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“THIS ARTWORK IS ALWAYS ON SALE”: THE NEED FOR A U.S. RESALE ROYALTY RIGHT FOR DIGITAL VISUAL ARTISTS IN THIS TECHNOLOGICAL AGE, AND PROOF OF CONCEPT THROUGH THE BLOCKCHAIN AND NFTs EXPLOSION

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“THIS ARTWORK IS ALWAYS ON SALE”: THE NEED FOR A U.S. RESALE ROYALTY RIGHT FOR DIGITAL VISUAL ARTISTS IN THIS TECHNOLOGICAL AGE, AND PROOF OF CONCEPT THROUGH THE BLOCKCHAIN AND NFTs EXPLOSION¹

*Janae Camacho*²

*“The roots of great innovation are never just in the technology itself. They are always in the wider historical context. They require new ways of seeing.” — David Brooks, New York Times, 2011*³

ABSTRACT

With the explosion of the internet, social media, non-fungible tokens (“NFTs”), and blockchain technology, there has been a shift in how people consume and commercialize art, thus resulting in the increased use of digital visual mediums to create, purchase, and receive payment for visual artwork. This increase has renewed the question of whether the United States should implement a resale royalty right for visual work artists. This question is of concern, especially in this digital age where it has become more difficult for digital visual artists to receive equitable compensation for their work, like that of their musical and written counterparts, due to how the internet operates.

As a result of the lack of a resale royalty right within the United States, many visual artists have been left on their own to create means by which they can receive equitable compensation for their work outside of the initial sale. The lack of governmental assistance in rectifying the inequitable compensation between visual artists and other artists under copyright law has further pushed these visual artists to find payment for their work in the digital arena.

For decades, the idea of implementing a version of the *droit de suite* or resale royalty right for visual artists has been discarded by those in the legislative branch of the United States. While those that have opposed such a right cite the (1) lack of financial incentives for artists; (2) negative economic impact on to cost of artwork; and (3) administrative effort required to develop and maintain such a right as reasons why it would not be achievable within the United States, we have seen through the explosion and use of NFTs and blockchain technology that many of these concerns can be dismissed.

This Article argues that the explosion and use of NFTs and blockchain technology to facilitate a resale royalty right amongst digital visual artists provides Congress with a proof of concept that the implementation of such a right has practical potential and could be feasible.

¹ Simon de la Rouviere, *THE ARTWORK IS ALWAYS ON SALE V2* (2020).

² Janae D. Camacho, University of Washington School of Law, Class of 2023; Colorado State University Global, B.S. 2019. Thank you, Professor David Ziff, of the University of Washington School of Law, for providing me valuable feedback and guiding me through the editing process and Professor Jane Winn, of the University of Washington School of Law, for providing me with invaluable guidance and a different perspective during this process.

³ David Brooks, *Where Are The Jobs?*, *THE NEW YORK TIMES* (October 6, 2011), <https://www.nytimes.com/2011/10/07/opinion/brooks-where-are-the-jobs.html>.

INTRODUCTION

The age-old question of whether or not to provide resale royalty rights to visual artists has come into the spotlight once more with the introduction of non-fungible tokens (NFTs) and the hype that has pushed their use and collection into the forefront of many consumers' and artists' minds.⁴ The resale royalty right, commonly known as the *droit de suite*, is a right that benefits the original artists in the event of subsequent sales of their artwork through the application of a royalty.⁵ Although the right originated in France in the early 20th century, it has since been expanded and codified in laws worldwide in more than 70 countries.⁶

To better understand the resale royalty right, here is an example of how the right would and would not be applied: A new emerging artist in the first few years of her career sells a work of art for \$500.⁷ Fifteen years later, after the artist has accumulated more recognition and fame, the same piece is resold for \$40,000.⁸ If this transaction were to happen in the United States and those countries that do not have a resale royalty right under copyright law, then the seller of the painting would be able to pocket the extra \$35,500. At the same time, the original artist—“the creator of the work—receives nothing” from the sale and increased the value of their work.⁹ “In that same scenario in a country where this right applies, the original artist could be entitled to receive a percentage of the resale value.”¹⁰

Additionally, while such a right under many European countries' laws is viewed as a moral right for artists, it can also be classified as a hybrid right that is both moral and economic. Furthermore, where many have thought that the resale royalty right for artists was at odds with the financial interests of society and the art world, we have seen that this concern may not be entirely accurate.¹¹ So, the question begins anew: Should the United States provide visual work

⁴ See ORIGYN Foundation, *NFTs and Royalties*, Medium (Jan. 7, 2022), <https://medium.com/@ORIGYN-Foundation/nfts-and-royalties-1d7ff1265f86>.

⁵ Wang Suchen, *Resale Royalty Right for Visual Artists in the US and China: A Comparative Study*, THE FRONTIERS OF SOCIETY, SCIENCE, AND TECHNOLOGY (2021), Vol. 3 Iss. 1., 10, 10, <https://doi.org/10.25236/FSST.2021.030103>.

⁶ Press Release, Nadler, Nadler, Hatch, Leahy & Collins Introduce Bipartisan, Bicameral American Royalties Too Act (Sept. 25, 2018), <https://nadler.house.gov/news/documentsingle.aspx?DocumentID=391396>.

⁷ Copyrightlaws.com, *Droit De Suite*, (July 1, 2021), <https://www.copyrightlaws.com/droit-de-suite/>.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Since the mid-2000s, there has been an increase in growth of the online art market for visual art. According to the 2013 Copyright Office Report on Resale Royalties, the Office believed that the internet may have enhanced new sales models, such as online art fairs, by providing an inexpensive and efficient way to communicate with buyers regardless of their geographic location. U.S. COPYRIGHT OFFICE, *Resale Royalties: An Updated Analysis* at 25. See also Hiscox & ArtTactic, *The Online Art Trade 2013*, April 9, 2013 (“Hiscox Report”), <https://www.hiscox.co.uk/sites/static-content/online-art-trade-report/docs/hiscox-online-art-trade-report-2013.pdf> (a report highlighting trends towards buying art online).

In the Hiscox Report, they found that seventy-one percent of art collectors purchased art “sight unseen” via online marketplaces and that twenty-six percent of those surveyed spent approximately \$82,000 USD or more via the online markets. Furthermore, fifty-nine percent of the galleries that were surveyed admitted to planning to implement e-commerce options into their websites because of the expected substantial growth of online art sales as a result of peer-to-peer online art markets. *Id.* at 3.

artists with resale royalty rights for their work? This is a question that has plagued the United States for decades. However, with the increased interest of artists and consumers in digital visual artwork, thanks to the push of new digital frontiers such as the Metaverse, it may be time for Congress to take another look at this age-old question.¹²

With the growing interest in the digital visual art market, many tangible visual artwork artists have taken to digital marketplaces to obtain profits for their works.¹³ For example, before the influx of NFTs via digital marketplaces, a young woman named Jazmin Boykins created and gave away her artwork for free.¹⁴ She has now been able to sell the same or similar artwork for thousands of dollars per piece, thanks to NFTs, blockchain, and smart contracts in a digital marketplace.¹⁵ But Boykins is not the only artist who has benefited from using technology to increase their audience and gain better exposure while recouping substantially life-changing payments for their work, which they would not have otherwise obtained if not for these technological advancements.¹⁶ Many other artists have taken to the same digital landscapes in search of equitable compensation for their artwork, which many believe they have not been able to obtain due to the hierarchy of the art world and the laws that have prevented these visual artists from fully engaging in the monetization and commercialization of their work similar to that of their musical and written counterparts.¹⁷ Because of the lack of equitable compensation for these digital artists, “many digital artists, fed up after years of creating content that generates visits and engagement on Big Tech platforms like Facebook and Instagram while getting almost nothing in return, have lunged headlong into the craze.”¹⁸

While the NFT craze has taken many digital visual artists and the world by storm, two significant issues, lack of exposure and lack of sufficient profits, continue to plague many visual artists.¹⁹ These two issues have contributed to this influx of interest and utilization of these new and innovative technologies. While there are various suggested routes that artists can take to

¹² ORIGYN, *supra* note 4.

¹³ Jinia Shawdagar, *The Future of Art? World-Famous Artists Delve into NFTs*, Cointelegraph (July 24, 2021), <https://cointelegraph.com/news/the-future-of-art-world-famous-artists-delve-into-nfts>.

¹⁴ Andrew R. Chow, *NFTs are Shaking Up the Art World—But They Could Change So Much More*, TIME MAGAZINE, (March 22, 2021, 12:38 pm EST), <https://time.com/5947720/nft-art/>.

¹⁵ *Id.*

¹⁶ Taylor Locke, *This 24-year-old Artist Has Made Over \$300,000 in 10 Months Selling NFTs: ‘I Hope to Inspire More Creatives Like Me’*, CNBC, (December 3, 2021, 11:36 am EST, updated 12:56 pm EST), <https://www.cnbc.com/2021/12/03/24-year-old-artist-made-over-300000-dollars-in-10-months-selling-nfts.html>; see also Rosana McLaughlin, *‘I Went From Having To Borrow Money to Making \$4 Million In a Day.’: How NFTs are Shaking Up The Art World*, The Guardian, (November 6, 2021, 7:30 EDT), <https://www.theguardian.com/artanddesign/2021/nov/06/how-nfts-non-fungible-tokens-are-shaking-up-the-art-world>.

¹⁷ Maxwell Anderson, *‘Self-Taught’ Black Artists are Often the Last to Benefit When Their Prices Go Up. But We Can Change That—Here’s How*, Artnet News (November 25, 2020), <https://news.artnet.com/opinion/resale-royalties-souls-grown-deep-1926363>.

¹⁸ *Id.*

¹⁹ Irina Tarsis, *Droit De Suite: Let’s Talk About Artists Resale Royalty Rights*, Secrets of Art Magazine (June 10, 2020), <https://secretsofartmagazine.com/2020/06/droit-de-suite-lets-talk-about-artists-resale-royalty-rights/>.

facilitate the monetization and commercialization of their artwork,²⁰ many artists and advocates suggest that there seems to be a lack of regulatory protection and assistance under the current laws.²¹ The issues concerning the lack of royalty rights for visual artists directly conflict with the U.S. Constitution's purpose in creating copyright law, which was created to "promote the progress of science and useful arts."²² While artists are free to contract with buyers to obtain royalties under the current law,²³ those who are most sophisticated and have the means benefit from contract law to obtain their justified royalties.²⁴ Not only does the lack of equitable compensation affect these less sophisticated artists in a purely economic sense as a way to earn money to live, but the lack of royalties creates a further racial and socioeconomic inequality that must be addressed. By not providing visual artwork artists with the necessary and morally apt rewards for their contribution to society through their artwork, we deny them the beauty and cultural rewards that accompany the creation and consumption of the arts.²⁵

²⁰ Other routes such as contracting for royalties have been used by many artists since the inception of the Artists' Contract in the 1970s, but those less sophisticated artists, particularly minority and lower socioeconomic artists, are placed at a disadvantage in the negotiation of such contracts.

²¹ "Copyright law is and always has been considerably more disadvantageous to visual artists. Artists therefore have a good claim to some form of remedy . . . artists feel that even small amounts paid occasionally are worthwhile both psychologically and financially." Shira Perlmutter, *Resale Royalties for Artists: An Analysis of the Register of Copyright's Report*, 16 COLUM.-VLA J.L. & ARTS 395, (1991-1992).

²² U.S. CONST. Art. I § 8, cl. 8.

²³ Lauren van Haften-Schick & Amy Whitaker, *From the Artist's Contract to the Blockchain Ledger: New Forms of Artists' Funding Using NFTs, Fractional Equity, and Resale Royalties*, 1, 4 (Dec. 14, 2020, revised January 10, 2022), <https://dx.doi.org/10.2139/ssrn.3842210>; see generally Seth Siegelau & Bob Projansky, *The Artist's Reserved Rights Transfer and Sale Agreement*, SCHOOL OF VISUAL ARTS, NEW YORK (Feb. 24, 1971), <https://primaryinformation.org/product/siegelau-the-artists-reserved-rights-transfer-and-sale-agreement/>.

²⁴ The Copyright Office mentioned in their report that "an artist may, by contract, attempt to negotiate a future financial interest in his work with a buyer. This, however, is by no means a common practice, even for accomplished artists, and it seems unlikely for one who is just starting out." U.S. COPYRIGHT OFFICE, *RESALE ROYALTIES: AN UPDATED ANALYSIS* (Dec. 2013) at 11. See also Franklin Feldman & Stephen E. Weil, *Droit de Suite*, Art Works: Law, Policy, PRACTICE, PRACTICING LAW INSTITUTE, 1, 81–97 (Jan. 1, 1974); see also Jay B. Johnson, Comment, *Copyright: Droit de Suite: An artist is entitled to royalties even after he's sold his soul to the devil*, 45 OKLA. L. REV. 493, 493-518 (1992) (addressing the issue of the "Artists' Contract" and the disadvantages of those artists that lack bargaining power); Carole M. Vickers, *The applicability of the Droit de Suite in the United States*, 3 B.C. INT'L & COMP. L. REV. 433, 433-466 (1980).

²⁵ "Between 1980 and 2000, the gap between black and white artists grew noticeably. In 1980 the median income of black artists—15,076 dollars—was only 85 percent that of white artists. Over the next two decades, it declined to 81 percent. Latin American artists did even less well. Their median income in 1980 was 83 percent that of whites—roughly the same as black artists—but by 2000 fell to only 64 percent. Average incomes tell the same story. In 1980 black and Latin American artists earned 79 and 76 percent, respectively, as much as white artists; by 2000, these figures had fallen to 76 and 60 percent. However, when we controlled for age, weeks worked, gender, and educational attainment, black artists appeared to be doing significantly better in 2000 than they had two decades earlier. In 1980 black artists earned on average nearly 1,200 dollars less than white artists; by 2000 black artists were earning nearly one-thousand dollars more than whites."

With the integration of the internet into our everyday lives, the consumption and commercialization of digital visual artwork have increased substantially, especially among digital marketplaces.²⁶ While many modifications to the Copyright Act have broadened the rights of those within the music industry,²⁷ little to no changes have been taken to benefit visual artists.²⁸ Due to this substantial increase in digital artwork through the explosion of NFTs (and the like), the laws associated with such creative works need to grow with the ever-changing technological advancements that will only become more integrated into our society.

This Article begins by explaining the history of the resale royalty right within Europe and the United States in Sections I and II. Then, in Section III, the Article examines how Congress has attempted to provide a similar right to address the digital age through mechanical licenses for musical copyright owners. Section IV explains the new digital frontier: NFTs, blockchain, and smart contracts and the disruption their explosion has caused to the art world. Section V concludes by demonstrating how Congress should address the resale royalty right in this digital age by utilizing NFTs, blockchain, and smart contracts to address the initial concerns that hindered the previous attempts to expand a resale royalty right for digital artists in the U.S.

Furthermore, this Article argues that the explosion and use of NFTs and blockchain technology to facilitate a resale royalty right amongst digital visual artists provides Congress with proof of concept that the implementation of such a right has practical potential and could be feasible.

While the central focus of this Article is geared toward implementing a resale royalty right for digital visual artists, it posits that these digital visual artists can be used as an example in which such a right could be applied to all visual artists. The hope is that through the demonstration of the applicability of such a right through the use and explosion of NFTs and blockchain, as it relates to digital visual artwork, the legislature will be compelled to act to provide these artists with a more equitable application of the law.

I. A CURSORY HISTORY OF DROIT DE SUITE IN EUROPE

The droit de suite right within Europe was created more than one hundred years ago to address the concerns of the lack of compensation for visual artists compared to their musical and written

²⁶ Oscar Holland, *How NFTs Are Fueling A Digital Art Boom*, CNN (Mar. 10, 2021), <https://www.cnn.com/style/article/nft-digital-art-boom/index.html>; see also Kristen Thomson, Kristen Purcell & Lee Rainie, *Arts Organizations and Digital Technologies*, PEW RESEARCH CENTER’S INTERNET & AMERICAN LIFE PROJECT (Jan. 4, 2013), <https://www.pewresearch.org/internet/2013/01/04/section-6-overall-impact-of-technology-on-the-arts/>.

²⁷ See generally the Music Modernization Act.

²⁸ U.S. COPYRIGHT OFFICE, *Resale Royalties: An Updated Analysis* at 32. The Copyright Office noted in their report that visual artists do not reap the same benefits from the exploitation of the exclusive rights that are available to authors in general, and it pointed out that the Copyright Act does not account for the difference in the markets between other artistic works and visual artwork.

artist counterparts.²⁹ Today, the right provides authors of original works of art and original manuscripts with an inalienable right to an interest in any subsequent sale of their work after the first sale by the original author and is viewed as both an economic and moral right for the artists.³⁰ It is a “right of visual artists to a percentage of the resale of their works of art on the art market.”³¹ In particular, it provides the artists an economic right to the resale of artwork within the secondary market after the initial sale by the artists.³² It is through this right that many of the disadvantages, such as (1) little to no economic incentive to create art; (2) lack of compensation necessary to provide for the artists’ basic needs; and (3) inability to enjoy the economic benefits of their future successes as their careers took off, were reduced through laws that provided the *droit de suite* right to artists by the European Union.³³ The intervention by the European government to provide a right that placed artists on the same playing field as musical and written artists shows a clear and distinct example of how such a right can provide both moral and economic benefits to these artists through governmental intervention.

A. The Foundational History

The artists’ right of *droit de suite* has a long history dating back to the early 1800s in France. However, the term was not commonly used until an attorney named Albert Vanous used it when describing the disadvantages of the visual artists to that of musicians in *Chronique de Paris*.³⁴ The *droit de suite* is presently a part of a bundle of rights collectively called “moral rights.”³⁵ Within that bundle under the *droit de suite*, the authors of work, particularly visual artists, can exploit the exclusive rights of their work to obtain monetary compensation through the right upon the resale of the work. While the term and idea of these rights were known in the early 1800s, it was not until the 1920s that France took significant steps to rectify these disadvantages that plagued the visual artists by enacting the resale right.³⁶ Shortly after that,

²⁹ Joëlle Farchy & Kathryn Graddy, *The Economic Implications of the Artist's Resale Right*, WORLD INTELL. PROP. ORG. [WIPO] 16, WIPO Doc. SCCR/35/7 (Nov. 6, 2017), https://www.wipo.int/edocs/mdocs/copyright/en/scrr_35/scrr_35_7.pdf.

³⁰ Berne Convention for The Protection of Literary and Artistic Works art. 14ter, Sept. 9, 1886 (amended 1979), 1161 U.N.T.S. 3.

³¹ Gerhard Pfennig, *The Resale Right of Artists (Droit De Suite)*, 31 COPYRIGHT BULLETIN 20, 20 (1997).

³² Mickael R. Viglino, *The Reception of Droit De Suite in International Law: Diagnosis and Remedy*, 17 BRAZILIAN J. OF INT'L L., 170, 171 (2020).

³³ Irina Tarsis, *Droit de Suite: Let's Talk about Artist's Resale Royalty Rights*, SECRETS OF ART MAGAZINE (June 10, 2020), <https://secretsofartmagazine.com/2020/06/droit-de-suite-lets-talk-about-artists-resale-royalty-rights/>.

³⁴ Joëlle Farchy & Kathryn Graddy, *The Economic Implications of the Artist's Resale Right*, WORLD INTELL. PROP. ORG. [WIPO] 16, WIPO Doc. SCCR/35/7 (Nov. 6, 2017), https://www.wipo.int/edocs/mdocs/copyright/en/scrr_35/scrr_35_7.pdf.

³⁵ Lara Mastrangelo, *Droit De Suite - Why the United States Can No Longer Ignore the Global Trend*, 18 CHI.-KENT J. INT'L L. 1, 3 (2018) (discussing *droit de suite* as a part of moral rights).

³⁶ *Id.*

other European countries, such as Belgium in 1921 and Czechoslovakia in 1926, followed France in passing similar legislation.³⁷

After these implementations of the *droit de suite*, France furthered the right through a proposed addition to the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”) in 1928 during the revision conference in Rome.³⁸ In 1948 the Berne Convention was officially amended to include the *droit de suite* right.³⁹ Through minor amendments, the *droit de suite* under Article 14ter of the Berne Convention currently provides authors of original works of art and original manuscripts with “an inalienable right to any interest in any subsequent sale of their work after the first sale by the original author.”⁴⁰ But, due to several countries’ opposition, particularly the United States and Japan, the application of the right was made optional and reciprocal.⁴¹ Therefore, those signatories of the Berne Convention need not enact such a law within their countries.⁴² Still, due to the reciprocal nature of the law, artists within those countries could not enjoy the resale royalties that they might have received from a country that observes the right.⁴³

Although a few countries have chosen not to enact laws to provide this right, many other European and non-European countries have passed similar laws granting these visual artists resale royalty rights.⁴⁴ And, in 2001, the European Resale Right Directive harmonized these laws for those within the European Union (“EU”).⁴⁵ Under the harmonization of these resale royalty rights laws, a visual work artist can receive compensation for the resale of their work.⁴⁶ With many countries participating in the *droit de suite* rights for visual artists, many artists have realized the actual monetary and commercialization of their work, thanks in part to the actions taken by the governments to provide these artists with equitable payment rights.

B. Policy Reasons and Application of Droit De Suite in Europe

³⁷ Sam Ricketson & Jane C. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* § 11.54 (2d ed. 2006).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Nadler, *supra* note 6 (there are more than 70 countries that provide resale royalty rights to visual artists); *see also* Laurel Wickersham Salisbury, *It's Not That Easy: Artist Resale Royalty Rights and the ART Act* (July 1, 2019), <https://itsartlaw.org/its-not-that-easy-artist-resale-royalty-rights-and-the-art-act/>.

⁴⁵ Council Directive 2001/84/EC, *On the Resale Right for the Benefit of the Author of an Original Work of Art*, 2001 O.J. (L 272) 32–36, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001L0084>.

⁴⁶ Summary of Council Directive 2001/84/EC, *On the Resale Right for the Benefit of the Author of an Original Work of Art*, ACCESS TO EUROPEAN UNION LAW (Nov. 1, 2019), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A126049> (defining the resale right as “the right, for the benefit of the author of an original work of art, to receive a percentage of the price obtained for any resale, made by professionals from the art market, of this work (auction houses, galleries or any other art market)).”

The droit de suite is meant to protect visual artists who have difficulty participating fully in the capitalization and monetization of their work.⁴⁷ The rationale for such a right can be viewed as a form of economic justice, allowing visual artists to benefit from the increased value of their work over the years due to the low valuation of their work in the initial portion of the artists' careers.⁴⁸ The divide between the musical and literary artists from that of the visual artists is stark because where the musical and literary artists can further capitalize on their creations with royalties and residuals, visual artists, hindered by the implemented laws, were unable to participate in that same enjoyment before the installation of droit de suite in the EU. In many cases, visual artists do not gain financial payments for the rights they retain; most of their economic gains are present in selling their paintings to interested buyers.⁴⁹ Therefore, to correct these inequalities amongst the artists, the EU and many other countries have incorporated these economically-focused moral rights that provide equitable compensation to visual artists.

Since the inception of the droit de suite right and the laws that facilitate it, many artists have realized the economic benefit of their artwork as their careers have progressed and they have gained notoriety. While it is not a cure-all for all the problems visual artists face, the policy reasons for its implementation through applicable laws bridge the want and need for a moral right through economic means.

II. ROYALTY RIGHTS IN THE UNITED STATES

The United States has not accepted the resale royalty right at the federal level, although legislature members have attempted its implementation on more than one occasion.⁵⁰ The lack of acceptance of such a right was due to the three main concerns raised by those in opposition: (1) there are no financial incentives created through its implementation for the artists; (2) there would be a negative economic impact on the cost of artwork due to the royalties; and (3) the administrative effort and cost required to create and maintain it would outweigh the possible benefits.⁵¹ This refusal to implement such a right is grounded in the history of the right in the United States. This history shows us the dominant utilitarian theory of copyright law in the United States that shapes the laws and the economic focus in which we view these laws. Also, it shows us the evolution of government members' views on the resale royalty right. Additionally, the history provides multiple examples of how a resale royalty right can be implemented in the United States through various federal efforts.

A. The History

⁴⁷ *Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1064-68 (9th Cir. 2018).

⁴⁸ Viglino, *supra* note 32.

⁴⁹ *Id.*

⁵⁰ Laurel Wickersham Salisbury, *It's Not That Easy: Artist Resale Royalty Rights and the ART Act*, CENTER FOR ART LAW (July 1, 2019), <https://itsartlaw.org/its-not-that-easy-artist-resale-royalty-rights-and-the-art-act/>.

⁵¹ Tarsis, *supra* note 19.

Although widespread in Europe, the United States has not accepted the resale royalty right of visual artists. This apprehension centers mainly on the differences in the ideologies of the United States and Europe.⁵² While many European countries see the need for moral rights under a personhood theory,⁵³ the United States takes a more economic incentive-based⁵⁴ utilitarian approach to copyright law.⁵⁵ Under this utilitarian theory, copyright law is meant to incentivize the authors of the works by providing exclusive rights for a limited duration.⁵⁶ Under this theory, it is hoped that through these exclusive rights, the authors of the works would be motivated to create more work that would offer more cultural value.⁵⁷ However, rewarding the artists for their contributions through copyright law is secondary.⁵⁸ From this lens, the United States implemented the law of the first sale doctrine.⁵⁹

The first sale doctrine permits a purchaser of a copyrighted work to sell, lend, or give away the copyrighted item to another.⁶⁰ Concerning artwork, the first sale doctrine allows the original artists to maintain control of the initial sale of the artist’s original artwork. Still, it does not permit the collection of any compensation by the artist for subsequent resales of their work.⁶¹ As a result of this doctrine, there is a significant limitation on the original artists’ rights in the event of subsequent sales and increased popularity and value of their work in the future.⁶² Thus,

⁵² Europe favors the moral rights of artists while the United States does not. Although, there has been some implementation of moral rights into the Copyright Act of 1976 due to the U.S. signing and joining the Berne Convention, the U.S. has not taken further steps to expand the moral rights as they relate to resale royalty rights. *See generally* Daniela Mohr & Florian Moritz, *What Are the Differences Between European Copyright and U.S. Copyright?*, COPYTRACK(April 25, 2019), <https://www.copytrack.com/blog/urheberrecht/european-us-copyright-difference>.

⁵³ William Fisher, *Copyright Theory*, Berkman Klein Center for Internet and Society at Harvard University (2017), <https://cyber.harvard.edu/copyrightforlibrarians/Introduction#Personhood>; *see also* Mastrangelo, *supra* note 35 at 9.

⁵⁴ Under this economic incentive-based approach, the main purpose in providing these copyright rights is not to reward the creators for their labor, rather, by providing “appropriate incentives” the government hopes to engage these creators to continue to participate in innovative and creative activities. *See* Shyamkrishna Balganes, Mark A. Lemley, Peter S. Menell, & Robert P. Merges, *Intellectual Property in The New Technological Age: 2022 Volume I: Perspectives, Trade Secrets and Patents at 1*, 19, Clause 8 Publishing (2022).

⁵⁵ Russel J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists’ Rights in France and the United States*, 28 BULL. COPYRIGHT SOC’Y 1, 3 (1980); *see also* *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985); 122 CONG. REC. 2834–35 (1976) (statement of Sen. McClellan); Shyamkrishna Balganes, *Foreseeability and Copyright Incentives*, 122 Harv.L.Rev.1569, 1576–77 (2009); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989); U.S. CONST. art. 1, § 8, cl. 8 (“[T]o promote the progress of science and useful arts”).

⁵⁶ Jeanne C. Fromer, *An Information Theory of Copyright Law*, 64 EMORY L. J. 71, 74 (2014); *see also* Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1197 (1996).

⁵⁷ *Id.*

⁵⁸ Balganes, *supra* note 54; *see also* *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948).

⁵⁹ *See generally* Mandour & Associates Intellectual Property Law, *First Sale Doctrine* (last visited Mar. 4, 2022), <https://www.mandourlaw.com/first-sale-doctrine/>.

⁶⁰ 17 U.S.C. § 109.

⁶¹ U.S. COPYRIGHT OFFICE, *Policy Studies: Resale Royalty Rights* (last visited Mar. 4, 2022), [https://www.copyright.gov/docs/resaleroyalty/#:~:text=Under%20the%20Copyright%20Act%20\(the%20%E2%80%9CAct%E2%80%9D\)%2C%2017%20U.S.C.&text=Instead%2C%20the%20first%20sale%20doctrine,the%20authorization%20of%20the%20creator](https://www.copyright.gov/docs/resaleroyalty/#:~:text=Under%20the%20Copyright%20Act%20(the%20%E2%80%9CAct%E2%80%9D)%2C%2017%20U.S.C.&text=Instead%2C%20the%20first%20sale%20doctrine,the%20authorization%20of%20the%20creator).

⁶² Unfortunately, the resale royalty right conflicts with the first sale doctrine. However, due to the increased interest and use of digital media, it may be possible to provide a resale royalty right to digital artists through a possible exception to the doctrine. By providing a resale royalty right, Congress, through the creation of applicable laws,

many artists do not fully realize the worth of their efforts until much later in their careers when they can increase the initial cost of their works.

Because of the economic incentive-based approach to copyright law and the implementation of the first sale doctrine, it seems that from a more historical look at how the United States has addressed the issue of artist resale royalty rights, such a right has never been attempted. However, the U.S. has made several attempts to implement a resale royalty right in federal law since the late 1970s.

B. Early Federal Efforts to Incorporate a Resale Royalty Right Fell Short of Their Goal Due to Economic and Policy Concerns

Due to the push by artists in the late 1960s to “consider alternatives to time-honored art world practices,” there was an increased interest in the U.S. to embrace an artist resale royalty right.⁶³ As a catalyst to this push, there was an incident between prominent artist Robert Rauschenberg and famous art collector Robert Scull.⁶⁴ The incident was one where Scull resold a piece of artwork by Rauschenberg for \$85,000 after his initial purchase from Rauschenberg for \$900 fifteen years prior.⁶⁵ When Rauschenberg realized what Scull was doing, Rauschenberg raised the issue that it was unfair that Scull was able to profit off of his work and later success without providing Rauschenberg with a portion of the profits.⁶⁶ Even though the artists’ effort was made to have the U.S. government recognize a resale royalty right,⁶⁷ many of the attempts at a federalized royalty right likely fell short of their goal due to the artists’ lack of financial and influential lobbying power.

The first effort to provide resale royalty rights to visual artists was seen in 1978 in the Visual Artists’ Residual Rights Act⁶⁸ that Representative Henry Waxman introduced in response to the Berne Convention, which later was finalized under the Visual Artists Rights Act of 1990 with changes from Waxman’s introduced bill.⁶⁹ The Visual Artists Rights Act of 1990 (“VARA”) sought to provide moral rights to artists by protecting their right to prevent mutilation or alteration of their visual works or receive credit for creating a piece of art.⁷⁰ In the first drafts

could address the growing concerns of these digital artists. See Sarah Reis, *Toward a “Digital Transfer Doctrine”? The First Sale Doctrine in the Digital Era*, 109 NW. U. L. REV. 173, 175 (2015) (suggesting an alternative solution to the first sale doctrine in light of the digital age).

⁶³ Salisbury, *supra* note 50.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Morgan & Purje, *supra* note 32, (“American artists and legislators have been actively battling to introduce a national Artist Resale Royalty for almost half a century”).

⁶⁸ U.S. Copyright Office, *Resale Royalties: An Updated Analysis* (2013).

⁶⁹ Berne Convention for the Protection of Literary and Artistic Works art. 14, Sept. 9, 1886, (revised 1971), (amended 1979), 102 Stat. 2853, 828 U.N.T.S. 221; see also WORLD INTELL. PROP. ORG. [WIPO], Guide to the Berne Convention for the Protection of Literary and Artistic Works (1971), at 90, WIPO Doc. 615(E) (1978), https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf.

⁷⁰ Visual Artists Rights Amendment of 1986, S. 2796 at § 3(d)(1), 99th Cong. (1986); see also Hughes, Hubbard & Reed, *VARA* (last visited March 4, 2022), <https://www.hhrartlaw.com/category/vara/>.

of VARA, legislators attempted to provide further moral rights to the artists, such as royalty rights.⁷¹ Unfortunately, due to the market-oriented mindset of the U.S., the justifications for such a right fell on deaf ears of the legislature.⁷² This failure to pass a resale royalty right resulted from the concerns of those opposing the creation of the resale royalty right.⁷³ Many objected to implementing a resale royalty right and were concerned with the lack of financial incentives for artists, the negative economic impact that such rights could cause on the cost of artwork, and the administrative effort required to create such rights.⁷⁴ But due to how controversial the inclusion of royalty rights was in the United States, the suggested provision in the initial drafts was not included in the finalized act that passed in 1990.⁷⁵ Thus, the artists’ championship in the United States to further such a right failed in this attempt.

Those opposed to implementing artist royalty rights believed that other remedies, such as the Artist Contract,⁷⁶ which is a model contract that artists could use when selling their work or transferring ownership, or general contracting laws were more suitable to provide such rights for these artists.⁷⁷ The Artist’s Contract as an alternative to royalty rights took hold in the 1970s to give the artists further moral rights such as royalty rights.⁷⁸ However, although the use of these contracts was seen as a way to provide further rights to the artists, the lack of sophistication of the artists when entering these contracts caused the contracts to be heavily against the artists’ interests.⁷⁹ These contracts only further perpetuated the lack of equitable compensation to the artists because they could not represent themselves at the same level as the art dealers and more sophisticated parties.

Notwithstanding the objections and failure to pass a U.S. *droit de suite* clause, Congress tasked the Copyright Office to investigate and advise them on the feasibility of incorporating the resale royalty rights within the United States.⁸⁰ In 1992, the Copyright Office advised Congress that it was not economically feasible to incorporate resale royalty rights into U.S. copyright law.⁸¹ However, the Copyright Office revised its recommendation in 2013, advising Congress to

⁷¹ Toni Mione, *Resale Royalties for Visual Artists: The United States Taking Cues from Europe*, 21 CARDOZO J. INT’L & COMP. L. 464, 484 (2013); *see also* Visual Artist Rights Amendment of 1986, S. 2796 at § 3(d)(1), 99th Cong. (1986) (“the Act’s purpose was “to provide for resale royalties”).

⁷² Salisbury, *supra* note 50.

⁷³ Tarsis, *supra* note 19.

⁷⁴ Allison Schten, *No More Starving Artists: Why the Art Market Needs a Universal Artist Resale Royalty Right*, NOTRE DAME JOURNAL OF INTERNATIONAL & COMPARATIVE LAW: VOL. 7 : ISS. 1 , ARTICLE 6, (2017); *see also* Charles Chen, *A Right Deferred: Resale Royalties for Visual Artists*, New York State Bar Association (Feb. 17, 2012) (updated at 1:35 pm), http://nysbar.com/blogs/lawstudentconnection/2012/02/a_right_deferred_resale_royalt.html.

⁷⁵ Mione, *supra* note 71 at 484.

⁷⁶ Artist Contract, *The Agreement of Original Transfer of Work of Art with Resale to Benefit a Charitable Organization*, (last visited May 9, 2022), <https://artistcontract.org/>.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ U.S. COPYRIGHT OFFICE, *Droit de Suite: The Artist Resale Royalty* (1992).

⁸¹ *Id.*

incorporate a resale royalty provision⁸² upon the 2001 harmonization of the EU laws.⁸³ In its 2013 report, the Copyright Office stated that “under the current legal system, visual artists are uniquely limited in their ability to fully benefit from the success of their work over time”⁸⁴ and that the distinctive way in which visual artists’ work is created has not changed since the first report in 1992, but that adoption of resale royalty rights by more than thirty additional countries since the 1992 report was a significant development that pointed towards a reevaluation of the issue and contributed to the ultimate decision to suggest a resale royalty right within the United States.⁸⁵ As determined by the Copyright Office, this development warranted “congressional consideration of a resale royalty right,⁸⁶ or a *droit de suite*, which would give artists a percentage of the amount paid for work each time it is resold by another party.”⁸⁷

In addition to the 2013 report submitted by the Copyright Office, a 2015 statement by Maria A. Pallante, Director of the U.S. Copyright Office and the United States Register of Copyrights, before the Committee on the Judiciary United States House Representatives was also submitted. She said that if the Judiciary Committee was prepared to act on the American Royalties Too Act of 2015,⁸⁸ “there was already a foundation in place”⁸⁹ to allow the bill’s passage.

Even with these reports and statements confirming the feasibility of a royalty right, there has not been a congressional change to the copyright law to allow for such rights for visual artists to this day. While the federal government has not made moves to implement a federalized

⁸² U.S. COPYRIGHT OFFICE, *supra* note 68.

⁸³ Mione, *supra* note 71, at 495.

⁸⁴ *Id.* at 1; *see also* Maria A. Pallante, *The Register’s Perspective on Copyright Review*, April 29, 2015 (stating “The Copyright Office concluded that certain visual artists operate at a disadvantage under the copyright law relative to authors of other types of creative works.”).

⁸⁵ *Id.* Additionally, the recent developments of the internet, NFTs, blockchain, and the push towards the Metaverse and the digital meddling of our lives would likely suggest the need for further protections under copyright law for digital visual artists.

⁸⁶ The Copyright Office provides some alternatives to correct the disadvantages faced by visual work artists under the current copyright law, *intra alia*, such as:

- (i) setting a minimum threshold value between \$1,000 and \$5,000;
- (ii) applying the resale royalty only to visual art works that are currently defined under section 101 of the Copyright Act;
- (iii) limiting the resale royalty rate to a percentage between 3 and 5%;
- (iv) include a cap on the royalty payment for each sale;
- (v) apply prospectively to only the resale of works that are acquired after the implementation of the law; and
- (vi) provide a collective management by private collecting societies that are generally oversighted by the U.S. Copyright Office.

U.S. COPYRIGHT OFFICE, *supra* note 40 at 3.

⁸⁷ *Id.* at 2.

⁸⁸ American Royalties Too Act of 2015, H.R. 1881, 114th Cong. (2015). The legislation was introduced by Representative Nadler and would have established a resale royalty right for visual artworks that were sold at auction by a person other than the author for \$5,000 or more and would instate a royalty amount of 5% of the sale price or \$35,000, whichever was the lesser, plus cost-of-living adjustments. *Id.* § 3.

⁸⁹ U.S. COPYRIGHT OFFICE, *supra* note 40 at 20.

royalty right provision for visual artists, it has made sweeping changes to protect the musical copyright owners better.

III. THE USE OF MECHANICAL LICENSES AND THE MODERNIZATION OF MUSIC IN COPYRIGHT LAW ALLOWED FOR FURTHER PROTECTION AND RIGHTS TO MUSICAL ARTISTS DUE TO DEVELOPING TECHNOLOGIES

Due to the vast amount of lobbying power that the music industry companies have, it is no wonder that the copyright owners, which are predominantly the record labels, and the music artists are provided equitable compensation through the extension of property rights in the form of royalties. The purpose of copyright law, which is regulated through governmental bodies, is to promote the creation of sciences and useful arts as prescribed by the Constitution.⁹⁰ In doing so, copyright law must balance the protection of creative works while incentivizing artists and allowing others to use the works. With the rise of the digital age, the protection of artists has become increasingly complex. It has required that further governmental regulation address the issues this digital age has created for these artists. In particular, Congress’s ability to provide further protection to artists in response to technological advances has been continuously demonstrated by the legislative creation of mechanical licenses that provide royalty payments for musical artists. There have been four notable governmental interventions to address the concerns of copyright law and technological innovation: (1) the creation of mechanical licenses in the Copyright Act of 1909; (2) substantial changes to the requirements for mechanical licenses in the Copyright Act of 1976; (3) addressing the digitalization of music through the Digital Performance Right in Sound Recordings Act of 1995; and (4) the creation of blanket licenses under the Music Modernization Act of 2018.

A mechanical license is a license that grants the person or company acquiring the license “the rights to reproduce and distribute a copyrighted musical composition in audio format.”⁹¹ In exchange for granting the license, the copyright owner receives payment for the use through royalties.⁹² The use of mechanical licenses to provide authors of copyrighted musical works with royalties originated when the music industry attempted to reproduce existing songs on piano rolls.⁹³ Due to the 1908 Supreme Court ruling in the *White-Smith Music Publishing Co. v. Apollo Co.* that piano rolls were not “copies” under the copyright law at that time, Congress addressed the issue of new technology and equitable compensation for artists by providing these authors with mechanical licenses to better protect and provide compensation for their work in the

⁹⁰ U.S. Constitution *supra* note 22.

⁹¹ Kevin Cornell & Justin M. Jacobson, *Mechanical Licensing 101*, True Core (Dec. 23, 2020), <https://www.tunecore.com/blog/2020/12/mechanical-licensing-101.html>.

⁹² *Id.*

⁹³ *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 18, 28 S. Ct. 319, 323, 52 L. Ed. 655 (1908) (holding that piano rolls were not “copies” under the copyright laws at the time); *see also* U.S. Copyright Office, *Statement of Marybeth Peters the Register of Copyrights Before the Subcommittee on Courts, The Internet and Intellectual Property House Committee on The Judiciary*, 1, 2 (March 11, 2004).

Copyright Act of 1909.⁹⁴ Although Congress created these statutorily required mechanical licenses, there were stringent requirements for using the compulsory licenses, and they were infrequently used under the 1909 Act.⁹⁵

Not until the Copyright Act of 1976 did mechanical licenses see significant changes that provided further protection and royalty payments for musical copyright owners. Upon the sunset of the mechanical licenses in 1961, the music industry sought and advocated for their retention, citing that the “elimination of the license would cause unnecessary disruptions in the music industry.”⁹⁶ While these concerns were the industry’s main focus, the question shifted from whether or not Congress should retain such licenses to whether there was a need to reduce the burdens on copyright owners and whether there needed to be an adjustment to the rates paid to the owners.⁹⁷ Congress adopted a variety of new conditions to section 115 of the Copyright Act of 1976 to address these concerns and provide appropriate rates to these owners.⁹⁸

In the 1990s, with the advancement and use of digital music, Congress addressed further concerns about copyright owners’ ability to obtain monetary compensation and capitalization on their work. They did this by updating the Copyright Act to include modifications to mechanical licenses to account for this digitalization of music.⁹⁹ Due to the likely increase in “digital transmission of sound recordings...[becoming a] very important outlet for the performance of recorded music,” Congress took steps to provide further protection for these copyright holders through the Digital Performance Right in Sound Recordings Act of 1995 (“DPRA”).¹⁰⁰ The

⁹⁴ Prior to the 1909 Act, most player pianos used musical works without payment to or a license from the composition’s owner. *See Intellectual Property Protection and Courts Amendments Act of 2004: Hearing Before the Subcomm. on Courts, The Internet and Intellectual Property H. Comm. on The Judiciary, 108th Cong. 1, 3 (2004)* (statement of Marybeth Peters, Register of Copyrights).

⁹⁵ *Id.*

⁹⁶ *Id.* at 3.

⁹⁷ *Id.* at 4.

⁹⁸ *Id.* at 4, 5. These new conditions consisted of:

- (1) Licenses are available only after the phonorecord, under the authority of the copyright owner, has been distributed to the public within the United States.
- (2) Licenses are only available to those whose primary intent is for distribution of the phonorecord to the public for private use.
- (3) Licenses cannot duplicate sound recordings without the authorization of the copyright owner of the sound recording.
- (4) Licensees must serve notice of intention on the copyright owner to obtain the compulsory license or serve notice to the Copyright Office.
- (5) The notice must be served before or within thirty days after making any phonorecord and before the distribution of any phonorecord.
- (6) Copyright owners only receive royalty payments on phonorecords made and distributed after the owner is identified.
- (7) The rate paid to the owner is adjusted by an independent body, which was the Copyright Royalty Tribunal prior to 1993.
- (8) Licenses may be terminated for failure to pay the monthly royalties to the copyright owner after the user fails to make a payment within thirty days of receipt of written notice from the Copyright Office of their default.

See also COPYRIGHT ACT OF 1976, §§ 115(a)(1), (a)(2), (b)(1), (c)(1), (c)(6).

⁹⁹ U.S. Copyright Office, *supra* note 93 at 6.

¹⁰⁰ SENATE JUDICIARY COMMITTEE, *Digital Performance Right in Sound Recordings Act of 1995*, S. REP. NO. 104-128, 1, 14 (1995).

reasoning behind these changes to section 115 of the Copyright Act was that Congress, along with the music industry, feared that “these new technologies also may lead to new systems for the electronic distribution of phonorecords with the authorization of the affected copyright owners.”¹⁰¹ Congress believed that the best route to combat these challenges of producing music in a digital format was to reform the Copyright Act, thus providing further protection to the copyright owners and ensuring their equitable compensation in the new digital age of music consumption.

For a fourth time, Congress stepped in to better protect the payments and commercialization of copyright owners of musical works and the rise of technological innovation in 2018 with the Music Modernization Act of 2018.¹⁰² With this modification to the Copyright Act, Congress provided musical copyright owners and artists with “blanket” licenses that were universal and automatic to address the concerns of digital music streaming services.¹⁰³ Additionally, Congress created a new Mechanical License Collective (“MLC”).¹⁰⁴ The MLC is a nonprofit entity tasked with the administrative aspects of issuing and maintaining these new digital streaming mechanical licenses.¹⁰⁵ This further modification mandated streaming services, such as Spotify, to pay royalties for each user play.¹⁰⁶ These royalty payments are paid to the copyright owners and artists through the streaming mechanical licenses, based on “a percentage revenue formula.”¹⁰⁷ This percentage revenue formula varies based on the licensee’s business model related to the offering of the musical recordings.¹⁰⁸ This means that the amount due by the service or digital music platform to each publisher is usually a proportional percentage of the revenue earned by that entity.¹⁰⁹ For example, despite the uncertainty and difficulty of the new frontier of the digital music age, Congress legislated to provide these mechanical royalty rates.¹¹⁰ Accordingly, the current royalty rates payable for on-demand streaming are about 11.8% and are predicted to increase to about 15.1% by 2022.¹¹¹ Additionally, there is a minimum payable rate according to the type of service provided by the streaming entity.¹¹² The types of service provided by the streaming entity include whether music subscription fees are charged by them, if the service is free to use, or if it is ad-supported.¹¹³

¹⁰¹ *Id.*

¹⁰² Congress passed it to modernize and modify the existing licensing system. U.S. COPYRIGHT OFFICE, *Music Modernization: Frequently Asked Questions* (last visited March 4, 2022), <https://www.copyright.gov/music-modernization/faq.html>.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Because the streaming service has to reproduce the musical composition each time a user plays a song, it is required to pay a royalty for each play under the Music Modernization Act.

¹⁰⁷ Justin Jacobson, *The Brief History of Mechanical Royalties and Music in The U.S.*, The Jacobson Firm P.C. (January 21, 2021), <https://thejacobsonfirm.com/the-brief-history-of-mechanical-royalties-and-music-in-the-u-s/>.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

The music industry has had a significant number of interventions by the federal government to provide better protection and equitable compensation for their musical work at the sight of technological innovation. This progression can be seen through the amendments and acts passed by Congress since the early 1900s. Because of these interventions, Congress' previous actions thus lays evidentiary precedent providing proof of concept in their authority to make substantial changes to the copyright law to effectuate digital visual artists' needs ensuring equitable compensation through resale royalty rights.

IV. NFTS, BLOCKCHAIN, AND SMART CONTRACTS: WHAT EVEN ARE THEY?

With every passing year, there is more innovation in the technology sector, much more than anyone could have imagined, from the invention of the phonorecord to the creation of CDs, the internet, social media, and now NFTs and the Metaverse; technology has become an integral part of our lives. While innovation can be daunting and scary at its cusp, the law, primarily copyright law, has been at the forefront of or arrived shortly thereafter the innovation. At the forefront of innovation today is the use of NFTs, blockchain, and smart contracts to produce and commercialize artwork, conduct art-related transactions and agreements, and provide digital visual artists with a broader audience than before and a way to obtain profits for subsequent sales of their digital artwork through royalties administered through smart contracts. Through the explosion of NFTs, blockchain technology, and smart contracts within the past few years, especially in 2021, we have seen their application as a means to provide various artists with an avenue to obtain equitable payment for their work through royalties on subsequent sales of their work on the blockchain. This innovation, while having some issues and concerns, has proven that an application of such a right as resale royalty rights can (1) easily be administered, tracked, and maintained; (2) not negatively affect the art market by the addition of royalties; and (3) provide artists with incentives to continue to create works through both the resale royalties and the broadening of their audience. Although the application of such a right has been met with hostility, it is clear that its possible feasibility has been proven through the recent NFT, blockchain, and smart contract explosion.

A. The New Digital Frontier: Basic Definitions

1. *What is Blockchain?*

Blockchain is a relatively new concept that originated in 2008¹¹⁴ and in 2014 it transformed into what we know today as a ledger to track business transactions.¹¹⁵ Since its

¹¹⁴ Robert Sheldon, *A Timeline and History of Blockchain Technology*, TechTarget (Aug. 9, 2021), <https://whatis.techtarget.com/feature/A-timeline-and-history-of-blockchain-technology#:~:text=Blockchain%20was%20first%20introduced%20in,interest%20coming%20from%20many%20quarters>.

¹¹⁵ *Id.*

origination, it has evolved and taken on a life of its own within the technological community.¹¹⁶ As defined by IBM, the blockchain is a shared digital immutable ledger that records and tracks transactions and both tangible and intangible assets.¹¹⁷ It is said to provide an efficient way to deliver information between parties through its immediate, immutable ledger that is transparent and easily accessible by only the network members of that blockchain.¹¹⁸ Information and tasks are effectively administered and executed through smart contracts stored on the blockchain and executed automatically.¹¹⁹

2. *What is an NFT?*

A non-fungible token (“NFT”) is a digital asset that can take the form of an image, gif, or video representing items on the blockchain, which records the transactions between peers in a system of networked computers.¹²⁰ Almost anything can be attached to an NFT, such as physical artwork, music, and real property. The NFT is merely a digital token or placeholder used to visually represent the asset associated with it on the blockchain.¹²¹ Additionally, NFTs, while available for public viewing, can only have one owner at a time, and the owner is the buyer of the NFT who holds the status as the authenticated owner and holds the “bragging rights.”¹²² These bragging rights are the main reason for continued interest in these NFTs, as the “owning” of the NFT provides social value, increasing the piece’s economic value.¹²³ Another reason for the increased interest by both consumers and artists is that NFTs cannot be as easily reproduced as other digital items due to their unique digital signatures associated with each NFT via the blockchain.¹²⁴ However, copies of the visual representation of the NFT can be created, similar to the counterfeit copying of physical artwork; the ability to prove actual ownership is the reason for its explosion amongst digital art collectors and investors.¹²⁵ Copying the digital visual token has caused some worries for artists concerned with counterfeits. Still, this issue can and has been

¹¹⁶ *Id.*

¹¹⁷ IBM, *What is Blockchain Technology?* (Last visited Mar. 4, 2022), <https://www.ibm.com/topics/what-is-blockchain>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Elizabeth Howcroft, *Explainer: What are NFTs?*, Reuters (Nov. 18, 2021), <https://www.reuters.com/technology/what-are-nfts-2021-11-17/>.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Courtney Duchene, *NFTs are Disrupting Fine Arts: Here’s What Risk Professionals Should Know*, Risk & Insurance (Feb. 22, 2022), <https://riskandinsurance.com/nfts-are-disrupting-fine-arts-heres-what-risk-professionals-should-know/>.

¹²⁴ Ethereum, *Non-Fungible Tokens (NFTs)*, ETHEREUM (March 4, 2022), <https://ethereum.org/en/nft/>.

¹²⁵ Duchene, *supra* note 123, (“To put it in a more familiar context, anyone can buy a print of the Mona Lisa; only one person can own the real thing. NFT owners are purchasing proof that they own the real thing”).

rectified through these digital marketplace platforms in a similar manner that the copyright laws have addressed copyright infringement.¹²⁶

3. *What are Smart Contracts?*

Smart contracts are programs stored on the blockchain that automatically execute agreements once predetermined conditions are met.¹²⁷ The automatic execution is done without a third party, thus increasing the efficiency of the transaction and arrangement.¹²⁸ These smart contracts are typically used to execute agreements between parties where all the parties can be sure of the outcome of the agreement.¹²⁹ The code used within the smart contract utilizes a simple “if/when then” mechanism to execute these transactions automatically. The smart contract can also be customized like a traditional contract between parties to include additional details, such as the specification of specific rules about the trading of the NFTs and the percentage of royalties the creator receives for every subsequent sale of their work.¹³⁰

The application of these technologies is vast and ever-changing. They can be used to improve businesses, governments, supply chains, and other organizations that rely on contracts, information delivery, transactions, and record keeping. As we push forward into the future, where technology will be fully integrated into our lives and where the physical reality and the digital one will meld, the United States must look to the adoption of these new technologies in conjunction with our traditions and established laws to better execute the goals and missions of our laws and Constitution.

B. The Digital Art World and NFTs, Blockchain, and Smart Contract Explosion

With the hype of NFTs and blockchain at the start of the COVID-19 pandemic, many consumers, collectors, and digital artists flocked to the various blockchain platforms in search of ways to view, collect, produce, and monetize digital artwork in what has become a more digital world due to the pandemic. It is said that the creation of NFTs within the digital art world was a byproduct of those within the digital artwork world wanting to address a real problem that many artists face, which is the lack of financial sustainability in the 21st century.¹³¹ Thus, NFTs on the blockchain were created, and resale royalties for subsequent sales became a standard feature of

¹²⁶ Lisa Gibbons, *There Is a way to Protect NFTs From Being Replicated or Lost: This Company Does Just That*, COINTELEGRAPH, (Oct. 28, 2021), <https://cointelegraph.com/news/there-is-a-way-to-protect-nfts-from-being-replicated-or-lost-this-company-does-just-that>.

¹²⁷ NIFTY KIT, *How Shared Smart Contracts Work and The Importance of Owning Your Contract as an NFT Artists*, NIFTY KIT (Aug. 10, 2021), <https://niftykit.com/how-shared-smart-contracts-work-and-the-importance-of-owning-your-contract-as-an-nft-artist/>.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Reethu Ravi, *NFT Smart Contracts: How To Read Them and Why You'd Need To*, NFT EVENING (Jan. 11, 2022), <https://nftevening.com/nft-smart-contracts-how-to-read-them-and-why-you-d-need-to/>.

¹³¹ Sarah Edwards, *The NFT Explosion: What Could Possibly Go Wrong?*, THE DALES REPORT (Aug. 8, 2021), <https://thedalesreport.com/crypto-nfts/the-nft-explosion-what-could-possibly-go-wrong/>.

the digital artwork created, bought, and sold on platforms like Opensea.¹³² While various blockchain platforms cater to all kinds of artists, those within the physical art world have even taken steps to join the hype, such as Saatchi Art.¹³³ Saatchi Art has created a platform for visual artists to sell their artwork where they provide the artists with 65% of earnings (the same standard of compensation as in the physical world) and royalties on secondary sales.¹³⁴ Many platforms give these digital visual artists royalties, maintained and executed through smart contracts on the blockchain, up to 10% on their secondary sales.¹³⁵ Many artists have found that they can meet their needs through these payments and continue producing more artwork by providing these royalties.¹³⁶

Additionally, while the standard of these blockchain platforms is to incorporate royalties into the smart contracts of the NFT artwork, there has been little to no adverse effect on the sale of artwork and the digital art market. While this is a significant concern for many who oppose resale royalty rights, the NFT art market has seen record-shattering monthly trading sales of \$4 billion despite the cryptocurrency crash in early 2022.¹³⁷ Moreover, NFT trading volume totaled more than \$23 billion in 2021.¹³⁸ The investment value in the NFT art market has continued to increase from \$31 million in previous years to \$755 million as of February 2022.¹³⁹

It is clear from the continued interest and investments into NFT digital art by various collectors and consumers that implementing a resale royalty right for the original digital visual artists has not hindered the market as many have feared. Moreover, the boom of NFTs has also increased the artists' incentives to continue to produce more work and has proven that using the blockchain can be easily administered. With the evidence of the practical applicability of resale royalties through NFTs, blockchain, and smart contracts, it is reasonable to assume that a similar application in the form of a resale royalty right within the United States can be feasible.

V. THE NFT CRAZE HAS SHOWN THAT A RESALE ROYALTY RIGHT WITHIN THE UNITED STATES IS ACHIEVABLE AND CAN BE FURTHERED THROUGH THE ADOPTION AND ACCEPTANCE OF EMERGING TECHNOLOGIES

¹³² Isabelle Castro, *Interest in NFT Market Grew Exponentially During Pandemic*, LENDLT FINTECH NEWS, (Feb. 02, 2022); <https://www.lendacademy.com/interest-in-nft-market-grew-exponentially-during-pandemic/#:~:text=The%20platform%20offers%20artists%20%E2%80%9Ccreator,2.5%25%20of%20every%20sale%20transacted.>

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Chow, *supra* note 14.

¹³⁷ Jonathan Ponciano, *NFT Sales Shatter Monthly Trading Record With \$4 Billion in Sales—Here's Why They're Still Booming Despite the Crypto Crash*, FORBES (January 20, 2022), <https://www.forbes.com/sites/jonathanponciano/2022/01/20/nfts-shatter-monthly-trading-record-with-4-billion-in-sales-heres-why-theyre-still-booming-despite-the-crypto-crash/?sh=413399557910>.

¹³⁸ *Id.* This trading amount reflected more than a 20,000% increase from less than \$100 million in 2020.

¹³⁹ Castro, *supra* note 132.

Although the history of *droit de suite* originated in France and stems from the theory of personhood rather than the more common approach in the United States, utilitarianism, the artist resale royalty right is not merely a moral right but an economic one as well.¹⁴⁰ Due to the duality of the right, implementing resale royalty rights for digital visual artists within the United States would not go against traditions.¹⁴¹ Instead, it would further promote the intent of the Constitution to “promote the progress of sciences and useful arts”¹⁴² by providing an appropriate incentive to the artists to continue to create further works for the betterment of the public.¹⁴³ The concerns raised by the opposition in the early 1990s and 2013 to the resale royalty right can be viewed as justifiable and reasonable, especially when viewing them through the lens of that time.¹⁴⁴ Still, many of the previous concerns can be addressed and solved by accepting and integrating new technologies to further the Constitution’s intent.

A. Policy Reasons for the Implementation of Royalty Rights for Digital Visual Artists

Although many opponents believe that allowing for royalty rights within the United States would be detrimental to the purpose of copyright law,¹⁴⁵ many reasons justify its implementation, both morally and based on policy. Using a resale royalty right gives artists the economic incentive to further create artwork and participate in the continued progression of the “sciences and useful arts”¹⁴⁶ as the Constitution intended. It also allows the United States to become more compliant with the Berne Convention, ushering the U.S. into a new age where we can be a part of the larger art world and market.¹⁴⁷ Furthermore, as we have seen through the progression of copyright laws related to the music industry and technological advancements,¹⁴⁸ the current copyright laws for visual artists need to make the necessary changes to acknowledge and accommodate the integration of technology into our everyday lives.

First, adopting resale royalty rights for digital visual artists would provide equitable compensation to the artist, providing increased opportunity for and reaching those artists from minority communities. In addition, “while the lack of artist resale royalties in the United States is generally detrimental to artists, it is particularly damaging to artists who only gain acclaim later in life — including artists of color whose work was long undervalued due to systemic

¹⁴⁰ Fisher, *supra* note 36.

¹⁴¹ *Id.*; see also Mastrangelo *supra* note 35 at 10–11 (stating that the resale royalty right, although viewed as a moral right in conflict with the utilitarian theory that dominates the U.S. copyright law, is actually not truly in conflict with it. This is because it meets the economic incentive goal of the utilitarian theory and the history of the right being applied to common law countries such as Britain prove that the right can be applied to the U.S. common law).

¹⁴² U.S. CONST., *supra* note 37.

¹⁴³ Balganes, *supra* note 54.

¹⁴⁴ Schten, *supra* note 74.

¹⁴⁵ *Id.*

¹⁴⁶ U.S. CONST. art. I, § 8, cl. 8.

¹⁴⁷ By implementing the *droit de suite* provision that the United States is a signatory to, thus allowing for the U.S. artists to participate fully in the international art world and obtain resale royalties in foreign countries that have such a right.

¹⁴⁸ Jacobson, *supra* note 107.

racism.”¹⁴⁹ It is not unknown that class and race play a significant role within the art world and the art market.¹⁵⁰ Many artists who are minorities or come from lower socioeconomic backgrounds cannot obtain formalized training like their white and wealthy counterparts.¹⁵¹ The current system in which artists receive compensation is substantially biased to these issues of class and race,¹⁵² thus resulting in many minorities and lower socioeconomic artists not receiving their just payment for their contribution to our society. Because of these issues, many minority artists have taken to the digital markets and created collectives that pay resale royalties for subsequent sales of their work.¹⁵³ One collective, Souls Down Deep Foundation, has even taken a step further to provide artists within its collections and foundation resale royalty rights at five percent of each subsequent sale of their work to bridge the gap between minority artists and their white counterparts.¹⁵⁴ To fully provide true equity and just compensation, the gates that the art world and those within power have kept shut need to be opened. The only proper equitable way to achieve true equality amongst artists is through a resale royalty right for these artists.¹⁵⁵

Furthermore, with the use of NFTs on the blockchain, artists can broaden their audience, thus furthering Congress’ intent to promote the arts and sciences¹⁵⁶ and allowing underrepresented artists to expand their market further than they would in the physical world. Many underrepresented artists, including those from minority backgrounds and lower socioeconomic backgrounds, would and have benefitted from the explosion of NFTs and the digital blockchain marketplaces.¹⁵⁷ Those same artists, who did not have broad audiences, have been able to build and foster new expanded communities of patrons for their work, increasing profits and recognition for these artists.¹⁵⁸ A clear example of this was seen within the last few years, and even more recently on much smaller scales by various artists, when artists sold their artwork as an NFT on the blockchain through the digital marketplace.¹⁵⁹ These artists were able to increase their audience and make a substantial profit in the initial sale of their artwork and through royalties found embedded within the smart contract of the NFT artwork.¹⁶⁰

Second, although it is not an obligation of the signatories to adopt resale royalty rights under the Berne Convention,¹⁶¹ by doing so, the United States would no longer be behind in this area of copyright and would enter into the significant art market of over 70 other countries that

¹⁴⁹ Cassie Packard, *Souls Grown Deep Starts Unprecedented Resale Royalties for Artists*, HYPERALLERGIC (Nov. 5, 2020), <https://hyperallergic.com/599296/souls-grown-deep-starts-unprecedented-resale-royalties-for-artists/>.

¹⁵⁰ Anderson, *supra* note 17.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ U.S. CONST., *supra* note 37.

¹⁵⁷ Daria Givens, *Black Artists are Banking on NFTs to Diversify the Industry and Create Community*, Insider (September 30, 2021, 7:35 am), <https://www.insider.com/nfts-break-barriers-create-community-for-struggling-black-artists-2021-9>.

¹⁵⁸ *Id.*

¹⁵⁹ Locke, *supra* note 9; *see also* McLaughlin, *supra* note 9.

¹⁶⁰ *Id.*

¹⁶¹ Ricketson, *supra* note 39.

all provide such rights to artists.¹⁶² Due to the reciprocal nature of the resale royalty right within the other countries, because the United States does not recognize the right within the country, many American artists cannot fully enjoy the benefits of their work abroad.¹⁶³ The lack of the U.S. recognizing these rights to artists can create additional economic hardship for digital artists who may lose out on the full extent of their rights due to the United States not providing all of the laws found within the Berne Convention. Furthermore, if the United States were to incorporate resale royalty rights for digital visual artists, the U.S. global public image would be increased, and the disadvantages the U.S. experiences on the global scale would be corrected.¹⁶⁴ Additionally, it would likely increase the artists' ability to collect on the commercialization of their work, thus providing a further incentive to create and produce more work for the public good. It only makes sense for the United States to further comply with the Berne Convention and further its international art market stance.

Third, adopting such a right would further protect digital visual work artists by applying laws better suited for our digital economy and society. The way in which visual artwork is viewed and consumed by people has changed with the advancement of technology. Yet, the copyright laws have not addressed the need for change to accommodate these new ways art is viewed, purchased, and experienced. It is necessary to address the speed and ease with which music, art, files, and other digital items can be downloaded, shared, exploited, and contained. Our society has seen that speed and ease through the progression of the use of musical entertainment with platforms like Napster, Spotify, iTunes, Pandora, and YouTube. Due to this increased use of these digital platforms, the music industry and the copyright laws were forced to adjust to provide adequate compensation and protection to the artists and music production corporations.¹⁶⁵ It is fair and reasonable that digital visual artists receive the same protections and compensation as those in the music industry. The ability to reform copyright law to better suit digital visual artists is within the legislature's power, as we have seen through mechanical licenses and updates to the law relating to the music industry. Updating the copyright laws to better align with how society views, purchases, and experiences artwork with a resale royalty right will not be at odds with the utilitarian theory of copyright law and would further incentivize artists to produce more work and participate in society for its betterment.

Although there may be perceived cause for concern, there are justifiable reasons, as seen through applying royalties to digital artwork via NFTs, for implementing resale royalty rights for visual artists within the United States copyright law. Furthermore, such implementation can also be accomplished by utilizing new and emerging technologies such as NFTs, blockchain, and smart contracts by governmental entities to assist in providing the resale royalty right to these digital visual artists.¹⁶⁶

¹⁶² Nadler, *supra* note 6.

¹⁶³ Salisbury, *supra* note 50.

¹⁶⁴ *Id.*

¹⁶⁵ Jacobson, *supra* note 107.

¹⁶⁶ Zhao Zhao, *Fulfilling the Right to Follow: Using Blockchain to Enforce the Artist's Resale Right*, 39 CARDOZO ARTS & ENT. L.J. 239, 253 (2021) ("...blockchain technology would not only maximize the amount of royalties

B. Using NFTs, Blockchain, and Smart Contracts Resolves Many, If Not All, Opposition Arguments, Thus Further Proving the Resale Royalty Rights Justification

With the integration of the digital world with our actual physical world, it would be remiss to neglect the significance and necessity of digital mediums such as NFTs, blockchain, and smart contracts to further the purpose of copyright law and protection. Considering the aforementioned, it is all the truer that regulating and administering such a right as the resale royalty rights of digital visual work artists is needed. Although the arguments presented by the opposition to the resale royalty right can be viewed as justifiable in the traditional context and framework, these concerns are resolved with the emergence of new technologies.

The arguments presented by those in opposition to resale royalty rights can primarily, if not entirely, be addressed by NFTs, blockchain, and smart contracts. The first argument that implementing resale royalty rights would not incentivize artists due to the benefits only reaching a select few of the artists¹⁶⁷ can be addressed by examining the NFT craze that has taken the world by storm. Many artists, mainly those unknown,¹⁶⁸ have flocked to the digital marketplaces on the blockchain to reap the immediate economic benefits of their first sale and the resale royalties from their subsequent sales.¹⁶⁹ These economic benefits that artists have experienced through subsequent sales are due to the ability to incorporate resale royalties into the smart contracts of the NFTs, thus providing them with a renewed incentive to create and share more of their digital artwork for consumers' consumption and appreciation.¹⁷⁰

Additionally, the second argument that the administrative costs and efforts required to maintain such a right are not economically feasible can, again, quickly be addressed through blockchain technology and smart contracts. Blockchain technology can efficiently collect and deliver information and payments to governmental regulatory agencies and the artists themselves with immutable ledgers.¹⁷¹ The ease with which blockchain technology can facilitate most, if not all, of the required mechanisms necessary to maintain and monitor the resale royalty rights

visual artists receive, but also enhance efficiency in the distribution of resale royalties to artists through more streamlined and cost-effective transactions. Smart contracts can be programmed on a distributed ledger to execute automatic royalty payments when conditions agreed upon between parties are met.”); *see also* Michael D. Murray, *NFTs Rescue Resale Royalties? The Wonderfully Complicated Ability of NFT Smart Contracts to Allow Resale Royalty Rights*, SSRN (July 15, 2022), <https://dx.doi.org/10.2139/ssrn.4164029>.

¹⁶⁷ Mione, *supra* note 71.

¹⁶⁸ While the hype of NFTs is based on the social aspect of owning' and the bragging rights that come along with that ownership, many unknown artists have been able to combine their use of social media to create a community and buzz behind their digital artwork on the blockchain. The way these unknown artists build such a community is mostly done through twitter, discord, YouTube, Instagram, telegram, and reddit. With the increased interest in NFTs and owning new and non-mainstream pieces, many unknown artists are able to gain a following for their projects. *See generally*, Volume99, *How to Grow Your Community as an NFT Project* (Jan. 26, 2022), <https://volume99.com/how-to-grow-your-community-as-an-nft-project/>.

¹⁶⁹ Anderson, *supra* note 17.

¹⁷⁰ Chow, *supra* note 14.

¹⁷¹ Zhao, *supra* note 166 (suggesting that Blockchain could be used as an alternative to Collective Management Organizations (CMOs) due to their immutable ledgers).

makes it an excellent candidate for reducing the efforts needed to administer them. Furthermore, blockchain technology can be highly cost-effective due to the automation of smart contracts to execute necessary functions and agreements without needing a third party. Its use in this capacity would decrease the need for multiple employees to collect monies, check information, maintain lists, and pay artists.

Finally, the argument that such a right would negatively impact the cost of artwork due to the need to adjust for the resale royalties within the sales price of the artwork has been disproven through the increased value of digital artwork for sale on the blockchain marketplaces. These royalty payments have not affected the sale or costs associated with the artwork; in fact, they have seen increased value regardless of their automatic resale royalty payments embedded into these smart contracts.¹⁷² We have seen this in the case of artist Jazmin Boykins, one of many artists who have found and utilized the benefit of NFTs, blockchain, and smart contracts.¹⁷³ In addition to the case of Ms. Boykins, we see that the implementation of a resale royalty right has not affected the sale or costs associated with the artwork through the past and projected revenues reported on the NFT craze.¹⁷⁴

C. NFTs: Proving Resale Royalty Rights Can Be Achievable

NFTs have proven, throughout their explosion, that the implementation of resale royalty rights has not had the adverse effects that many of those in opposition have feared. As seen in many cases, NFTs have effectively provided these royalty rights and maintained and not disrupted the art market. As we look at the functionality of giving these royalty rights through NFTs, blockchain, and smart contracts, very few issues have arisen by executing these royalty rights for the subsequent sales of these digital artists' work. Because of the artists' successes through these NFTs, it is clear that NFTs, blockchain, and smart contracts technology have proven that execution of these resale royalty rights is achievable within the United States.

Although NFTs have provided a clear showcase of the achievability of resale royalty rights in the United States, it is essential to note that according to the NFT July 2022 data report, the NFT and Cryptocurrency markets have seemed to crash.¹⁷⁵ However, many economists and critics have stated that this "crash" is "much needed" for NFTs to move forward in a more mature atmosphere.¹⁷⁶ Chain analysis economist Ethan McMahon believes that when the NFT market matures due to this "crash," NFTs will be able to move into "truly innovative...use cases like gaming, royalties, and ownership of real-life assets."¹⁷⁷ Additionally, while there are benefits

¹⁷² Ponciano, *supra* note 137.

¹⁷³ Locke, *supra* note 16.

¹⁷⁴ Ponciano, *supra* note 137.

¹⁷⁵ Lara Williams, *The NFT Market Has Collapsed (But That May Not Be a Bad Thing)*, Investment Monitor (Aug. 21 2022, 4:40 PM), <https://www.investmentmonitor.ai/crypto/nft-market-collapse-cryptocurrency-value>.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

to these use cases, especially in resale royalty rights for digital artists, there is room for improvement within these technologies.¹⁷⁸

However, thanks to the showcase of the possibilities for artists and resale royalties through the NFT craze and the predictions that the NFT crash is simply the catalyst for genuinely innovative use cases, such as royalties, the argument for a U.S. resale royalty right is valid and achievable. The improvements in the uses of these technologies do not take away from the demonstration that providing such a right to digital visual artists is feasible within the United States and that many, if not all, of the concerns by those in opposition to the right, can be solved through the use of these technologies.

CONCLUSION

History is said to repeat itself, and we have seen this repetition through the fight for artists’ resale royalty rights in the United States. Still, it is now time for the United States to become a part of the larger art and technological world. The increase in the consumption of art, thanks to the innovation of social media and the internet, has contributed to the need for further protection of digital visual artists and their work. It is no longer fair for these digital visual artists to be alienated from the fruits of their labor due to the lack of consideration for the unique market space in which they reside. If we are to indeed be in line with the mission of what the Constitution has intended for copyright law, then we must continue to incentivize and protect all artists through equitable rights and regulations.

Through the example of the use of NFTs, blockchain, and smart contracts for digital visual art, digital visual artists have been able to obtain the proper compensation for their artwork. Furthermore, through a digital medium such as NFTs on the blockchain and their smart contracts, it has been proven that royalty rights can be effectively administered and tracked,¹⁷⁹ thus dispelling the economic concerns that have hindered the implementation of royalty rights within the United States for decades. Moreover, NFTs on the blockchain, particularly their smart contracts, would provide a valuable mechanism to effectively apply, collect, and distribute the required resale royalty percentages placed on the subsequent sales of these digital visual artists’ work.¹⁸⁰ Additionally, access to minority artists has and likely will continue to be expanded through such digital mediums, as would access to equitable compensation for their artwork, thus bridging the gap between racial and socioeconomic divide amongst artists. By adopting a resale royalty right, digital visual artists will be provided better protection through governmental regulation that would continue advancing the purpose of Copyright law, which is to “promote the sciences and useful arts.”¹⁸¹

¹⁷⁸ See Zhao, *supra* note 166 at 266-268 (providing potential barriers to the use of blockchain to facilitate a resale royalty right).

¹⁷⁹ See IBM, *supra* note 117.

¹⁸⁰ See NIFTY KIT, *supra*, note 138.

¹⁸¹ U.S. CONST., *supra*, note 22.

As the Director of the Copyright Office and Register of Copyrights stated in their review, “the foundation is there”¹⁸² if and when the legislature is ready to move forward with securing resale royalty rights for visual artists. The time is now. In the words of Pandit Jawaharlal Nehru, “you don’t change the course of history by turning the faces of portraits to the wall.”¹⁸³ Let us not continue to deny these digital visual artists these equitable rights and be fearful of the future and its innovation, by turning their work and need, to face the proverbial wall.

¹⁸² U.S. COPYRIGHT OFFICE, *supra*, note 40 at 20.

¹⁸³ HW English, “*You Don’t Change The Course of History By Turning the Faces of Portraits to The Wall*”: Pandit Jawaharlal Nehru, HW News (August 7, 2018 6:47 AM), <https://hwnews.in/news/opinion/lest-not-forget-nehru-legacy/52188>.