THE DROIT DE SUITE HAS ARRIVED: CAN IT THRIVE IN CALIFORNIA AS IT HAS IN CALAIS?*

The droit de suite is the legislatively mandated right of an artist\(^1\) to receive a percentage of the price paid for his work in sales after the initial alienation.\(^2\) It is, therefore, an attempt to permit the artist to share\(^3\) in the appreciation in value which his art may undergo, and is independent of contractual stipulation.

On September 22, 1976, California Governor Edmund G. Brown, Jr. signed the Resale Royalties Bill,\(^4\) into law thereby

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* This comment is adapted from an essay submitted by the author in 1977 to the Nathan Burkan Memorial Competition, sponsored by the American Society of Composers, Authors and Publishers.

1. In context of this legislation, an artist is the creator of a work of tangible visual art—a painting, watercolor, sculpture, signed print.

2. The necessity for such legislation is illustrated by the April 15, 1965, sale of Degas's "Repetition de Ballet" for $410,000 in New York. With the painting, went a letter in which Degas asked his dealer for about $100 for the work. *A Degas Is Bought for $410,000 Here*, N.Y. Times, April 15, 1965, at 30, col. 3. That same auction saw Matisse's "Femme Assise" sold for $23,000 after having been purchased in 1934 for $500.

One of the most infamous recent examples of such an occurrence took place at a Parke-Bernet auction in New York in 1973 where Robert Rauschenberg's *Thaw* was sold for $85,000. Rauschenberg had sold it to Robert Scull for $900. Both men were present. Rauschenberg stormed up to Scull protesting the inequity of Scull's receiving the entire 9.444% profit, but "Mr. Scull, looking suitably grim, told the rude dauber that he ought to be grateful, since the auction price would push up the price of his new work." Rauschenberg's non-grateful retort: "From now on, I want a royalty on the resales and I am going to get it." Hughes, *A Modest Proposal: Royalties for Artists*, TIME, Mar. 11, 1974, at 66.

3. The rationale is more understandable when one realizes that the stereotyped description of "starving artists" is not entirely facetious. The average annual income of fine artists solely from the sale of their art ranged from $1,054 to $1,839 between 1971 and 1974. Leggieri, *Fiscal Profile of Visual Artists*, ART WORKERS NEWS, April, 1976, at 6-7.

4. CAL. CIV. CODE § 986 (Supp. 1977). For complete text of the Resale Royalties Act, see Appendix infra. This act was the culmination of two years of collaboration among the Artists Equity Association, the California Confederation of the Arts, the Bay Area Lawyers for the Arts, Artists for Economic Action, the California Arts Council, and Assemblyman Alan Sieroty, who sponsored the legislation. M. Price & H. Sandison, *A Guide To The California Resale Royalties Act* 3 (1976) [hereinafter cited as Guide].

The Act, A.B. 1391, Cal. Legis., 1975-76 Reg. Sess., went through seven versions before being passed:

(1) As initially introduced by Assemblyman Sieroty on April 2, 1975, the bill differed from the law finally passed in that a) only sales at an auction or by a gallery or museum in California were covered; b) the droit de suite passed to
introducing the droit de suite into the United States. The Act essentially provides that an artist be paid a royalty on each

the artist’s heirs for twenty years after his death; c) the state library was to maintain an artists’ address index to facilitate administration; and d) the State Board of Equalization was responsible for enforcement.

(2) As amended in Assembly May 7, 1975, the word “resale” was substituted for “sale” at several points to clarify that this was a “resale” royalty.

(3) The version as amended in Assembly, May 20, 1975, was significantly different. A registration system with the State Board of Equalization was provided. In order to be eligible for a resale royalty, the artist had to register and provide designated information. The provision for an artists’ address list in the State Library was eliminated. Enforcement was still to be by the State Board of Equalization and an additional provision granted this Board the power to issue regulations necessary for the implementation of the bill.

(4) The version as amended in Assembly, January 13, 1976, eliminated the requirement that the artist had to have registered with the Board of Equalization to be eligible for the resale royalty. It also removed the enforcement function from the Board, as well as its power to issue implementing regulations. Finally, the date on which the bill would become effective was changed from January 1, 1976 to January 1, 1977.

(5) The version as amended in Senate, August 2, 1976, significantly altered the bill’s scope. The type of art work covered by the royalty was expanded by striking the word “original” before “work of fine art.” In effect, this would have allowed multiple prints to be included. The kinds of sales to be covered were expanded to include sales at auction, or by a gallery, broker, dealer, museum, or other person acting as an agent for the seller, thereby including some types of private as well as public sales taking place in California. It was also this version which expanded the bill’s application to out-of-state sales if the buyer or seller was a California resident.

For the first time, a prohibition of transfer was added, along with a provision that the resale royalty right could not be waived unless for an amount greater than five percent. The seller was now made responsible for collecting the royalty and delivering it to the artist, or if the artist could not be found within ninety days, to the California Arts Council, which would deposit the money in a special Artists’ Residual Fund in the state treasury. The final bill’s provision that money unclaimed by the artist for seven years becomes the property of the Arts Council also can be traced to this version of the bill. In this version of the bill, as in the final draft, enforcement is left to the artist, who may sue to enforce his right to a resale royalty if he wishes.

(6) The version as amended in Senate August 16, 1976, significantly altered the Artists’ Residual Fund in the state treasury. Instead, the Council was to deposit unclaimed royalties in a Special Deposit Fund. Only the artist, his heirs, assigns or personal representatives could file a claim for the resale royalty. Finally, the word “original” was put back into the definition of works covered, which were not specifically limited to original paintings, sculptures, or drawings. Multiple prints were again excluded by implication.

(7) As amended in Assembly-Senate Conference August 31, 1976, the final bill emerged restricting the application of the droit de suite several ways. The out-of-state sales covered were now just those in which the seller was a California resident, not the buyer. The resale royalty could only be collected by the artist or his agent, not his heirs or assigns. The droit de suite now terminated at the artist’s death, not twenty years later. The resale royalty right was expanded, however, to cover sales where property other than cash, or along with cash, was used to purchase the art. The severability provision was also added along with a description of when the artist’s rights vest.
resale of his work if the sale price is one thousand dollars or more. The key section directs:

Whenever a work of fine art is sold and the seller resides in California, or the sale takes place in California, the seller or his agent shall pay to the artist of such work of fine art or to such artist’s agent 5 percent of the amount of such sale. The right of the artist to receive an amount equal to 5 percent of the amount of such sale is not transferable and may be waived only by a contract in writing providing for an amount in excess of 5 percent of the amount of such sale.\(^5\)

The purpose of this article is to examine the California Resale Royalties Act—its background, its provisions, its classification, and the practical and constitutional problems it faces.

**BACKGROUND**

The term *droit de suite* comes from French law and has been translated as “the follow-up right.”\(^6\) There are three types of rights which “follow-up,” i.e. bind the artist to his work even after a sale. The first is the *droit de suite* or resale royalty right.\(^7\) This is an economic right usually discussed in this country under its French name or in English as the “art proceeds right” or the “resale royalties right.”

The second type of residual rights, those relating to publication and reproduction, are protected by copyright law,\(^8\) which will be considered below in relation to the constitutional question of preemption.\(^9\)

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5. CAL. CIV. CODE § 968(a) (Supp. 1977).
9. See text at note 128 infra.
The third type of residual or "follow-up" rights are *les droits moreaux*, a composite of rights protecting the artist against any deformation, mutilation, and unfavorable presentation of his work after it is sold, the rationale being that the artist's creation is an extension of his personality. *Les droits moreaux* are considered personal rights, which the Berne Convention defines as follows:

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or his reputation.

The *droit morale* seeks to acknowledge this continuing relationship between an artist and his work. Mere acknowledgment, 10 J. Bross & M. Price, *Droit Moral*, in ART LAW 62 (L. DuBoff ed. 1977).

11 Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 557 (1940). Some types of injury to the work should be regarded as actionable because of the harm done to the artist's personal reputation as well as to his property interest in his art. Thus, if a buyer of a large work decided to cut it up in sections to be resold individually, the artist could prevent the mutilation. See Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976) for a discussion of Buffet v. Fersing, 1962 Recueil Dalloz [D. Jur.] 570, (Cours d'appel, Paris), in which the court held that the artist could prevent a dealer from splitting a six panel work executed on a refrigerator and selling the panels individually. A German Supreme Court has decreed that the transferee of a mural could not change it to correspond to his preferences, i.e., clothing nude figures. Roeder, *supra*, at 554, citing a German case, 79 Entscheidungen des Reichsgerichts in Zivilsachen 397 (1912). In the United States, however, the opposite result was reached in Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 89 N.Y.S.2d 813 (1949). Crimi, the artist, had sought to compel the defendant to remove paint which had been used to cover a mural the Congregation found offensive because Christ was shown bare-chested. The court held the artist had no right to object, since there is no *droit morale* in this country and since his contract had not reserved such rights to him. Id. at 819.


13 That an artist could have such powers after the sale of his work might come as a shock even to a legally trained American buyer. He might be accustomed to copyright protection which enables the artist to reserve certain rights to himself when he alienates the object. But an American is likely to regard a painting as a piece of personal property which he purchases much as he would a tailored suit. "The buyer, justly regarding it as a tangible chattel, will freely do with the painting as he chooses—keep it, reproduce it, sell it, or even destroy it. *Jus utendi et abutendi.*" Hauser, *supra* note 6, at 2.
however, does not thereby give to the artist the rights enumerated by the Berne Convention. As Article 6bis (3) points out, the means of safeguarding residual rights "shall be governed by the legislation of the country where protection is claimed." As of summer, 1977, the United States had no such legislation on the federal level. Nor is it a member of the Berne Copyright Union nor a party to the Berne Convention.

In addition, American courts have refused to accord the right to any artists. For example, in Vargas v. Esquire, Inc., an artist had drawn and sold to Esquire Magazine pictures of "the Varga girl." The magazine began to print them without the artist's signature. Esquire contended that it had bought the pictures outright with all the artist's interest therein. Vargas asked the court to protect "his honor and integrity" by recog-

If it troubles his aesthetically sensitive conscience to equate a Degas painting with a dacron dress for the purpose of property classification and transfer of ownership, the American buyer might agree with Monroe Price that "[t]he artist's product ought not to be treated by the legal rules governing the transfer of mundane chattels—a chair, a lump of clay." M. Price & A. Price, Rights of Artists: the Case of the Droit de Suite, in ART LAW 26 (L. DuBoff ed. 1977). The painting remains associated with the artist in a way that a car or chair does not, once it is sold: "Even sold, separated from the artist who created it, the work of art remains under the influence of his genius .... If the artist works, improves, perfects himself, grows in genius, the works of all his periods grow in the esteem and desires of other men." Schulder, Art Proceeds Act: A Study of the Droit de Suite and a Proposed Enactment for the United States, 61 NW. U. L. REV. 19, 24 (1966) (quoting Duchemin, Le Droit De Suite Des Artistes 41 (1948)).

However, investigative procedures are now underway in Washington, D.C., preparatory to the formulation of national legislation covering residual rights for artists. On July 22, 1977, Democratic Representative of California, Henry A. Waxman sponsored a meeting of interested parties—pro and con—from California to New York to discuss legislative possibilities. Phone interview with Evan Kaizer, Legislative Assistant to Representative Waxman (July 20, 1977).

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16. However, a United States citizen may enjoy the protection of the Convention through the "back door" if he publishes his works first in a Berne Convention country. Berne Convention, Art. 4(b), Nimmer, supra note 12, at 1036. France also makes specific provision for the inclusion of non-French citizens under the umbrella of the droit morale and droit de suite provided the artist has "participated in the life of French art" and "been domiciled in France for at least five years even not consecutive." Schulder, supra note 13, at 42 (construing Decree of 1956). The arrangements for the protection of foreign artists by French law have changed several times, however. Among foreign artists who have collected droit de suite funds in France are: Encor, Picasso, Sisley, Stevens, Valloton, and Van Dongen. Schulder, supra note 13, at 42.
17. 164 F.2d 522 (7th Cir. 1947).
18. Id. at 523.
19. Id. at 524.
20. Id. at 526.
nizing his right to demand that the work be credited to him despite a sales contract giving *Esquire* "all rights" to the work. The court refused: "What plaintiff in reality seeks is a change in the law in this country to conform to that of certain other countries . . . . [W]e are not disposed to make any new law in this respect."22 This position has been subsequently reinforced.23 Thus, a New York court stated: "[T]he doctrine of moral right is not part of the law in the United States, . . . except insofar as parts of that doctrine exist in our law as specific rights—such as copyright, libel, privacy and unfair competition."24

New York has made a statutory beginning in protecting artists by recognizing the artist’s right of privacy25 and by providing some protection in the artist-art dealer relationship.26 Illinois recognizes the so-called right of "paternity," or declaration of authorship, in relation to prints.27 California provides the same protection,28 as well as regulating the obligations of the consignment process between artist and dealer.29 Of greatest

21. Id. at 527.
22. Id. at 526.
23. See Shostakovich v. Twentieth Century-Fox Film Corp., 196 Misc. 67, 80 N.Y.S.2d 575 (1948) where the internationally famous Russian composers Dmitri Shostakovich, Aram Khachaturian, Serge Prokofieff, and Nicolai Miashovsky sued to enjoin the defendant from using their names and music in its film, "The Iron Curtain." Selections of their works—all of which were in the public domain, thus enjoying no copyright protection—were used as background music throughout the film. They were credited with the works in the film's preliminary credits. Id. at 576-77. The alleged wrong was the use of their music in a picture whose theme was antithetical to their political ideology, a "theory which leads inescapably to the Doctrine of Moral Right." Id. at 578. The court denied the injunction. Id. at 579. Also, Geisel v. Poynter Products, Inc., 295 F.Supp. 331 (S.D.N.Y. 1968) in which plaintiff, the world famous author and artist known as "Dr. Seuss", accused defendants of manufacturing and selling dolls based on some cartoons which plaintiff had sold to Liberty Magazine. Id. at 333. Geisel felt the magazine had only the right to publish the cartoon, not to manufacture products based on the cartoons. Id. at 331. The court disagreed. Id. at 358. Geisel also felt that his "implied" rights could prevent this "distortion" of his work. The court held there is no "moral right" [i.e., droit morale] in this country. Id. at 339-340 n.5.
24. Id. at 340 n.5 (citations omitted).
26. N.Y. GEN. BUS. LAW §§ 220-224 (McKinney 1966). For example, § 220 provides that art delivered to a dealer for sale may not be appropriated by him for his own use.
27. ILL. ANN. STAT. ch. 121 1/2 §§ 361-369 (Supp. 1977). This statute requires *inter alia* that information be provided to buyers regarding the artist, the year when printed, whether the plate was destroyed after the current edition.
28. CAL. CIV. CODE §§ 1744(a)(g) (West 1973). This is very similar to the Illinois statute supra.
29. CAL. CIV. CODE § 1738.5-1738.9 (Supp. 1977). The delivery of art to a
significance, however, is California's Resale Royalties Act,\textsuperscript{30} the most controversial artists' rights law in the country.

**THE CALIFORNIA RESALE ROYALTIES ACT**

The key section of the law provides that whenever a work of art is sold in California or whenever a work of art owned by a Californian is sold elsewhere, the artist shall be paid five percent of the sale price. This right is not transferable nor may it be waived unless for an amount greater than five percent.\textsuperscript{31}

The seller is responsible for deducting the royalty from the sale price received, finding the artist, and delivering it to him.\textsuperscript{32} If the artist cannot be found and paid, the money is to be deposited with the California Arts Council\textsuperscript{33} which will place it in a Special Deposit Fund while the council takes over the task of locating the artist and paying him.\textsuperscript{34} If seven years pass from the date of the sale without payment being made, the money can be used by the council for its programs.\textsuperscript{35} Only resales for a gross price of one thousand dollars or more are covered by the law,\textsuperscript{36} and then only if the sale price represents an increase over the purchase price.\textsuperscript{37} The law will not apply if the artist is dead.\textsuperscript{38}

The law became effective January 1, 1977, and applies to works created before and after that date.\textsuperscript{39} Enforcement is left to the artist; if the seller refuses to pay the five percent, the artist must sue within three years after the sale or one year after the discovery of the sale, whichever is longer.\textsuperscript{40}

The foregoing are the bill's main provisions. The objective of the California bill is to improve the financial condition of artists.\textsuperscript{41} The droit de suite, however, might not be the most

\textsuperscript{30} CAL. CIV. CODE § 986 (Supp. 1976).
\textsuperscript{31} See text at note 5 supra.
\textsuperscript{32} CAL. CIV. CODE § 986(a)(1) (Supp. 1976).
\textsuperscript{33} Id. § 986(a)(2).
\textsuperscript{34} Id. § 986(a)(4)-(5).
\textsuperscript{35} Id. § 986(a)(5).
\textsuperscript{36} Id. § 986(b)(1)-(2).
\textsuperscript{37} Id. § 986(b)(4).
\textsuperscript{38} Id. § 986(b)(3).
\textsuperscript{39} Id. § 986(d).
\textsuperscript{40} Id. § 986(a)(3).
\textsuperscript{41} There is no doubt as to the dire economic plight of the American artist trying to make a living from his art. Despite an average of 16.25 years of formal education and 12.7 years of professional experience, only 7.6% of professional artists surveyed in 1974 could support themselves from the sale of their art, including commissions from prints, film distributions, etc. Leggieri, supra note 3, at 6-7.
effective means of achieving this objective. A number of theoretical, practical, and constitutional problems arise in the implementation of these provisions.

THE PRACTICAL PROBLEMS

Eight practical problems must be faced in the achievement of the California droit de suite. These are: 1) the dependence on resales; 2) the absence of a registration system; 3) difficulties of collection; 4) the computation procedure for determining the royalty; 5) the limitation to works sold for over $1,000; 6) the definition of works covered; 7) the time frame in which the law applies; and 8) the effect on the art market in California.

The first difficulty relates to the probability of resale and price appreciation in the United States today. In order for an artist to benefit from the Act, his works must change hands. This presupposes the likelihood of resale. Despite current myths to the contrary, resale and price appreciation of art works are extremely unlikely. In any given year, 99% of all contemporary art sold for the first time declines in value. Moreover, the likelihood of any resale, even for a reduced amount, is small, and according to some, "most of it has virtually no resale value except as a 'hand-painted picture.'" The fact is that there is no secondary market except for successful artists—the Robert Rauschenbergs, the Jamie Wyeths, the Andy Warhols. Critics sarcastically point out that these are the "poor, struggling" artists who will be helped by a resale royalties law.

The second practical difficulty with the California law is that it does not provide for a registration system. Thus, though

45. *Id.*
46. No droit de suite law without a registration system has succeeded. France, whose droit de suite law has proven its success for 57 years, has a dual registry. In the first registry, the artist files a special declaration in the Journal Officiel which includes his name, address, artistic signature, and legal signature. In the second, public auction officers must note sales and prices received. The Union of Artistic Property uses the two registers, along with trade papers, as a complete and effective basis for supervising the collection of sums due. Hauser, supra note 6, at 8-9.

The writer notes, however, that the scope of the California law is broader than that of the French. The inclusion of public and private sales in the Califor-
the artist must enforce his right to a royalty, he will have no way of checking how many times his art has changed hands or what the selling prices have been. Nor will the new buyer/seller have any method for ascertaining the artist's whereabouts or identity, if a pseudonym has been used in the signature.47 Somewhat after the fact, the California Arts Council is starting a registry of artists, but this will be of limited help since only selected California artists are to be included.48 The Resale Royalties Act, on the other hand, applies to artists from anywhere. Without any registration system,49 at least one critic feels that the California law merely invites being evaded or ignored.50

A third problem inherent in the schema outlined by the Resale Royalties Act is that of collection. Even before the French enacted the first droit de suite legislation, Abel Ferry and his successor as chairman of the French Fine Arts Commission, Leon Berard, warned that the "virtual functioning of the droit de suite presupposes an association of artists which will protect the interests of its members . . . ."51 Such a group can serve as the artists' agent.52 Section 986(a) of the California law makes a registration system even more necessary. The artist would be absolutely unable to independently police private transactions.

In a 1957 Revision, France tried to broaden the scope of its droit de suite from public auctions only to all sales made "through the intermediary of a merchant." Hauser, supra note 6, at 11. This revision has not been implemented perhaps due to successful lobbying efforts of the dealers and a technicality in French law, Mandel, supra note 7, at 3, 5-6. See also Schulder, supra note 13, at 34.

47. In the first civil suit to threaten the new law, plaintiff Morseburg refuses to pay the Arts Council the royalty due a French artist using the pseudonym Antoine Blanchard. Morseburg states he has not been able to learn either the true identity or location of Blanchard. The plaintiff contends that the law is unconstitutional because it violates the Supremacy Clause, the fourteenth amendment, and the Contracts Clause. Complaint for Declaratory Relief at 4, Morseburg v. Baylon, No. 77-2410 (C.D. Cal., filed Jun. 29, 1977).


49. The necessity of a registration system to facilitate the enforcement of an artist's rights in the United States is recognized by the new copyright law as a prerequisite to filing suit. 17 U.S.C.A. §§ 411-412 (Supp. 1977) (effective January 1, 1978). The registration procedure consists of: 1) attaching the notice ©, the date, and the name of the copyright owner to the work; 2) depositing two copies of the work in the Copyright Office; and 3) registration, which basically involves filling out appropriate forms. Id. §§ 401-409.

Professor Monroe Price has suggested a registration system for art similar to that used by the American Kennel Club. It works voluntarily and successfully. M. Price & J. Strong, Registration of Works of Art, in ART LAW 51 (L. Duboff ed. 1977).


51. Hauser, supra note 6, at 9.

52. In France, the Union of Artistic Property has become that agent. Using the registry system noted earlier, the Union sends a statement to the auction officer who indicates the price paid for the art and the amount due under the
seems designed to accommodate just such an arrangement: it permits the receipt of sums due by an agent of the artist.\(^5\)

California has no such group agent, but it does have a number of artists' organizations\(^5\) which might evolve into such a union. It is encouraging that even in France where the droit de suite has been so successful, a single group agent was not specified by the law. Since then, several groups have struggled for supremacy in this matter.\(^5\) In short, "[t]he fact that there are presently in existence no collection societies for artists is not a bar to the adoption of such a right [the droit de suite]; it is not difficult to conceive of such organizations developing within a reasonable time to enforce the rights given artists."\(^5\)

Since the law assigns enforcement to the artist, it becomes his responsibility to police the marketplace to keep track of public and private sales, and to demand his money from recalcitrant sellers. If rebuffed, the artist can sue for his money, but the amount will have to be substantial to justify the time and expense involved. Many of them feel that "time to make art is too precious to divert into . . . detective work . . . ."\(^5\)

If such an attitude is prevalent among artists, dealers might simply ignore the droit de suite entirely unless threatened with litigation. Since the Resale Royalties Act does not include any punitive damage provisions, the dealer has nothing to lose. He can pay the occasional artist who demands his royalty, and forget about any who do not.

The fourth practical difficulty with the law is its computation procedure. There are two basic approaches in computing a droit de suite: the value-added system\(^5\) and the royalty system.\(^9\) The Resale Royalties Act, as its title implies, employs a royalty system in determining the artist's percentage on resale. The royalty system assesses the artist's commission on the en-

droit de suite. The statement and money are returned to the union, which pays the artist. Hauser, supra note 6, at 9-10. "The law would probably be unworkable without such a group." Schulder, supra note 13, at 25.

53. CAL. CIV. CODE § 986(a) (Supp. 1977).

54. See text at note 5 supra.

55. Hauser, supra note 6, at 9.


57. Elsen, supra note 42, at 15.

58. This is used in Italy, Uruguay, Poland, and Czechoslovakia. See Schulder, supra note 13, at 31 n.50.

59. The royalty system is used in France, Belgium, California, and West Germany. Mandel, supra note 6, at 4, 18, app.
tire gross price of each sale. California uses this method at the rate of five percent. The simplicity of this system is appealing. It may result in more money to the artist since the royalty is assessed in some nations even if the resale price is less than the original purchase price. Because of an exclusion in the California law, however, sales at a loss would not yield a royalty for the artist.

Under a value-added system, sometimes called the capital gains theory, the artist's percentage is levied only on the increase in the work's price. The most common rate assessed by such laws is twenty percent. The value-added, or capital gains, system may have the advantage of giving the artist a greater return on subsequent resales. In addition to this advantage, authorities cite three reasons for preferring the value-added system: a) it is more closely related to the rationale of copyright and the droit de suite: incentive and reward; b) the increased difficulty of computation is not significant enough to increase the likelihood of fraud or difficulties of supervision; and c) this system might be more acceptable to the art market.

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60. CAL. CIV. CODE § 986(a) (Supp. 1977).
The writer has determined that rates used in other countries vary from one to six percent. France experimented with sliding rates depending on the price of the work. The 1922 Amendment had established the following scheme:

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<tr>
<td>1%</td>
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<tr>
<td>1 1/2%</td>
<td>50 - 10,000 francs</td>
</tr>
<tr>
<td>2%</td>
<td>10,000 - 20,000 francs</td>
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<tr>
<td>3%</td>
<td>above 20,000 francs</td>
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This scheme has been abandoned in favor of a uniform rate of 3%. Hauser, supra note 6, at 7.

62. These rates range from one to twenty-five percent. Schulder, supra note 13, at 31.

63. A comparison of the two methods in operation will indicate the advantage to the artist of using the value-added system in the context of a Rauschenberg/Scull sale. See note 2 supra.

Royalty System:

- Sale price: $85,000
- Rate of droit de suite: x .05
- Resale Royalty: $4,250

Value-added System:

- Recent sale price: $85,000
- Original sale price: -900
- Value added: $84,100
- Rate of droit de suite: x .20
- Resale Royalty: $16,820

Due to the extraordinary increase in price, the value-added system would have netted Rauschenberg $12,570 more than the royalty system.

64. Sherman, supra note 56, at 76.
65. Id. at 66-69, 76.
66. Id. at 76.
Finally, using a straight royalty system, the dealer might find that he is actually losing money, not just sharing his profits with the artist. Under the California law, if a dealer buys a painting from an artist for $50,000 and sells it for $51,000, he owes the artist $2,550, thereby losing $1,550. Despite the fact that the work was sold at a profit, the net result to the seller would be a loss.67

A fifth criticism of the Act is that it limits the royalty right to resales of $1,000 or more.68 Since the works of few artists in this country realize such prices,69 this limitation restricts the benefits of the bill to a successful few.70 However, some of these few do not seem pleased with their newly acquired benefit. "Artists such as Nathan Oliveira and Bruce Beasley have made it clear to Alan Sieroty that the California art world doesn't need AB 1391, but rather a law that helps needy artists, young and old."71 Museum directors fear that instead of encouraging art buyers, this law will discourage the collecting in California of the works of living painters and sculptors.72

A sixth difficulty with the Act is the scope of "fine art," which is defined as "an original painting, sculpture, or drawing."73 Some feel that the word "fine" suggests the exclusion of utilitarian articles,74 whereas at least one commentator claims the "fine art" should "encompass anything created by an indi-

67. This possibility had apparently never occurred to Arlen Gregorio, the co-author of the bill, until it was suggested to him at a public meeting after the bill's passage. Elsen, supra note 42, at 16.
69. This can be gathered from the average total annual income from the sale of art cited in note 3 supra. See also Elsen, supra note 42, at 15.
70. See note 3 supra.
72. Id.
73. CAL. CIV. CODE § 986(c)(2) (Supp. 1977). This obviously excludes multiple prints and limits the coverage to one-of-a-kind works. The definition is significantly narrower than those found in the Right of Reproductions Act of 1975, CAL. CIV. CODE § 982(d)(1) (Supp. 1977); the Artist-Dealer Relations Act of 1975, CAL. CIV. CODE § 1738(b) (Supp. 1977); and the Art in Public Buildings Act of 1976, CAL. GOV. CODE § 15813.1(b) (Supp. 1977).
vidual, such as a piece of fine wood furniture, a Tiffany lamp or a Bugatti automobile."\textsuperscript{75}

This definitional problem is not one of defending the value of art or its contribution to our culture, but rather of justifying an exclusion of the works of artisans as opposed to artists. The distinction has been made by American Customs Law,\textsuperscript{76} although some might object to adopting a classification procedure whose purpose is to protect domestic manufacturers.\textsuperscript{77} Dean John Strong has proposed that the justification for defining the parameters of the \textit{droit de suite} coverage is based on the buyer's primary motivation in purchase.\textsuperscript{78}

The seventh practical obstacle to the Act's success is its self-imposed time frame. For the \textit{droit de suite} to serve its function, resales of the art must occur at increased prices.\textsuperscript{79} However, these resales must take place quickly, since, under the terms of the California law, the right to royalties ceases with the artist's death.\textsuperscript{80} Thus, the theory works only if artistic taste matures

\textsuperscript{75} \textit{Discussion} (quoting B. Vail, in \textit{ART LAW} 67 (L. Duboff ed. 1977)). Why not include a Frank Lloyd Wright house? Sandison and Price's \textit{Guide to the Resale Royalties Act}, see note 4 supra, does not provide much help in justifying the limitation. "An antique car would not be covered; a urinal, on the other hand, may become a work of fine art. By the same token, architectural drawings are not included." \textit{Guide}, supra note 4, at 19.

\textsuperscript{76} \textit{Discussion} (quoting C. Ellerby, in \textit{ART LAW} 68-69 (L. Duboff ed. 1977)).

\textsuperscript{77} \textit{Discussion} (quoting J. Bross, in \textit{ART LAW} 69 (L. DuBoff ed. 1977)).

\textsuperscript{78} \textit{Discussion}, in \textit{ART LAW} 69 (L. DuBoff ed. 1977).

The purchaser of a Bugatti is buying primarily a utilitarian object which might have incidental artistic qualities. The purchaser pays the artisan full compensation at the time of the first sale. By contrast, the purchaser of a painting is supposedly buying an object whose primary purpose is artistic. The reader will have to decide whether this constitutes an adequate response to the challenge that "the \textit{droit de suite} is singling out a special group, namely artists, for protection against inflation." \textit{Id.} at 69-70.

\textsuperscript{79} It [\textit{droit de suite}] is an expression of the belief that (1) the sale of the artist's work at anything like its "true" value only comes late in his life or after his death; (2) the postponement in value is attributable to the lag in popular understanding and appreciation; (3) therefore the artist is subsidizing the public's education with his poverty; (4) this is an unfair state of affairs; (5) the artist should profit when he is finally discovered by the newly "sophisticated market."


\textsuperscript{80} \textit{CAL. CIV. CODE} § 986(b)(3) (Supp. 1977). In France, the right extends fifty years beyond the artists' death. \textit{See} Mandel, supra 6, at 6. Extending the \textit{droit de suite} for twenty years after the artist's death was considered in regard to the making of the California law as well. \textit{See} Assembly Bill, No. 1391, Sess. 1975-76, April 2, 1975; May 7, 1975; May 20, 1975; Jan. 13, 1976; Aug. 2, 1976; and Aug. 16, 1976. It was not until the final version of the bill was reported out of the Assembly-Senate Conference, Aug. 31, 1976, that the Bill limited the \textit{droit de suite} to the artist for his lifetime.
quickly enough to make the artist fashionable within his lifetime. This is hoping “for a lot even in this accelerated century.”

The final practical objection to the Act is that it may have an adverse effect on the California art market. Major dealers are already beginning to announce that they will not auction the work of living artists in California, and “representatives of southern and northern California art dealers have pointed out that no out-of-state collectors in their right mind will want to sell in California . . . .” Besides inflicting an economic loss on the seller, the law rubs salt in the wound by assigning him the administrative tasks of determining and delivering the artist’s royalty.

THE CLASSIFICATION PROBLEM

The resale royalty does not easily fit into a genre of American law. However, the basic rationale of the royalty is the same as that of copyright legislation: “to stimulate and encourage production of artistic works by assuring that an adequate financial reward will accrue to the creator of the work.” It is justified as providing compensation for the visual artist analogous to that which copyright law already provides the author or composer. For example, France, Czechoslovakia, Poland, and Uruguay have included it within their copyright legislation. The droits moreaux are similarly treated abroad but in relation to American law, Nimmer pointedly refers to them as “separate and apart from copyright” and “not strictly rights of ‘copy-

81. M. Price & A. Price, Rights of Artists: the Case of the Droit de Suite, in ART LAW 25 (L. DuBoff ed. 1977). “[The droit de suite rewards the wrong painters with probably inconsequential amounts of money at the wrong time in their lives.” Id. at 37.

82. The same objection was raised in France as debate raged over the droit de suite. Auctioneers objected that it would result in decreased sales in France and increased sales in neighboring countries where the droit was not in effect. The same alarm is being sounded now by California dealers. If it serves as any consolation, the experience in France has not shown that this diminution in sales occurs. Schulder, supra note 13, at 34 (citing Duchemin, LA PROPRIÉTÉ ARTISTIQUE, 19 REVUE INTERNATIONALE DU DROIT D’AUTEUR 323, 345 (1958)). “The art market has not suffered appreciably from the application of the surcharge, and substantial sums have been collected.” Sherman, supra note 56, at 53.


84. Id.
85. Sherman, supra note 56, at 57.
86. Hauser, supra note 6, at 18-23.
87. Id. at 19.
88. NIMMER, supra note 11, at 443, § 110.1.
right.'" The practice of habitually discussing the *droit de suite* in the context of artists' rights does not thereby make it the equivalent of copyright protection.

It has been suggested that the *droit de suite* should be considered instead in the context of property law since it "has certainly a relationship to or is a substantial equivalent of a property right . . . ." One scholar feels it could be regarded as a possibility of reverter if the artist had the right to retake the work were the royalty not paid. Or it could be thought of as an equitable lien, "the ability to enforce a right to proceeds by recourse against the property itself at a future time . . . ." However, the use of real property concepts would not work well with personal property because of the notice problems inevitable in a scheme lacking a registration system.

The money collected for the artist becomes part of the Art Council's coffers if its owner, the artist, cannot be found. Perhaps in that case, it may be regarded as abandoned property, which would be put to work in programs designed to benefit art.

Another possible classification which has been suggested is that the *droit de suite* is like a tax, but this classification does not fit well. The money is meant to benefit the artist. It is not to be used for governmental or public purposes, nor is it collected by the government. As Mr. Justice Roberts stated in *United States v. Butler*: "A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government. The word has never been thought to connote the appropriation of money from one group

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89. Id. at 444, § 110.2.
92. Id. at 48. Hauser felt that French assessments of a percentage could be regarded as a form of servitude that follows the work from owner to owner. Hauser, *supra* note 6, at 25.
93. J. Strong, *Artist's Property Rights*, in *ART LAW* 48-49 (L. DuBoff ed. 1977). "Without a system of registration of some sort, I cannot conceive that a court would enforce such an equitable lien beyond the first purchaser of the art." *Id.*
95. *Id.* § 986(a). The money may also be used to fund programs of the California Arts Council as noted above. *Id.* at (5).
for the benefit of another.97 Were the droit de suite considered to be a private tax, constitutional problems might result if the legislation were on a federal level.

This is a California state law, however. The California Supreme Court has defined a tax as "a charge upon persons or property to raise money for public purposes."98 That public purpose or object must be within the purposes for which governments are established. Taxation for a private purpose would clearly be void.99 It is not sufficient to say that benefiting a particular artist would indirectly benefit the community. The legislature simply does not have the power to impose taxes for the benefit of individuals connected with a private enterprise even though the public will be benefited in a collateral fashion.100

The resale royalty does not seem to have the characteristics of a federal tax. In considering the droit de suite as a California state tax, there are two problems: first, this royalty is not a lien, as are taxes in California;101 secondly, the definitional hurdle of whether this is "money for a public purpose"102 must still be crossed. To term this royalty "money for a public purpose," might require stretching the size of the group benefited by including groups benefited by similar legislation.103

The federal copyright classification does not require these legislative or conceptual gyrations. Section 202 of the new copyright act is entitled: "Ownership of copyright as distinct from ownership of material object."104 The text seems to define copyright itself as a type of residual interest available to the artist: "Ownership of a copyright . . . is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object . . . does not of itself convey

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97. Id. at 61.
100. People v. Parks, 58 Cal. 624, 639 (1881).
102. Id. (quoting Perry v. Washburn, 20 Cal. 318, 350).
103. For example, see the statutes in notes 25-29 supra.
any rights in the copyrighted work embodied in the object . . . \textsuperscript{105} That residual interest is a good parallel to the California droit de suite which does not—indeed cannot—\textsuperscript{106} pass with transfer of ownership. Whereas a copyright may be sold to others, the resale royalty is available only to the artist and ceases at his death.\textsuperscript{107} One commentator feels that conceptually the droit de suite is acceptable under the proposed copyright revision: the scope of rights set out in section 106\textsuperscript{108} is easily broad enough “to cover a droit de suite incorporated into American law.”\textsuperscript{109}

THE CONSTITUTIONAL PROBLEMS

PREEMPTION

The Problem Before January 1, 1978

Congress derives the power to pass federal patent and copyright legislation from the United States Constitution, article 1, section 8, clause 8: “The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . .”

Pursuant to this grant of power, Congress provided a system of federal copyright protection.\textsuperscript{110} This legislation is not all-inclusive, however, and therefore a system of state laws has complemented and co-existed with it for some time.\textsuperscript{111}

The issue of preemption has been determined in regard to such laws, by looking first to the supremacy clause itself: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the . . . Laws of any State to the Contrary notwithstanding.”\textsuperscript{112} Therefore, if the state law contradicts federal legislation, it cannot stand. The California law goes further in its attempt to protect the artists’ rights to

\textsuperscript{105} Id.
\textsuperscript{106} CAL. CIV. CODE § 986(a) (Supp. 1977).
\textsuperscript{107} Id. § 986(b)(3).
\textsuperscript{108} 17 U.S.C. § 106 (Supp. 1977). Copyright here includes the rights to reproduction; to production of derivative works; to distribution by sale or other transfer of ownership, by rental, lease or lending; to public performance; and to display. Id.
\textsuperscript{109} Sherman, supra note 56, at 86.
\textsuperscript{111} The history, rationale, and examples of the parallel systems are summarized by Chief Justice Burger in Goldstein v. California, 412 U.S. 546, 556-60 (1973).
\textsuperscript{112} U.S. CONST. art. VI, § 2.
economic gain from their art than does federal copyright law, but it does not thereby contradict anything in the federal legislation. This is merely the first hurdle in a preemption inquiry.

A law can also be held to be preempted, if it fails part of the three-pronged test enunciated by the Supreme Court in *Rice v. Santa Fe Elevator Corp.*:  

a) Is the "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it"?  
b) Is the field one in which the "federal interest is so dominant" as to preclude state laws?  
c) Would the "state policy . . . produce a result inconsistent with the objective of the federal statute"?  

Under the current copyright law, precedent dictates a negative response to these three questions. Although non-copyright cases can be used to support a finding of preemption, cases focusing specifically on federal copyright preclusion of state protection lead to the opposite conclusion, i.e., the California statute is not preempted. The controlling decision in that regard is *Goldstein v. California*, which considered a situation closely parallel to that of the droit de suite. California had enacted a statute making "record piracy" or "tape piracy" a criminal offense. This did not contradict anything in federal copyright law but, like the Resale Royalties Act, it did go further than the federal legislation. The Supreme Court dealt explicitly with the preemption question, from the standpoint of the three-

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113. 331 U.S. 218 (1947).  
114. Id. at 230.  
115. Id.  
116. Id.  
119. CAL. PENAL CODE § 653(h) (West 1968). The statute prohibits transferring "any sounds recorded on a phonograph record. . . tape. . . or other article on which sounds are recorded, with intent to sell or cause to be sold. . . such article on which such sounds are so transferred, without the consent of the owner." Id. § 653(a)(1) "Owner" here means the person who owns the master phonograph record, disc, tape, etc. used for reproducing the recorded sound. Id. § 653(b).  
pronged Rice test, and from the principles laid down by Alexander Hamilton in The Federalist. The Court held that “[t]he clause of the Constitution granting to Congress the power to issue copyrights does not provide that such power shall vest exclusively in the Federal Government. Nor does the Constitution expressly provide that such power shall not be exercised by the States.”

Although the benefits of a national system are recognized, state legislation is not therefore “unnecessary or precluded.” The Court seems to have returned to the words of the supremacy clause in settling on the determining test: “Since state protection would not then conflict with federal action, total relin-


The issue of preemption was considered in the context of the general power of taxation in essays No. 30-36. The majority opinion in Goldstein included this reference from No. 32.

An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the [Constitutional] convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority of the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant. Id. (quoting The Federalist No. 32, p. 132 (B. Wright ed. 1961)).

Hamilton summarized the rationale for cases of concurrent state and federal jurisdiction in his conclusion:

The necessity of a concurrent jurisdiction in certain cases results from the division of the sovereign power; and the rule that all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor, is not a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed Constitution. We there find that, notwithstanding the affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the States, to insert negative clauses prohibiting the exercise of them by the States. The tenth section of the first article consists altogether of such provisions. This circumstance is a clear indication of the sense of the convention, and furnishes a rule of interpretation out of the body of the act [the proposed Constitution] . . . . The Federalist No. 32, at 189 (H.C. Lodge ed. 1888) (emphasis added).

On the other hand, James Madison asserted in essay No. 43 of The Federalist that the states “cannot separately make effectual provision for either” patents or copyrights. Id. at 267.

122. 412 U.S. at 553.

123. Id. at 556-57.
The problem after January 1, 1978

On January 1, 1978, the United States Copyright Act of 1976 will take effect. Section 301 provides that on and after that date:

all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106... are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

Thus under the new copyright law, the nature of a preemption analysis is radically changed. If there were any doubts as to congressional intent in section 301, the Report of the House Judiciary Committee definitively answered them: Congress phrased its intent "in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act

124. Id. at 559.
127. Id. at 479.
preemptively. . . .” The intention was that “[a]ll corresponding State laws . . . are preempted and abrogated.”

In copyright litigation concerning preemption under the old copyright law, focus was concentrated on ascertaining congressional intent. There was no constitutional presumption of preemption. To the contrary, there has been rather a constitutional presumption that the states may regulate. “Only a specific congressional attempt to preempt can be effective. . . .” If specificity of intent is totally determinitive, the California Resale Royalties Act would seem at first reading to be preempted by the new federal law, for Congress has certainly attempted to preempt. This does not need to be the result, however. First, a declaration of preemptive intent alone does not necessarily determine the issue. Secondly, the wording of the new federal copyright law section 301, and section 106 to which it refers, does not preclude state legislation to the extent one might guess on first reading.

Although a declaration of congressional intent is very important, it does not end the preemption inquiry. “In the great majority of cases, the pre-emptive implications of the federal statute must be derived without the specific legislative guidance, and even when such guidance is offered, it does not represent the whole solution. . . .”

The mere existence of such a clause does not necessarily strike down a state law, just as the mere presence of a clause stating the opposite, i.e., that state legislation is not precluded, does not necessarily mean that the law can stand. “[N]either the presence nor the absence of a savings or exclusiveness provision is alone sufficient to resolve a pre-emption question.” If it were, the Supreme Court would be abrogating its responsibility in this area since “the Court and only the Court can make the final judgment of incompatibility required by the supremacy clause.” If the Court goes beyond the mere existence of a statement of intent and decides the issue on the conventional

130. Id.
131. 74 COLUM. L. REV., supra note 120, at 964.
133. Id. at 212.
134. Id. at 215.
135. Id. at 224, quoted in GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 359 (9th ed. 1975).
bases of either incompatibility with the federal law, or statutory construction, the California droit de suite could probably survive a preemption attack.

It does not contradict any provisions of the new federal copyright law nor strive for results inconsistent with it, nor interfere with its enforcement. It cannot therefore, be said to be contrary to the federal legislation.

The wording of the federal statute itself also provides a solution to the preemption problem. Section 301 sets up two conditions, both of which must be met for a state law to be preempted. First, the legal or equitable right must be “equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression....” Secondly, this right must “come within the subject matter of copyright as specified by sections 102 and 103 . . . .”

The California Resale Royalties Act meets the second of these conditions. The subject matter protected is a work of fine art such as is specified in section 102. It does not meet the first requisite for preemption, however. This right does not seem to be the equivalent of any of the six copyright rights set out in federal section 106. If the California droit de suite is not equivalent, section 301(b)(3) should control:

Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

. . . . (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

The congressional intent to preempt need not, therefore, extend to the resale royalty right, and the preemption challenge can be answered through a relatively simple statutory interpretation.

136. See note 112 supra.
138. Id.
139. “Works of authorship include . . . pictorial, graphic, and sculptural works. . . .” Id. § 102(a)-(a)(5).
140. See note 108 supra. This does not undermine the validity of Sherman's assertion that the scope of these enumerated rights could encompass other artists' rights besides those listed. Section 301 is more restrictive for the purposes of determining which statutes will be considered the "equivalent" of the rights set forth in section 106, and hence be preempted.
ART LAW

IMPAIRMENT OF CONTRACTS

Two constitutional problems intertwine when the Contract clause is studied in the context of the Resale Royalties Act as the law not only affects the obligations and rights of contracts and the property rights emerging therefrom, but affects them retroactively.\(^\text{142}\)

The strongest test of the new law's constitutionality undoubtedly lies in the fact that it is retroactive with respect to art by all living artists bought any time before Jan. 1, 1977. Collectors and dealers are naturally angered by the five per cent confiscation of their already held private property and the violation of previous contractual agreements.\(^\text{143}\)

The United States Supreme Court has consistently held, however, that not all retrospective statutes are unconstitutional, "but only those which upon a balancing of the considerations on both sides are felt to be unreasonable."\(^\text{144}\) This standard of reasonableness is the same as that used in contract clause cases for "determining the validity of retrospective legislation under the

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142. The sections of the United States Constitution involved are the Contract Clause (art. I, § 10) and the 5th and 14th amendments. The retroactivity argument cannot use the constitutional prohibition of ex post facto laws since this prohibition applies only to criminal legislation. "I [Justice Chase] do not think it [the prohibition] was inserted, to secure the citizen in his private rights of either property or contract." Calder v. Bull, 3 U.S. (3 Dan.) 385, 389-90 (1798). The California Constitution also has language in article I, § 16 which might be held to be similarly infringed by the Resale Royalties Act.

143. See Elsen, supra note 42, at 16.

As one critic remarked, how would you like it if Congress passed a law requiring you to give five percent of the sale of your house to the architect? Edelson, supra note 44. In deference to California Assemblyman Sieroty, though, it must be pointed out that he faced a dilemma. If the law were not made retroactive, the artist who sold his work in the past would not be protected, and "[t]he injustice which the droit de suite seeks to remedy would be continued and perpetuated in the case of these creative workers." Sherman, supra note 56, at 79. But if the law were made retroactive, it would arguably result in an unfair imposition of a duty to pay on those who previously purchased the art. Assemblyman Sieroty opted for retroactivity because he wanted as broad an application of the resale royalty as possible. Elsen, supra note 42, at 16. He had international precedent for doing so.

The most successful of all droit de suite legislation, the French statute of 1920, was effective "notwithstanding all assignments of artistic property to which the artist may have consented before the present law." Schulder, supra note 13, at 33. But the French did not enact their law pursuant to the United States Constitution. As Schulder points out, a retroactive enactment of the droit de suite in this country is probably unconstitutional. Schulder, supra note 13, at 33.

due process clauses of the fifth and fourteenth amendments.\textsuperscript{145} Traditionally, three factors have been considered in determining the reasonableness of a statute: a) the nature and strength of the public interest promoted by the statute; b) the extent to which the statute effects the previously existing right; and c) the nature of the right altered by the statute.\textsuperscript{146}

An argument might be made that the group of artists benefited by the California statute is so small that their welfare does not constitute the requisite public interest. Laws striving for equity for small groups have met this test before, however. The rationale seems to be that "much legislation adjusts the rights of private groups in an attempt to achieve a balance which best serves the 'public purpose'."\textsuperscript{147} But if the group served is small and the interests served are "neither pressing nor substantial,"\textsuperscript{148} the courts are much more critical. Since the Resale Royalties Act does not address an emergency situation, nor deal with a matter of public health, environmental protection, or transportation,\textsuperscript{149} the state's interests must be justified under the standards established in the recent case of United States Trust Co. of New York v. State of New Jersey.\textsuperscript{150}

In United States Trust, the Court proposed a new test for contract clause cases. This is the first case in nearly forty years in which the Court invalidated purely economic and social legislation on the strength of the Contract Clause.\textsuperscript{151} The test has three criteria. First, are the needs served by the contract impairment important public needs?\textsuperscript{152} Second, are there less restric-

\textsuperscript{145} Id. at 695.
\textsuperscript{146} Id. at 697.

The measurement of public interest was a factor in Gelfert v. National City Bank, 313 U.S. 221 (1941); Treigle v. Acme Homestead Ass'n, 297 U.S. 189 (1936); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

The extent of the abrogation of the preenactment right was the Court's focus in Kuehner v. Irving Trust Co., 299 U.S. 455 (1937); W. B. Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935); Crane v. Hahlo, 258 U.S. 142 (1922).

The nature of the right altered was the Court's focus in Cummings V. Deutsche Bank und Discontogesellschaft, 300 U.S. 115 (1937); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934); Block v. Hirsch, 256 U.S. 135 (1921); Louisville & N.R.R. v. Mottley, 219 U.S. 467 (1911).

\textsuperscript{147} Hochman, supra note 144, at 698.
\textsuperscript{148} Id. This factor was mentioned by Mr. Justice Harlan in his dissent in FHA v. The Darlington, Inc., 358 U.S. 84, 93-98 (1958).

\textsuperscript{149} Cited by Mr. Justice Brennan in his dissent as sufficient grounds to justify the impairment of contracts was the case of United States Trust Co. v. New Jersey, 97 S. Ct. 1505, 1532 (1977).

\textsuperscript{150} Id. at 1505.
\textsuperscript{151} Id. at 1537.
\textsuperscript{152} Id. at 1521.
tive alternatives to meeting these needs? Third, is this impairment reasonable in the light of circumstances which have changed since the contract's execution? In United States Trust, the Court waived the consideration of the statute in question in relation to the first criterion: the importance of the public needs served. Mr. Justice Blackmun stated that in the categories of economic and social regulation, the courts properly defer to legislative judgment. This is important since the Resale Royalties Act would fall in one of those categories.

The second criterion is much more difficult to meet. Even assuming that the improved economic welfare of the small group of artists affected by this statute is a sufficient public need to justify contract impairment, this need might be met using "less drastic" means. Several alternatives to the Act have been suggested. First, California could have its Act but simply not make it retroactive. Secondly, "[t]he suggestion has been made by artists, dealers, and collectors to set aside part of the California sales tax on art to establish a fund to help artists who really need it." Thirdly, the government could encourage the art market by increasing its own purchases and by using its taxing powers in a manner which encourages others to buy. Finally, the private sector could solve the problem through contractual arrangements between dealers and artists.

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153. Id.
154. Id. at 1523.
155. Id. at 1518.
156. Id. at 1522.
157. If the Court were to rule that the Resale Royalties Act was unconstitutional as applied retroactively, a severability provision, CAL. CIV. CODE § 986(e) would allow the act to survive in a nonretroactive form.
158. Elsen, supra note 42, at 16. It has been suggested that there is a precedent since part of San Francisco's sales tax helps pay for BART (Bay Area Rapid Transit). Id.
159. More art could be purchased for use in public buildings, for example. There has been a movement in a number of states called "One percent for the Arts" which is beginning to bear legislative fruit. California passed such a law in 1976. CAL. GOV. CODE § 15813 (Supp. 1977). Its "Legislative findings and declaration" preamble concisely explains such laws:

The Legislature finds and declares that the State of California has a responsibility for expanding public experience with art. The Legislature recognizes that other states have enacted legislation requiring the expenditure of 1 percent of funds allocated for the construction of state buildings for works of art for such buildings.

Id.

Secondly, the tax laws have often been used to encourage behavior deemed desirable by the government, for example, by making the interest on certain types of municipal bonds tax-exempt. In this case, perhaps individual purchasers could be allowed part of the purchase price of the works of living artists as a tax deduction.
providing the benefits available under the droit de suite without legislation.¹⁶⁰

Some well-known artists have already begun using such a contractual substitute for the droit de suite.¹⁶¹ Because they are well-known, however, these men have a bargaining position which a young or obscure artist does not when a buyer appears. It is for precisely this reason that the California royalty cannot be transferred or waived unless for an amount greater than five per cent.¹⁶² The drafters did not want a hungry artist coaxed or forced into relinquishing the royalty rather than lose a sale. There is another problem with a contractual substitute for the legislative droit de suite, however. No privity exists between the artist and future buyers.

This list of alternatives is by no means comprehensive, but whether any of them would be effective is another matter. “[A] State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well.”¹⁶³ Only the courts could decide if the legislative purpose would be “equally well” served by one of the alternative courses of action.

The third element of the new test is the need to show changed circumstances which were unforeseeable at the time of contracting.¹⁶⁴ If the courts were to weigh the California droit de suite in relation to this element of the new test, the result would be difficult to predict. One could say that Robert Rauschenberg never foresaw his work Thaw reselling for $85,000 or he certainly would not have sold it initially for $900.¹⁶⁵ On the

¹⁶⁰. “The Artist’s Reserved Rights Transfer and Sale Agreement” was drafted in 1971 by Robert Projansky.

The contract provides that the artist:
1) receive 15% of any increase in value of each work each time it is resold;
2) have a record of who owns his works at any given time;
3) be notified when the work is to be exhibited;
4) has a veto power over such exhibition;
5) may borrow the work for exhibition two months out of every five years;
6) be consulted if repairs are needed;
7) receive half the rental received for any exhibitions of the work;
8) retain all reproduction rights.

Guide, supra note 4, at 23-29.


¹⁶³. 97 S. Ct. at 1522.

¹⁶⁴. This aspect of the “test” was strongly criticized in Mr. Justice Brennan’s dissent. Id. at 1534-35 n. 17, 1537.

¹⁶⁵. See note 2 supra.
other hand, one could say that nothing in this situation represents any real change from what has been occurring in the art world for generations.

In summary, nothing in the California Resale Royalties Act answers these criteria patently enough for the onlooker to be able to predict the outcome on the constitutional issues of retroactivity or the impairment of contract as the Supreme Court is analyzing such cases in 1977.

If, however, the Court were to regard United States Trust as distinguishable from the case testing the California Resale Royalties Act and use determinants from previous cases, the Court would have given consideration to the nature of the affected right and the extent of the abrogation. Has California taken from the buyer "the quality of an acceptable investment for a rational investor?" If the person would not have entered the transaction had he been able to foresee the subsequent legislation, the Court will be more apt to view the law unfavorably. Would five percent of a sale price really deter an investor, though? Sales taxes do not seem to have that effect on American consumers. This writer feels it unlikely that the droit de suite would be held to disrupt the buyer's expectations or to vitiate the nature or acceptability of the investment.

However, when the contracts are so impaired, the result is a deprivation of private property without—it might be alleged—due process. Answering the constitutionality of one of these issues, however, will also answer the other.

[T]here is at least a tendency for the contract clause and the due process clause to coalesce. Although there is no clause expressly forbidding the federal government to pass laws impairing the obligation of contracts, any federal law impairing them in a manner which the Supreme Court deemed unreasonable would doubtless be held to be a deprivation of property without due process. And a state law which impaired obligations in a manner which the Court deemed reasonable would be held valid.

After all suggested analysis, the criterion to which one re-

166. See note 47 supra.
167. The recent case of the United States Trust Co. was a four to three decision. See 97 S. Ct. at 1523.
169. Hochman, supra note 144, at 692-93; 97 S. Ct. at 1516-17 n.17.
turns is reasonableness, but perhaps that is the basis on which the Resale Royalties Act will fare best.

INTERFERENCE WITH INTERSTATE COMMERCE

"The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States. . . ."\footnote{171} The California droit de suite has far-reaching geographic application. It applies not only to sales which take place in California, but also to sales taking place in other states or countries if the seller is a resident of California.\footnote{172} The implications of this in interstate commerce are virtually hydra-headed, but before analyzing this aspect of the law constitutionally, one should understand exactly what types of out-of-state sales might be covered.

If a California resident takes a painting executed by a Japanese artist to New York and sells it to a dealer the law applies. This is despite the fact that the California Commercial Code\footnote{173} allows the parties to an interstate contract to determine which state's laws will govern their rights and duties. The Resale Royalties Act in effect takes this right away by declaring that California's law will control the disposition of the funds resulting from the sale, at least to the extent of directing five percent to the artist. The California law will apply if the art work is owned by a Californian, no matter how overriding the contacts with another state are.\footnote{174} Nor is an exception made for dealings in an international setting.\footnote{175}

\footnote{171} U. S. CONST. art I, § 8 cl. 3.  
\footnote{172} CAL. CIV. CODE, § 986(a) (Supp. 1977). "[T]he word ‘seller’ here does not include an agent." See Guide, \textit{supra} note 4, at 8.  
\footnote{173} CAL. COM. CODE § 1105 (West 1964).  
\footnote{174} Let us assume a situation where a California dealer owns a gallery in Phoenix, Arizona, which handles Hopi art. He sells an Indian painting to a resident of Scottsdale, Arizona, who is house-hunting in Sun City, Arizona. Why should the dealer be forced to follow California law? His residency there seems insignificant in relation to the contacts with Arizona.  
\footnote{175} If a New York dealer sells a painting owned by a Californian but painted by a French artist to a French collector for personal delivery in Paris, the law applies. This is despite the fact that the UCC § 2-401, CAL. COM. CODE § 2401(2) (West 1963), states that a sale takes place when title (ownership) passes, i.e., "at the time and place at which the seller completes his performance with reference to the physical delivery of the goods." In this situation, then, the sale takes place in Paris, according to California's own law, and yet the Resale Royalties Act will be held to apply even in this international context. And if the artist cannot be located, the California Arts Council will be the recipient of French funds paid for French art in France!
The question of whether California has the power to extend the reach of its legislation into other states in a manner directly determining the sales price of goods sold there is a difficult one. Exact parallels are impossible to find, which is not surprising since this is the first droit de suite legislation in this country. However, the Supreme Court has dealt with state legislation which sought to reach outside its own territory in the context of milk pricing practices. In *Baldwin v. Seelig, Inc.*, the Court held, “New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there. So much is not disputed.” Almost forty years later, the Court stated, “But we further hold that even though Louisiana has the power and the right to regulate the price at which milk products are sold within the State of Louisiana, it has no power to project its legislation into Tennessee. . . .”

The issue of a state attempting to regulate contracts executed elsewhere was considered in *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*

A state may limit or prohibit the making of certain contracts within its own territory . . .; but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made. . . . Nor may it . . . enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen.

If the Resale Royalties Act governs out-of-state sales by imposing the duty on the seller of paying five percent to the artist, it has certainly “enlarged the obligations” of one of the parties.

What California seems to have done is to deny the relative importance of any contacts which the parties might have with other states, thereby precluding a choice of law. The Court has held that this conflicts with the fourteenth amendment:

A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for

177. Id. at 521.
179. 292 U.S. 143 (1934).
180. Id. at 149 (citations omitted) (emphasis added).
all purposes into contracts of the forum regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment.\textsuperscript{181}

The fact that the seller is a resident of California is not significant enough by itself to override any contacts with other states. In \textit{Home Insurance Co. v. Dick},\textsuperscript{182} the Court discussed this situation in a problem where a Texas resident wanted his state's law to apply to a contract made and totally performed elsewhere. Mr. Justice Brandeis refused saying, "The fact that Dick's permanent residence was in Texas is without significance."\textsuperscript{183}

Despite the fact that there were seven versions of this bill, Assemblyman Sieroty has indicated he is still receptive to suggestions for amendments to the Resale Royalties Act.\textsuperscript{184} Perhaps the interstate application could be one of the first areas for his attention. It is ironic, however, that the California legislature did not leave the application of the law to California sales, as was originally proposed. As amended in the Senate on August 2, 1976, the scope was expanded beyond sales at an auction, gallery, or museum, to all sales taking place in California or those taking place elsewhere if the buyer or seller is a California resident.\textsuperscript{185} Returning to Assemblyman Sieroty's original version of April 2, 1975, would admittedly narrow the application of the \textit{droit de suite} but it might also eliminate the interstate commerce complications.

\textbf{CONCLUSION: IS RESOLUTION POSSIBLE?}

A number of the practical and constitutional problems discussed earlier could be solved if the presently enacted law were

\begin{footnotesize}
\begin{enumerate}
\item[181.] \textit{Id.} at 150.
\item[182.] 281 U.S. 397 (1930). Issues which help in the choice of applicable law in contracts having multi-state contacts are discussed in \textit{Restatement (Second) of Conflicts of Law} §§ 187-188 (1969) and the comments which follow. Section 187, comment \textit{g}, states that application of the chosen law can be refused if another state "has a materially greater interest than the state of the chosen law in the determination of the particular issue." The decision as to whether "a fundamental policy" is involved will be made according to the principles of the forum state.
\item[183.] 281 U.S. at 408.
\item[184.] Elsen, supra note 42 at 16.
\item[185.] A.B. 1391, Cal. Legis., 1975-76 Reg. Sess. (1976). If the resale royalty legislation were on the federal level, the entire interstate commerce problem would be eliminated, as would preemption.
\end{enumerate}
\end{footnotesize}
amended to more closely conform to one of the bill's earlier versions which was proposed but not passed. In this version, a registration system was to be established in which the artist or his agent had to register his name and address in order to be eligible to receive payments. This solved two problems: it narrowed the class of artists covered to a more manageable group as contrasted with the enacted bill, and it provided the seller with a means of finding the artist without having to hire a detective.

Secondly, that version of the bill assigned enforcement to the State Board of Equalization, which was empowered to issue necessary regulations. This relieved the artist of sole responsibility for enforcement thus making it more likely that dealers would comply.

Thirdly, only sales at an auction or by a gallery or museum were covered. This made supervision much easier than if private sales had to have been policed.

Fourthly, the bill would have governed only sales in California. This eliminated some of the interstate commerce complications.

In addition to reinstating these previous provisions in the present law, a clause limiting the coverage to works sold after the bill's passage should be considered. This would solve the retroactivity/contract clause/due process problem.

The highest hurdle remaining would be preemption by the new federal copyright act and this problem is far from insurmountable. The committee hearings on section 301(b)(3) indicate that the door has been left open for state regulation of rights and remedies "different in nature from the rights comprised in a copyright." Although a copyright-related concept, the droit de suite is an entity unique unto itself and might very well be classified as "different in nature from the rights comprised in a copyright."

188. Id. § 986(d)-(e).
189. Id. § 986(a).
190. Id.
191. In Schulder's proposed Act, she consciously avoided just this problem by having the law inapplicable to works transferred prior to enactment. Schulder, supra note 13, at 33.
Yes, with changes merely amounting to a re-orientation to the American legal system, the resale royalty can survive here. Bienvenu, *Droit de Suite!*  

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CALIFORNIA ARTISTS' ROYALTY LEGISLATION

CAL. CIV. CODE § 986 (Supp. 1977) reads as follows:

§ 986. (a) Whenever a work of fine art is sold and the seller resides in California or the sale takes place in California, the seller or his agent shall pay to the artist of such work of fine art or to such artist's agent 5 percent of the amount of such sale. The right of the artist to receive an amount equal to 5 percent of the amount of such sale is not transferable and may be waived only by a contract in writing providing for an amount in excess of 5 percent of the amount of such sale.

1. When a work of art is sold at an auction or by a gallery, dealer, broker, museum, or other person acting as the agent for the seller the agent shall withhold 5 percent of the amount of the sale, locate the artist and pay the artist.

2. If the seller or agent is unable to locate and pay the artist within 90 days, an amount equal to 5 percent of the amount of the sale shall be transferred to the Arts Council.

3. If the seller or his agent fails to pay an artist the amount equal to 5 percent of the sale of a work of fine art by the artist or fails to transfer such amount to the Arts Council, the artist may bring an action for damages within three years after the date of sale or one year after the discovery of the sale, whichever is longer.

4. Moneys received by the council pursuant to this section shall be deposited in an account in the Special Deposit Fund in the State Treasury.

5. The Arts Council shall attempt to locate any artist for whom money is received pursuant to this section. If the council is unable to locate the artist and the artist does not file a written claim for the money received by the council within seven years of the date of sale of the work of fine art, the right of the artist terminates and such money shall be transferred to the operating fund of the council as reimbursement to fund programs of the council.

6. Any amounts of money held by any seller or agent for the payment of artists pursuant to this section shall be exempt from attachment or execution of judgment by the creditors of such seller or agent.

(b) Subdivision (a) shall not apply to any of the following:

1. To the initial sale of a work of fine art where legal title to such work at the time of such initial sale is vested in the artist thereof.

2. To the resale of a work of fine art for a gross sale price of less than one thousand dollars ($1,000).

3. To a resale after the death of such artist.

4. To the resale of the work of fine art for a gross sales price less than the purchase price paid by the seller.

5. To a transfer of a work of fine art which is exchanged for one or more works of fine art or for a combination of cash, other property, and one or more works of fine art where the fair market value of the property exchanged is less than one thousand dollars ($1,000).

(c) For purposes of this section, the following terms have the following meanings:

1. "Artist" means the person who creates a work of fine art.

2. "Fine art" means an original painting, sculpture, or drawing.

(d) This section shall become operative on January 1, 1977, and shall apply to works of fine art created before and after its operative date.

(e) If any provision of this section or the application thereof to any person or circumstance is held invalid for any reason, such invalidity shall not affect any other provisions or applications of this section which can be effected, without the invalid provision or application, and to this end the provisions of this section are severable. (Added by stats. 1976, c. 1228, p.—, § 1.)
Section 2 of Stats. 1976, c. 1228, p.—, provides: "The rights of an artist of a work of fine art to receive payment of an amount equal to 5 percent of the amount of a sale of fine are [sic] within the provisions of Section 986 shall be vested at the time of such sale; except that an artist shall have no rights to any payment pursuant to this act, if any provision therein is subsequently repealed so as to remove the provisions for such payment, as to any sale which occurs subsequent to such repeal; and except that, in the event any provision in this act is otherwise subsequently amended or changed, an artist shall have only those rights to payment provided for by such subsequent amendment or change and shall have no rights to any payment pursuant to this act, as to any sale which occurs subsequent to such amendment or change."