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Technological Rights Accretion

Kristelia A. García

University of Colorado Law School

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NOTICE & COMMENT



A Blog from the Yale Journal on Regulation and the ABA Section of Administrative Law & Regulatory Practice

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Technological Rights Accretion, by Kristelia A. García

by [Guest Blogger](#) – Wednesday, Sept. 19, 2018

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Recently, a company named Adappcity Inc. launched a new application called [UppstArt](#). The app purports to use blockchain technology to enable visual artists to “track” art they sell such that if and when it is later resold, they are able to enforce a so-called “resale royalty.” A resale royalty is a mandatory, predetermined payment made by a subsequent purchaser to the artist who created the work. This payment is made in addition to whatever price the subsequent purchaser pays to the seller of the work.

According to a [press release](#), UppstArt works by issuing a digital certificate of authenticity that records and preserves information about a work’s authorship and price history. When a work of art is resold, this record goes with it, and the artist is automatically paid a resale royalty. In other words, a subsequent purchaser agrees to terms that include a resale royalty and the app automatically enforces this term. In this way, UppstArt looks like any other “smart contract” currently pervading the Internet of Things (IoT).

Smart contracts give manufacturers of smart products and devices—such as cars and speakers—the ability to remotely, and unilaterally, enforce terms of service. For example, rental car companies can [use tracking devices](#) to charge customers punitive fees for driving outside of state lines where fine print in the rental contract so prohibits. Sonos, maker of smart speaker systems, [recently announced](#) changes to its data collection and privacy policy that users are obligated to accept in order to receive necessary software updates. Without those updates, the speakers will cease to function.

The interesting thing about UppstArt is that it aims to enforce a term—the payment of a resale royalty—that has been repeatedly considered and explicitly rejected by Congress. Previous bills introducing a resale royalty include the [American Royalties Too \(“ART”\) Act of 2015](#), the [Equity for Visual Artists Act of 2011](#), the [Visual Artists Rights Act of 1987](#), the [Visual Artists Rights Amendment of 1986](#), and the [Visual Artists’ Residual Rights Act of 1978](#). Most recently, the Ninth Circuit Court of Appeals [struck down](#) California’s Resale Royalty Act—legislation that allowed artists to collect 5% of all secondary market sales of their work conducted either in California or by a California-based company—as an unconstitutional violation of the Commerce Clause.

To date, all legislative attempts to institute a resale royalty have failed. This is so despite the existence of an equivalent *droit de suite* in the European Union, and despite a [recent report](#) from the Copyright Office urging their passage. The Copyright Office’s report relies heavily on the fact that visual artists engage in a “one-shot” market—i.e., they earn money on a single sale of a work, as opposed to, say, a recording artist, who may earn repeatedly on copies of her work—to conclude that these artists are disadvantaged by the current copyright system and might be helped by institution of a resale royalty. Congress’ continued reticence toward adoption of a resale royalty has been [applauded](#) by some commentators who see the concept as favoring elite artists at the cost of lesser-known artists, and [decried](#) by others who view resale royalties as generative of art more generally.

Regardless of the propriety of resale royalties, the UppstArt app imposes a payment that Congress not only doesn’t recognize, but has also made clear is not owed. It is this regulatory override, and extra-regulatory enforcement by private ordering, that differentiates UppstArt from many other smart contracts.

To be sure, private override of public law is not new. For example, [Section 1201](#) of the Digital Millennium Copyright Act arguably allows content owners to use Digital Rights Management (“DRM”) technology to [block potential fair uses](#) of content that copyright law might otherwise allow. Like DRM, UppstArt uses technology to automate unilateral enforcement of extra-regulatory terms. Unlike DRM, however, UppstArt uses technology to introduce a new right—in this case, a right to payment—for which there is no statutory basis.

Commenters have long expressed [concern about rights accretion](#) in the copyright context, blaming a combination of statutory ambiguity—particularly in the context of fair use—and high-stakes penalties for infringement. For example, the New York Times, in a notorious abundance of caution, licensed four lines of poetry for [an editorial](#) that clearly qualified as parody (thereby exempting it from licensing). The primary concern is that over-licensing can lead to a feedback loop in which others in the space face an expectation of licensing notwithstanding the absence of a legal obligation.

UppstArt’s use of blockchain technology potentially raises the stakes. Unlike rights accretion resulting from statutory ambiguity, which might be mitigated with simpler statutory language and/or clearer precedent, the technological rights accretion exhibited by UppstArt doesn’t suggest an obvious solution. Perhaps none is needed. An alternate interpretation of UppstArt’s business model might be as a signal to the legislature that not only can the market bear such a royalty, but even what that value might look like. As technology enables more of such regulatory overrides, it will be interesting to see if they tend toward nefarious, unilateral term-setting, or instead serve to improve the information available to lawmakers.

Kristelia A. García (@kristelia) is an associate professor at the University of Colorado Law School, where she teaches copyright, trademark, and property. She also serves as a director of the Silicon Flatirons Center for Law, Technology and Entrepreneurship. Prior to entering academia, Kristelia practiced in firms and in-house in the music industry, most recently at Universal Music Group. Comments, compliments, and criticism couched as such welcome at kristelia@colorado.edu.

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