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Give or Take—Is the Droit De Suite a Taking Without Just Compensation?

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Give or Take—Is the *Droit De Suite* a Taking Without Just Compensation?

ABSTRACT

The Constitution mandates Congress to protect the arts and sciences directly by creating an exclusive right called copyright. However, visual artists such as painters, sculptors, and photographers in the United States still cannot participate in the significant profits from the secondary sales of their copyrighted works at public and private auctions. In over eighty countries worldwide, the droit de suite, also known as the Artist Resale Royalty (ARR), grants visual artists such royalties. Unfortunately, the United States currently lacks such a royalty, despite multiple unsuccessful attempts by Congress to pass federal legislation. Although California enacted its own version of the royalty, it was eventually preempted by federal copyright law in the Ninth Circuit case, Close v. Sotheby's Inc.

Several law review comments have cautioned against implementing a federal resale royalty due to the unique history of property rights in the United States, the first sale doctrine, and the economics of the secondary art market. Nonetheless, the 2013 Copyright Office Resale Royalty Report thoroughly analyzed and supported the adoption of the ARR, but acknowledged that takings claims could potentially be raised against the royalty.

By examining the failed resale royalty legislation attempts, the California Resale Royalty Act, subsequent case law like Close v. Sotheby's Inc.*, and international examples of the royalty, this Comment explores the most effective approach to drafting federal legislation for the ARR while addressing possible takings claims. Through a detailed analysis of regulatory and the most recent per se takings jurisprudence in the 2015 Supreme Court case* Horne v. Department of Revenue (Horne II)*, this Comment concludes that takings claims will fail if the statute defines the royalty as derived from the copyright itself rather than the physical property being sold and resold. This approach firmly establishes the royalty within the Copyright Statutes without disrupting United States law and doctrine. It is high time for the United States to fully uphold the principles of the Constitution and the Berne Convention by incorporating an ARR right into the copyright statutes.*

TABLE OF CONTENTS

"*An artist is not paid for his labor but for his vision.*"
James Whistler, American-Born/UK-Based Fine Artist Painter, 1834–1903.[1]
"*I've been working my ass off just for you to make that profit.*"
Robert Rauschenberg, American Painter and Graphic Fine Artist, 1925–2008.[2]

I. INTRODUCTION

The Constitution directly mandates Congress to protect the arts and sciences through the creation of an exclusive right known as copyright.[3] Yet, to this day, visual artists in the United States do not have the ability to partake in the windfall profits from secondary sales at public and private auction of their own copywritten works.[4] Visual artists include painters, sculptors, and photographers who create unique, usually one-of-a-kind, works of art in which all value is embodied within a singular physical work, unlike musicians and authors whose copyright value lies in the number of copies distributed.[5] Such a difference has made copyright protections more difficult to apply for visual artists and has created a need for a different understanding of how copyright protections can be applied to protect the unique form in which visual art is distributed.[6]

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1. *Quote*s, THEHISTORYOFART.ORG, https://www.thehistoryofart.org/james-whistler/quotes/ (last visited Sept. 21, 2023).

2. Whitney Kimball, *Shouldn't Artists Benefit When Their Paintings Auction for Millions?*, SLATE (June 29, 2014, 11:45 PM), https://slate.com/culture/2014/06/artists-royalties-and-droit-de-suite-the-american-royalties-too-act.html (discussing the 2014 Artist Resale Royalty bill presented in Congress and why it should pass).

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

4. *See* Alexander Bussey, *The Incompatibility of Droit de Suite with Common Law Theories of Copyright*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1063, 1083–85 (2013) (discussing the attempts to pass the *droit de suite* in the United States, the preemption of the California Resale Royalty Act, and United States copyright theories which go against the passing of a federal resale royalty).

5. S*ee* Michelle Janevicius, *Legislative Update: Droit de Suite and Conflicting Priorities: The Unlikely Case for Visual Artists' Resale Royalty Rights in the United States*, 25 DEPAUL J. ART TECH. & INTELL. PROP. L. 383, 383 (2015) ("*Droit de suite,* often referred in the United States as a resale royalty right, allows an artist to receive a royalty when his or her work is resold. This is important, especially for a visual artist, whose artwork is unique and he cannot receive a profit from making copies (unlike authors or musicians who can mass produce their works), because the original artist can benefit from a possible increase in value of the artwork after its original sale.").

6. *See id.* Songwriters and musicians within the United States, and most of the world, are given

In the early nineteenth century, courts in France started to acknowledge the existence of moral rights for visual artists.[7] Included in these Moral Rights was the *droit de suite,* or Artist Resale Royalty (ARR), which eventually would become official French law in 1920 due to the public outcry against artists being robbed of the massive increase in profits their works garnered after the first sale.[8] The *droite de suite,* or ARR, is a copyright royalty paid to visual artists for the secondary sale of their works—with sales mainly occurring in public auction houses, but technically a secondary sale is any sale after the first sale.[9] The royalty percentage varies between 3–7% of the secondary sale price from country to country.[10] Now, the ARR is the law in over eighty countries around the world with the United States and China being the only holdouts within the world's top art markets.[11]

The United States is a signatory to the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)—an international convention dating back to 1886—which mandates minimum national copyright laws for all signatories, but at the behest of a few countries including the United States, the ARR was made optional.[12] In 1990, the United States

multiple rights underneath copyright law protecting their intellectual property including mechanical royalties, synchronization royalties, print royalties, performance royalties, and more, while visual artists are usually left with only a percentage of their work's first sale. *See id* at 386. "[A] writer can receive royalties from every copy of his book sold and can continually benefit beyond his initial sale, whereas once a visual artist sells a piece of art, he does not receive economic benefit from it beyond the initial sale." *Id.* at 387.

7. Calvin D. Peeler, *From the Providence of Kings to Copyrighted Things (and French Moral Rights)*, 9 IND. INT'L & COMP. L. REV. 423, 434 (1999) ("The first judicial ruling espousing a moral right policy occurred in 1828 when a Paris court announced the *droit de divulgation*.").

8. Stephanie B. Turner, *The Artist's Resale Royalty Right: Overcoming the Information Problem*, 19 UCLA ENT. L. REV. 329, 335–36 (2012).

9. *See* Tiernan Morgan & Lauren Purje, *An Illustrated Guide to Artist Resale Royalties (aka 'Droit de Suite')*, HYPERALLERGIC (Oct. 24, 2014), https://hyperallergic.com/153681/an-illustrated-guide-to-artist-resale-royalties-aka-droit-de-suite/ ("*Droit de suite* ('right to follow') is the notion that artists, their heirs, and estates should receive an Artist Resale Royalty (ARR) every time one of their works is subsequently resold.").

10. *See id.* ("The royalty is typically a small percentage of a resale (usually around 3–7%).").

11. *See* Simon T.L. Marshall, *Droit de Suite: A U.K. Perspective on the Artist's Resale Right*, 12 LANDSLIDE 24, 25 (2020) ("Since the implementation of the directive across the EU, ARR has continued to spread across the world, with 81 countries adopting ARR into their laws."); Wang Suchen, *Resale Royalty Right for Visual Artists in the US and China: A Comparative Study*, 3 FRONTIERS SOC'Y, SCI. & TECH. 10, 11–12 (2021) (noting the failure of the U.S. and China to enact legislation supporting an ARR).

12. *See* OFFICE OF THE REGISTER OF COPYRIGHTS, RESALE ROYALTIES: AN UPDATED ANALYSIS 4–5 (2013), https://www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf [hereinafter "2013

passed the Visual Artists Rights Act (VARA) which added a few moral rights protections for visual artists to the copyright statutes, but again, the ARR was left out.[13] There are many articles, commentaries, and theories as to why the United States has prolonged the inevitable passage of the ARR.[14] These theories include the royalty's antithesis to the first sale doctrine embedded within United States copyright law and property rights doctrines, the possible (yet unproven) economic damage it could do to the fine art secondary market, and the constitutionally protected property rights unique to the United States.[15] Focusing on the property rights issue, this Comment explores whether the process of giving more royalty rights to visual artists ends up becoming a taking of the art seller's property rights without just compensation.[16] The answer to this question is not quite clear, nor simple, particularly with the recent per se takings jurisprudence additions, but the solution could very well lie within the copyright statutes already written, using examples from copyright royalties already carved out for musicians and songwriters.[17] Other answers lie in the passage of the California Resale Royalties Act, the only successful ARR statute passed in the United States, which was eventually preempted by federal copyright laws in *Close v. Sotheby's, Inc.*[18] This Comment attempts to explore all the different solutions available to create an ARR statute which can stand up to any possible takings claims or defenses, while allowing for possible retroactivity.[19]

Part II examines the history of moral rights, including the evolution of

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COPYRIGHT REPORT"] (detailing the history of the *droit de suite* in Europe with its eventual inclusion into the Berne Convention as an optional moral right); *see also* The Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S. TREATY DOC. NO. 99-27 (1989) [hereinafter Berne Convention] (entered into force in the United States Mar. 1, 1989).

13. *See* 2013 COPYRIGHT REPORT, *supra* note 12, at 5 ("[A]lthough the United States is a signatory to the Berne Convention, it is not required to implement *droit de suite* under its domestic copyright law," because the right was made "optional and reciprocal"); Visual Artists Rights Act of 1990 § 603(a), 17 U.S.C. § 106A (1990).

14. *See, e.g.*, Janevicius, *supra* note 5, at 398–99, 409–10 (discussing the multiple arguments of why a resale royalty will be difficult to pass in the United States including economic concerns and historic United States copyright doctrines).

15. *Id.* at 402–03, 409–10, 414 ("Those who oppose a resale royalty argue that by imposing a *droit de suite*, the overall incentive to resell artwork may diminish, thus reducing the secondary art market.").

16. *See infra* Part IV.

17. *See infra* Part IV.

18. *See infra* Section II.B.1; Close v. Sotheby's, Inc., 894 F.3d 1061, 1076 (9th Cir. 2018) (holding the CRRA was preempted by federal law for all years other than 1977–1978).

19. *See infra* Parts II–V.

the *droit de suite,* starting in France and eventually spreading to over eighty countries around the world.[20] Part III analyzes whether a takings claim, or defense, is possible once a federal ARR bill is passed.[21] It begins with a threshold takings analysis, including the question of standing, and whether the ARR is actually a constitutionally protected property interest, then moves onto a regulatory takings analysis utilizing the *Penn Central* factors,[22] and closes with an analysis of the new per se takings jurisprudence from *Horne v. Department of Agriculture* (*Horne II*).[23] Part IV includes recommendations for the ARR statute that would allow for bypassing any takings claims, while including as much retroactivity as possible.[24] Part IV also explores the basics of copyright law and discusses whether the property taken by the ARR is property that can be claimed as a taking by the owners, or handlers, of the physical work of art.[25] Part V briefly concludes this Comment.[26]

II. HISTORY OF THE DROIT DE SUITE

In 1920, France became the first country to implement the *droit de suite*, also known as the Artist Resale Royalty (ARR), with the goal of protecting the fine artist's moral right to claim a portion of the massive profit increases that accrued between the artist's first and secondary sales of their unique, one-of-a-kind works.[27] Now, just over one hundred years later, numerous countries have implemented a form of the ARR within their copyright statutes, excluding the two largest art market economies in the world, the United States and China.[28] To understand how the United States can implement an effective ARR statute, the history of the *droite de suite* needs to be analyzed

20. *See infra* Part II.

21. *See infra* Part III.

22. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (creating the legal test for regulatory takings).

23. *See infra* Part III; *see also* Horne v. Dep't of Agric. (*Horne II*), 576 U.S. 351, 364–65 (2015) (holding that "a governmental mandate to relinquish specific, identifiable property as a 'condition' on permission to engage in commerce," does in fact create a per se taking).

24. *See infra* Part IV.

25. *See infra* Section IV.A.

26. *See infra* Part V.

27. *See* Turner, *supra* note 8, at 330 ("This right, which entitles artists to share in the proceeds from resales of their works, was first codified into law in France in 1920.").

28. *See* Suchen, *supra* note 11.

and understood beginning with the history of international moral rights, including the *droite de suite*.[29] Furthermore, the history of moral rights and its connection to the ARR in the United States—which includes the California Resale Act's rise and fall, previous congressional attempts to pass ARR legislation, and the culmination of the general state of the world art and auction markets since 2018—are helpful to understand prior to analyzing takings claims and defenses associated with the ARR.[30]

A. International Moral Rights and the Droit de Suite

The *droit de suite*,[31] or ARR,[32] initially appeared in 1893 when a French attorney wrote an article in the journal *Chronique de Paris* detailing the differences between visual artists, mainly painters and sculptors, and other artists, like musicians and authors.[33] Musicians and authors could display and disseminate their works through reproduction or live performance, while visual artists create one-of-a-kind pieces that could not be as easily reproduced in the quantity or manner of the musician or author.[34] The public clamored for a resale right when the French media began portraying famous artists living in squalor and dying penniless, while greedy collectors made

29. *See infra* Section II.A (discussing the history of international moral rights and the *droit de suite)*.

30. *See infra* Section II.B (discussing the history of moral rights and the ARR in the United States).

31. *See* Bussey, *supra* note 4, at 1066. ("Droit de suite literally means 'follow-up right,' but is more generally understood as an artist's resale royalty right, which provides the artist with a certain percentage of the sale price when his work is resold on the secondary art market."); *see also Resale Royalty Right,* U.S. COPYRIGHT OFF., https://www.copyright.gov/docs/resaleroyalty (last visited Oct. 23, 2022) (defining the *droit de suite* as "provid[ing] artists with an opportunity to benefit from the increased value of their works over time by granting them a percentage of the proceeds from the resale of their original works of art").

32. *See* Turner, *supra* note 8, at 330 ("The artist's resale royalty right, commonly called the droit de suite, has proven politically popular in a diverse range of countries.").

33. *See* Janevicius, *supra* note 5, at 385 ("The concept of *droit de suite* was first mentioned in an article written in 1893 in the journal 'Chronique de Paris,' by Albert Vaunois, a French attorney. In this article, he defended the rights of artists and highlighted that writers, musicians, and authors could all have their works represented in multiple areas while visual artists could not perceive their paintings or sculptures ever being reproduced in this manner.").

34. *See id.* at 383. The *droit de suite* was rationalized through the classic copyright formulation that although the actual work of art was "in possession of the collector, the right of reproduction remain[ed] the property of the creator of the artwork," with reproduction meaning resale in this instance. *Id.* at 386.

all secondary sale profits.[35] By 1920, the *droit de suite* was enacted in France, followed by other European countries[36] all "with similar legislation," providing "authors of original works of art and original manuscripts an inalienable right to an interest in any subsequent sale of the work after the first transfer by the author."[37]

The ARR is part of copyright law's visual art bundle of rights "commonly and collectively known as 'moral rights.'"[38] Moral rights include

35. Turner, *supra* note 8, at 335 ("The French parliament adopted the *droite de suite* 'after hearing lengthy descriptions of artists who died in misery at a time when their paintings were bringing enormous sums, among them Millet, Cezanne, and Gauguin.'"). "[A] primary driver for the introduction of *droit de suite* in France which would ensure that artists, or their heirs, receive a royalty payment on subsequent sales of their works," occurred when French artist Jean-Francois Millet personally sold a painting for "1,000 francs but was resold 14 years after his death for 553,000 francs"—the resale coming "at a time when Millet's family were in dire need of money." Marshall, *supra* note 11, at 25.

36. Turner, *supra* note 8, at 336 n.39 ("Belgium enacted resale royalty legislation in 1921, Poland in 1931, Italy in 1941, and Germany in 1965.").

37. 2013 COPYRIGHT REPORT, *supra* note 12 (detailing the history of the *droit de suite* in Europe with its eventual inclusion into the Berne Convention as an optional moral right). The "basic structure" of the legislation remained the same for most of the European countries—the right was "both unwaivable (that is, the artist cannot sell works that are free of the obligation to pay a resale royalty) and nonassignable (that is, the right to collect resale royalties in a given work cannot be transferred by the artist to another person)," and the "laws provide that artists receive a payment when their works are sold on the secondary market." Turner, *supra* note 8, at 336. The differences between the laws came with royalty percentages and where the royalty could be collected from. *See id.* France set the royalty at "three percent of the total sales price" of the work when sold at "public auction or private sale," Germany allowed for a collection of five percent from public auctions only, and Italy set the rate "between two and ten percent of any profit . . . made on sales" with a "complicated sliding scale mechanism" to determine the exact royalty rate. *Id.*

38. 2013 COPYRIGHT REPORT, *supra* note 12, at 4 (quoting U.S. COPYRIGHT OFFICE, DROIT DE SUITE: THE ARTIST'S RESALE ROYALTY (1992), http://www.copyright.gov/history/droit_de_suite.pdf). "Where other moral rights assure attribution (paternity) or protect against mutilation (integrity), the resale right provides visual artists with an opportunity to benefit from the increased value of their works over time by granting them a percentage of the proceeds from the resale of their original works of art." *Id.* Under the French copyright system, "all artists . . . have four moral rights: the rights of paternity, the right of integrity, the right to release, and the right to withdraw or modify," all of which are "continuous and absolute." Janevicius, *supra* note 5, at 384–85 (discussing a detailed early history of the *droit de suite*, and its roots in the French understanding of "different rights between visual artists and other types of artists," eventually leading to "a report dealing with inherent unfairness that artists who create art that can be reproduced, such as photographers and engravers, could profit from selling their artwork in multiples whereas other visual artists would lose any profit if their work were resold."). France is the originator of "*le droit moral*," or the moral rights doctrine, with the French adjective "moral" having "no precise English equivalent." *See* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.01 (2022) (citations omitted).

"the right to attribution,[39] integrity,[40] disclosure,[41] withdrawal,[42] and the resale royalties."[43] Moral rights reach "beyond ownership of economic control of works of authorship to encompass protections of the personality of the author."[44] In 1886, the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) created minimum international copyright law standards required to be a member country.[45] Minimum standards included "national treatment," a "foundational principle of the Convention," which mandated all Berne signatories to "grant authors the same protection they accord to their own nationals."[46] The 1928 Berne Convention's Article 6*bis* added moral rights (without the resale right) to the minimum standards.[47] In 1948, the Berne Convention reconvened, adding Article 14*ter* to include the resale right, providing "authors of original works of art and original manuscripts an inalienable right to an interest in any subsequent sale of the work after the first transfer."[48] However, in 1971, due to opposition from multiple countries, including the United States, the resale right was "made optional and reciprocal—Member States were not required to implement the right but if they failed to do so their citizens could not benefit from

39. *See* Elizabeth Schéré, *Where is the Morality? Moral Rights in International Intellectual Property and Trade Law*, 41 FORDHAM INT'L L.J., 773, 775 (2018) ("[T]he right of paternity or attribution . . . gives the author the right to choose whether to include his name in the work, or to publish it anonymously or under a pseudonym."); NIMMER & NIMMER, *supra* note 38, at § 8D.03 (stating that the attribution right requires the "use of the author's name, and forbidding that usage," allowing for an author, or creators, name to be attributed to their work, or allowing for anonymity).

40. *See* Schéré, *supra* note 39, at 775 ("The right of integrity . . . protects the author's work from any kind of distortion or mutilation.").

41. *See id.* at 776. The right of disclosure includes "whether the author decides to publish the work and make it public or keep it private." *Id.*

42. *See* Michael Rushton, *The Moral Rights of Artists: Droit Moral ou Droit Pécuniaire?*, 22 J. CULTURAL ECONS. 15, 16 (1998). The withdrawal right encompasses the right to withdraw the "work from circulation." *Id.*

43. Lara Mastrangelo, *Droit de Suite*: *Why the United States Can No Longer Ignore the Global Trend*, CHI.-KENT J. INT'L & COMP. L. 1, 6 (2018). In Europe, moral rights are "considered a natural right innate to the artist." *Id.*

44. *Id.*

45. *See* Schéré, *supra* note 39, at 777. "Berne signatories must grant authors the same protection they accord to their own nationals." *Id.* "[T]he United States only recognized the moral rights of visual artists through the Visual Artists Rights Act of 1990 (VARA)." Mastrangelo, *supra* note 43, at 6.

46. Schéré, *supra* note 41, at 777.

47. *Id.*

48. *See* 2013 COPYRIGHT REPORT, *supra* note 12, at 4.

the right in other countries."[49]

The resale right continued to gain popularity and, following a 2001 European Union (EU) directive harmonizing the resale royalty laws of all its member states, the United Kingdom (U.K.) implemented the right in 2006.[50] The Australian government followed in 2009, thus effectively spreading the resale right to "common law countries, which do not have the strong tradition of artists' rights found in civil law countries" like France.[51]

By 2015, more than seventy countries around the world implemented some form of the resale royalty.[52] This number rose to eighty-one countries in 2020.[53] The royalty rate averaged between 3–7% paid to the original artist, via a rights organization, upon the resale of a work—the resale typically occurring at a public auction.[54] Thus far, the U.K. is the largest art market to implement the ARR, coming in at $1.99 billion in auction sales in 2021, with only China and the United States ahead in sales.[55] The U.K. initially enacted the ARR in 2006 with a sliding scale royalty rate ranging from 0.25% to 4% depending on the total resale price, but delayed the full implementation until 2012 to allow for a six-year period to study the ARR's art

49. *Id.* at 5. In 1971 Article 14*bis* was updated to 14*ter* reflecting this optional resale royalty language within the moral rights obligation of Berne Convention signatories. *See* Turner, *supra* note 8, at 337. Also, around this same time, "numerous countries in Europe and elsewhere—including Algeria, Chile, Czechoslovakia, Guinea, Mali, and Turkey, to name just a few—adopted variations of the right. Not surprisingly, the right proved especially popular in civil law countries, which have long recognized various protections for creative persons, including moral rights." *Id.*

50. 2013 COPYRIGHT REPORT, *supra* note 12, at 13.

51. Turner, *supra* note 8, at 337–38. In 2001, the EU created a commission to decide whether "to adopt a resale royalty, or it would be uniformly abolished," ultimately deciding in favor of "institut[ing] a consistent *droit de suite*," for all member states under Directive 2001/84/EC. Janevicius, *supra* note 5, at 392. "This Directive required EU member states to create *droit de suite* legislation where a work of visual art was resold under the purview of 'art market professionals.'" *Id.* at 392–93.

52. *See* Janevicius, *supra* note 5, at 390 (stating that in 2015, "over seventy different countries worldwide recognize some form of *droit de suite* for their visual artists").

53. *See* Marshall, *supra* note 11, at 25 ("Since the implementation of the directive across the EU, ARR has continued to spread across the world, with 81 countries adopting ARR into their laws.").

54. *See* Tiernan & Purje, *supra* note 9; *see also* Marshall, *supra* note 11, at 25–26 (describing the regulation of collecting agencies in the UK).

55. *See Artprice 2021 Global Art Market Report: Main Trends and Key Figures*, ARTPRICE (Mar. 18, 2022), https://www.artprice.com/artmarketinsight/artprice-2021-global-art-market-report-main-trends-and-key-figures ("This report offers an analysis of global auction sales of fine art, including paintings, sculptures, drawings, photographs, print, videos, installations, tapestries—and NFTs.").

market effects.[56] Similar to the other countries that have implemented this right, the U.K. has multiple collections societies, including Design Artists Copyright Society (DACS) and Artists' Collecting Society (ACS), which collect the resale royalties from the auction houses, or other art industry professionals conducting resales, and pay out to the artists, or estates, registered with those societies.[57] U.K. regulations suggest the art seller pays the ARR royalty out of the sale price, but in practice the buyer will usually pay the ARR royalty in excess of the sale price.[58] ARR studies released in the U.K. between 2016 and 2018 revealed the ARR's positive impact on emerging artists and the overall art market in the UK itself, in addition to the low "scale and cost of administering the ARR."[59] Between 2006 and 2021

56. *See* 2013 COPYRIGHT REPORT, *supra* note 12, at 14–15. The sliding scale rate is is the same royalty rate as mandated for all European Union Member States, the only difference being the UK opted for a minimum resale price of €1,000 to be eligible for the royalty—the EU minimum resale price is €3,000. *Id.* at 14.

57. *See* Marshall, *supra* note 11, at 6. "[C]ollecting societies acting on behalf of the ARR owner to request the information from art market professionals. DACS sends requests for information on a quarterly basis to all art market professionals it holds on record requiring them to disclose all qualifying sales made by them in the preceding 90 days." *Id.* This collection process is similar to the performance royalty collection scheme within the music industry in the United States, and other countries around the world, whose job is to collect the royalty from television and radio performances to pay out to registered songwriters and publishers. *See What is the Difference Between Performing Right Royalities, Mechanical Royalties, and Sync Royalties?*, BMI, https://www.bmi.com/faq/entry/what_is_the_difference_between_performing_right_royalties_mechanical_r (last visited Oct. 23, 2023); *see also* Turner, supra note 8, at 336 ("[T]he German law applies only to public auctions, and it entitles artists to collect five percent of the total sale price. Under the Italian law, artists may collect between two and ten percent of any profit (rather than the total sales price) made on sales of their works; the exact percentage is determined based on a complicated sliding scale mechanism.").

58. *See FAQ: Who Pays the Artist's Resale Right Royalties?*, ARTISTS' COLLECTING SOC'Y, https://artistscollectingsociety.org/faq/ (last visited Oct. 23, 2023) ("According to the UK Regulations, the seller of the work is jointly responsible and shares the responsibility with i) the agent of the seller, or if the seller is not using an agent ii) the agent of the buyer, or if the buyer is not using an agent iii) the buyer, provided the seller, agent or buyer is an art market professional. In practice, the terms of the art market professional may provide for the buyer to pay the ARR royalties."); *see also* Michelle McMullan, *Michaela Yearwood-Dan (B. 1994)*, CHRISTIE'S: LIVE AUCTION 21609, https://www.christies.com/lot/lot-6414648?ldp_breadcrumb=back&intObjectID=6414648&from=salessummary&lid=1 (last visited Sept. 21, 2023). The Michaela Yearwood-Dan auction at Christie's, which closed on February 28, 2023 included a special notice stating, "Artist's Resale Right ('Droit de Suite'). Artist's Resale Right Regulations 2006 apply to this lot, the *buyer agrees to pay us an amount equal to the resale royalty provided for in those Regulations*, and we undertake to the buyer to pay such amount to the artist's collection agent." McMullan, *supra* (emphasis added).

59. *See* Marshall, *supra* note 11, at 26. An independent study by Kathryn Graddy of Brandeis University released in 2017 "concluded that no evidence could be found that ARR harmed the art

DACS distributed over £100 million to 5,624 artists and artists' estates.[60]

B. Moral Rights and the Artist Resale Royalty in the United States

The United States Constitution grants Congress the ability to "[p]romote the Progress of Science and useful Arts, by securing for limited Times to Authors and Investors the exclusive Right to their respective Writings and Discoveries"[61] thus creating United States copyright law, which reflects the Framers' "utilitarian rationale" behind their views on copyright.[62] Due to this opposing view of copyright law, the United States initially refused to sign onto the Berne Convention, attending the convention only as an observer, along with Japan.[63] The United States' other issues with the Berne Convention included the lack of interest in providing equal copyright protection

market, or that it forced relocation of art sales to other jurisdictions." *Id.* In fact, the U.K. overtook China as the number two art market in the world in 2018, and since its implementation, the distribution of resale royalties has increased each year. *See id.* A 2014 U.K. government study on administrating ARR costs found it costs "art market professionals approximately £20 ($24.62) per quarter," including an average of fifteen minutes per quarter responding to informatjon requests, thirty minutes per quarter calculating ARR liabilily, and ninety-five minutes per quarter on all other administrative tasks. *Id.* DACS released a study in 2016 showing the ARR was "positively impact[ing] a range of artists including low earners," plus recent data from DACS between 2016 and 2018 has shown that the ARR is "typically supporting emerging and less well known artists." *See id.*

60. *See* Vanessa Giorgo, *DACS Hits £100m Paid Out in Artist's Resale Right Royalties*, DACS (June 9, 2021), https://www.dacs.org.uk/latest-news/dacs-hits-£100m-artist-s-resale-right-royalties-pa?category=For+Artists&title=N; *see also* DACS, TEN YEARS OF THE ARTIST'S RESALE RIGHT: GIVING ARTISTS THEIR FAIR SHARE 7 (2016), https://www.dacs.org.uk/DACSO/media/DACSDocs/reports-and-submissions/Ten-Years-of-the-Artist-s-Resale-Right-Giving-artists-their-fair-share-DACS-Feb-16.pdf (showing ARR distributions between 2006 and 2016).

61. U.S. CONST. art. I, § 8, cl. 8.

62. Samuel Jacobs, *The Effect of the 1886 Berne Convention on the U.S. Copyright System's Treatment of Moral Rights and Copyright Term, and Where That Leaves Us Today*, 23 MICH. TELECOMM. & TECH. L. REV. 169, 172–73 (2016). "The U.S. copyright system is based on the *utilitarian* theory that copyright law exists purely to provide a marketable right for the creators and distributors of copyrighted works, which in turn creates an incentive for production and dissemination." *Id.* at 172 (internal citations omitted). Through U.S. copyright law, authors are granted an "alienable 'limited monopoly' in their creative works," with "the federal government promot[ing] 'progress' in knowledge and learning by *incentivizing* the creation of works," thus, United States copyright law is more of a "tool for advancement of the public interest, rather than a form of guaranteed right arising out of creation." *Id.* at 173. In contrast, European copyright systems are largely "based on the notion that an author's *natural right* in his creation forms the principal justification for copyright protection." *Id.*

63. *Id.*

to foreign works, and most significant to this Comment, the United States' "steadfast denial of moral rights."[64] This denial stemmed from the United States "copyright system's emphasis on economic rights."[65]

The United States eventually signed onto the Berne Convention in 1988 because of the national treatment provision which would effectively protect United States artists' work in other countries.[66] However, no moral rights provisions existed within United States copyright law until 1990 when Congress passed the Visual Artists Rights Act (VARA) under 17 U.S.C. § 106A.[67] VARA offered protection to "a narrow class of art defined to include paintings, drawings, prints, sculptures, or photographs produced for exhibition purposes, existing in a single copy or limited edition of 200 copies or fewer."[68] VARA granted the rights of attribution, integrity, and the limited right to prevent destruction for artists of "recognized stature."[69] VARA left out the ARR since the right did not square with the United States' "free market traditions," the first sale doctrine embedded into federal copyright law, and overall property rights doctrines of the United States.[70]

64. *Id.* at 170–71 (discussing the United States' early resistance to moral rights because of the "U.S. copyright system's emphasis on economic rights and origins in utilitarian theory").

65. *Id.*

66. *See* Robert Brauneis, *National Treatment in Copyright and Related Rights: How Much Work Does It Do?*, GEO. WASH. L. FAC. PUBLICATIONS & OTHER WORKS. 1, 4 (2013), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2113&context=faculty_publications. The Berne Convention includes the oldest national treatment provision covering "discrimination against authors" by stating that all Berne Convention countries will provide the same copyright treatment to international artists as they provide their own nationals. *Id.*

67. *See* Jacobs, *supra* note 62, at 175; *see also* Schéré, *supra* note 39, at 778 ("[T]he United States successfully avoided the issue of moral rights by enacting the Berne Convention Implementation Act of 1988, which stated that the Convention was not 'self-executing in that existing law satisfied the United States' obligations in adhering to the Convention.'"); David E. Shipley, *Droit de Suite, Copyright's First Sale Doctrine and Preemption of State Law*, 39 HASTINGS COMM. & ENT. L.J. 1, 35 (2017) (discussing how VARA "recognized moral rights in the United States for the first time.").

68. Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 83 (2d Cir. 1995) (discussing the history of moral rights and VARA). VARA is in effect for works created "on or after June 1, 1991," and lasts "for the life of the author or, in the case of a joint work, the life of the last surviving author," plus the right is not transferable, but it can be waived "by a writing signed by the author." *Id.*

69. 17 U.S.C. §106A. VARA does not define the "recognized stature" of an artist, and there is very little case law providing guidance on the meaning of the term. *Id.*; *see* Carter v. Helmsey-Spear, Inc. 861 F. Supp 303, 325 (S.D.N.Y. 1994), *aff'd in part, vacated in part, rev'd in part*, 71 F.3d 77 (2d Cir. 1995) (specifiying that the artist must show "(1) that the visual art in question has 'stature,'" meaning the artist has some merit, "and (2) that this stature is 'recognized' by art experts, other members of the artistic community, or by some cross-section of society").

70. Shipley, *supra* note 67, at 7; *see* 2013 COPYRIGHT REPORT, *supra* note 12, at 5 ("Although

In addition, the Berne Convention did not require the United States to incorporate the ARR right to become a signatory.[71]

During the 1960s and 1970s the resale royalty started to permeate within the United States legal community.[72] The famously publicized 1973 auction incident involving the artist Robert Rauschenberg created anger within the art community and helped usher in vast legislation culminating with the passage of VARA.[73] The famous Rauschenberg incident involved his painting, titled "Thaw," which originally sold for $900 in 1958, but was auctioned for over $85,000 in 1973, without any of the additional profits going to the artist.[74] In 1978 and 1986, prior to VARA and the United States becoming a Berne Convention signatory, federal legislation was introduced to amend the copyright statutes, providing for a resale royalty.[75] Meanwhile, California, New York, Ohio,[76] and nine other states began attempts to create their own

the United States is a signatory to the Berne Convention, it is not required to implement *droit de suite* under its domestic copyright law," since the right was made "optional and reciprocal."). Due to the reciprocal nature of the right, and the United States' failure to include the right with VARA legislation, "a generation of resale royalties has been lost to American artists [as well as] the reciprocity that should have been sent overseas." 2013 COPYRIGHT REPORT, *supra* note 12, at 5.

71. Shipley, *supra* note 67, at 6–7.

72. *See* Bussey, *supra* note 4, at 1069. The culmination of the initial legal arguments for the ARR came in 1976 when "California became the first U.S. state to create an artist's resale royalty right," followed by Congress considering the implementation of the "droit de suite among other moral rights for artists." *Id.*

73. *See* 2013 COPYRIGHT REPORT, *supra* note 12, at 6 ("Rauschenberg originally sold 'Thaw' for $900, but fifteen years later it was resold at auction for $85,000 without any additional compensation to the artist."); *see also* Anna Louie Sussman, *How the Scull Sale Changed the Art Market*, ARTSY (Apr. 26, 2017, 9:32AM), https://www.artsy.net/article/artsy-editorial-three-ways-single-auction-1973-changed-art-market ("The famous . . . Scull sale . . . demanded copious amounts of marketing and publicity, launched prices for living artists into new territory, and catalyzed an ongoing debate on artist resale royalties.").

74. *See* 2013 COPYRIGHT REPORT, *supra* note 12, at 6; *see also* Bussey, *supra* note 4, at 1065 n.5 (noting the sale upset Rauschenberg to the point where he may have physically assaulted the seller).

75. *See* 2013 COPYRIGHT REPORT, *supra* note 12, at 6. Henry Waxman introduced the Visual Artists' Residual Rights Act of 1978, providing a "5 percent royalty to the artists (subject to several exceptions) to be paid by the seller, on resales of artwork for $1,000 or more," plus creating a Treasury Department provision to administer the right, which would take effect one year after the bill passage and apply to works initially sold after the passage of the bill. *Id.* at 6–7. In 1986 and 1987, Senator Edward Kennedy introduced two bills that would establish overall moral rights for artists, including a 7% resale royalty—the 1987 bill became VARA after Congress "removed the resale right provision." *Id.*

76. *See* REGISTER OF COPYRIGHTS, DROIT DE SUITE: THE ARTIST'S RESALE ROYALTY 74–75 (1992), https://www.copyright.gov/history/droit_de_suite.pdf [hereinafter "1992 COPYRIGHT REPORT"]. The Ohio bill was introduced in 1977. *Id.* at 75 n.67 ("[W]henever a work of fine art is sold and the seller is an Ohio resident or the sale takes place in Ohio . . . [a] payment of five percent

state laws incorporating resale royalty provisions.[77] California was the only successful implementation of the resale royalty provision at the state level, but its law would be short lived.[78]

1. The California Resale Royalty Act (CRRA)

In 1976, California passed the California Resale Royalty Act (CRRA), which provided a 5% royalty upon the secondary sale of art, paid to the artist or the artists' "heirs, legatees, or personal representatives, until the 20th anniversary of the death of the artist."[79] The seller had to reside in California, or the sale must have taken place in California, and the right was "not truly waivable."[80] The right was not applied to works resold for less than the initial sales price, and only applied to works resold within ten years of the initial sale.[81] The statute appeared to violate "the Commerce clause, the Takings Clause, the first sale doctrine, and/or that it [was] preempted by the federal copyright statute," but passed regardless of the possible constitutional issues.[82] Upon the successful passage of the CRRA many artists actively started lobbying for "Congress to pass federal legislation, but dealers, collectors, museum officials and some young artists (whose concern was the possible ending of investments by collectors) contested the law."[83]

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of the sales price [goes] to the artist.").

77. *See id.* at 75. Other than California, resale royalty legislation was "introduced in Connecticut, Florida, Illinois, Iowa, Maine, Michigan, Nebraska, New York, Ohio, Rhode Island, and Texas"—none became state law other than California. *Id*.

78. *See* Mastrangelo, *supra* note 43, at 23–26.

79. *See* CAL. CIV. CODE § 986(a) (West 2015). According to the statute, secondary sales occur "[w]hen a work of fine art is sold at an auction or by a gallery, dealer, broker, museum, or other person acting as the agent for the seller . . . ." *Id.* The agent then "withhold[s] 5 percent of the amount of the sale," locates, and then pays the original artist. *Id.* The work's initial sale must be $1,000.00 or more for the resale royalty to take effect. *Id.*

80. Emily Eschenbach Barker, *The California Resale Royalty Act: Droit de [not so] Suite*, 38 HASTINGS CONST. L.Q. 387, 389 (2011). "An artist may only waive this right 'by a contract in writing providing for an amount in *excess* of five-percent of the amount of such sale,'" thus the right is not waivable and still allows for artists and dealers to contract above the statutory limit, but does not allow for the waiver of anything below 5%. *Id.*

81. CAL. CIV. CODE § 986. The artist does not have to be a citizen of California for the royalty to apply, the only prerequisite is that the artist is a United States citizen. *See id.*

82. Turner, *supra* note 8, at 339.

83. Mastrangelo, *supra* note 43, at 24. Other controversial portions of the bill included the collection of resale royalties "if the seller is based in California," but the auction took place in another state. Allison Schten, *No More Starving Artists: Why the Art Market Needs a Universal Artist Resale Royalty Right*, 7 NOTRE DAME J. INT'L & COMP. L. 115, 124 (2017).

In 1980, the Ninth Circuit case *Morseburg v. Babylon* upheld the first litigated challenge to the CRRA.[84] The case involved a "Beverly Hills art dealer," who claimed that "the 1909 Copyright Act preempted the CRRA" since the CRRA impaired the dealer's ability to sell or transfer their property.[85] The *Morseburg* court found the Copyright Act did not preempt the CRRA because "[t]echnically speaking such acts in no way restrict the transfer of art works."[86] The court also reasoned the CRRA did not "violate the Contracts clause," because the harm to "Morseburg's contract was not severe and served a 'generalized economic or social purpose.'"[87] The CRRA was left unchallenged until 2011 when "three classes of artists sued Christie's and Sotheby's, the two largest auction houses in the United States, for allegedly failing to make [resale royalty] payments under the California law."[88] This challenge led to a string of cases including *Estate of Graham v. Sotheby's, Inc.*,[89] *Sam Francis Foundation v. Christies, Inc.*,[90] a Supreme Court writ of certiorari denial,[91] finally culminating in 2018 with the Ninth Circuit case *Close v. Sotheby's, Inc.*[92]

84. 621 F.2d 972, 975 (9th Cir. 1980) (holding that the 1909 Copyright Act did not preempt the CRRA, nor did the CRRA violate the Contracts Clause or the Due Process Clause of the U.S. Constitution).

85. Mastrangelo, *supra* note 43, at 24; *see also Morseburg*, 621 F.2d at 975. The *Morseburg* court addressed the issue of retroactivity and the resale right within the due process claim analysis by stating, "[m]uch legal business consists of assisting clients to adjust their affairs to the new laws." *Morseburg*, 621 F.2d at 980. It has been said that "[o]nly when such retroactive effects are so wholly unexpected and disruptive that harsh and oppressive consequences follow is the constitutional limitation exceeded," thus this law was not arbitrary and capricious, and did not violate Due Process. *Id.* "In regard to the first sale doctrine the court concluded that section 27 of the Copyright Act of 1909 did not, by implication, preclude states from passing resale royalty legislation because it did not 'technically speaking' restrict the transfer of works of art." Shipley, *supra* note 67, at 15.

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

87. Mastrangelo, *supra* note 43, at 24–25.

88. Turner, *supra* note 8, at 339.

89. 178 F. Supp. 3d 974, 999 (C.D. Cal. 2016), *aff'd in part, rev'd in part and remanded sub nom*. Close v. Sotheby's, Inc., 894 F.3d 1061, 1064 (9th Cir. 2018) (holding that the CRRA conflicted with the first sale doctrine and was expressly preempted by the Copyright Act of 1976).

90. 784 F.3d 1320, 1326 (9th Cir. 2015) (holding that the CRRA provisions violated the Dormant Commerce Clause but the offending provision of the statute regarding art sales outside of California was severable from the remainder of the statute). "We hold that the provision regulating out-of-state sales violates the Dormant Commerce Clause but that the provision is severable from the remainder of the Act." *Id.*

91. Sam Francis Found. v. Christies, Inc., 577 U.S. 1062 (2016) ("Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.").

92. Turner, *supra* note 8, at 339; *see Close*, 894 F.3d at 1068 (holding that the CRRA conflicted

As the Ninth Circuit summarized, the district court in *Estate of Graham*, "dismissed plaintiffs' complaints with prejudice, holding that the CRRA's regulation of sales outside California violated the dormant Commerce Clause and the offending portion of the statute was not severable."[93] On the first appeal, the Ninth Circuit, sitting en banc, agreed with the district court's ruling regarding the Dormant Commerce Clause but overruled the severability ruling, possibly allowing the resale royalty to attach to in-state sales.[94] On remand, the district court in *Estate of Graham* held that federal copyright law preempted the CRRA.[95] The case went back up on appeal to the Ninth Circuit, which briefly discussed the defendants' takings claims arguments.[96] However, the court ultimately held that the CRRA was only operative for works resold during one year—the period between the CRRA's effective date of January 1, 1977 and the 1976 Act's effective date of January 1, 1978—since the Copyright Act of 1976 preempted the CRRA under the express preemption provision in 17 U.S.C § 301(a).[97]

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with the 1976 Copyright Act and thus was preempted to claims arising after the Copyright Act effective dates).

93. *Close*, 894 F.3d at 1067. The *Graham* court found the CRRA explicitly regulated "sales of fine art occurring wholly outside California," thus creating a per se violation of the Dormant Commerce Clause. *Graham*, 860 F. Supp. 2d at 1124.

94. *Sam Francis Found.*, 784 F.3d at 1326.

95. Estate of Graham v. Sotheby's, Inc., 178 F. Supp. 3d 974, 982–91 (C.D. Cal. 2016), *aff'd in part, rev'd in part and remanded sub nom*. *Close*, 894 F.3d at 1061 (finding both express and conflict preemption). Regarding conflict preemption, "the first sale doctrine provides that 'once the copyright owner places a copyrighted item in the stream of commerce by selling it, he has exhausted his exclusive statutory right to control its distribution[,]'" thus the CRRA was in conflict with the first sale provision, which would make it in conflict with federal law. *Id.* at 982. Regarding express preemption the district court held that the 1976 Act expressly preempts the CRRA because "the CRRA does no more than broaden the distribution rights granted under the Copyright Act." *Id.* at 989.

96. *Close*, 894 F.3d at 1074–76. The Defendants in *Close* argued the CRRA "effects an unconstitutional taking in violation of the Fifth Amendment" because after the first sale of works "artists have no further property interest," and cannot receive 5% of the resale without violating the Takings Clause. *Id.* at 1074. The court chose to not answer the takings claim issue, but still does some interesting analysis of the issue, including comparing the CRRA to "legislation imposing rent control, setting a minimum wage, or requiring a zoning permit," and stating, "[t]he application of the CRRA to sales of fine art acquired *before* the CRRA's enactment suggests greater interference with 'investment-backed expectations,' and may raise a concern under the Takings Clause." *Id*. at 1075 (quoting Lingle v. Chevron U.S. Inc., 544 U.S. 528, 539 (2005)).

97. *Id.* at 1075–76. The CRRA "had a short effective life . . . permissibly coexist[ing] for exactly one year alongside the 1909 [Copyright] Act," until it was preempted by the 1976 Act which codified the first sale doctrine in 17 U.S.C. § 301(a). *Id.* at 1076.

2. ARR Federal Legislation Attempts

The failed attempts to enact post-VARA federal ARR legislation[98] started in 2011 with the Equity for Visual Artists Act of 2011 (EVAA).[99] The EVAA, brought by Representative Nadler (Democrat) and Senator Kohl (Democrat), included a 7% resale royalty for secondary sales over $10,000, split between the copyright owner and "an escrow account to support U.S. nonprofit museums in their future purchases of visual art created by living artists domiciled in the United States."[100] Representative Nadler changed the name to the American Royalties Too Act (ART Act) and tried to pass it again in 2014, 2015, and 2018, with a reduced royalty rate of 5%, capped at $35,000, paid in full to the artist through a Copyright Office designated collection society—all attempts were sent to committee without a vote.[101] These last three attempts included the same provisions, but the 2018 attempt marked the first time the bill was introduced to both the Senate and House of Representatives via bipartisan judiciary committee leaders.[102] The 2018

98. *See* Mastrangelo, *supra* note 43, at 22–23. A federal resale royalty was included in "the original version of VARA, introduced to Congress in 1978 and amended in 1986 and 1987, . . . but was so controversial that it was finally deleted from" the final 1990 VARA bill. *Id.*

99. *See id.* at 26.

100. 2013 COPYRIGHT REPORT, *supra* note 12, at 23–24. The EVAA limited "the royalty to sales at [public] auction, excluding Internet sales," with a public auction house defined as "an entity that sells to the highest bidder works of visual art in which the cumulative amount of such works sold during the previous year is more than $25,000,000 and does not solely conduct the sale of visual art by the entity on the Internet." *Id.* at 23. The EVAA failed to pass because legislators feared that the act would would shift sales from public auction houses to "the private sector to avoid the royalty," and artists would receive "less than 3 percent of the total royalty because of the subtractions provided by the law." Mastrangelo, *supra* note 43, at 26–27.

101. *See, e.g.*, American Royalties Too Act of 2014, H.R. 4103, 113th Cong. (2014); American Royalties Too Act of 2015, H.R. 1881, 114th Cong. (2015); American Royalties Too Act of 2018, H.R. 6868, 115th Cong. (2018); Schten, *supra* note 83, at 124 ("In 2014 the American Royalties Too Act was introduced in Congress but ultimately failed to pass. Its proposed terms would have imposed a five percent royalty rate on public sales of $5,000 or more, capping the maximum royalty at $35,000. Sotheby's and Christie's, two of the largest auction houses in the world, allegedly spent more than $1 million in lobbying efforts against the bill.").

102. *See* Terry Hart, *2019 in US Copyright Law and Policy*, COPYHYPE (Jan. 7, 2019), https://www.copyhype.com/2019/01/2019-in-us-copyright-law-and-policy/. In 2018, Jerry Nadler (D-NY) was a ranking member of the House Judiciary Committee, the committee that oversees intellectual property issues. *See id.* Nadler and Collins were both instrumental to the passage of the Music Modernization Act, a major and much-needed update to music related copyright statutes. *See id.* In addition to Nadler, Senators Orin Hatch (R-UT) and Patrick Leahy (D-VT), plus Representative Doug Collins (R-GA) introduced the 2018 ART Act. *See* Press Release, Jerry Nadler, House of Representatives, Nadler, Hatch, Leahy & Collins Introduce Bipartisam, Bicameral American Royal-

ART Act language provided for a resale royalty on auction house secondary sales only, excluding online and private secondary sales, taking effect one year after the bill's passage.[103] Curiously, the bills contained no concrete language regarding whether the first or secondary sales needed to occur after the bill passage; in fact, there is no mention of the first sale in the bills at all.[104] The only mention of any effective dates was in regards to when the bill would take effect.[105] Thus, it appears the first sale could have occurred prior to the bill passage, but the secondary sales must occur at least one year after passage.[106] Since 2018 there have been no more attempts to pass ARR legislation in the United States, but interest in the ARR has continued to grow within the fine art community.[107]

3. United States Art and Auction Market Since 2018

The United States contemporary and ultra-contemporary art[108] auction market has continued to skyrocket in the past couple of years, with numerous young artists' work reselling for astronomical prices at public auction.[109]

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ties Too Act, (Sept. 25, 2018), https://nadler.house.gov/news/documentsingle.aspx?DocumentID=391396.

103. *See* American Royalties Too Act of 2018, H.R. 6868, 115th Cong. (2018).

104. *See id.*

105. *See id.*

106. *See id.*

107. *See* Tim Schneider, *Why Better Artist Resale Royalties Are an Opportunity for Better Business in the Art Market (and Other Insights)*, ARTNET NEWS (July 13, 2022), https://news.artnet.com/news-pro/gray-market-artist-resale-royalty-2145967 (arguing for the implementation of the ARR in the United States while negating the issues ARR detractors use to argue against passage of the royalty—issues including the ARR moving business to non-ARR regions for the secondary art market).

108. *See* Tim Schneider & Julia Halperin, *'Contemporary Artist' Means Everyone from Andy Warhol to Avery Singer. Here's a New Category for the Art of Our Time*, ARTNET (Dec. 9, 2021), https://news.artnet.com/market/ultra-contemporary-explainer-1493983. Ultra-contemporary art "strictly applies to artists born from 1975 to the present day, as a way to bring valuable visibility to the youngest talents with strengthening secondary markets. (We defined contemporary as artists born from 1945 to 1974.)." *Id.*

109. *See id.* (analyzing auction figures for the ultra-contemporary compared to contemporary artists); *see also* Casey Lesser, *10 Breakthrough Artists at Auction in 2022*, ARTSY (Dec. 15, 2022, 8:19AM), https://www.artsy.net/article/artsy-editorial-10-breakthrough-artists-auction-2022. Contemporary Artist Anna Weyant's painting, *Falling Women*, sold for $37,800 in November of 2021, but then sold for $1,623,000 in May of 2022 at a public auction. *See id.* Contemporary artist Rachel Jones's painting, *Spliced Structures*, initially sold for $19,223 in March of 2021, and then sold for $1,202,702 at a public auction in March of 2022. *See id.* Whether either of these artists received

However, without a federal ARR in place, there is still no sharing of these secondary sale profits—profits similar to the famous Rauschenberg auction incident, but coming within a shorter period of time.[110] The year 2022 saw the United States in first place for world auction market turnover, grabbing a 39% market share with auction sales at just over $1 billion for the year.[111] The rest of the top worldwide art market numbers are as follows: China (27% market share, $740 million auction turnover, no ARR), United Kingdom (18% market share, $486 million auction turnover, ARR since 2006), and France (3% market share, $68 million auction turnover, ARR since 1973).[112] The auction market looks extremely bright for young artists in the ultra-contemporary designation, and it will continue to rise for them, according to numerous auction forecasts.[113]

III. WITH THE PASSAGE OF A FEDERAL ARR COMES THE TAKINGS CLAIMS AND DEFENSES

This Comment assumes that the ARR will pass at the federal level similar in form to the American Royalties Too Act of 2018 (and for argument's sake this will be the basic statutory form analyzed).[114] Once the ARR passes, sellers—via public auction houses or sellers themselves—will inevitably

royalties for the secondary sales via contract is not mentioned, but there is a high probability they did not, due to the artist's limited bargaining power upon a first sale. *See id.*

110. Whitney Kimball, *Shouldn't Artists Benefit When Their Paintings Auction for Millions?*, SLATE (June 29, 2014, 11:45PM), https://slate.com/culture/2014/06/artists-royalties-and-droit-de-suite-the-american-royalties-too-act.html (referencing the first "scandolously record-breaking Sotheby's art auction" in 1973 involving Robert Scull who profited on fifty artworks, including Robert Rauschenberg's paiting, *Thaw*, stating Rauschenberg watched the piece, "which he had initially sold for $900," sell for $85,000).

111. *See* ARTPRICE.COM, THE ULTRA CONTEMPORARY ART MARKET IN 2022 5 (2022), https://imgpublic.artprice.com/pdf/the-contemporary-art-market-report-2022.pdf.

112. *See id.*

113. *See* Liz Catalano, *Ultra-Contemporary Art Ascendant: The Rise of the Market's Newest Category*, AUCTIONDAILY (Dec. 9, 2021), https://auctiondaily.com/news/ultra-contemporary-art-ascendant-the-rise-of-the-markets-newest-category/ ("[T]he future of ultra-contemporary art looks extraordinarily bright. The current market appears undeterred by worries about speculation, and auction houses show no signs of reducing their offerings of fresh art.").

114. *See supra* Section II.B.2 (discussing the history of the American Royalties Too Act of 2018 and prior attempts). In a recent conversation, contemporary artist Laura Owens proposed naming the legislation "The Van Gogh Act" or a similar title, leveraging the story of the famous artist who died impoverished but whose works now command hundreds of millions, with the aim of bolstering public backing for the bill and increasing its likelihood of approval. Interview with Laura Owens, Fine Artist and Professor, ArtCenter, in Los Angeles, Cal. (Dec. 17, 2022).

file lawsuits.[115] These lawsuits will attempt to block the legislation through any means possible by using previous CRRA-related federal litigation as a guidepost.[116] If secondary sellers refuse to pay artists, similar to the events surrounding the CRRA cases, artists may bring suit against the sellers, or auction houses, demanding their statutorily mandated royalties, thus bringing in the takings claim as a defense for the auction houses and the sellers they represent.[117] Whichever way this new law gets to trial, takings claims will be front and center.[118]

Takings claims have appeared in all the CRRA cases, and in numerous commentaries on the federal resale royalty legislation.[119] The Ninth Circuit resolved the CRRA cases without fully analyzing the takings issue.[120] Dormant Commerce Clause claims, initially preempting the CRRA, will not apply to a federal ARR right because the federal government has the "authority to control commerce among the states."[121] Bill of Attainder claims are most likely unrealistic,[122] and the first sale doctrine can be statutorily by-

115. *See* Jillian Steinhauer, *Auction Houses Lobby Against Artist Resale Royalty Act*, HYPERALLERGENIC (Mar. 24, 2014), https://hyperallergic.com/116238/auction-houses-lobby-against-resale-royalty-act/ (discussing how Sotheby's and Christie's spent a significant amount of money lobbying against the ART Act of 2014).

116. *See generally* Close v. Sotheby's Inc., 894 F.3d 1061, 1067–68 (including defenses and challenges to the ARR that have yet to be answered, including takings claims).

117. *See id.* (discussing the history of the claims against the CRRA and the past claims that were analyzed by the courts prior to reaching the Ninth Circuit in this case).

118. *See* 2013 COPYRIGHT REPORT, *supra* note 12, at 60–63 (discussing the different claims which could be brought against the ARR with takings claims being the only claim that "cannot be predicted with certainty").

119. *See id.* at 21–22, 60–64 (discussing the string of cases against using the CRRA and an ARR takings claim analysis).

120. *See Close*, 894 F.3d at 1067–68 (holding that the CRRA was preempted by the 1976 Copyright Act and did not have to answer the defendant's takings claim).

121. 2013 COPYRIGHT REPORT, *supra* note 12, at 21.

122. *See* U.S. CONST. art. I, § 9, cl. 3 (creating the Bill of Attainder Clause); *see* 2013 COPYRIGHT REPORT, *supra* note 12, at 64 (quoting Selective Serv. Sys. v. Minn. Pub. Int. Rsch. Grp., 468 U.S. 841, 851 (1984) ("[The Bill of Attainder Clause prohibits] statutes that inflict punishment on [a] specified individual or group.") To succeed on a Bill of Attainder claim the Supreme Court has created a factor-based test inquiring "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a congressional intent to punish.'" 2013 COPYRIGHT REPORT, *supra* note 12, at 64–65 (quoting *Selective Serv. Sys.*, 468 U.S. at 846–47). The resale royalty does not resemble "punishment historically associated with bills of attainder, which include the death penalty, 'imprisonment, banishment, . . . [and]the punitive confiscation of property,'" and the royalty right will most likely not be found to further a punitive legislative purpose, because courts have given

passed by new legislation creating the resale right.[123] Additionally, due process claims will likely be unsuccessful since it will be extremely difficult to prove "that the legislature has acted in an arbitrary and irrational way."[124] Thus, takings claims are likely the only legitimate claim against a federal resale royalty right.[125] The question is what type of takings claim will this be, and how might the conservative-leaning, property-rights-driven Supreme Court analyze the different types of takings claims?[126]

Congress "broad deference . . . when it legislates pursuant to its Copyright Clause authority." *Id.* Another way around the claim is to not limit the resale royalty law "to large auction houses." *Id.* at 65.

123. 2013 COPYRIGHT REPORT, *supra* note 12, at 60 ("[T]he [Copyright] Office concludes that the first sale doctrine presents no legal barrier to the enactment of a resale royalty right. Even if the right is viewed as a partial modification of the doctrine, such a change is within Congress's power to implement, subject to the constitutional considerations discussed next."); *see also* Eldred v. Ashcroft, 537 U.S. 186, 204 (2003) (on question of "whether [legislation] is a rational exercise of the legislative authority conferred by the Copyright Clause," courts "defer substantially to Congress"); *id.* at 222 ("As we read the Framers' instruction, the Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause."); Sony Corp. of Am. v. Univ. City Studios, Inc., 464 U.S. 417, 429 (1984) ("[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors . . . in order to give the public appropriate access to their work product.").

124. 2013 COPYRIGHT REPORT, *supra* note 12, at 63 (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976)). The arbitrary and irrational test for due process claims would apply to both a retrospective and prospective resale royalty statute, and the Court has previously "expressed concerns about using the Due Process Clause to invalidate economic legislation." *Id.* at 64 (quoting E. Enter. v. Apfel, 524 U.S. 498, 537 (1998)).

125. *Cf.* Estate of Graham v. Sotheby's, Inc., 178 F. Supp. 3d 974, 992 (C.D. Cal. 2016), *aff'd in part, rev'd in part and remanded sub nom.* Close v. Sotheby's, Inc., 894 F.3d 1061 (9th Cir. 2018) (dismissing the Takings Clause claim, but on appeal the Ninth Circuit declined to answer that question, leaving it to factually specific events that may arise later). Successful takings claims will not make the resale royalty right unconstitutional, or preempt the law, but the threat of successful takings claims could stall the passing of the right or prevent the right from passing altogether. *See* 2013 COPYRIGHT REPORT, *supra* note 12, at 62 (discussing the resale royalty law's effects in light of a regulatory taking's analysis).

126. *See* Horne v. Dep't of Agric. (*Horne II*), 576 U.S. 350, 364–65, (2015) (holding when "a governmental mandate to relinquish specific, identifiable property as a 'condition' on permission to engage in commerce," does in fact create a per se taking); *see also* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2080 (2021) (holding that a regulation allowing unions the right to enter employers' property at specifically identified times to recruit employers' workers was a per se physical taking requiring just compensation). *Cedar Point* and *Horne II* show the current Supreme Court taking a greater property rights approach, creating per se takings out of what used to be regulatory takings. *See Horne II*, 576 U.S. at 365–66.

A. Takings Claims and the Resale Royalty: Threshold Matters

1. Standing

As a threshold matter, to bring takings claims on behalf of the sellers, the auction houses will need to have standing before any court will answer whether this constitutionally protected property interest has been taken "for public use, without just compensation."[127] The 2016 case *Estate of Graham v. Sotheby's, Inc.*, thoroughly addressed the standing issue.[128] The artists who brought the suit challenged the auction houses' standing because the auction houses "never held title to the underlying art and, at most, acted as agents for their clients in effecting sales."[129] The district court in *Graham* found the "injury that would result from the imposition of those royalties is patently sufficient to confer standing" to the auction houses.[130]

The CRRA cases are informative because similar arguments will arise at the outset of any case brought against a federal resale royalty.[131] However, the lack of standing argument will most likely not pass muster because the auction houses will have to pay the resale royalty directly to a resale royalty collection society, similar to DACS in the United Kingdon.[132] The royalties paid by auction houses might even come out of the percentages the auction houses are taking from the sales, thus directly affecting auction house profits.[133] Also, auction houses are agents of the seller, thus certain fiduciary du-

127. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

128. 178 F. Supp. 3d at 991–92.

129. *Id.* at 991.

130. *Id.* at 992.

131. *See id.* at 991–92; *see also* Close v. Sotheby's, Inc., 894 F.3d 1061, 1067–68 (9th Cir. 2018).

132. *See What is DACS?*, DACS, https://www.dacs.org.uk/about-us/what-is-dacs (last visited Sept. 23, 2023) ("We collect and distribute royalties to visual artists and their estates through Payback, Artist's Resale Right, Copyright Licensing and Artimage."). *But see* Appellants' Reply to (1) Joint Brief Of Appellees Christie's, Inc. and Sotheby's, Inc. and (2) Answering Brief of Defendant-Appellee Ebay Inc., Close v. Sotheby's, Inc., 894 F.3d 1061 (9th Cir. 2018) (No. 16-56234) 2017 WL 4077685, at *38 [hereinafter "Apellate Brief"]. The Plaintiff's reply brief in *Close* disputes that the auction houses have standing to claim a takings violation. *See id.* ("Defendants do not contend that the CRRA takes any property from them. . . . This is because the CRRA provides that the seller, not the auction house defendants, bears the financial obligation to pay artists. The defendants are obligated by the statute only effectuate that payment.").

133. *See Frequently Asked Questions in Online Auctions*, CUNNINGHAM AUCTIONS, https://www.cunninghamauctions.com/faq (last visited Sept. 23, 2023) ("A buyer's premium is an additional charge, usually a straight percentage, that a buyer is charged based on the hammer

ties may allow for standing in this type of suit.[134] Thus, a court will assess whether there is a constitutionally protected property interest at stake before starting a regulatory or per se takings analysis.[135]

2. Is the ARR a Constitutionally Protected Property Interest?

The ARR does not fall into the "'classic taking'" category where "the government directly appropriates private property for its own use."[136] However, private property interests taken via economic regulations can, and have been, considered a constitutionally protected property interest, and thus a taking can occur within certain economic regulatory schemes.[137] The Court recently stated the Takings Clause protects the "appropriation of personal property," just like it would protect the taking of real property—fine art, and the money that goes along with the sale of fine art, definitely fall into the realm of personal property.[138] The resale royalty property interest is some-

price."). A 15% buyer's premium can include numerous fees and taxes, but also could be included in the ARR, thus directly coming from auction house profits. *See id. But see* Appellate Brief, *supra* note 132, at *38. "In short, it's not the auction houses' money that is used to pay the 5%; instead, it's the seller's money. Defendants concede this when they state that the CRRA takes property from the sellers they represent." *Id.*

134. *See* Judith Prowda, *On The Artist-Dealer Relationship*, STROPHEUS LLC, https://stropheus.com/artist/artist-dealer-relationship/ (last visited Feb. 7, 2023) ("Fiduciary relationships are common in the art market. By law, a fiduciary acts on behalf of the principal. Similar to the dealer, who acts as a fiduciary to an artist he represents, auction houses are fiduciaries to their consignors."). *But see* Appellate Brief, *supra* note 132, at *41. Plaintiffs in *Close* argued that the auction houses were mere vendors, not owners; thus, are they entitled "standing to assert its vendees' rights." *Id.* (quoting Hong Kong Supermarket v. Kizer, 830 F.2d 1078 (9th Cir. 1987)).

135. *See* Appellate Brief, *supra* note 132, at *41.

136. E. Enters. v. Apfel, 524 U.S. 498, 522–23 (1998) (discussing a regulatory scheme where the Court applied a regulatory taking analysis to a situation involving the federal government mandated funding of healthcare benefits to retired coal mine workers by their previous coal operator employer).

137. *See* Horne v. Dep't of Agric. (*Horne II*), 576 U.S. 351, 368 (2015) (explaining the Hornes' status as raisin growers created a unique situation in that they have "full economic interest in the raisins").

138. *See id.* at 357–58. "The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home." *Id.* The *Horne II* opinion delves deep into the history and principles of the Takings Clause, going as far back as the year 1215 to the Magna Carta, "which specifically protected agricultural crops from uncompensated takings," which was then utilized by the early United States colonists regarding the taking of private property, through to the creation of the Constitution. *Id.* The clause was possibly created because of the "arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war, without any compensation." *Id.* at 359 (quoting

what similar to the *Eastern Enterprises* property interest.[139] *Eastern Enterprises* dealt with the Coal Act, which federally mandated coal mine royalties to be set aside for a coal mine worker's health care fund, leading the plurality directly to a regulatory takings analysis without even considering whether a constitutionally protected property interest was taken.[140] The plurality reasoned that the Coal Act would permanently deprive Eastern "of those assets necessary to satisfy its statutory obligation," thus the Coal Act royalties were a protected property interest that could be taken.[141]

Considering that the *Eastern* Court found a protected property interest in the Coal Act royalties, the ARR right is a protected property interest.[142] Like the Coal Act, the ARR could be viewed as permanently depriving the "assets necessary to satisfy its statutory obligation," since the art seller, or auction house, is deprived of the sale profits to pay for the royalty.[143] The ARR deals with *specific* property, fine art pieces, and the money associated with those fine art pieces—taken from the owners of those fine art pieces and paid to a third party.[144] The ARR percentage taken from the sale of a painting would permanently deprive the owner of those specific assets in order to satisfy the statutory needs, exactly like the situation in *Eastern*.[145] Thus, the

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WILLIAM BLACKSTONE, COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 305–06 (St. George Tucker ed., 1803)).

139. *See generally E. Enters.*, 524 U.S. at 522–23 (noting the similarities and differences between per se and regulatory takings).

140. *See id.* at 523. *But see id.* at 540 (Kennedy, J., concurring in the judgment and dissenting in part) ("To the extent [the Coal Act] affects property interests, it does so in a manner similar to many laws; but until today, none were thought to constitute takings. To call this sort of governmental action a taking as a matter of constitutional interpretation is both imprecise and, with all due respect, unwise."). According to Kennedy's concurrence in part and dissent in part, the Coal Act did not signify a taking of a constitutionally protected property interest because it "neither targets a specific property interest nor depends upon any particular property for the operation of its statutory mechanisms. The liability imposed on Eastern no doubt will reduce its net worth and its total value, but this can be said of any law which has an adverse economic effect." *Id.* at 543.

141. *Id.* at 523.

142. *See id.*

143. *See id.*

144. *See Resale Royalty Right*, COPYRIGHT.GOV, https://www.copyright.gov/docs/resaleroyalty (last visited Sept 23, 2023) ("An artist resale royalty, or droit de suite as it is often called in Europe, provides artists with an opportunity to benefit from the increased value of their works over time by granting them a percentage of the proceeds from the resale of their original works of art.").

145. *See E. Enters.*, 524 U.S. at 523 (reasoning the Coal Act would permanently deprive Eastern "of those assets necessary to satisfy its statutory obligation," thus the Coal Act royalties were a protected property interest that could be taken) (quoting Connolly v. Pension Benefit Guar. Corp., 475

resale royalty is likely a constitutionally protected property that could support takings claims, especially if the resale royalty is retrospective in any manner—reaching back prior to the passing of the ARR to first sales, resales, or both, and applying the royalty to those past sales.[146]

If the resale royalty is written prospectively and does not attach to any first sale or resale prior to the passing of the ARR, this analysis could change.[147] The *Graham* court found no property interest existed to warrant a takings claim within the CRRA context because the California statute made it "clear that the five percent royalty interest is not the reseller's 'property.'"[148] The CRRA accomplished this lack of a property interest through exempting the 5% resale royalty from any money judgment enforcement by the creditors of the seller or agent.[149] The court also explained that this type of royalty is exactly what the "Copyright Act has done for over a century: it transfers certain interests in intellectual property from downstream owners to original artists."[150] The Copyright Act gives Congress the power to "promote the progress of science and useful arts," by creating an exclusive right for artists over a limited time, thus serving as a property interest limitation on non-artists, and placing the royalty outside the bounds of the Takings Clause.[151]

If the royalty is truly prospective and includes a provision similar to the CRRA, the seller would have never owned the 5%, and the seller, or auction house agent, would not be able to claim a constitutionally protected property

U.S. 211, 222 (1986)).

146. *See* Brian L. Frye, *Equitable Resale Royalties*, 24 J. INTELL. PROP. L. 237, 256 n.92 (2017) ("However, a retroactive resale royalty right might be a 'taking' under the Fifth Amendment, because it would affect the property rights of an owner of a particular copy of a work of authorship.").

147. *See* 2013 COPYRIGHT REPORT, *supra* note 12, at 77 ("To minimize the likelihood of a constitutional challenge on this basis, the Office recommends that Congress strongly consider applying any resale royalty legislation prospectively only.").

148. Estate of Graham v. Sotheby's, Inc., 178 F. Supp. 3d 974, 993 (C.D. Cal. 2016). The idea that the property was never owned by the seller is an interesting addition to any federal resale royalty legislation and is explored in later sections of this Comment. *See id.*; *see also infra* Section IV.A. This will work perfectly with a true prospective federal resale royalty, but probably would not pass muster on a retroactive royalty, so the question remains how far back is too far back for the royalty to reach without triggering takings claims? *See infra* Section IV.B.

149. *See Graham*, 178 F. Supp. 3d at 993 (quoting CAL. CIV. CODE § 986(a)(6) (West 2015)).

150. *Id.* at 994.

151. U.S. CONST., art. I, § 8, cl. 8; *Graham*, 178 F. Supp. 3d at 994 ("In sum, Defendants' clients never possessed property interests in the entire resale value of the artwork they purchased. California's redistribution of that interest is not an infringement on traditional property rights; instead, it is a valid regulation of intellectual property that has been practiced for hundreds of years.").

right was ever taken from them.[152] Thus, the challenge is to make the statute retroactive to make up for at least some lost revenue attaching to a first sale without triggering a takings claim.[153]

3. Is the ARR a Taking for Public Use?

The United States Constitution prohibits the taking of private property "for *public use*, without just compensation," but what is a *public use*, and is the resale royalty a "taking" for the public use?[154] According to the Supreme Court in *Armstrong v. United States*, the main directive of the Takings Clause is to prevent the individual from bearing the burden that "should be borne by the public as a whole."[155] The Court in *Kelo v. City of New London* analyzed the public use requirement of the Fifth Amendment stating, "[w]ithout exception, our cases have defined [public use] broadly, reflecting our longstanding policy of deference to legislative judgments in this field."[156] The *Kelo* Court relied, in part, on *Hawaii Housing Authority v. Midkiff*, which most closely resembles the resale royalty.[157] In *Midkiff*, the Court found a constitutional public use when just compensation was paid during the transfer of land titles from landlord to lessee.[158] The *Midkiff* Court reasoned "the State's purpose of eliminating the 'social and economic evils of a land oligopoly' qualified as a valid public use."[159] Also, transferring property directly from one private owner to another did not diminish the "public use" aspect of the analysis.[160]

Midkiff and the resale royalty are somewhat similar because both include a transfer of property from one owner to another, from private citizen

152. *See Graham*, 178 F. Supp. 3d at 993.

153. *See infra* Section III.B (discussing how to create a retroactive ARR statute without triggering a regulatory or per se taking).

154. U.S. CONST. amend. V.

155. 364 U.S. 40, 49 (1960).

156. 545 U.S. 469, 480 (2005) (holding that although the city could not confer land from one private owner to another, this particular development plan went under careful consideration, did not "benefit a particular class of identifiable individuals," and thus could be defined as a public use). *Id.* at 438.

157. *See id.* at 481; *see also* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 233–34 (1984).

158. *See Kelo*, 545 U.S. at 481–82.

159. *Id.* at 482 (quoting *Midkiff*, 467 U.S. at 235).

160. *Id.* The *Midkiff* Court explained "it is only the taking's purpose, and not its mechanics," thus negating any argument about the way in which the taking is transferred, and to whom the payment is transferred. *Midkiff*, 467 U.S. at 230.

to private citizen.[161] However, the resale royalty is a small percentage of the overall sale (5%) rather than the entire land title, and there is no just compensation paid to the art seller.[162] The Court has historically allowed the legislature broad deference to define the public use prong, especially in an area that the legislature has control over, and as applied to ARR, that area is copyright.[163] The Constitution specifically mandates Congress to set up and create copyright statutes protecting copyright owners, thus any new copyright statute protecting visual artists would fall under legislative control.[164]

Still, how is the ARR a "public use" when it is clearly targeting one part of the population, visual artists, and not necessarily helping the public at large?[165] *Midkiff* answers this issue through stating "public use" can include the process of "correcting market failure" through correcting market deficiencies via redistribution of fees.[166] In *Midkiff*, market deficiencies were corrected because the Land Reform Act's redistribution of fees simple was determined by the legislature to be a "rational exercise of the eminent domain power."[167] The ARR is simply a redistribution of fees to copyright owners correcting a failure within the art market and copyright statutes,[168] which previously disallowed visual artists to participate in the profits of their copyrights; thus, the ARR falls within the *Kelo* and *Midkiff* public use jurisprudence.[169]

Many other public use arguments are available for the ARR.[170] The most obvious argument is that the public is better off with art as it provides

161. *See id.* at 233–34.

162. *Compare* CAL. CIV. CODE § 986(a) (West 2015) *with Kelo*, 545 U.S. at 472.

163. *See Kelo*, 545 U.S. at 480.

164. *See* U.S. CONST. art. I, § 8, cl. 8.

165. *See Midkiff*, 467 U.S. at 242–43.

166. *Id.*

167. *Id.* at 243.

168. *See* 1976 Copyright Act, 17 U.S.C §§ 101–805, 1001–1205.

169. *See* Kelo v. City of New London, 545 U.S 469, 481–86. "Quite simply, the government's pursuit of a public purpose will often benefit individual private parties. For example, in *Midkiff*, the forced transfer of property conferred a direct and significant benefit on those lessees who were previously unable to purchase their homes." *Id*. at 485.

170. *See* Randy Cohen, *10 Reasons to Support the Arts in 2021*, AMS. FOR ARTS (Mar. 2021), https://www.americansforthearts.org/by-program/reports-and-data/legislation-policy/naappd/10-reasons-to-support-the-arts-in-2021 ("Arts have social impact. University of Pennsylvania researchers have demonstrated that a high concentration of the arts in a city leads to higher civic engagement, more social cohesion, higher child welfare, and lower poverty rates.").

culture, education, perspective and expression for public consumption.[171] If artists are paid properly, more art will be created, thus the public will receive all the previous benefits stated and be able to enjoy more art, and so on and so forth.[172] Fine art is showcased in beautiful monuments and museums around the country and world.[173] These monuments and museums are tourist attractions, expanding the understanding of the world and defining a time, place, and culture surrounding the creation of that art.[174] If artists are not paid properly for their work, there will be no art to fill the museums, no incentive for the artists to continue making art, and no basis to allow artistic development.[175] These are grand overarching themes of the public benefits of fine art, but government-mandated royalties for fine artists clearly relate to an interest that judicial deference has deemed sufficiently public; thus the ARR is a "public use."[176]

If the ARR is indeed a taking for a public use, the next step is to figure out what kind of taking it is—a regulatory[177] or a per se physical taking[178]—and arguably, it appears to have all the markings of a regulatory taking.[179] But further analysis of both regulatory and per se takings is necessary to see

171. *See id.*

172. *See id.* (discussing the benefits and cultural impact art provides for the public).

173. *See, e.g.*, Alex Greenberger & Emily Watlington, *The 25 Best Museum Buildings of the Past 100 Years*, ARTNEWS (Jan. 24, 2022, 12:18PM), https://www.artnews.com/list/art-news/artists/best-museum-buildings-1234615068/ (listing and describing buildings housing fine art around the world).

174. *See, e.g.*, Michael Juliano & Rhys Thomas, *The 20 Best Museums to Visit in Los Angeles*, TIMEOUT (May 16, 2023), https://www.timeout.com/los-angeles/attractions/essential-museums-to-visit-in-los-angeles (describing art museums as tourist attractions in Los Angeles).

175. *See, e.g.*, Ben Sisario, *Musicians Say Streaming Doesn't Pay. Can the Industry Change?*, N.Y. TIMES (May 10, 2021), https://www.nytimes.com/2021/05/07/arts/music/streaming-music-payments.html (discussing how musicians are not getting enough royalties and thus find it difficult to continue working within the arts).

176. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242–43 (1984).

177. *See* 2013 COPYRIGHT REPORT, *supra* note 12, at 61. "Regulatory takings . . . generally involve an 'interference' with property that 'arises from some public program adjusting the benefits and burdens of economic life to promote the common good.'" *Id.* (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

178. *See id.* "Physical takings [otherwise known as per se takings] relate to the government's duty under the Fifth Amendment's 'plain language' to provide compensation whenever it 'acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation.'" *Id.* (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 321 (2002)).

179. *See id.* ("The Supreme Court's takings jurisprudence . . . suggests that economic legislation challenged on retroactivity grounds generally should be analyzed under the regulatory takings framework.").

if the ARR is actually a public use taking that needs just compensation under the Fifth Amendment.[180]

B. Resale Royalty Right and Regulatory Takings

At first glance, the ARR appears to be a regulation that "goes too far," thus placing it within the regulatory takings analysis.[181] A regulation can be deemed to have gone "too far"[182] through an "essentially ad hoc,[183] factual inquir[y]," by analyzing factors initially identified in the 1978 Supreme Court case, *Penn Central Transportation Co. v. City of New York*,[184] including: "[1] the economic impact of the regulation, [2] its interference with reasonable investment backed expectations, [3] and the character of the governmental action."[185]

1. Economic Impact Factor

The first factor, economic impact of the regulation, weighs against a regulatory taking because a resale royalty capped the lesser of 5% or $35,000 will not severely impact overall profits, nor will it cause a diminution of value (overall loss of value) necessary to find a taking.[186] Looking at

180. *See id.* Even though it appears the ARR could only fall under the regulatory takings framework, there is a chance that under the recent *Horne II* and *Cedar Point* per se framework the ARR could be at the very least argued as a per se taking, necessitating an analysis within this Comment. *See supra* note 126 (discussing *Horne II* and *Cedar Point* holdings).

181. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."); 2013 COPYRIGHT REPORT, *supra* note 12, at 61.

182. *Mahon*, 260 U.S. at 415.

183. *See Ad Hoc*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/ad-hoc (last visited Oct. 25, 2023) (defining the adjective ad hoc as "happening or existing only for a particular purpose and not previously planned").

184. 438 U.S. 104, 124 (1978) (creating the *Penn Central* factors for analyzing regulatory takings, a test that over time has favored the government over private parties bringing takings claims). In *Penn Central*, the New York City Landmarks Preservation Act of 1965 selected specific buildings, including Grand Central Terminal owned by Penn Central, as landmark sites, meaning certain development restrictions were placed on these areas as to not allow destruction or altering of their character. *Id.* at 105. Penn Central claimed this type of development restriction was a taking, but the Court found otherwise while holding that the Act placed a reasonable restriction substantially related to the overall benefit of the city. *Id.* at 123–38.

185. E. Enters. v. Apfel, 524 U.S. 498, 523–24 (1998); *see Penn Central*, 438 U.S. at 124.

186. *See Penn Central*, 438 U.S. at 124 ("The economic impact of the regulation on the claimant

average United States and world auction data from the past year, a reduction in overall profits and auction sales is highly unlikely.[187] Even if the royalty constituted the total profits from the sale, when combined with the other factors, a regulatory taking may not be found.[188]

The Federal Circuit Court of Appeals examined diminution of value in *Rose Acre Farms, Inc. v. United States*, holding that no regulatory taking existed when the statutorily related diminution of value was only 10% of the egg producer's (Rose Acre Farms) market value.[189] The *Rose Acre Farms* court suggested that the Supreme Court consistently used a diminution of value approach to calculate economic impact, citing numerous Supreme Court cases utilizing this method.[190] Thus, even though profit loss is a factor in calculating economic impact, diminution of value is more important in the overall analysis.[191]

Regarding the resale royalty, there appears to be no diminution of value, and even if there were a slight diminution found, the Federal Court of Claims, a court that hears many regulatory taking claims, "has generally relied on diminutions well in excess of 85 percent before finding a regulatory taking."[192] If 10% diminution of value was too low for the court in *Rose*

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and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations."); *cf.* Barker, *supra* note 80, at 392–93 ("[T]he [CRRA] mandates a transfer of five-percent of the sale price, not the profit. Thus, the amount taken could in fact be a confiscation of the entire profit at the point of sale.").

187. *See Artprice 2021 Global Art Market Report: Main Trends and Key Figures*, *supra* note 55 (including 2021 global auction data such as "[g]lobal art auction turnover reached $17.08 billion, a 60% increase versus 2020[,]" and "[t]urnover from Fine Art sales in the West rose 68% to a total of $10.9 billion."); ARTPRICE.COM, *supra* note 111, at 3 ("Between July 1, 2021, and June 30, 2022, turnover from global Contemporary Art sales totaled $2.7 billion, compared with $2.73 billion the previous year.").

188. *See* Adam R. Pomeroy, *Penn Central After 35 Years: A Three Part Balancing Test or a One Strike Rule?*, 22 FED. CIR. B. J. 677, 677 (2013) ("*How* to balance the [*Penn Central*] factors might be in dispute, but a balancing test it is.").

189. *See* 559 F.3d 1260, 1269 (Fed. Cir. 2009) ("[W]hen a court considers only a profits-based approach, this precedent provides limited guidance and constrains a factfinder's ability to provide a complete and fair assessment of the economic impact prong of *Penn Central*."). The circuit court stated, "Rose Acre points to no case in which a court has found a diminution in value of 10% as being severe or as favoring a taking." *Id.* at 1275.

190. *See id.* at 1268–69 (citing Andrus v. Allard, 444 U.S. 51, 65–66 (1979); Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926); Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915)).

191. *See id.*

192. Daniel L. Siegel, *Evaluating Economic Impact in Regulatory Takings Cases*, 19 HASTINGS W-N.W. J. ENV'T. L. & POL'Y 373, 376 n.19 (2013) (quoting Brace v United States, 72 Fed. Cl. 337, 357 (2006)).

Acre Farms to justify a taking, it is highly unlikely that a 5% resale royalty on the overall sale would be considered a severe economic impact.[193] Plus, it would be difficult for a claimant to prove any diminution of value in art from this royalty with the average annual art sale returns exceeding 14% during the last twenty-five years worldwide.[194] Furthermore, the countries with resale royalty statutes have seen no decline in their overall art market sales—in fact, the first and secondary markets continue to rise in these countries.[195] Thus, there appears to be no diminution in value, and therefore, the economic impact factor weighs against a regulatory taking in nearly all circumstances.[196]

2. Interference with Reasonable Investment Backed Expectations Factor

To determine whether a federal statute interfered with a property owner's reasonable investment-backed expectations, a court will analyze the general retroactivity of the statute, exploring whether the statute "attaches

193. *See Rose Acre Farms*, 559 F.3d at 1275.

> Rose Acre points to no case in which a court has found a diminution in value of 10% as being severe or as favoring a taking. Additionally, the infirmities in the diminution in return metric, as discussed above, warrant against placing much, if any, weight on that calculation on the facts of this case. We hold therefore that, although the monetary loss to Rose Acre was not insignificant, it did not even approach the level of severe economic harm and thus does not strongly favor Rose Acre.

Id.

194. Vicky McKeever, *There's a 'Unique' Opportunity in Art, Which Has Beat the S&P 500 over 25 Years, Asset Manager Says*, CNBC (May 27, 2021, 8:44AM), https://www.cnbc.com/2021/05/27/there-are-unique-opportunities-in-art-says-one-asset-manager.html.

> Contemporary art has offered an annual return of 14% over the last 25 years, as of December 2020, versus a 9.5% annual return from the S&P 500, according to the Citi Global Art Market chart, cited by fine art investment company Masterworks. . . . Over the last quarter-century, contemporary art—defined as works created from 1945 onwards—recorded losses in only 4% of cases, over 3-year investment periods.

Id.

195. *See* Marshall, *supra* note 11, at 25 (stating between 2010 and 2020, "the global art market has grown by 9 percent, rising to $67.4 billion in 2018"). In 2017, a Brandeis University research project found no evidence that the "ARR harmed the art market, or that it forced relocation of art sales to other jurisdictions." *Id.* at 26. In fact, DACS distribution data has shown "an increase in the distribution of resale royalties each year, and in the growth of the U.K. art market, which has overtaken China to become the second largest in the world with a 21 percent share of the market in 2018." *Id.*

196. *See supra* Section III.B.1 (discussing the regulatory takings economic impact factor).

new legal consequences" to property purchased before the statute's enactment.[197] Statutory retroactivity is "generally disfavored in the law," and the Constitution included the Takings Clause to combat this very type of legislation.[198] However, Congress has the power to create retroactive legislation regarding contractual agreements between private parties as long as the retroactivity is confined to short and limited periods required by the "practicalities of producing national legislation."[199] *Eastern Enterprises* suggests that the limit to those periods of retroactivity is somewhere between thirty and fifty years.[200] However, deciding the reasonableness of statutory retroactivity is an objective test, thus the "party's subjective expectation is irrelevant to whether that expectation is reasonable," and the expectation is analyzed from multiple viewpoints and must not be abstract.[201]

Additionally, courts analyze this prong by first considering the property owner's actual expectation—did the art owner "subjectively rely" on that 5% when they invested in the art?[202] Secondly, the court considers "whether that expectation was reasonable," determining reasonableness through whether the claimant can "establish that it made the investment because of its reasonable expectation of receiving the benefits denied or restricted by the government action, rather than the remaining benefits."[203] Lastly, the

197. E. Enters. v. Apfel, 524 U.S. 498, 532 (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994)).

198. *Id.* at 532–33 ("Our Constitution expresses concern with retroactive laws through several of its provisions, including the *Ex Post Facto* and Takings Clauses."). "Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." Gen. Motors Corp. v. Romein, 503 U.S. 181, 191 (1992). "In his Commentaries on the Constitution, Justice Story reasoned: 'Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.'" *E. Enters.*, 524 U.S. at 533.

199. *E. Enters.*, 524 U.S. at 528 (quoting Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 731 (1984)).

200. *See id.* at 532 ("[T]he Coal Act substantially interferes with Eastern's reasonable investment-backed expectations. The Act's beneficiary allocation scheme reaches back 30 to 50 years to impose liability against Eastern based on the company's activities between 1946 and 1965.").

201. Res. Invs., Inc. v. United States, 85 Fed. Cl. 447, 511 (2009) (quoting Cienega Gardens v. United States, 331 F.3d 1319, 1346 n.42 (2003)) ("[A] party's subjective expectation is irrelevant to whether that expectation is reasonable.").

202. CCA Assocs. v. United States, 91 Fed. Cl. 580, 603 (2010), *aff'd in part, rev'd in part*, 667 F.3d 1239 (Fed. Cir. 2011).

203. *Id.* ("[T]he court should consider whether that expectation was reasonable."); *Cienega Gardens*, 503 F.3d at 1289 ("Finally, the claimant must establish that it made the investment because of its reasonable expectation of receiving the benefits denied or restricted by the government action,

court determines the importance of the taken benefit at the time the initial purchase was made utilizing one of two tests to determine the importance: "(1) [T]here is no taking unless the expectation was the 'primary' investment-backed expectation, or (2) the expectation is 'investment-backed' if an investor would not have invested 'but for' the expectation, even if it is not the primary expectation."[204] The *Penn Central* ruling appears to support the first test.[205]

Investment backed expectations will presumably be the most litigated factor within a takings claim against the ARR due to the inherent retroactive nature of the statute.[206] However, according to the Supreme Court in *Fourth Estate Public Benefit Corp., v. Wall-Street.com, LLC*, copyright law allows for the retroactive collection of any copyright infringement once the copyright is officially registered with the Copyright Office.[207] Technically, copyright owners are bestowed exclusive rights the moment the copyright is created, thus prohibiting any infringement from the moment of creation onward.[208] But how far back in time is too far to attach this royalty to a first sale?[209] There is some guidance on this figure, but this is regarding health care for coal mine workers, not a statutorily mandated copyright royalty that is theoretically created the moment a work is created by the artist, no matter

rather than the remaining benefits.").

204. *CCA Assocs*., 91 Fed. Cl. at 603.

205. *See id.* "The [*Cienega Gardens*] court did not determine which standard should be applied, though it indicated that the 'primary' standard 'appears to be supported by *Penn Central*.'" *Id.* (quoting *Cienega Gardens*, 503 F.3d at 1290.) The *Penn Central* court held "that a zoning restriction did 'not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel.'" *Id.* (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 136 (1978)).

206. *See* 2013 COPYRIGHT REPORT, *supra* note 12, at 62. "A more significant question could be presented by the second factor–interference with reasonable investment backed expectations," since there is argument that "the law would reduce the value of works acquired years or decades earlier, when there was no reasonable expectation that the artist would be entitled to a percentage of any resale proceeds." *Id.*

207. 139 S. Ct. 881, 891 (2019) ("[T]he Copyright Act safeguards copyright owners, irrespective of registration, by vesting them with exclusive rights upon creation of their works and prohibiting infringement from that point forward. If infringement occurs before a copyright owner applies for registration, that owner may eventually recover damages for the past infringement, as well as the infringer's profits.").

208. *See id.*

209. *See* E. Enters. v. Apfel, 524 U.S. 498, 532 (explaining that thirty to fifty years retroactivity may be reaching too far back, thus constituting a taking).

how far back the work was created.[210]

Furthermore, it will be difficult to prove that a 5% difference in total profits was the reason for the initial purchase, and that had the purchaser known about such a royalty rate, they would have never bought the piece.[211] Claimants could argue that they chose, or were advised, to purchase the art in the United States, or to purchase a United States citizen's artwork, solely because the United States does not have a resale royalty, thus receiving a higher portion of their investment backed expectations after other fees and taxes.[212] However, this is an objective test so it will not matter what the purchasers subjectively knew, or understood in the moment they made the purchase, and an argument can be made that any art investor was on notice the moment VARA was passed, or even the moment the *droit de suite* became law in France.[213]

Art collecting and investment involves international transactions, a trend of which continues to grow year after year.[214] Thus, the claimants would have undoubtably known of this royalty for some time, with auction houses already collecting and paying out this royalty in over eighty international ju-

210. *See id.*

211. *See, e.g.*, *Frequently Asked Questions in Online Auctions*, *supra* note 133 (discussing that auction houses already collect fees of up to 15% of the auction price sometimes); *cf.* Barker, *supra* note 80, at 392–93 (discussing how the CRRA-mandated 5% transfer of the sale price could be a confiscation of the entire sale profits, thus creating the possibility that the entire property interest could be expropriated).

212. *See* Schten, *supra* note 83, at 131 ("[P]iecemeal implementation of *droit de suite* does, even if only to a small extent, distort[] the market. Players prefer to deal in locations with low transaction costs, including low administrative burdens and lower costs, even if both of those things are negligible in the grand scheme of the art trade."); *cf.* Barker, *supra* note 80, at 393 ("Although the [CRRA] statute applies only to sales where the gross sales price is more than the purchase price, any sale for less than five-percent above the purchase price will create the scenario in which the seller is forced to pay out more money than he has earned.").

213. Res. Invs., Inc. v. United States, 85 Fed. Cl. 447, 511 (2009) (discussing how the test for investment backed interest is an objective test).

214. *See* DR. CLARE MCANDREW, ART BASEL & UBS, A SURVEY OF GLOBAL COLLECTING IN 2022 116–17 (2022) (discussing where collectors buy their art on a worldwide scale).

> Despite lingering uncertainties over the full impact of the COVID-19 pandemic in 2022, and within a context of ongoing political and economic concerns, the international cross-border trade in art has recovered strongly. Global imports of art and antiques increased 41% in 2021 and exports were up 38%, with double-digit increases continuing in the first half of 2022 compared to the same period in 2021. If growth continues at the same pace in the second half of 2022, cross-border trade could reach record levels in the major markets for art.

Id. at 11.

risdictions where the royalty's collection and distribution is mandated and could reasonably foresee this becoming law in the United States.[215] With an average 14% annual investment growth rate within art collection, no provable secondary sale decline within resale royalty countries,[216] and an understanding that fees are part of the art investment process,[217] a 5% royalty rate will likely not deter any investments, nor would they have deterred the investment had the investor known of the royalty at the time.[218] Thus, it is unlikely a court will find the resale royalty negatively affected investment-backed interests to such a severe degree as to constitute a taking.[219]

3. Character of Government-backed Action

According to the Court in *Lingle*, the third and final *Penn Central* factor, the character of the government-backed action, may relate back to the

215. See *Important Information*, CHRISTIE'S, https://www.christies.com/help/buying-guide-important-information/financial-information (last visited Sept. 24, 2023); *see also Post Sale Services*, SOTHEBY'S, https://www.sothebys.com/en/about/services/post-sale-*services* (last visited on Sept. 24,, 2023) ("In certain locations, Sotheby's may be required to collect are-sale royalty (droit de suite), which goes to European Economic Area (EEA) living artists and artists' estates where the EEA artist died in the last 70 years, each time one of their works is resold.").

216. *See* 2013 COPYRIGHT REPORT, *supra* note 12, at 67. The U.K.'s 2011 report on the effects of the resale royalty on the art market found no correlation between the EU's art market decline and the "application of the resale right in the EU on 1 January, 2006." *Id.*

217. *See id.* "The U.K. report suggests that, in many cases, resale royalty payments may already be "roughly equal" to the cost of transporting artworks overseas, and therefore 'shipping items to avoid ARR would be unlikely to be attractive even at the top end of the market.'" *Id.* at 67 (quoting KATHRYN GRADDY ET AL., A STUDY INTO THE EFFECT ON THE UK ART MARKET OF THE INTRODUCTION OF THE ARTIST'S RESALE RIGHT 38 (2008), https://webarchive.nationalarchives.gov.uk/ukgwa/20140603083549/http://www.ipo.gov.uk/study-droitdesuite.pdf).

218. *See id.* at 62 ("[O]ften substantial charges that parties to art sales already expect to pay (auction house commissions and sales taxes, for example) arguably limit the extent to which a resale royalty could be said to disrupt settled expectations."). *But see* Naomi Rea, *Artists May Be the Unwitting Losers in Christie's Victory over Resale Royalties in France*, ARTNET (Jan. 9, 2019), https://news.artnet.com/art-world/france-resale-rights-christies-1435159 (explaining a possible change in France's *droit de suite* laws could make buyers pay the royalty, adding to already mounting buyers fees and hurting the secondary art market for artists and buyers alike).

219. *See* Herbert I. Lazerow, *Art Resale Royalty Option*, 63 J. COPYRIGHT SOC'Y USA 201, 229 (2016) ("While it can be argued that it is an unconstitutional taking to impose a resale royalty on any owner who bought the work at a time when there was no such law, that argument is unpersuasive in light of cases upholding the constitutionality of zoning changes that provide reasonable periods for amortization of earlier investments."); *see* Harbison v. City of Buffalo, 152 N.E.2d 42, 46–47 (N.Y. 1958).

public use determination.[220] Thus, if the resale royalty does not meet the public use requirement "government action is found to be impermissible," thus ending the inquiry, and "[n]o amount of compensation can authorize such action."[221] The *Lingle* case redefined this factor's analysis to "whether governmental action 'amounts to a physical invasion' or 'adjusts the benefits and burdens of economic life to promote the common good.'"[222]

There still is much confusion and little guidance from the Supreme Court as to the best analysis method for this factor.[223] If the resale royalty is found to be a permanent physical invasion of the property under *Loretto*, the ARR is a per se taking, end of analysis; alternatively, if the resale royalty is found to be a quasi-Federal "police power[,]" then there is appropriate government action.[224] The creation of a resale royalty is well within the powers of Congress, as mandated by Article 1, Section 8, Clause 8 of the United States Constitution 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."[225] Furthermore, the resale royalty is an optional

220. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 543 (2005) ("[I]f a government action is found to be impermissible—for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.")

221. *See id.*

222. Michael Lewyn, *Character Counts: The "Character of the Government Action" in Regulatory Takings Actions*, 40 SETON HALL L. REV. 597, 637 (2010).

> In sum, courts' "character" factor analysis should proceed as follows: (1) If a regulation amounts to a physical invasion, then the "character" factor most likely supports a taking. (2) Otherwise, courts should focus on the public interest at stake-not just whether the government has a legitimate purpose for its conduct, but the extent to which the specific regulation effectively promotes that purpose. The government will want to show that its actions created a high level of public benefit and/or prevented a significant public harm. By contrast, a takings plaintiff will want to show that the regulation produces minimal benefits.

Id. at 636.

223. *See* Thomas W. Merrill, *The Character of the Governmental Action*, 36 VT. L. REV. 649, 655 (2012) ("After *Penn Central*, the Supreme Court has done relatively little to clarify what it meant by the character of the governmental action . . . .").

224. *See id.* at 672 ("Courts should consider all factors that have enduring persuasive force in differentiating governmental powers, including factors suggesting the governmental action falls toward the police power end of the spectrum."); *see also* Loretto v. Teleprompter Manhattan Corp., 458 U.S. 419, 421 (1982) (holding that a New York law resulting in Loretto losing roughly one and a half cubic feet of her property for the installation of television facilities was a taking without just compensation); *see also infra* Section III.C (discussing the *Loretto* case).

225. U.S. CONST. art. I, § 8, cl. 8.

addition to copyright laws for signatories of the Berne Convention, which includes the Unites States, so it would appear to be appropriate government action.[226] An argument does exist that this royalty could be a full appropriation of the sale profits, the profits are the property rights in question, and thus if the property rights are completely taken there exists a permanent physical occupation, or expropriation, of the property.[227] However, this argument is refutable by pointing to the general returns from public auction at an average growth of 14% per year.[228] Adjusting copyright royalties and statutes to protect artists' intellectual property and revenue streams is well within the powers of the federal government, and according to the *Estate of Graham* court, it is "what the Copyright Act has done for over a century . . . transfer[ing] certain interests in intellectual property from downstream owners to original artists."[229] Thus, the resale royalty appears to be within the spectrum of "adjusting the benefits and burdens of economic life to promote the common good."[230]

On balance, the resale royalty appears to pass the regulatory takings test, but will it pass a per se takings test if the Court decides it is more of a permanent physical occupation or similar to the situation in *Horne II*?[231]

C. Resale Royalty Right and Per Se Takings

The per se takings jurisprudence began in 1982 with *Loretto v. Telempromter Manhattan CATV Corp*.[232] The *Loretto* Court analyzed whether a "New York law requiring a landlord, Jean Loretto, to permit a cable television company to install its cable facilities on her property violated the Takings Clause."[233] Instead of utilizing the *Penn Central* regulatory takings

226. *See* Berne Convention, *supra* note 12, 1161 U.N.T.S. at 9; *see generally* Merrill, *supra* note 223 (discussing the ways in which lower courts have analyzed the government action prong since the Supreme Court has given little guidance).

227. *See* Barker, *supra* note 80, at 392–93.

228. *See* McKeever, *supra* note 194.

229. Estate of Graham v. Sotheby's, Inc., 178 F. Supp. 3d. 974, 994–95 (C.D. Cal. 2016) *aff'd in part, rev'd in part, remanded sub nom.* Close v. Sotheby's, Inc., 894 F.3d 1061 (9th Cir. 2018).

230. Lewyn, *supra* note 222, at 634–35 (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

231. *See infra* Section III.C (discussing the resale royalty and per se takings).

232. *See* 458 U.S. 419, 421 (1982) (holding that a New York law resulting in Loretto losing roughly one and a half cubic feet of her property for the installation of television facilities was a taking without just compensation).

233. Jessica L. Asbridge, *Redefining the Boundary Between Appropriation and Regulation*, 47

analysis, the Court held the law to be a taking without just compensation because the installation was a permanent physical occupation of the property, or an appropriation.[234] When a taking is a permanent physical occupation of property, it does not matter what the economic benefits are, or what the investment backed interest is—it is a taking.[235] Thus, the per se, or physical taking, branch of the takings analysis was created, relating to the permanent physical occupation of real property by the government.[236]

In the past ten years, with Supreme Court rulings in *Horne v. Department of Agric.* (*Horne II*) in 2015, and *Cedar Point Nursery v. Hassid* in 2021, the per se takings jurisprudence has started to branch out into historic regulatory takings cases.[237] The *Horne II*[238] decision, in particular, stated that the taking of personal property (raisins in that case) via government regulation could be considered a per se taking, when previously this type of taking would have fallen under the regulatory takings test.[239] Prior to *Horne*

BYU L. REV. 809, 816 (2022); *Loretto*, 458 U.S. at 435–38.

234. *See* Asbridge, *supra* note 233, at 816–17. "The Court described an 'appropriation' as 'perhaps the most serious form of invasion of an owner's property interests.' The New York law resulted in a 'special kind of injury' because a stranger had directly invaded and occupied the private property." *Id*. "[W]hen the 'character of the governmental action,' is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto*, 458 U.S. at 434–35 (1982) (quoting *Penn Cent.*, 438 U.S. at 124).

235. *See* Asbridge, *supra* note 233 ("[T]he Court found irrelvent the economic impact of the law on Loretto and the public interest at issue . . . .").

236. *See* John D. Echeverria, *What is a Physical Taking?*, 54 U.C. DAVIS L. REV. 731, 745 (2020). "[T]he Court has said that, '[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.'" *Id.* (quoting Sierra Pres. Council v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 322 (2002)).

237. *See* Horne v. Dep't of Agric. (*Horne II*), 576 U.S. 350, 365–66 (2015) (holding that "a governmental mandate to relinquish specific, identifiable property as a 'condition' on permission to engage in commerce," does in fact create a per se taking); *see also* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074 (2021) (holding that a regulation allowing unions the right to enter employers' property at specifically identified times to recruit employees was a per se physical taking requiring just compensation). *Cedar Point* and *Horne II* show the Supreme Court taking a greater property rights approach as of late, creating per se takings out of what used to be regulatory takings. *See Cedar Point*, 141 S. Ct. at 2074; *Horne II*, 576 U.S. at 365–66.

238. *See Horne II*, 576 U.S. at 367. *Horne II* was the Supreme Court's second hearing on the matter after the Court, in *Horne I*, remanded the case back to the Ninth Circuit for a decision on the merits. *See id.* at 366–67.

239. *See id.* at 357. "The first question presented asks '[w]hether the government's "categorical duty" under the Fifth Amendment to pay just compensation when it "physically takes possession of an interest in property", applies only to real property and not to personal property.' The answer is no." *Id.* (citations omitted). Justice Sotomayor's dissent argued for a regulatory takings analysis

II, per se takings occurred during three possible scenarios: "permanent physical invasions of real property," "regulations depriving owners of all economically beneficial use of their real property," and specific land use permitting conditions requiring forfeitures of property rights.[240]

In *Horne II*, the Supreme Court analyzed whether a taking without just compensation occurred via a federally mandated order for raisin growers to "physically set aside" up to 47% of their crop, "free of charge . . . [t]o help maintain stable markets for particular agricultural products."[241] The Court held this was a per se taking, stretching the per se jurisprudence outside the realm of real property and into personal property.[242] Thus, expanding the per se doctrine to a much wider set of government regulations, which could include the ARR.[243]

In the *Horne II* majority opinion, Chief Justice Roberts provides three new possible per se takings scenarios: (1) a physical appropriation of real, or personal property, does in fact give rise to a per se takings analysis;[244] (2) the "retention of an interest in net proceeds" may still give rise to the per se takings rule;[245] and (3) in certain situations, a "governmental mandate to relin-

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because "the retention of even one property right that is not destroyed is sufficient to defeat a claim of a *per se* taking under *Loretto*," and in this instance the Hornes retain their property interest in the raisins they still own. *Id.* at 379 (Sotomayor, J., dissenting). The dissent ultimately argued for the Court to follow the Ninth Circuit's opinion which found no taking under a regulatory takings analysis, and no taking under the *Nollan/Dolan* exactions analysis. *See id.* at 378–79.

240. Horne v. U.S. Dep't of Agric., 750 F.3d 1128, 1132 (9th Cir. 2014), *rev'd sub nom*. Horne v. Dep't of Agric. (*Horne II)*, 576 U.S. 350 (2015) (holding the raisin reserve requirement was not a regulatory taking under *Penn Central* factors, and ruled out a per se taking because the raisin reserve requirement did not meet any of the three per se takings scenarios).

241. *Horne II*, 576 U.S. at 354–55.

242. *See Fifth Amendment—Takings Clause—Regulatory Takings*—Horne v. Department of Agriculture, 129 HARV. L. REV. 261, 270 (2015), https://harvardlawreview.org/2015/11/horne-v-department-of-agriculture ("By applying a categorical rule to a regulation of personal property, the *Horne* Court not only eliminates this burden but deprives the government of the opportunity to defend its myriad regulations of personal property that might fall into this new category.").

243. *See id.* at 261. "While directed at a program Chief Justice Roberts understood to be a 'historical quirk,' his opinion in Horne nevertheless threatens to radically expand the Court's per se takings doctrine at the expense of the government's ability to operate effectively." *Id. See also* Echeverria, *supra* note 236, at 745 ("In the case of *Horne v. Department of Agriculture*, the Court extended the *per se* rule for physical takings from real property to personal property.").

244. *See Horne II*, 576 U.S. at 357. "The first question presented asks '[w]hether the government's "categorical duty" under the Fifth Amendment to pay just compensation when it "physically takes possession of an interest in property," applies only to real property and not to personal property.' The answer is no." *Id.* (citations omitted).

245. John D. Echeverria & Michael C. Blumm, Horne v. Department of Agriculture*: Expanding*

quish specific, identifiable property as a 'condition' on permission to engage in commerce effects a per se taking."[246] These new per se takings scenarios could be utilized in any challenge to the ARR, whether the challenge is brought as a defense, or as a claim.[247]

1. A Physical Appropriation of Real or Personal Property Does in Fact Gives Rise a Per Se Takings Analysis

Art is personal property,[248] and so is the money from the sale of the art, thus a regulation designed to take a percentage of a sale of art clearly falls under personal property takings, not real property.[249] However, the question is whether the entity bringing the claim—the auction house or individual seller—actually owns the personal property?[250] In *Horne I*, the Hornes initially positioned themselves as raisin handlers trying to bypass the reserve requirement because handlers technically are not owners who would have to set aside the mandated percentage.[251] Art auction houses do not own the art they auction, but they act as handlers of the auctioned art and facilitators of a sale who take a percentage of the sale as a commission before paying the proceeds, minus taxes and other fees, to the seller.[252] Auction houses as handlers is similar to the Hornes' situation, but the Hornes were actual own-

Per Se Takings While Endorsing State Sovereign Ownership of Wildlife, 75 MD. L. REV. 657, 666 (2016); *see Horne II*, 576 U.S. at 362–63.

246. *Horne II*, 576 U.S. at 364–65.

247. *See infra* Section III.C.1–3 (analyzing the ARR for a possible per se takings claim). The auction house defendants in *Close v. Sotheby's* used the per se takings jurisprudence from *Horne II* in their brief before the Ninth Circuit to claim the CRRA was a per se taking. *See* Joint Brief of Appellees Christie's, Inc. & Sotheby's, Inc. at 75**,** Close v. Sotheby's, Inc., 894 F.3d 1061 (9th Cir. 2018) (No. 16-56235), 2017 WL 2812594, at *60–61.

248. *See* 26 U.S.C. § 2055 ("Work of art defined**.**—For purposes of this paragraph, the term 'work of art' means any tangible personal property with respect to which there is a copyright under Federal law.").

249. *See Horne II*, 576 U.S. at 358 ("Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.").

250. *See* Echeverria & Blumm, *supra* note 245, at 668 (discussing whether the Hornes actually owned the raisins they claimed were taken from them, and if they did not in fact own them then there is no taking). "Because the Hornes as handlers did not own the raisins at issue, they should have lost in the Supreme Court." *Id.*

251. *See id.* at 668–69.

252. *See How to Sell at Christie's*, CHRISTIES, https://www.christies.com/selling-services/selling-guide/before-the-sale?sc_lang=en#your-sellers-agreement (last visited Sept. 17, 2023).

ers of raisins as well as handlers, unlike an auction house who does not own the work sold.[253] Either way, auction houses will likely bring a takings claim or defense to a claim for unpaid royalties, similar to what happened in *Close* where the auction houses brought a per se takings defense.[254]

Sellers of the art presumably own title to the art they are selling and thus would meet the ownership requirement to bring a takings claim or defense for nonpayment.[255] At first glance it would appear that the sellers, or owners of the art, have a better claim than auction houses since they are the owners of the property being taken.[256] However, there is an argument that even if the owners of the art never owned the copyright to the art they are selling—the ARR is part of copyright ownership which is retained with the copyright owner (the creator of the art, unless expressly transferred to the purchaser of art), and thus the seller has no property right to make a takings claim.[257] According to § 202 of the copyright statutes,[258] the copyright is retained by the creator of the work even after the sale, so if the ARR is truly a copyright-based royalty, rather than a statute-based royalty, nothing is being taken from the owner of the physical work because they never owned the copyright.[259]

Conversely, sellers, and auction houses as the seller's agent, can argue that the first sale doctrine allows for the owner of the physical work to "sell

253. *See id.* (giving detailed instructions on the seller's agreement when seeking to sell art which consists of consignment terms). Not only will auction houses like Sotheby's and Christie's not sell work directly from an artist, but they also only sell work via consignment. *See id.*

254. *See* Eric Molinsky, *Famous Paintings Sell for Millions At Auction, but the Artist Gets Zero*, NPR (Nov. 12, 2014, 3:49AM), https://www.npr.org/2014/11/12/363313707/famous-paintings-sell-for-millions-at-auction-but-the-artist-gets-zero (discussing how Christie's and Sotheby's tried to "kill the [ARR] bill" through lobbying efforts).

255. *See* Horne v. Dep't of Agric. (*Horne II*), 576 U.S. 350, 357 (2015) (allowing for takings of personal property under the per se takings jurisprudence).

256. *See id.*

257. *See infra* Section IV.A (discussing the owner of the physical work's lack of copyright ownership in more detail).

258. *See* 17 U.S.C. § 202.

> Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

Id.

259. *See infra* Section IV.A.

or otherwise dispose. . . of that *copy* . . . without the authorit[zation] of the [copyright] owner."[260] However, mandating a royalty upon resale does not disallow the secondary sale, nor does the seller, or auction house, have to ask permission of the copyright owner prior to auction.[261] Similar to music, the mechanical royalty mandated by § 115 of copyright statutes calling for a compulsory royalty rate paid to the copyright owners for every sale of a physical or digital recording embodying the copyright, does not encumber the free transfer of copyrighted material, nor does it require permission from the copyright owner.[262] Thus, both sellers and auction houses will also most likely fall short, but auction houses arguing they are in a similar position to the Hornes, and referencing a successful argument for standing in *Estate of Graham* would put themselves in the best position for this type of per se taking.[263]

2. The "Retention of an Interest in Net Proceeds"[264] May Still Give Rise to the Per Se Takings Rule

The Court in *Horne II* reasoned that if a physical appropriation of personal property has occurred, it is a per se taking and it does not matter if the

260. 17 U.S.C. § 109(a) (emphasis added) (codifying the first sale doctrine). The word *copy* is emphasized because the ARR is mostly dealing with original works of fine art like paintings and sculpture, not copies of works like music, film, or books, thus upon the plain meaning of the statute, the first sale doctrine might not even apply to secondary sales of artistic works incapable of being reproduced. *See id.*; *see also* SAS Inst., Inc. v. Iancu, 138 S. Ct. 1348, 1355 (2018) (citing for support Social Security Bd. v. Nierotko, 327 U.S. 358, 369 (1946)) ("Where a statute's language carries a plain meaning, the duty of an administrative agency is to follow its commands as written, not to supplant those commands with others it may prefer."). *Id.*

261. *See* 2013 COPYRIGHT REPORT, *supra* note 12, at 58 ("[ARR] [p]roponents respond that a resale royalty does not conflict with the ability to freely transfer property because it simply would require payment when a subsequent sale has been made and would not otherwise restrict the transfer or sale.").

262. *See* 17 U.S.C. § 115 (codifying music distribution mechanical royalties, or compulsory licenses for making and distributing phonorecords).

263. *See* Estate of Graham, v. Sotheby's, Inc., 178 F. Supp. 3d 974, 992 (C.D. Cal. 2016) ("Although Defendants could not have challenged a seizure of the sellers' artwork, they have standing to contest the validity of the royalties Plaintiffs seek to recover from Defendants . . . . [I]njury that would result from the imposition of those royalties is patently sufficient to confer standing. Under *Horne*, therefore, Defendants may assert a Takings Clause defense."). *See also* Horne v. Dep't of Agric., 750 F.3d 1128, 1132 (9th Cir. 2014) *rev'd sub nom.* Horne v. Dep't of Agric. (*Horne II*), 576 U.S. 350 (holding that handlers of personal property can bring a takings defense).

264. Echeverria & Blumm, *supra* note 245, at 666; *see Horne II*, 576 U.S. at 362–63.

owner retains the remainder of the profits.[265] If the ARR is considered a physical appropriation, then under the *Horne II* reasoning it is a per se taking, no matter how much retained interest exists after the 5% is taken out of the sale price.[266] However, the question remains: Is the ARR an appropriation,[267] a regulation, or none of the above?[268] According to the *Horne II* Court, *Loretto* is an example of an appropriation where "[the] installation of a cable box on [Loretto's] rooftop was a physical taking of real property," justifying compensation, "without regard to the claimed public benefit or the economic impact on the owner."[269] In contrast, *Lucas v. South Carolina Coastal Commission*, "a case involving extensive limitations on the use of shorefront property," provides an example of a regulatory taking, not a physical appropriation, since the owners of the land still own the land under regulation; the regulation just took away their economic benefits of owning the land.[270]

The ARR could be considered an appropriation under *Horne* and *Loretto* because there may be a physical taking of a percentage of the profits from

265. *See Horne II*, 576 U.S. at 364–65. "[W]hen there has been a physical appropriation, 'we do not ask . . . whether it deprives the owner of all economically valuable use' of the item taken." *Id.* (quoting Tahoe–Sierra Pres., Council, Inc., v. Tahoe Reg'l Plan. Agency, 535 U.S., 302, 323 (2002)). "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner . . . regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." *Tahoe–Sierra Pres. Council*, 535 U.S. at 322.

266. *See Horne II*, 576 U.S. at 364–65.

267. *See Appropriation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

> The exercise of control over property, esp. without permission; a taking of possession. Cf. EXPROPRIATION (1); MISAPPROPRIATION (1). 2. *Torts.* An invasion of privacy whereby one person takes the name or likeness of another for commercial gain. 3. A legislative body's or business's act of setting aside a sum of money for a specific purpose. If the sum is earmarked for a precise or limited purpose, it is sometimes called a *specific appropriation*. 4. The sum of money so voted.

Id.

268. *See generally Horne II*, 576 U.S. at 360–61 (discussing the historic difference between appropriations and regulations).

269. *Id.* at 360. The *Loretto* Court explained that this physical invasion of property was historically protected because "[s]uch an appropriation is perhaps the most serious form of invasion of an owner's property interests," depriving the owner of the "the rights to possess, use and dispose of the property." *Id.* (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S., 419, 435 (1982)).

270. *Id.*; *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1020, 1027 (1992) (holding that a regulation on a piece of land goes too far constituting a regulatory taking when the owners are deprived of all economically beneficial uses of that piece of land).

a sale.[271] Physical takings can occur with personal property as well as real property, thus it would not matter what the public benefits are, or what the economic impact of the owner might be.[272] Also, under this strict rule it would not matter whether the percentage withheld is 5% or 47%, anything withheld without just compensation becomes a per se taking.[273]

The ARR could also be considered a regulation, but as analyzed in the previous section, the ARR is likely not a regulation that goes too far.[274] The 5% royalty rate is a low figure overall, which does not take away all economic benefits of the sale when normal profits from art auctions are well above a 5% increase from the first sale.[275] Over the last twenty-five years contemporary art has offered an annual return of 14%, and only recorded loses in 4% of sales over a three-year investment period.[276] Thus, the ruling depends on whether the ARR is considered an appropriation or a regulation, and the *Horne II* ruling creates the possibility for the ARR to be viewed as an appropriation.[277] However, for an appropriation to occur the person, or entity, whose property is appropriated needs to actually own the property in question.[278] Thus, the question remains, is the ARR a property interest transferred upon first sale, or does the artist retain that property interest for the life of the copyright?[279]

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271. *See Horne II*, 576 U.S. at 360–62; *see also Loretto*, 458 U.S. at 435.

272. *See Horne II*, 576 U.S. at 360.

273. *See id.* at 355 ("In 2002–2003, this Committee ordered raisin growers to turn over 47 percent of their crop.").

274. *See supra* Section III.B.

275. *See supra* Section III.B.

276. *See* McKeever, *supra* note 194 ("Contemporary art has offered an annual return of 14% over the last 25 years, as of December 2020, versus a 9.5% annual return from the S&P 500, according to the Citi Global Art Market chart."). *But see* Steven Sulley, *Art Investment Trends to Look Out For in 2022*, FORBES (Jan, 18, 2022, 7:30 AM), https://www.forbes.com/sites/forbesbusinesscouncil/2022/01/18/art-investment-trends-to-look-out-for-in-2022/?sh=7357f2df2fa0 ("[A]rt consistently delivers average returns of 7.6% and, because it is unaffected by how the financial markets are performing, is a much more stable investment.").

277. *See* 2013 COPYRIGHT REPORT, *supra* note 12, at 61 (analyzing takings arguments in 2013 prior to the *Horne II* ruling expanding per se takings to personal property). "The commenters asserting the takings argument have not specified whether they believe such a law would constitute a per se or a regulatory taking. The Supreme Court's takings jurisprudence, however, suggests that economic legislation challenged on retroactivity grounds generally should be analyzed under the regulatory taking's framework." *Id.* at 61.

278. *See infra* Section IV.A. (discussing how the property taken under the ARR was never actually owned by the seller, thus the ARR is not an appropriation of personal property).

279. *See infra* Section IV.A. (attempting to determine who retains the property interest upon the

3. A "Governmental Mandate To Relinquish Specific, Identifiable Property as a Condition on Permission to Engage in Commerce"[280] May Create a Per Se Taking

The third, and last, of the new possible per se takings from *Horne II* states that a per se taking can occur when a government regulation, that sets aside a certain amount of "specific identifiable property," is used as a condition on which to enter into commerce within that specific industry.[281] Chief Justice Roberts states that *Horne II* is a specific instance where the setting aside of raisins in order to "engage in commerce" is a taking, but this type of mandate will not always create a per se taking.[282] The ARR asks art owners to set aside 5% of their profits from public auctions, but this is not necessarily a condition upon reselling the art.[283] There are other avenues art dealers can utilize to sell their art which may not be covered by the ARR, including private auction, secondary sales through galleries, or online auction.[284] The ART Act of 2018 excluded online and private secondary sales, concentrating on public auction only, but most global ARR statutes collect for any secondary sale over a certain amount conducted by an industry professional, whether in a gallery, online, or at auction.[285] Albeit, public auctions appear

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sale, and the effect of the copyright on that determination).

280. Horne v. Dep't of Agric. (*Horne II*), 576 U.S. 350, 364–65 (2015).

281. *Id.* ("The third question presented asks '[w]hether a governmental mandate to relinquish specific, identifiable property as a "condition" on permission to engage in commerce effects a per se taking.' The answer, at least in this case, is yes.").

282. *Id.* at 365; *see* Echeverria & Blumm, *supra* note 245, at 688 ("One hint that the Court itself may not take its ruling on this issue very seriously is the carefully worded response to the third question in the petition: 'The answer,' the Court said, '*at least in this case*, is yes.'").

283. *See* Simon de Pury, *Auction Houses Are Shifting More and More to Private Sales. So Why Haven't Top Galleries Tried Their Hand at Auctions?*, ARTNET NEWS (Jan. 26, 2021), https://news.artnet.com/opinion/private-sales-auction-houses-galleries-1939075 (discussing how public auction houses are increasingly using the private sale space for the secondary market).

284. *Id.* ("[I]t is actually private sales that have allowed auction houses to maintain a decent profitability."). Public auction houses are increasingly utilizing private sales for the secondary market, an area that would not be covered under the ARR as written in the ART act. *See id.*

285. American Royalties Too Act of 2018, H.R. 6868, 115th Cong. (2018).

> An "auction" is a *public sale* at which a copy of a work of visual art is sold to the highest bidder and which is run by a person that sold not less than $1,000,000 of copies of works of visual art during the previous year. *A person that conducts all sales exclusively online does not conduct an "auction" for purposes of this title*."

Id. (emphasis added). *See* Intellectual Property Office, *Artist's Resale Right*, GOV.UK (May 16, 2004), https://www.gov.uk/guidance/artists-resale-right ("The Artist's Resale Right (ARR) entitles

to be the most popular format for gaining the most profit from a secondary sale, so if the online and private sale exclusion is included in the statute, this royalty set aside does not cut off all possible secondary sale methods.[286]

Out of the three new per se takings added in *Horne II*, this appears to be the weakest per se taking argument for the ARR—unless the statute is written to include all secondary sales in every possible format, not just public auction.[287] If the ARR statute is written as a blanket clause covering all secondary sales, no matter what the format, then this would be a condition placed upon sellers and auction houses alike to enter the market of reselling.[288] If the claim is brought by public auction houses as a defense for a nonpayment suit, and the statute is written to apply only to sales in public auction houses, then this could be seen as condition for auction houses to do business—if auction houses do not pay out the royalty they will face fines and lawsuits, thus effectively taking them out of the business of reselling fine art without paying this royalty.[289]

However, this new addition to per se takings possibly overlaps with the *Nollan/Dolan* analysis for exactions.[290] This test states:

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creators ('authors') of original works of art [including paintings, engravings, sculpture and ceramics] to a royalty each time one of their works is resold through an auction house or art market professional."); *see also Resale Right*, ADAGP, https://www.adagp.fr/en/adagp-role-and-missions/copyrights-managed-adagp/resale-right (last visited Sept. 25, 2023) (stating France's ARR applicable conditions to a sale including, "an art market professional must be involved in the sale, which may take place physically or electronically, in the capacity of seller, buyer or intermediary. Examples [include] auction houses, art galleries, art dealers, booksellers, etc.; the sale must take place on French territory or be subject to French VAT; the sale price must be equal to or higher than 750 €, not including VAT.").

286. *See* de Pury, *supra* note 283. ("According to Art Basel's 2020 art market report, private sales accounted for 17 percent of Sotheby's total revenue, or $990 million, in 2019. In 2020, Christie's reported that it sold more works worth over $25 million privately than publicly, and both main auction houses reported record highs for private sales.").

287. *See* American Royalties Too Act of 2018, H.R. 6868., S. 3488, 115th Cong. (2018).

288. *Id.* ("A person that conducts all sales exclusively online does not conduct an 'auction' for purposes of this title."). *But see Frequently Asked Questions,* DACS, https://www.dacs.org.uk/for-art-market-professionals/frequently-asked-questions#FAQ136 (last visited Sept. 25, 2023) (defining the ARR as a royalty for work resold for more than £1,000 with the "involvement of an auction house, gallery, or dealer."). In the UK, Art Market Professionals and the sellers of the work are "jointly and severally liable" for the ARR payment, defining art market professionals as "someone 'acting in the course of a business of dealing in works of art'. In practice this includes galleries, dealers, auction houses and agents, but excludes in general museums and private individuals." *Id.*

289. *See Frequently Asked Questions*, *supra* note 288.

290. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (establishing the *Nollan* essential nexus part of the *Nollan/Dolan* test by finding an exaction to be a taking when there is no nexus

> a condition on the grant of a land use permit requiring the forfeiture of a property right constitutes a taking *unless* the condition (1) bears a sufficient nexus with and (2) is roughly proportional to the specific interest the government seeks to protect through the permitting process. If those two conditions are met, then the imposition of the conditional exaction is not a taking.[291]

In *Horne II*, the Ninth Circuit applied the *Nollan/Dolan* reasoning because they believed the raisin set-aside restriction was similar to the land used permitting process.[292] The Ninth Circuit found an exaction did not occur with the raisin set-aside mandate because the reserve program furthered the ends which it advanced and was "related both in nature and extent to the impact" of the Hornes's activity.[293] Plus, *Horne II* can be distinguished from the ARR since the ARR is only "taking" 5% of the sale, with a cap of $35,000, whereas the raisin set-aside mandated up to 47% of the raisins one year, "in exchange for the 'benefit' of being allowed to sell the remaining 53 percent."[294] Thus, this type of per se taking could be argued by the auction houses and sellers alike, but there appears to be better arguments within the first two new per se additions discussed above.[295]

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between the government's regulatory objectives and the exaction's purpose); Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (establishing the Dolan rough proportionality prong of the *Nollan/Dolan* test finding a taking has occurred if the exaction's imposed burden is not roughly proportional to the regulated activity's threatened public harms).

291. Horne v. U.S. Dep't of Agric., 750 F.3d 1128, 1139 (9th Cir. 2014), *rev'd sub nom.* 576 U.S. 350 (2015).

292. *Id.* at 1143 ("[T]here are important parallels between *Nollan* and *Dolan* on one hand and the raisin diversion program on the other. All involve a conditional exaction, whether it be the granting of an easement, as in *Nollan*; a transfer of title, as in *Dolan*; or the loss of possessory and dispositional control, as here. All conditionally grant a government benefit in exchange for an exaction.").

293. *Id.* (analyzing the *Nollan/Dolan* test and finding the raisin mandate is not an exaction); *see also* Echeverria & Blumm, *supra* note 245, at 683–88 (analyzing the *Horne II* Court's possible errors with the third prong of the new per se takings analysis and suggesting the court should have affirmed the Ninth Circuit's holding regarding this specific question through utilizing the *Nollan/Dolan* test for exactions). "The [*Horne II*] Court answered the third question in the Hornes' petition in the affirmative, despite the fact that its precedents unambiguously supported a negative answer," through the *Nollan/Dolan* analysis. *Id.* at 684.

294. Horne v. Dep't of Agric. (*Horne II*), 576 U.S 351, 366 (2015) (citing *Nollan*, Chief Justice Roberts utilized the high percentage taken from the Horne's raisin reserve to distinguish from exactions cases justifying a per se taking in this instance).

295. *See supra* Sections III.C.1–2.

IV. RECOMMENDATIONS FOR THE RESALE ROYALTY STATUTE

The ART Act of 2018[296] provides a great starting point for structuring the resale royalty statute, but in order to create the most efficient ARR statute—and make sure the statute can survive claims, or defenses, from sellers, auction houses, or other art industry professionals liable for the royalty payment—additional language and definitions need to be added.[297] These additions include making it clear that the property right "taken" was never actually owned by the seller, dealing with the retroactivity issue, and redefining the key terms "distribution" and "copy" within the visual art copyright statutes.[298]

A. Property Right "Taken" Was Never Owned by the Seller

The best solutions are usually the simplest, and in this instance, there lies a solution already stated in the copyright statutes, with very little additional language needed to protect visual artist's resale right.[299] Congress has the power, granted by the Constitution[300], to "enact laws establishing a system of copyright in the United States."[301] Section 202 of the Copyright codes states the following:

> Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. *Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object*; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under

296. American Royalties Too Act of 2018, H.R. 6868, S. 3488, 115th Cong. (2018).

297. *See supra* Sections III.A–C (discussing the recommendations for the resale royalty statute to survive claims and defenses).

298. *See supra* Sections III.A–C.

299. *See, e.g.*, 17 U.S.C. §§ 101–1511 (statutes creating and defining copyright).

300. U.S. CONST. art. I, § 8, cl. 8 (granting Congress the enumerated power "[t]o 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.").

301. *A Brief Introduction and History*, U.S. COPYRIGHT OFF., https://chnm.gmu.edu/digitalhistory/links/cached/chapter7/link7.6.USCOhistory.html#:~:text=Th (last visited Sept. 25, 2023).

a copyright convey property rights in any material object.[302]

When an artist sells a work of fine art defined by the copyright statutes, they do not sell the underlying copyright, even though the copyright was created when the work was physically created.[303] This is the entire idea of intellectual property itself, basically creating a legal fiction which allows for artists, writers, musicians, scientists, etc. to be paid for their creations.[304] If the copyright is retained by the artist upon a sale of the work, then any copyright-related royalty is inherently owned by the artist, and successor in interest, for the duration of the copyright.[305] Thus, the reseller owns, or the auction house handles, the physical embodiment of the work—but not the copyright itself—meaning there is technically no standing to bring a takings claim, or defense, because property cannot be taken from someone who does not own that property.[306] The statute should therefore include language referencing the physical embodiment of the work as separate from the copyright, repeating an essential tenant of the copyright law and applying this idea to the ARR.[307]

The CRRA statute included this idea through the creation of a prospective statute.[308] Any purchase of art in California, or from a California artist, after the passage of the law, was subject to the 5% resale royalty, thus the

302. 17 U.S.C. § 202 (emphasis added).

303. *See id.*

304. *See Copyright In General*, U.S. COPYRIGHT OFF., https://www.copyright.gov/help/faq/faq-general.html (last visited Sept. 25, 2023) ("What does copyright protect? Copyright, a form of intellectual property law, protects original works of authorship including literary, dramatic, musical, and artistic works, such as poetry, novels, movies, songs, computer software, and architecture.").

305. 17 U.S.C. § 202 ("Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object.").

306. *See id.*; *see also* 2013 COPYRIGHT REPORT, *supra* note 12, at 59–60 ("Thus, although the Office identified the United States' 'well-settled principles of free alienability' as potentially conflicting with a resale royalty policy, we must acknowledge that where Congress has felt it important to act as a policy matter to restore a greater balance in the copyright system, it has freely done so, even where those changes created limited exceptions to the traditional first sale right.").

307. *See* 17 U.S.C. § 202.

308. CAL. CIV. CODE § 986(a) (West 2015) ("The amendments to this section enacted during the 1981–82 Regular Session of the Legislature shall apply to transfers of works of fine art, when created before or after January 1, 1983, that occur on or after that date."). The statute applied to works created prior to the date the CRRA became effective, but the first sale had to be completed after the statute was passed. *Id.*

property was never owned by the purchaser.[309] The CRRA was prospective in order to bypass takings issues and attach this royalty directly at purchase, but under federal copyright law, the 5% is arguably never owned by any purchaser unless the copyright is expressly transferred upon purchase.[310]

B. The Retroactivity Issue

A federal resale royalty can allow for retrospective application because copyrights are created the moment the work is created, thus the right exists the moment the work comes into physical existence.[311] Retroactive secondary sales are clearly off limits due to policy and collection reasons, but what about first sale retroactivity?[312] Going back thirty to fifty years is too far according to *Eastern Enterprises*, but it is possible to argue that sellers were placed on notice of this type of royalty the moment France enacted the *droit de suite*—or when the EU mandated all EU countries to enact the royalty, or when the UK first implemented it—thus going back at the very latest to 2006, or earliest 1973.[313]

The creation of the Copyright Act of 1976, creating Title 17 of the United States Code, acts as a guide providing for how far is "too far" and the "basic framework for the current copyright law."[314] Section 202 of Title 17 states that the purchase of a physical object is separate from the purchase of

309. Barker, *supra* note 80, at 399–400. ("Most likely, a piece of artwork purchased from an artist in California, after enactment of the California Resale Act, was purchased subject to the artist's mandatory five-percent royalties; i.e., not in fee simple. In this limited circumstance, it can be said that the five-percent royalty right inheres in the title at purchase. As a person cannot sell more than he owns, every resale would be less than fee simple and subject to the inherent five-percent royalty.").

310. *See* 17 U.S.C. § 202.

311. *See Copyright in General*, *supra* note 304 ("Copyright exists from the moment the work is created. You will have to register, however, if you wish to bring a lawsuit for infringement of a U.S. work.").

312. *See* Turner, *supra* note 8, at 353 (arguing that secrecy within the art world and art auction houses makes it difficult to collect a resale royalty given that artists may not know a secondary sale has occurred at all). Reaching back to secondary sales that occur prior to the passage of the ARR will be riddled with issues, with the collection issue already possibly being an issue for collection of a prospective royalty. *See id.*

313. *See* Res. Invs., Inc. v. United States, 85 Fed. Cl. 447, 511 (2009) (stating the "party's subjective expectation is irrelevant to whether that expectation is reasonable," so the expectation is not "unilateral . . . or an abstract need.").

314. *See Copyright Law of the United States (Title 17) and Related Laws Contained in Title 17 of the United State Code*, COPYRIGHT.GOV., https://www.copyright.gov/title17 (last visited Sept. 25, 2023).

the copyright, putting any purchaser of art on notice that copyright related royalties, whether existing or future royalties, are excluded from any purchase of the copyright's physical form.[315] Thus, any work purchased in a first or secondary sale after the 1976 Copyright Act took full effect on January 1, 1978 should be subject to the ARR upon a secondary sale at public auction.[316] *Landgraf* provides some rules and means of analyzing statutory retroactivity stating "familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance" on retroactivity.[317] Fair notice, reasonable reliance and settled expectations, are all arguable at the moment the 1976 Copyright Act took effect because the statute clearly states the copyright does not transfer with the sale of the physical embodiment of work.[318] Thus, Congress can create all forms of reasonable copyright royalties to further their constitutional mandate of protecting arts and sciences, and owners of the copyright's physical embodiment are not entitled to those royalties.[319]

Furthermore, as a compromise, the statute can propose that any work purchased in a first or secondary sale—prior to the 1976 Copyright Act—can still be subject to the ARR, but only after a sale occurs once the ARR takes full effect.[320] Basically, the sale after the ARR is effectively the first sale, and any sale after that will be the secondary sale subject to the ARR.[321] This type of retroactivity allows for enough notice to first sale purchasers of

315. *See* 17 U.S.C. § 202.

316. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994) (holding that retroactive application of statutes is proper in many situations).

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id.

317. *See id.* at 270.

318. *See* 17 U.S.C. § 202.

319. *See* U.S. CONST. art. I, § 8, cl. 8.

320. *See Landgraf*, 511 U.S. at 270 (analyzing statutory retroactivity stating "familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance" on retroactivity.)

321. *See id.*

art, and acts as a compromise for works purchased prior to the Title 17 additions.[322]

C. Redefining Key Terms "Distribution" and "Copy" Within the Visual Art Copyright Statutes

Because visual artists create one of a kind works, with the value of the work retained within that individual work, additional definitions and protections for visual arts need to be added to the copyright statutes.[323] Musicians and writers have these protections built into the statutes because the idea of distribution is much clearer with these artistic mediums—the value of these "other" mediums lie in the amount of copies that can be produced and sold, whereas the value of certain visual arts lies in the individual pieces created by the artist.[324] The American Royalties Too Act of 2018 includes some additional definitions helping to create this type of royalty for visual artists, but the bill needs to go further in defining how visual art is fundamentally different from the other protected mediums.[325] Primarily, the difference is in the understanding of what distribution means, and how distribution is defined between visual art versus music or books.[326]

The ART Act calls for additional language within Section 101[327], including an additional Section 106(B) with specific definitions and procedures creating the collection of the resale royalty.[328] The statute should in-

322. *See id. See generally* 17 U.S.C. § 115 (containing the codification of the Music Modernization Act, a copyright addition added in 2018, which allows for the compulsory licenses created within the act to reach recordings prior to 1972).

323. *See, e.g.*, 17 U.S.C. §§ 101–1511 (statutes creating and defining copyright).

324. *See supra* notes 2–3 and accompanying text.

325. *See* American Royalties Too Act of 2018, H.R. 6868, S. 3488, 115th Cong. (2018).

326. 17 U.S.C. § 106 (defining the exclusive rights of copyrighted works); *see supra* notes 1–3 and accompanying text; *see also* Janevicius, *supra* note 5, at 384 ("In the United States, an author has six basic rights in this 'bundle:' to copy the work, to prepare derivate works, to distribute the work, to publically perform the work, to publically display the work, and for sound recordings, to publically perform the work through a digital transmission. A resale royalty right would allow artists to continually benefit from their distribution right.").

327. American Royalties Too Act of 2018, H.R. 6868, S. 3488, 115th Cong. (2018) ("Section 101 of title 17, United States Code, is amended by inserting after the definition of 'architectural work' the following: 'An "auction" is a public sale at which a copy of a work of visual art is sold to the highest bidder and which is run by a person that sold not less than $1,000,000 of copies of works of visual art during the previous year. A person that conducts all sales exclusively online does not conduct an "auction" for purposes of this title.'").

328. *See id.* ("(a) EXCLUSIVE RIGHTS IN COPYRIGHTED WORKS.—Section 106 of title 17,

clude additional language defining the distribution of visual art—in relation to the new Sections 106(7) and 106(b)—to a secondary sale via public auction.[329] Such language could be similar to copyright royalty mechanisms already in place for music, including mechanical or performance royalties.[330] For example, a copyright-based mechanical royalty is paid to songwriters each time their song is purchased, or technically, each time the song is pressed to a physical, or digital, format.[331] Thus, one solution is to define the resale royalty as the mechanical royalty equivalent within fine art—every time a work is sold at an auction, a royalty is due because that sale is defined as a distribution of a copy of the work, even though that copy is the original physical embodiment.[332] Not only does this help to clarify first sale issues,[333] but it also makes it clear that visual art is distributed in a different manner due to the one-of-a-kind nature of the work.[334]

V. CONCLUSION

Through an in-depth analysis of a takings-related claim or defense, in relation to the inevitable passage of a federal ARR, it appears the only available route could come in the form of a per se taking.[335] This route is only

United States Code, is amended— (1) in paragraph (5), by striking 'and' at the end; (2) in paragraph (6), by striking the period at the end and inserting '; and'; and (3) by adding at the end the following: '(7) in the case of a work of visual art, to collect a royalty for the sale of a copy of the work if the copy is sold by a person other than the author of the work or, if applicable, the author's successor as copyright owner for a price of not less than $5,000 as the result of an auction.'").

329. *See id.*

330. *See* Kevin Zimmerman, *Understanding Mechanical Royalties*, BMI (Mar. 28, 2005), https://www.bmi.com/news/entry/Understanding_Mechanical_Royalties; *see also What is the Difference Between Performing Right Royalties, Mechanical Royalties, and Sync Royalties?*, *supra* note 57 ("BMI royalties are performing right royalties, which are earned when a musical work is performed publicly. Public performance occurs when a song is sung or played, recorded or live, on radio and television, as well as through other media such as Internet streaming services, live concerts and programmed music services.").

331. Zimmerman*, supra* note 330 ("Basically, each time a consumer purchases a sound recording, publishers receive a mechanical royalty payment, which is then passed on to the songwriter.").

332. *Cf. What is the Difference Between Performing Right Royalties, Mechanical Royalties, and Sync Royalties?*, *supra* note 57. The resale royalty can also be defined as a performance royalty, whereby, each time the work is transferred to another person it counts as a performance of the work within the space it was displayed or stored. *See id.*

333. *See supra* Section III.C.1 (discussing the first sale doctrine and its relation to the taking of property within the fine art context).

334. *See supra* notes 3–6 and accompanying text.

335. *See supra* Sections III.C.1–3.

available because of the newest addition to the per se takings jurisprudence stated in *Horne II*.[336] Even with the limited ability to win on a takings claim, it does not mean that auction houses, or art sellers, will not bring this claim or defense upon the passage of the ARR.[337] Additionally, with the current Supreme Court's per se takings focus on carving out more exceptions to what would previously be considered a regulatory takings analysis, it would be beneficial to write the resale royalty statute in the best way to bypass any possible takings claims.[338] The key to writing the statute is to define the royalty as not rooted in the physical property sold and resold, but in the copyright itself, restating the principle from Section 202 of Title 17.[339] There is no taking of private property for just compensation when one does not actually own, or handle for the owners, the property that is taken.[340] In addition, the statute can be written with a fair amount of retroactivity, allowing for the right to attach to first sales made after the enactment of the 1976 Copyright Act.[341]

Takings arguments were the only claim not fully analyzed by the courts during previous CRRA-related lawsuits.[342] Regulatory takings claims under the *Penn Central* analysis likely will not pass muster, and the new per se jurisprudence of *Horne II* cannot reach the ARR if the statute includes this Comment's recommendations.[343] Thus, if takings are unavailable, there is no excuse to exclude the ARR from the federal copyright statutes.[344] Visual artists in the United States are worthy of the same protections and economic benefits that any other artists, like musicians, around the world have enjoyed for nearly a century.[345] It is time for the United States to fully honor the words of the Constitution and the Berne Convention and include an ARR right within the copyright statutes.[346]

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336. *See* Horne v. Dep't of Agric. (*Horne II*), 576 U.S. 350, 365–66 (2015).
337. *See supra* Sections III.A–B.
338. *See supra* Part IV.
339. *See supra* Section IV.A.
340. *See supra* Section IV.A.
341. *See supra* Section IV.B.
342. *See supra* Sections III.B.1–3.
343. *See supra* Sections III.C.1–3, IV.A–C.
344. *See supra* Section II.B.1.
345. *See supra* Section II.A–B.
346. *See supra* Section II.A–B.

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