED: Mr. Stine.

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

16 MR. REED: Mr. Clement?

17 MR. CLEMENT: Yes, I mean, I hate
18 to, you know, sort of burden you with
19 hypotheticals, but I think it's actually
20 helpful to think about the issue here, which
21 is to say that, I mean, again, the dichotomy
22 between the policy issue and the

1 constitutional issue. It is probably true
2 that, within certain broad contours, the
3 federal Congress can either have or not have
4 the First Sale doctrine.

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

16 I would think that that would be
17 viewed very differently by the courts above
18 the takings, and perhaps, the due process
19 standpoint than if Congress tried to do the
20 same thing prospectively and said, okay, we've
21 had 225 years to fool around with the First
22 Sale doctrine, you know, it's got some pluses

1 and some minuses, we've decided we're going to
2 move on, we're not going to have the First
3 Sale doctrine prospectively.

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

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

16 MR. CLEMENT: I think it would. I
17 don't think that it would become entirely free
18 from constitutional doubt. I think you could
19 still make the arguments, but I do think from
20 the perspective of the constitutional
21 arguments, that, sort of, prospectively only
22 versus a retrospective effect on existing

1 chattels is a very big difference.

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

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

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

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

1 recognize resale royalty.

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

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

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

20 MR. CLEMENT: Again, I'm here to
21 talk about the constitutional issues. I think
22 there are some constitutional issues if it's

1 done prospectively. I think there are very
2 significant constitutional issues.

3 MR. REED: Mr. Lehman?

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

15 No, it applied to the works under
16 copyright. If we were talking about taking
17 something that was not copyrighted and making
18 it copyrighted, now, that might be a different
19 situation. But we are talking about works,
20 presumably, which have legitimately been under
21 copyright, so it's simply a question of what
22 are the scope of rights in that copyright?

1 And in fact, I think we have a
2 case where the facts are a lot worse than
3 this, in the Golan case, recently, and the
4 Supreme Court has spoken on that issue. So I
5 think if they can handle Golan, I can't
6 imagine how they wouldn't handle this.

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

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

20 And if you had a resale royalty
21 and apply it retroactively, that would be
22 something to deal with. I think that also

1 goes to your question, Mr. Reed, about, should
2 it be a copyright infringement suit? And
3 that, I think, is a very difficult question
4 because it implicates a lot of the remedies
5 that are in the Copyright Act, not only for
6 liability without any showing of intent or
7 fault, but also, statutory damages and
8 potential fees.

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

14 And the last thing I'd say is,
15 there's been a lot of references to statutes
16 where Congress has enlarged copyright over the
17 years. I think, in general, those have been
18 reactions, at least over the past few decades,
19 to new technologies and new kinds of works.
20 And sometimes it's taking Congress a little
21 while to get to it, but they have usually been
22 reactions to new technologies.

1 And certainly, the DMCA, which Mr.
2 Lehman mentioned, is a good example, in that
3 it didn't create infringement in Section 512,
4 for example, it actually provided safe
5 harbors. As to the anti-circumvention, it
6 recognized that there were certain protections
7 needed for circumvention of protections for
8 access to copyrighted work.

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

19 MR. REED: All right. Thank you.
20 And we have just a couple minutes left, but we
21 have previously elected to see if there are
22 any questions and comments from the audience

1 as well. John has a microphone there. If you
2 could also come forward to ensure that our
3 court reporter can hear.

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

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

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

22 I also like the concept in

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.

1 MR. CLEMENT: Sure, I mean, I'll
2 try to briefly address it. I mean, the wholly
3 apart from the takings and due process issue,
4 there really is the bill of attainder issue.
5 And the bill of attainder doctrine, basically,
6 just says that, in general, you have to
7 legislate on a basis that's general.

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

16 And if you get to the point where
17 you're imposing it on a single entity, or one
18 or two entities, you raise very serious
19 concerns. And then the intermediate step is,
20 if there are a variety of people that have the
21 same characteristics, so logically, the
22 imposition should be on all of them, and then

1 you pick out a subset of that group for the
2 imposition, I think that also starts to raise
3 the bill of attainder concerns because
4 Congress will get some deference when they
5 say, well, but we didn't impose this on
6 everybody because not everybody sells artwork.

7 But if you get to the universe of
8 entities that sell artwork, and it's only a
9 subset of those, then that puts, sort of, a
10 heightened burden on Congress.

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

17 MS. CLAGGETT: I think that we now
18 have all of the panelists and so we're going
19 to go on to panel four, which is, The Equity
20 for Visual Artists Act of 2011, and I know,
21 actually, there are a number of issues that we
22 asked about in our notice of inquiry leading

1 up to this specific roundtable, and we don't
2 have a lot of time, so again, we'll open it up
3 afterwards if you all want to come in to talk
4 to us about any specific issues that we
5 weren't able to cover.

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

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

19 For example, in terms of the
20 amount of artists, or the number of artists,
21 that would be affected, should the threshold
22 be changed so that we could actually involve

1 more artists, and who might be able to
2 participate in actually receiving the federal
3 resale royalty right?

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

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

22 So do other resale royalty regimes

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

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

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

22 MS. LEVINE: No, first, we just

1 heard a discussion about some of the
2 constitutional issues, the bill of attainder
3 problem, which I think is really substantial,
4 the bill as it's written -- first of all, let
5 me just say that, I think it's hard for me to
6 accept the premise that there will be such a
7 bill because I think there are no ways to make
8 it better.

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

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

20 And I think what that is likely to
21 do is to drive sales from auction into those
22 other non-covered forms, which, I think, has

1 additional negative effects in addition to all
2 the negative effects that have been discussed
3 about the bill. You know, the auction process
4 creates a public record for an artist's work.
5 There's significant benefit to all kinds of
6 artists from the public auction market, so to
7 put the incentive to drive that into more
8 private sales, or other types of sales,
9 reduces that availability.

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

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

16 MS. LOENGARD: Hi. Phillipa
17 Loengard from the Kernochan Center at Columbia
18 Law School, and I'm not an auction house, and
19 I don't represent the auction houses, nor do
20 I represent any individual group, so I'm
21 looking at this from a fairly distant
22 perspective, and I think that the issue with

1 the EVAA, and it targeting auction houses, is
2 indicative of the issues with the resale
3 royalty right in general.

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

14 I think I also just want to
15 expound and what Ms. Levine said, which is, if
16 we start driving things from public auction to
17 private sale in order to evade, is a rather
18 easy way, if you don't mind me saying, to
19 evade paying the resale royalty, then the
20 people who are left at public auction are
21 places like museums, who use public auction
22 because it's the most transparent way, if they

1 want to deaccession a work, it's the best way
2 for them to raise money and there are great
3 benefits to them from using the public auction
4 process.

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

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

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

20 MS. COBDEN: To build on what is
21 said here, I do think you have a big bill of
22 attainder problem with this bill that targets,

1 be it four or five, auction houses out of the
2 entire art market is an unconstitutional and
3 unfair burden. However, it also disregards
4 the way the art market is changing. For
5 instance, Christie's does online auctions too.
6 Because we're an auction house, we would be
7 subject to a resale royalty on those auction.

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

14 Now, understand why that's done
15 because it will create a lot more opposition
16 to the bill if you bring in the dealers, and
17 if you bring in eBay, and some of the other
18 eCommerce entities. So by limiting it to
19 auction houses, you limit your opposition.

20 You also have the problem, and
21 it's a big problem, and we know it from
22 Europe, of enforcement and accountability.

1 And once you leave the auction houses, not so
2 much on the eCommerce side, but on the dealer
3 side, you're going to have a big problem with,
4 how do you account for these sales that are
5 private?

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

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

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

21 MR. PERLMAN: Surprisingly, I find
22 myself agreeing a lot with a lot of what's

1 been said by the auction houses. I really
2 echo what Phillipa said, by the hypothetical,
3 we have assumed that there is a problem and
4 that we are trying to find the solution. If
5 you're going to find the solution, why would
6 you want only a very limited partial solution?

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

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

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

22 MS. CLAGGETT: And actually, that

1 was going to be my next question, so I think
2 that we can go around to the people who raised
3 their hands in the first question to respond
4 to that, the initial transaction-type
5 question, and then if anybody wants to add
6 anything in terms of the scope of the type of
7 artwork that should be covered by any resale
8 royalty, you can kind of do that as well.
9 Anita.

10 MS. DIFANIS: I think in the
11 question of driving sales to the private
12 market has a real impact on museums because,
13 as has been said, the auction houses are
14 transparent, you know where the works are
15 going, you know who the owners are. Being
16 able to follow that ownership, is critically
17 important to museums that are, downstream,
18 going to buy these works, maybe from several
19 different galleries -- or from a private
20 dealer where they have already changed private
21 hands several times, you've lost a certain
22 ownership history.

1 MS. CLAGGETT: So I think we're
2 going to go with Ted, Bruce, and Ms. Levine,
3 and then Ms. --

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

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

18 MS. COBDEN: Actually, we do.

19 MR. FEDER: That's what I thought.

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

22 MR. FEDER: I assume that you did

1 in spite of the fact that there's no resale
2 royalty.

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

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

17 The auction market in public and
18 transparent is the place where you have a
19 reliable, you said a reliable benchmark for
20 prices paid for artist's works. And that
21 benefits artists in the resale market because
22 if they're successful and those high reported

1 prices are made known, as they often are, that
2 increases the value of the artist's other
3 works, which is how the artist's who are
4 commercially successful become that way.

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

11 MS. CLAGGETT: Mr. Lehman.

12 MR. LEHMAN: I'd like to answer
13 your question by basically talking a little
14 bit about why I believe the legislation is
15 structured the way it is. Number one, with
16 regard to the question of auction sales only,
17 you know, the reason is very simple, these are
18 very transparent transactions that are very
19 easy to track, they're easy to enforce, the
20 legislation is drafted to attempt to put as
21 little burden as possible on the art business,
22 and at the same time, be equitable to artists.

1 And so this seemed to be the best
2 way of doing that; very transparent, very easy
3 to track, very easy to enforce system with
4 minimal bureaucracy involved.

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

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

1 had the moral rights piece.

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

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

22 In the way Senator Kennedy setup

1 this bill, that only happened if the artists
2 were living. For all the deceased artists in
3 the States, basically, there was, then, the
4 money went to the National Endowment for the
5 Arts for the purpose of a fund to give
6 stipends to artists.

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

20 Nevertheless, just as a matter of
21 fairness, and this is supposed to be about
22 fairness, the provisions in the bill which

1 give half the royalties to, basically, an
2 endowment for the purpose of purchasing new
3 works of art is really attempting to address
4 that very issue that we heard about so much
5 this morning.

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

16 We certainly know that, right now,
17 by far, far, far, the largest amount of money
18 and burden on an auction sales transaction are
19 the buyers' and sellers' commissions that
20 these very well heeled and very prosperous
21 auction houses charge, none of which is, of
22 course, shared with a single creator.

1 And even at a 7 percent royalty,
2 only half of which goes to the artist, that's
3 still vastly lower than even, in most cases,
4 just one of the two sides of the buyer's
5 premiums.

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

13 MR. OMAN: Just briefly. Mr.
14 Lehman has given the history that I was going
15 to give, but he omitted the fact that Senator
16 Kennedy himself was a very renowned amateur
17 painter and at the hearing on his bill, he
18 said that he had many artist friends and he
19 said all of his artist friends urged him to
20 spend more time on Senate business and all of
21 his Senate colleagues urged him to spend more
22 time painting pictures.

1 But the point I wanted to make was
2 that we do have distinctions in law fairly
3 frequently; small business exemptions allow
4 the laws to focus on the large corporations
5 and exempt small businesses. I think we could
6 probably fashion a provision in this bill that
7 captures the major auction houses, and
8 captures eBay, but exempts the small galleries
9 and other that would mess up the bookkeeping
10 operation thing.

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

16 MS. GOODYEAR: Right. I just want
17 to start by saying a quick word about the
18 College Art Association itself, which has
19 14,000 members that include individual
20 members, institutional members, and which
21 actually grabs many of the constituencies that
22 are represented here today; artists, art

1 historians, curators, dealers.

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

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

20 So it does seem as though,
21 perhaps, if we're going to march forward, it
22 makes sense to try to broaden that in some

1 fashion. I think that then raises a host of
2 other questions that we would want to examine.
3 Certainly, the question of how these royalties
4 would be assessed, at what threshold, at what
5 percentage, what would be the collecting
6 mechanism, and so forth?

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

16 What do we do in terms of artists
17 who may not traditionally have been recognized
18 under this rubric, such as native artists?
19 There are probably other categories as well,
20 but this question of what we mean by fine art,
21 I think, has to be looked at very closely.
22 And I know, of course, this is one of the

1 issues that the Copyright Office acknowledges
2 needs to be considered.

3 I think Mr. Perlman's question
4 about what constitutes a work of fine art,
5 also, is something that we need to look at.
6 I think as EVAA currently describes the
7 concept, it uses the phrase, the original
8 embodiment of the work of art, which
9 immediately raises questions, I think, for
10 anybody who's interested in things like
11 photography or digital works, which we
12 recognize are inherently multiple.

13 Digital work, in particular, is
14 not fixed, and in fact, really cannot be fixed
15 in order to survive. So I think this question
16 of how we describe art, particularly in an era
17 where increasingly hybrid forms are becoming
18 the norm rather than the exception, really has
19 to be scrutinized very carefully. Thank you.

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

22 MS. LEVINE: Thank you. I was

1 just going to make one quick point to respond
2 to the notion that the definition of who's
3 covered, you know, is akin to some kind of
4 reasonable, you know, targeted, you know,
5 exclusion of something like small businesses.
6 And I think it's sort of really important that
7 we understand the way the art market works.

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

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

1 to make that comment.

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

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

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

21 The global community is not going
22 to agree to it, and frankly, I don't think the

1 United States would agree to it. There is
2 significant opposition, both in the courts in
3 California, in the 15 states that have refused
4 to ratify this, and in the fact that the, at
5 least, initial attempt to introduce a resale
6 royalty bill died with barely a whisper in
7 committee.

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

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

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

1 question, I quite agree.

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

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

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

1 outside of the bucket.

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

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

17 MS. CLAGGETT: Thank you very
18 much, and you actually mentioned the next
19 issue that I wanted to talk about. Since we
20 don't have a lot of time, I'm going to put
21 three issues on the table for you to consider
22 in terms of specific provisions dealing with

1 the federal resale royalty right, and that
2 would be the threshold value.

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

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

21 And then, the final question will
22 be duration, whether the resale royalty right

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

9 REGISTER PALLANTE: Hi, everyone.

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

17 I, as a former Manhattan person,
18 will say, I lived in his District, which
19 includes the West Village, and he will tell
20 you exactly where his District goes, but it
21 goes all the way up to, I think you said,
22 122nd, all the way down to where the Twin

1 Towers were, and I think, over to parts of
2 Brooklyn, and in addition to being a member of
3 the IP Subcommittee on the House Judiciary
4 Committee, he is also a former chairman and
5 now, ranking member of the constitutional
6 Subcommittee.

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

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

17 I always used to say that it's an
18 extremely diverse District. It goes from
19 Nathans to Zabars, and I thought the country
20 people would laugh, but I can no longer say
21 that because I no longer have Coney Island,
22 and therefore, Nathans, but it's still a very

1 diverse District.

2 In any event, good afternoon. I
3 want to thank you for inviting me here to
4 discuss the important issue of resale royalty
5 rights. I want to thank you for your time and
6 efforts to examine this issue, to hold today's
7 public hearing, and to take the matter
8 seriously. The issue affects thousands of
9 American artists and concerns millions of
10 dollars in revenues every year, which you all
11 know.

12 My role in this began a couple of
13 years ago when I first became aware of some of
14 the unresolved issues around royalties and
15 intellectual property in the arts.
16 Representing many hardworking artists in my
17 District, which includes neighbors like
18 Chelsea, and Soho, Hell's Kitchen, and Redhook
19 in New York City, it dawned on me that there's
20 a serious lack of equity when it comes to the
21 distribution of revenues generated by sales
22 and resales of works of art.

1 In the last Congress, in the
2 previous Congress, along with now retired
3 Senator Herbert Kohl of Wisconsin, I
4 introduced the bill that you've been
5 discussing, the Equity for Visual Artists
6 Rights Act, which is designed to let visual
7 artists to share in revenues generated by the
8 resale of their works.

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

17 Passage of the bill would
18 effectively bring the U.S. artist resale
19 royalty system into line with what many of our
20 counterparts in Europe and elsewhere are
21 doing. Unlike the composers, lyricists,
22 playwrights, and screenwriters, the primary

1 means by which visual artists support
2 themselves is through their first sale of a
3 physical work of art.

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

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

19 I do plan to reintroduce the
20 legislation soon. It may not be the same
21 legislation. It may not be seven percent, it
22 may not be \$10,000, all these questions are

1 open and, frankly, somewhat arbitrary;
2 obviously. And the outcome of today's hearing
3 of the Copyright Office's forthcoming report
4 will have a great deal of bearing, probably,
5 on the bill's contents and maybe on subsequent
6 amendments, and certainly, on the future
7 success.

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

16 In fact, I will tell you that, one
17 day, when I was talking to then Governor
18 Spitzer, and he asked me what I had done
19 before I was elected to Congress, and I said
20 I was in the State Assembly for 16 years, and
21 he said, well, it's good you got out of there;
22 in just that tone.

1 But my legislative experience
2 tells me that when a subject is opened up, and
3 the people pursue it, it is quite likely that
4 eventually something will be done, maybe not
5 exactly what they proposed initially, but
6 something. So I think it's important and this
7 seems, to me, an issue, and to other people.
8 We will get more sponsors on the bill, we'll
9 hold hearings in the committee, and the
10 subcommittee, and ultimately, either we'll
11 pass something or it'll become an ongoing
12 issue, and eventually, something will happen.

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

17 I will be the first to admit that
18 I do not start this as an expert in the issue,
19 but simply as someone who is looking at it and
20 who thinks that there is some equity shortfall
21 here, and the equity shortfalls ought not to
22 be tolerated, but ought to be dealt with, and

1 that's where we're coming from. Thank you.

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

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

8 REGISTER PALLANTE: Sure.

9 CONGRESSMAN NADLER: Thank you.

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

12 CONGRESSMAN NADLER: Sure.

13 MS. COBDEN: Yes?

14 MS. CLAGGETT: Yes, and once
15 again, thank you very much for joining us.
16 Some of the issues, actually, that you just
17 raised were the issues that I had actually,
18 just opened up to the panel, which was if this
19 is reintroduced, we might have further
20 discussion and debate in terms of the
21 particulars about the threshold requirements
22 of an actual royalty rate, whether seven

1 percent is appropriate, or it should be a
2 difference, what the duration should be, and
3 so that was actually the specific question
4 that we asked when you just arrived.

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

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

19 MS. CLAGGETT: So with that, I
20 would open up to the panel in terms of if you
21 had any questions or comments, rather, on
22 those three issues; the threshold amount, the

1 royalty rate, and the duration. And I'm going
2 to go around, starting with Vick.

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

10 MS. CLAGGETT: Thank you. Ms.
11 Goodyear.

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

22 MS. CLAGGETT: Mr. Oman.

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

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

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

20 MR. OMAN: I will say a high
21 threshold, get those artists that are well-
22 established, but a low enough threshold so it

1 captures some of the struggling artists that
2 you represent in Soho. We have to frame this
3 bill in terms of what we're doing to help the
4 struggling artists. If it's just going to be
5 a dispute between rich artists, rich art
6 collectors, and the rich corporations that act
7 as intermediaries, it's going to be dead on
8 arrival.

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

16 And that's what we've got to do in
17 this case, and if we can do that, if we can
18 convince Sotheby's and Christie's that this
19 will serve their interests as well as everyone
20 else's, we will be home free. I was going to
21 suggest that we might want to consider a
22 provision that would require the artist to

1 personally collect the resale royalty from the
2 collector, so it would be a kick for both of
3 them, for the person that bought the painting
4 to meet the artist, and for the artist who
5 created the painting to say thank you to the
6 collector.

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

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

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

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

22 Now, we already have systems, as

1 you know, in place elsewhere. But in our
2 country, we have a very strong system of
3 distribution of royalties to creators in the
4 music collecting societies, and this would
5 create a system much like that for visual
6 artists, because they don't have any kind of
7 statutory limit on what level of sales, or use
8 of your music, are you entitled to get a check
9 from ASCAP or BMI.

10 But as a practical matter, what
11 happens is that, ASCAP and BMI only distribute
12 royalties, I think, if the amount is at least
13 \$300 a year, or \$400. Now, of course, that
14 means that the sales, or the air play, has to
15 be, you know, since the royalty rate isn't
16 that huge, to be much larger.

17 But there is, I think, in most
18 working systems, some kind of a, sort of,
19 cutoff rate that you at least have to meet to
20 make the system work. And so that's where
21 this idea of a threshold came from, is that
22 concept.

1 With regard to some of the other
2 features about the other question was -- the
3 other two questions were?

4 MS. CLAGGETT: I think resale
5 royalty --

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

13 The way the bill is drafted at the
14 present time, of course, the artist only gets
15 half that, that's 3-1/2 percent, and the other
16 3-1/2 percent goes to, basically, an endowment
17 where museums can purchase works of living
18 American artists, and as I said, that's
19 designed to deal with this problem of inequity
20 so that, you know, there's a way for younger
21 artists, college artists, for example, could,
22 you know, sell their works under this fund.

1 So, you know, that's, you know,
2 where that came from, and I think the issue
3 is, obviously, the lower the royalty,
4 probably, presumably, would be easier to pass,
5 I don't know, but I think that it has to be,
6 if it's going to be meaningful, and
7 particularly if it's going to include that
8 other feature. Now, if you take that out,
9 then you can lower it a lot.

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

22 If we proceed, we're not, you

1 know, a small European country, we are the
2 United States of America, to do something
3 along this, it probably is much more likely to
4 become the world standard, and by the way,
5 then lead to harmonization efforts, re-
6 visitation of Berne, et cetera, et cetera.

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

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

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

19 And we had some discussion before
20 you came in, Representative Nadler, about the
21 definition of who's covered within the bill
22 applying only to a very small number of major

1 auction houses how that raises serious
2 constitutional bill of attainder issues, is
3 patently unfair, and would drive a significant
4 portion of the market away from the
5 transparent auction realm into the private
6 sale realm where there would be no public
7 record of prices paid for artist's work, which
8 I think substantially harms artist's interests
9 in establishing resale value for their other
10 works.

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

18 And the disconnect between that
19 money going to that very successful group of
20 artists and the idea of helping new emerging
21 artists who are not even participating at all
22 in the resale market.

1 CONGRESSMAN NADLER: So we should
2 make the threshold much lower.

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

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

17 CONGRESSMAN NADLER: How would you
18 change that?

19 MS. LEVINE: How would I change
20 that? I don't think a resale royalty can be
21 fixed. I think there are many creative ways
22 we could come up with as a matter of policy

1 that would be much more beneficial to artists,
2 to the people, you know, who are looking to
3 get into a primary market.

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

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

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

22 A seven percent royalty is a cost

1 and if it's not imposed in another market, or
2 it's a lot less, it's going to drive the
3 market somewhere else. And, you know, again,
4 I think the fixes that we've seen in the E.U.
5 don't really fix this problem, that it doesn't
6 really benefit the population of artists that
7 we all would like to benefit.

8 MS. CLAGGETT: Ms. Cobden.

9 MS. COBDEN: First, I would just,
10 Congressman Nadler, like to say thank you.
11 It's lovely to see you here and have you
12 listen to our comments, and be available for
13 questions. To build on what Jane says, and
14 I'm from Christie's, the other big auction
15 house, we have many concerns about this bill.

16 We have a concern that it targets
17 about four of us out of what is a very large
18 art market. But I also have an overall
19 concern about the practicalities of, is this
20 a working and successful model? I believe the
21 data we're seeing from the E.U. says no. Part
22 of what Jane was referring to is, the recent

1 data from the E.U. shows that only three
2 percent fo the living artists in the E.U. had
3 eligible sales, and they have a lower
4 threshold than we do; three percent.

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

7 CONGRESSMAN NADLER: Why is there
8 only three percent?

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

17 Now, that's very nice for those
18 families, but to the extent we're trying to
19 incentivize the creation of new art, that's
20 not going to work. So I'm concerned that this
21 mechanism that we're thinking about just
22 doesn't achieve the goals that we are setting

1 for it, and that there might be other better
2 mechanisms that would do so.

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

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

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

21 MR. LEHMAN: Congressman, I just
22 want to say that these figures that you're

1 hearing are disputed. We had the German
2 society here earlier who gave a much different
3 picture.

4 CONGRESSMAN NADLER: I take
5 nothing as gospel.

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

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

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

19 CONGRESSMAN NADLER: Is what?

20 MS. LEVINE: Is the only market.
21 The resale market is already taking us into a
22 very narrow slice.

1 MS. CLAGGETT: Thank you. I think
2 there were some questions or comments, sorry
3 to butt-in, but moving over on this side.

4 MS. LOENGARD: High.
5 Representative Nadler, you are my
6 Representative, so thank you and I appreciate
7 your email that I can't go to the White House.
8 I just got it yesterday, but I appreciate your
9 effort. So there's a couple of things that
10 have struck me throughout the day's
11 discussion. The first is, and this goes to
12 the whole idea of the nitty-gritty of the bill
13 and the broader purpose.

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

19 I just want to make the point
20 that, certainly, while there's not a reason
21 not to search for benefits for one group
22 because you can't serve all, while

1 screenwriters may get a benefit, there are
2 tens of thousands of people who work on movies
3 every day as work-for-hire who get no benefit
4 from royalties or anything like that.

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

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

16 MS. CLAGGETT: And I know that
17 Representative Nadler who has kindly, not only
18 given remarks, but also has been able to stay
19 a little bit to hear your remarks and comments
20 as well, has to leave very soon, so we're
21 going to just have the last three comments
22 here, very, very quickly, and I think we have

1 a couple of comments here, and he has to leave
2 in about five minutes, so I want to make sure
3 that he has an opportunity to hear those.

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

12 MS. CLAGGETT: Thank you. Mr.
13 Feder.

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

22 That's akin to my maintaining that

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

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

10 MR. FEDER: What's that?

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

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

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

20 MR. FEDER: And lastly, on the
21 three issues of changing it, I'm in favor of
22 lowering the threshold, broadening its

1 application to galleries, yes, and then the
2 royalty could be lowered. I think these are
3 all things that we're going to find out in
4 committee and in the studies that Congressman
5 Nadler is undertaking now, and that we're
6 doing ourselves as well.

7 MS. CLAGGETT: Thank you very
8 much.

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

21 Now, if this bill had been in
22 effect back when Senator Kennedy introduced

1 it, I would probably be able to benefit from
2 it now, and I'm neither a rich artist nor a
3 dead one. So I can stand as testimony that it
4 would actually constitute an incentive because
5 I was just barely out of high school when I
6 started doing this work, and I was doing it
7 for very little money at the time.

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

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

21 MR. BROWN: I'd like to echo what
22 Ted said about rates and the duration, et

1 cetera. I think one of the problems that the
2 auction houses have, of course, seven percent
3 does sound high. I'm not in big favor of that
4 three and a half percent that goes to a fund
5 for museums, et cetera, to buy new works. I
6 ran the Society of Illustrators Museum for 20
7 years and I think a museum needs to earn its
8 money and not be given it.

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

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

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

22 MS. TARSIS: Very few comments.

1 Seven percent, in my opinion, needs to be
2 capped because otherwise, you are looking at
3 not astronomical, but very high amounts, and
4 really, your goal is not to tax auction
5 houses, or tax buyers, or tax artists. Your
6 goal is to provide fairness and equity, so
7 there should be a cap, similar to the systems
8 that are in place in Europe and Australia.

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

21 We did have somebody comment on
22 that being one of the holding back mechanisms,

1 so that's a way to directly assist artists.

2 And I think that's it. Thank you.

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

13 MR. OMAN: Just a short question,
14 I'm surprised to hear people complaining about
15 the 3.5 percent to the museums. This is the
16 political reality. You've got to get as many
17 people onboard as possible, and you should be
18 willing to recognize that and accept the
19 compromise that this master legislator here,
20 former Commissioner Lehman, has put together
21 in an effort to get this through after 20
22 years of thinking about it.

1 MS. CLAGGETT: Thank you very
2 much. Any last burning comments from the
3 audience.

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

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

16 MS. SPRIGGENS: I very quickly
17 want to say, in the U.K., the resale royalties
18 are paid, or due, on sales, or transactions
19 with an art market professional; an auction
20 house, a gallery, or an art dealer. Sales
21 between two private individuals are excluded,
22 that means, sales that are transacted over

1 eBay by art market professional on other
2 online platforms, all art market professionals
3 and sales are transacted, then that royalty is
4 collected.

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

18 MS. CLAGGETT: Thank you very
19 much. I think at that, I'm going to,
20 actually, have to close it out. I wanted to
21 thank all the panelists who've been here all
22 afternoon on all of the different panels. We

1 certainly received a lot of interesting
2 information for the office to consider as we
3 conduct our review.

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

16 Once again, thank you for
17 attending.

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

21
22

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