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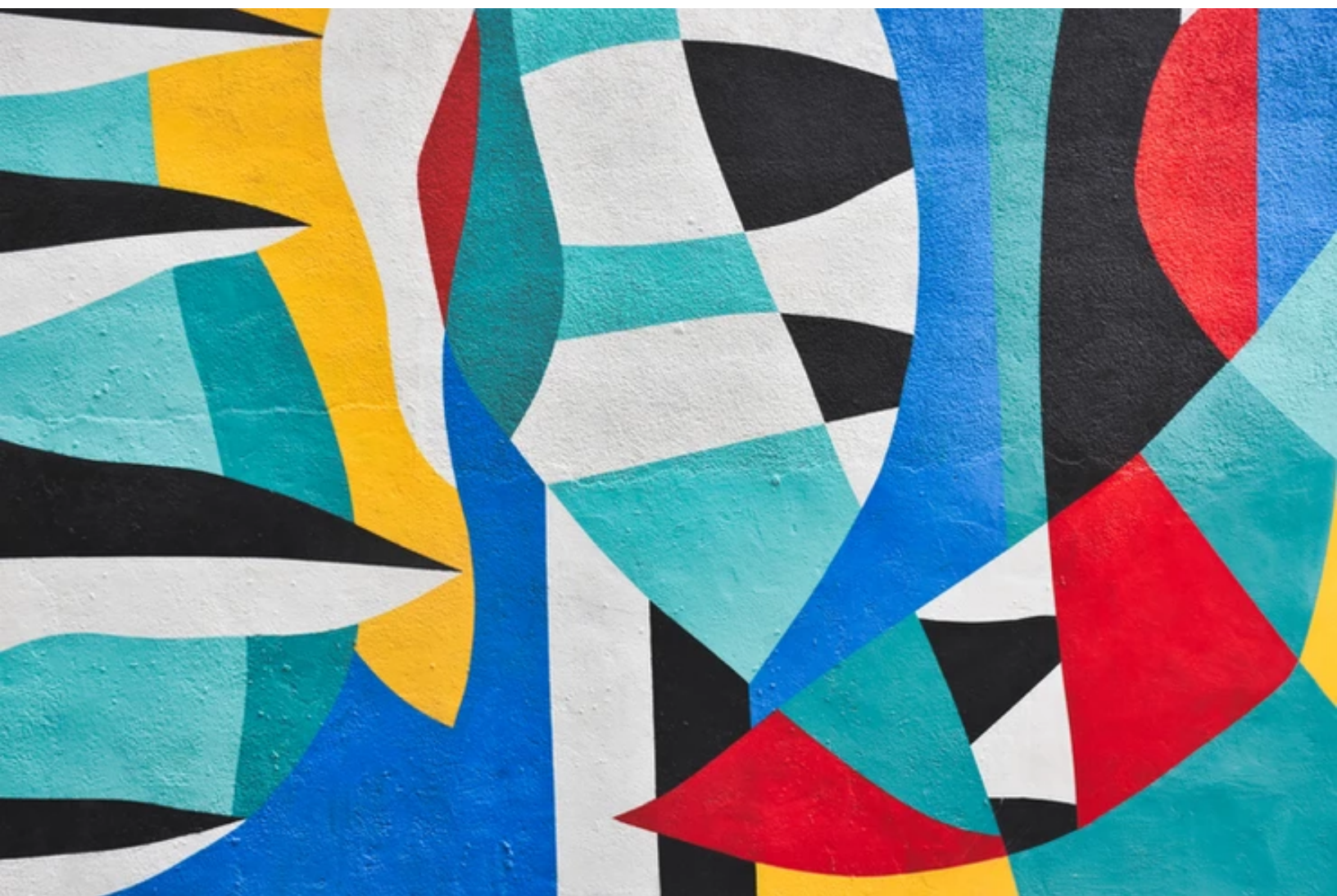
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Flipping Black Art: Christie's Special Contract

* *By: Jessica Wang*



This past summer, Christie's auction house began asking prospective purchasers and collectors to sign a special contract for art pieces that were part of their ongoing "Say It Loud (I'm Black and Proud)" exhibition. This contract binds the collectors from reselling the art pieces on a secondary market for at least five years. Even if they decide to sell after the agreed-to five year period, they would be contractually bound to offer the artist the right of first refusal.[1] Furthermore, if they sell the piece to someone other than the original artist, they would be obligated to give the artist 15 percent of the proceeds.[2] This contract was introduced in an attempt to detract from instances of "art flipping," whereby collectors purchase works by emerging artists and subsequently sell them on secondary markets, hoping to ride the coattails of the artists' growing popularity without having to pay for a piece of art at their zenith of fame. Offering artists the right of first refusal, as well as potentially 15 percent of proceeds, allows for greater autonomy and agency for emerging artists, especially Black artists. This is especially significant considering the lucrative profits that could be made from flipping art.[3] Art flipping is often viewed as a

means of devaluing artists and their work, while the cadre of rich collectors can profit from these flipped pieces and perpetuate their own wealth-building.[4]

The right of first refusal and the conditional offer of 15 percent is called *droit de suite*, and certainly not a novel concept despite its recent adoption by Christie's.[5] This right gives the artist an ongoing “stake in their works and a share in any increasing value.”[6] This right was passed into law in the United Kingdom in 2006, through a regulation called the Artist Resale Right Regulations (ARRR).[7] A similar law was passed throughout Europe by a September 2001 directive from the European Parliament and Council, which makes specific mention to the exploitative aspects of flipping art as justification for passing this directive,

(2) The resale right is a right of a productive character which enables the author/artist to receive consideration for successive transfers of the work. The subject-matter of the resale right is the physical work, namely the medium in which the protected work is incorporated.

(3) The resale right is intended to ensure that authors of graphic and plastic works of art share in the economic success of their original works of art. It helps to redress the balance between the economic situation of authors of graphic and plastic works of art and that of other creators who benefit from successive exploitations of their works.[8]

The United States has yet to pass federal protections for resale rights such as the ones detailed in the Christie's contract; however, California had a similar right that was recently gutted by the Ninth Circuit.[9] Without such protections, Black artists are unable to claim royalties from subsequent sales of their art, especially when increased prices are the fruit of their labors, and benefit only middlemen such as dealers and auction houses.[10] This is especially troubling given the historical implications and ongoing legacies of exploitive Black labor to drive wealth-increasing enterprises. This legacy reinforces the idea that those who produce the labor are barred from participating in and benefitting from the profits and good. Primary markets are the private exchanges between artists and gallerists, who then aid in facilitating sales to institutions and collectors, retaining a share of the proceeds.[11] These collectors may then put the artwork up for sale at an auction, i.e. a secondary market, where the artist does not receive any returning benefit without resale royalty rights.[12] These practices leave young, emerging artists particularly vulnerable as speculative bubbles arise in these secondary markets that well exceed their estimated value, and after these bubbles burst, the artists' subsequent artwork tends to be further devalued on the primary market.[13]

Since the adoption of the ARRR in the UK, not only has there been a steady growth in sales and international investment, the adoption has also provided crucial opportunities for artists to “share in the increasing value of their work and to curate their legacy.[14] The royalties collected by the original artists from subsequent sales have not been proven to be so immodest as to dissuade purchasers from purchasing the pieces and has been particularly beneficial to less-established artists.[15] Despite the comparatively small dents that the artists' share of these subsequent sales has had on the art trade in the UK, the overall impact for artists have been promising. Since its implementation, there have been over £65 million distributed to over 5,000 artists as a result of this piece of legislation.[16] This is a win-win situation, where the value of art as it is passing through the hands of collectors and auction houses remains relatively constant without devaluing the artists' share of their labor.

Adopting a similar law to the UK ARRR or the European Parliament directive would be a promising gateway for greater sustainability and space for Black artists. The push for greater diversity and representation requires going beyond the literal and figurative visual presence of Black creators, and ensuring rigorous implementation of statutory guarantees of protected resale rights helps to produce greater equity between Black artists and exploitative industry practices.

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[1]Daria Harper, *Collectors buying from a Christie's exhibition of works by Black artists must pledge not to flip them*, Artsy(Aug. 14, 2020 at 12:16 PM), <https://www.artsy.net/news>.

[2]*Id.*

[3]See Hillary Hoffower, *Forget real estate – 'art flipping' is the latest way rich millennials are building wealth, and it's an investment baby boomers largely ignored*, Bus. Insider (Apr. 9, 2020, at 10:05 AM), <https://www.businessinsider.com/rich-millennials-investing-art-flipping-build-wealth-2019-4>.

[4]*Id.*

[5]Mark Waugh, *We Owe Artists the Crucial Income Resale Royalties Provide*, Artsy (Aug. 8, 2018, at 5:15 PM), <https://www.artsy.net/article/artsy-editorial-owe-artists-crucial-income-resale-royalties-provide>.

[6]*Id.*

[7]Artist Resale Right 2014, c. 27 (Eng.), [https://www.gov.uk/guidance/artists-resale-right#:~:text=The%20Artist's%20Resale%20Right%20\(%20ARR,house%20or%20art%20market%20professional](https://www.gov.uk/guidance/artists-resale-right#:~:text=The%20Artist's%20Resale%20Right%20(%20ARR,house%20or%20art%20market%20professional).

[8]Council Directive 2001/84/EC, of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, 2001 O.J. (L 272), 32-6.

[9]Louise Carron, *Street Art: Is Copyright for "Losers"? A Comparative Perspective on the French and American Legal Approach to Street Art*, N.Y. St. B.J., November 2019, at 34, 37.

[10]*Id.*

[11]Aline Cohen, *Why "Flipping" Art is so Controversial*, Artsy(Feb. 10, 2020, at 11:20 AM), <https://www.artsy.net/article/artsy-editorial-flipping-art-controversial>.

[12]*Id.*

[13]*Id.*

[14]*Supra* note 5.

[15]*Id.*

[16]*Id.*