Accepting Droit de Site as an Equal and Fair Measure under Intellectual Property Law and Contemplation of Its Implementation in the United States Post Passage of the EU Directive

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by

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I. Introduction

In the late 1950s, American pop artist Jasper Johns’ 1956 Green Target painting sold for a mere four thousand dollars.¹ The same year, Marlon Brando gave a famous performance in On the Waterfront.² Both Johns’ painting and Brando’s performance are recognized as marshalling

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² Id.
significant new movements into the American contemporary cultural experience.\textsuperscript{3} Today, however, while Brando's breakthrough performance continues to pay the actor's estate royalties, when \textit{Green Target} resold for several million dollars in the early 1990s, less than forty years after the original sale, Johns received not a single penny.\textsuperscript{4}

Droit de suite\textsuperscript{5} refers to a resale royalty which allows visual artists the right to share in the increase in value of their work in sales subsequent to the original sale.\textsuperscript{6} In jurisdictions without droit de suite legislation, such as the United States,\textsuperscript{7} the artist profits only from the original sale while the dealers responsible for subsequent sales in the secondary market receive all profits.\textsuperscript{8} Thus, visual artists are uniquely situated as compared to other artists, such as authors, composers, and actors, who continuously participate in the increase in value of their work in a way that visual artists cannot.\textsuperscript{9} They are not afforded the same protection under United States federal intellectual property law. As United Kingdom art lawyer, Henry Lydiate, points out:

In other creative fields artists are able to benefit from continuing commercial use of their work e.g., the sale of published sheet music, public performance . . . of their music, and sale of sound recordings which incorporate their music. . . . Visual artists, by contrast, are rewarded for only one kind of commercial use: sale of reproductions of their work. . . . They have no right to receive a royalty when their work is commercially used by resale.\textsuperscript{10}

\footnotesize
\begin{itemize}
\item 3. \textit{Id.}
\item 4. \textit{Id.} As will be mentioned later, admittedly, visual artists do get royalties from reproductions such as postcards. However, visual artists are unique when compared to other artists as their work may appreciate in value greatly over time and this increase in value is seen mainly in the secondary art market—the sale and purchase of art post original sale. Visual artists are not actors in this market and consequently do not participate in the increase in value of their work in the same way as other artists do.
\item 7. With the exception of the California Resale Royalty Act, CAL. CIV. CODE § 986 (West 2007).
\item 10. Lydiate, \textit{Resale Royalty, supra} note 8.
\end{itemize}
Accordingly, the introduction of a droit de suite scheme provides visual artists with a return equivalent to that received by other artists.\footnote{11} As such, the art market in the United States is strongly weighted toward dealers. The view of artwork as strictly a sale of property leads visual artists to become under-protected when compared to other copyright holders.\footnote{12} The persistence of this exploitation is assisted further by the uneven bargaining position between the typically poor artist and the more powerful dealer.\footnote{13} Droit de suite attempts to remedy this disparity.

Introduced first in France in the 1920s, the royalty was a direct response to the starving artist phenomenon now strongly associated with the Impressionist Period.\footnote{14} Most European countries, eleven of the fifteen member states of what is now the European Union (EU), soon followed suit by incorporating droit de suite provisions into their own copyright laws.\footnote{15} Not until 2001, however, did the EU adopt a directive requiring all member states to implement resale royalties for visual artists.\footnote{16} To date, droit de suite has not found much support within such countries as the United States (with the exception of California), Australia, Canada, and New Zealand, as well as countries within Asia.\footnote{17}

The following will argue that while many criticisms against droit de suite legislation are based on economic grounds, these grounds are not
those on which the royalty is and should be based. These arguments miss the mark by focusing on the inadequacy of the economic value of the royalty rather than viewing droit de suite as a "moral rights" based measure, providing visual artists fair and equal protection under intellectual property law. Once one accepts the latter view and understands the royalty as a measure necessary to remedy the unjust treatment of visual artists under copyright law, the inadequate state of droit de suite in the United States becomes clear.

Furthermore, while various methods of implementation have been attempted in various countries and states, these methods have had varying degrees of success. The recent EU Directive on droit de suite appears to have been structured in a way that considered carefully these successes and failures by allowing member states to implement a central collection and distribution agency. Its passage not only places pressure on the United States to pass similar federal legislation, but also, unlike the California Resale Royalty Act, provides the United States a workable model on which to build.

II. Economic-Based Arguments Against Droit de Suite

The general consensus among economic analysts is that the droit de suite has an effect opposite of that intended. They argue that the law not only fails to help visual artists in a true economic sense but actually hurts them. These opponents base much of their contentions on the lack of economic value the droit de suite will have on the individual artist and the art market as a whole.

A principle argument against the droit de suite claims that the actual benefits received by the artist from the royalty will be diminished to negligible returns as sale prices paid the artist drop in response to accommodate the "tax." If galleries are forced to pay artists a portion of

18. Moral rights are rights the artist retains "even though the work of art has been sold. Once we accept this continuation of 'moral rights,' we should easily accept the notion that an artist may retain rights to future royalties in a work of art even when he has long since parted with the work." Jay B. Johnson, 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, 503 (1992).


21. MCANDREW AND DALLAS-CONTE, supra note 19, at 19.

22. Id.

the resale value of the work, the gallery may demand a lower price when purchasing the painting from the artist in the first place. Given the unequal bargaining positions between the two parties, the dealer will likely prevail in lowering the market price of a piece of art at the initial sale. Consequently, the art market’s reaction to the droit de suite will actually prevent visual artists, in the end, from profiting economically.

Similarly, opponents also argue that individual art markets will do its best to avoid its payment by transferring sales to jurisdictions that do not impose the royalty. Rational sellers and buyers when faced with heightened costs imposed by the droit de suite will naturally search for a way to evade payment and maximize profit. Thus, if the United States were to adopt federal droit de suite legislation, opponents argue that art dealers would simply transfer the art work to non-royalty countries such as Switzerland or Japan (assuming, of course, that it is cheaper to do so). Such forum shopping within the European Union was a concern to which the EU Directive was a solution. For instance, in 1988, well prior to the enactment of the Directive, the sale of three Joseph Beuys paintings took place in a London auction house for 462,000 GBP. Both parties to the sale were German nationals and it is suggested that a decisive factor in the decision not to conduct the sale in the home state was circumvention of the German resale royalty. Opponents’ concern with forum shopping here rests on the deduction that individual art markets in these jurisdictions will suffer as a result.

24. Lewis, supra note 11, at 312.
28. Id. There are strong arguments against this view. Some, such as Henry Lydiate and Catherine Trautmann, argue that the cost of transferring the piece of art is frequently more expensive than the royalty itself. Weatherall, supra note 12, at 24; Henry Lydiate, Artists Resale Royalty Right: Droit de Suite (1996), ARTAW, http://www.artquest.org.uk/artlaw/resaleroyaltyright/28851.htm (last visited Jan. 18, 2008). Trautmann states “that considering the tax regimes in place in 1999, costs will amount to 22,000 Euros to sell a work in Switzerland or 33,000 Euros to ship to the United States. Clearly from this simplified standpoint the maximum royalty payment or 12,500 Euros [see EU Directive] will not encourage migration of sales to third countries.” Weatherall, supra note 12, at 24. Lydiate also relays a reassuring occurrence in London: “It is interesting and relevant to note that in 1992, Sotheby’s increased their buyer’s commission from 10% to 15% (considerably more than the 2% to 4% resale royalty that would be payable) and appear to have suffered no economic damage as a result. Lydiate, Droit de Suite (1996), supra. Moreover, both Sotheby’s and Christie’s take a commission not only from the buyer but also from the seller, which in Christie’s case amounted to around £5m of their profit in 1995.” Id.
30. Id.
31. Id. As will be discussed below, this was a major concern of the United Kingdom who vigorously opposed the enactment of the EC Directive. London’s art market grew to its large size
Many critics of droit de suite also argue that there are no longer starving artists; such a phenomenon is a myth, and resale royalties for visual artists are aimed at aiding a group that no longer needs the government’s paternalistic assistance. These critics believe that if the intention of the law is to make economically better off a disadvantaged group of artists, the law is then based on a fictional premise.

Further, critics also argue that many individuals are attracted to high risk careers in the arts for the possibility of an eventual large payoff or the significant non-monetary rewards of creation. In other words, these artists are willing to sacrifice monetary gain for other advantages and are no different than other members of society who merely happen to choose a risky profession. For example, “artists work a substantially lower average number of hours, have more rapid earnings growth than other workers, [and] fewer of them leave their professions than do workers in other occupations.” Thus, the argument goes, if the law does not protect others who enter precarious careers, why should artists deserve protection?

Moreover, the administrative costs associated with resale royalties remains a continuous concern as well. Opponents of droit de suite highlight that such costs outweigh the actual benefit received by artists. Administering the collection and distribution of the droit de suite requires an extensive infrastructure to work properly and effectively. Once the costs of running this infrastructure are factored in, artists receive very little money in-pocket, a result, they argue, is counter to the intention of the royalty. For example:

because, pre-Directive, it did not have droit de suite measures in place while other European countries, particularly France, did. Let the Bad Times Roll, ECONOMIST, Jan. 24, 2002. As of the 1990s, approximately 30% of all art sales in the world took place in London (second to New York as the world’s largest). London also dominates the European art market. Dealers and artists alike were concerned that valuable art would exit the European art market generally, but more particularly the London art market, should the Directive pass. Is London Done For?, supra note 26; Pre-Directive, the British art market “employ[ed] 51,000 people and ha[d] an annual turnover of more than 2.2 billion GBP . . . [Therefore] the United Kingdom [was] inclined to be protective of its art market.” Pfeffer, supra note 5, at 535.

33. Id.
34. Id.
35. Id.
36. Id.
37. Weatherall, supra note 12, at 19; Johnson, supra note 18, at 510.
38. Alderman, supra note 32.
40. Id.
Danish society in charge of [Denmark’s droit de suite royalty collection and distribution] takes as much as 40% of the royalty to cover administrative costs. The ADAGP, the French collecting agency, levies 20% before paying artists. In some cases, especially in France during the last years, very little, if anything, is left for the artists.\textsuperscript{41}

Moreover, because of the many expenses involved, the “motivation to deviate from the regime will always be higher than the incentives to maintain it.”\textsuperscript{42} Thus, not only will artists receive a significantly diminished royalty due to administrative expenses, but it is unlikely they will receive anything at all if neither party involved (i.e., the artist, the dealer, and the government) is motivated to preserve the collection and distribution scheme.\textsuperscript{43}

Overall, these arguments conclude that the droit de suite will fail to accomplish its goal of providing incentive to artists to create because it fails to improve economically the position of both the artists and the art market.

III. Accepting Droit de Suite as a Moral Right as Opposed to an Economic One\textsuperscript{44}

There are many papers and articles that address specifically and individually the above arguments.\textsuperscript{45} The point of this note is not to imitate those counter-arguments but rather alter the way in which one views and justifies the implementation of droit de suite. The royalty is most frequently attacked on its lack of economic pragmatism and attractiveness. However, if one begins with the United States Constitution and examines the overarching goals of intellectual property law in general, as pertains to the arts, resale royalties for visual artists are justified not because they benefit economically the artist and the art market, but because by making more fair the treatment of visual artists they provide an incentive for creativity, even if that incentive is not purely economic in nature.


\textsuperscript{42} Weatherall, \textit{supra} note 12, at 19.

\textsuperscript{43} \textit{Id}.

\textsuperscript{44} Opponents and “[most] proponents of the droit de suite argue that it is an economic right, because it protects an economic interest . . . . The purpose of the droit de suite is to give visual artists rights and economic incentives similar to those the law gives authors and musicians . . . . What makes the droit de suite not an economic right, but a moral one, is its inalienability . . . . The reason for the right’s inalienability is to address what the right’s creator considered the artist’s lack of bargaining power.” Pfeffer, \textit{supra} note 5, at 547-48.

\textsuperscript{45} See Frazier, \textit{supra} note 9. See Kernochan, \textit{supra} note 9; Reddy, \textit{supra} note 14.
Congressional power to regulate intellectual property rests on the more general power to promote progress in the areas of art and science.\(^4\) The goal of intellectual property law is to encourage people to engage in activities from which society as whole will benefit.\(^4\) Thus, through copyright, trademark, patent, and trade secret law Congress uses its power to provide incentive and ensure continued innovativeness.\(^4\)

Just as with other intellectual property protections, one notion behind droit de suite is also based on providing an incentive for creativity.\(^4\) The point of the resale royalty is to generate a fair environment in which artists feel as though their efforts are protected and rewarded, an incentive in and of itself.\(^5\) As Lydiate argues, for the art market to function properly, we need to be able to promise a fair return on output.\(^5\) In order to encourage production of art, visual artists must feel as though they are being treated fairly under intellectual property law by being able to participate in the increased value of their work.\(^5\)

Opponents, and some proponents, assume that an incentive for creativity must be an economic incentive. As has been demonstrated above, those against the royalty argue that droit de suite fails to provide this economic encouragement. Those in favor of the royalty argue that it does.\(^5\) In other words, they argue that droit de suite is an effective mechanism that will make better off the economic situation of visual artists.\(^5\) However, that is not the appropriate aim of droit de suite. The royalty attempts to encourage creativity by sending the message to visual artists that their contribution is as of equal value to that of other artists that

\(^{46.}\) Article I, section 8 of the United States Constitution states that Congress shall have the power to promote the progress of science and the useful arts. U.S. CONST. art. I, § 8.

\(^{47.}\) Id.


\(^{49.}\) Id.; "The introduction of a droit de suite internalizes a portion of this value to the artists and gives them an incentive to increase and maintain the quality of the body of work over a lifetime. The law thus allows the artist to share in the appreciation in value and creates an incentive to hasten the time of 'discovery,' presumably by increasing the current quality of work compared to that without a droit de suite." Carson W. Bays, Does a Droit de Suite Benefit Artists? The Case of California, 2 (2006), available at http://www.fokus.or.at/fileadmin/fokus/user/downloads/acei_paper/Bays.doc.


\(^{51.}\) Id.

\(^{52.}\) Id.

\(^{53.}\) "A resale royalty would provide artists with an economic incentive to create more works of art." Johnson, supra note 18, at 500; Kernochan, supra note 9, at 1435.

\(^{54.}\) Kernochan, supra note 9, at 1435.
receive protection. "The rationale behind the droit de suite is that artists should participate in the increasing value of their art." 55

Thus, the major criticisms against the royalty fall short. While economic-based concerns with the droit de suite are perhaps important when discussing the utility of its implementation, as is discussed infra, they do not relate to the underlying intent of the measure: recognition of an artist's right to participate in the increased value of his work. A right to participate equally and fairly cannot be disputed on economic grounds and unfortunately, these arguments cloud the debate as to whether droit de suite is an appropriate measure in the first place.

IV. Droit De Suite in the United States at the Federal Level

In 1989 the United States signed onto the Berne Convention for the Protection of Literary and Artistic Works. 56 Article 14 of this international copyright treaty provides: "The author, or after his death the persons or institutions authorized by national legislation, shall with respect to original works of art enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work." 57 The Convention therefore allows implementation of droit de suite by countries party to the treaty. 58 The contracting countries, however, "agreed that the droit de suite would not be a minimum convention requirement." 59 Thus, as it is not binding, most countries without droit de suite laws already in place, including the United States, refrained from implementing this Article when signing onto Berne. 60

55. MCANDREW & DALLAS-CONTE, supra note 19, at 19.


58. Frazier, supra note 9, at 338.

59. Pfeffer, supra note 5, at 539.

The proximate impetus for urging the importation of the European concept of droit de suite into the United States did not really come until the celebrated conflict between investor Robert Scull and artist Robert Rauschenberg.\textsuperscript{61} Scull had originally purchased a painting, \textit{Thaw}, directly from Rauschenberg in the 1950s for 800 USD.\textsuperscript{62} Twenty years later he resold it at auction for 85,000 USD.\textsuperscript{63} This left Rauschenberg distraught over his inability to participate in the increased value of his work, a right provided others, such as authors and composers, however not visual artists.\textsuperscript{64} Consequently, this conflict highlighted nationally the disadvantaged position of visual artists in the art market.\textsuperscript{65}

Soon thereafter, an attempt to implement federal droit de suite legislation was made by Senator Edward Kennedy and Representative Edward Markey; however, their proposal never passed as part of the Visual Artists Rights Act of 1990 (hereinafter “VARA”).\textsuperscript{66} The Kennedy-Markey proposal provided for an inalienable right to seven-percent resale royalties for the lifetime of the artist and up to fifty years after his death.\textsuperscript{67} The seven-percent royalty would apply only to works resold for more than 1,000 USD and only to the amount in excess of the original sale price.\textsuperscript{68} This proposal received criticism not uncommon against droit de suite legislation: “They help the few who need help the least; they decrease the incentive for investment in works of art; they assume that artists are incompetent to alienate property; and they create a costly bureaucracy to engage a national registration system for art.”\textsuperscript{69} Given the many criticisms that clouded the debate and distracted from the true aim of droit de suite legislation, VARA passed without inclusion of royalty rights for visual artists.\textsuperscript{70} Instead, VARA merely requires the “Register of Copyrights, in consultation with the Chair of the National Endowment for the Arts, to

\begin{flushright}
62. \textit{Id.}
63. \textit{Id.}
64. \textit{Id.}; “I have been working my ass off just for you to make that profit!”... Painter Robert Rauschenberg to art collector Robert Scull after the resale of his painting “Thaw” for 85,000, the painting was purchased ten years earlier by Scull for 900.” ROBERT E. DUFFY, ART LAW: \textit{REPRESENTING ARTISTS, DEALERS AND COLLECTORS} 264, 264 n.4 (1977) (citing Roger Ricklefs, \textit{Artists Decide They Should Share Profits on Resale of Paintings}, \textit{WALL ST. J.}, Feb. 11, 1974, at 1; Robert Hughes, \textit{A Modest Proposal: Royalties for Artists}, \textit{TIME}, Mar. 11, 1974, at 66).” Reddy, \textit{supra} note 14, at 509.
68. \textit{Id.}
69. \textit{Id.} at 77-78.
70. Johnson, \textit{supra} note 18, at 500; Frazier, \textit{supra} note 9, at 342-343.
\end{flushright}
study the feasibility of implementing a resale royalty on the sale of works of visual art. Thus, despite the urging of many artists, legislators and scholars, the United States has yet to pass and put into operation resale royalties for visual artists.

V. Droit de Suite in the United States at the State Level—California: A Misguided Step in the Right Direction

To date, the United States' only experience with implementation of any droit de suite measures is the California Resale Royalty Act of 1977 (hereinafter "the California Act"). The California Act has been praised as "plac[ing] California at the forefront of a growing international movement to improve the legal position of artists." It expresses "a principle of parity between the visual artist and other creators, and it gives recognition - in the visual arts - to the underlying policy of the Constitution that all creators should have the right to participate in the commercial use of their work."

The California Act took effect on January 1, 1977, and protects the inalienable right of the artist and his estate to receive royalty payments until twenty years after his death. It applies to all public and private sales by California residents of original paintings, sculptures, drawings, and glass arts. The royalty is set at five percent and the resale price necessary for the resale royalty to kick in is 1,000 USD.

Under the California Act, there is no central collection agency and no right to information from sellers, dealers, and auction houses. It is the obligation of the seller both to locate the artist and pay the royalty due, a payment which generally comes out of the seller's own pocket. If the seller is unable to locate and pay the artist, he then provides the California Arts Council with the artist's name and the funds due. The Council must then attempt to locate the artist and administer the royalty for a

71. Alderman, supra note 32.
72. Frazier, supra note 9, at 338.
73. CAL. CIV. CODE § 986 (West 2007).
74. Lydiate, Resale Royalty, supra note 8.
75. Id.
76. CAL. CIV. CODE § 986(d); William Carleton, Copyright Royalties for Visual Artists: A Display-Bases Alternative to the Droit de Suite, 76 Cornell L. Rev. 510, 531 (1991); CAL. CIV. CODE § 986(a)(7).
77. CAL. CIV. CODE § 986(c)(1).
78. Id. § 986(a)(1); id. § 986(b)(2).
79. MCANDREW & DALLAS-CONTE, supra note 19, at 43-44. See CAL. CIV. CODE § 986.
80. MCANDREW & DALLAS-CONTE, supra note 19, at 43. See CAL. CIV. CODE § 986.
82. CAL. CIV. CODE § 986(a)(2) (West 2007).
statutory period of seven years. In the frequent event that the Council is unable to find the artist the artist's right terminates and the money reverts to the Council for use in purchasing fine art for its Art in Public Buildings Program. In the also common event that a seller fails to pay the artist the royalty and fails to provide the Council with the artist's name and the money due, "the artist can bring damages within three years after the date of the sale or one year after the discovery of the sale, whichever is longer."

The California system differs from the EU Directive and other European droit de suite systems in several respects. First, generally in Europe, royalty rights last approximately seventy years beyond the death of the artist, a duration identical to that of U.S. copyright law. Moreover, the royalty usually applies only to public sales, not those that occur in private settings. These minor differences, however, are not those that truly distinguish the California Act from others. Most droit de suite legislation in European countries, prior to the EU Directive, provided for a central collection agency and allowed at least partial rights to information. As mentioned above, California provides nothing of the sort and arguably this lack of an adequate enforcement mechanism is the system's largest fault.

There appears to be a general consensus that the Act is at best ineffective and at worst disastrous. Critics of the law generally fall into two camps. There are those that point to the legislation as an example of the inevitable failure of all droit de suite measures and those who champion the implementation of droit de suite, but find inherent faults in the California system. The United Kingdom falls in the former camp.

83. Id. § 986(a)(5); California Resale Royalty Act, California Arts Council, http://www.cac.ca.gov/95/ (last visited Feb. 27, 2007).
84. CAL. CIV. CODE § 986(a)(5); MCANDREW & DALLAS-CONTE, supra note 19, at 43.
85. CAL. CIV. CODE § 986(a)(3); MCANDREW & DALLAS-CONTE, supra note 19, at 44.
86. CAL. CIV. CODE § 986(d); MCANDREW & DALLAS-CONTE, supra note 19, at 10, 14.
87. CAL. CIV. CODE § 986(c)(1). This is true of the EU Directive and individual legislation in countries: Belgium, Denmark, Finland, France, and Germany prior to the directive. MCANDREW & DALLAS-CONTE, supra note 19, at 10.
88. The directive allows Member States to chose their own method of collection and distribution. Directive, supra note 16, at art. 6. Prior to the directive, Denmark, Finland, France, and Germany all used central collection agencies. MCANDREW & DALLAS-CONTE, supra note 19, at 10. See also Ramanbordes, supra note 15, at 26 (chart which demonstrates that almost all pre-existing droit de suite collection systems had mandatory central collection mechanisms).
89. MCANDREW & DALLAS-CONTE, supra note 19, at 44.
90. Reddy, supra note 14, at 530.
91. Id.
92. Frazier, supra note 9, at 339.
Following final passage of the EU Directive, the United Kingdom was forced to bring to an end their vigorous battle against droit de suite legislation.\textsuperscript{93} Having come to grips with the inevitable, the Arts Council of England (hereinafter "the Arts Council") performed an extensive study of various droit de suite systems in order to determine the best methods to implement the measure in the United Kingdom.\textsuperscript{94} Their conclusions, as discussed \textit{infra}, essentially recommended that the United Kingdom ignore most characteristics of the California system.\textsuperscript{95} Specifically, the Arts Council of England criticizes California’s collection and distribution mechanism, or lack thereof.\textsuperscript{96} Their report states that even the California Arts Council, the only body entrusted with any implementation power, finds the collection and distribution procedure to be problematic: \textsuperscript{97}

It is often difficult to locate the artist and there is no system whereby artists register with the [California] Council or any connections to unions or other organizations for visual artists. The Council has no means of monitoring who is paying the royalty or not and has no designated funding to run the system but must take it from existing staff and budgets. The Arts Council’s responsibility is merely to hold on to money for artists; it is not an enforcement agency that tracks the amounts of art sold or by whom. The Council does not retain any administration costs for locating artists or track the amount of time or money spent locating artists and administering the levy.\textsuperscript{98} They also report that between the years 1993 and 2000 the California Arts Council averages a mere annual payment of 802 USD to artists.\textsuperscript{99}

Unfortunately, the California Act is placing its force in the hands of those who it negatively affects, the seller.\textsuperscript{100}

In a 1986 survey of artists conducted by Bay Area Lawyers for the Arts ("BALA"), thirty-two percent of the respondents said dealers had refused to give them the name or address of the buyer or even the resale price, despite their right under the law to assign collection of the royalty to another. In a comment submitted to the Copyright Office as part of its study of the droit de suite, California arts attorney Peter Karlen stated that artists are unable to collect their royalty because art dealers ‘feel they can get away with it.’ He also noted that many galleries will not deal with an artist who demands a written agreement. Even if the artist gets the gallery to agree to a contract, he must still rely on the dealer to

\textsuperscript{93} \textit{Is London Done For?}, supra note 27.  
\textsuperscript{94} \textit{MCANDREW \& DALLAS-CONTE}, supra note 19, at 7.  
\textsuperscript{95} \textit{Id.} at 64-65.  
\textsuperscript{96} \textit{Id.} at 43-44.  
\textsuperscript{97} \textit{Id.}  
\textsuperscript{98} \textit{Id.} at 44.  
\textsuperscript{99} \textit{Id.}  
\textsuperscript{100} \textit{Id.}
provide all of the information regarding the resale, and to collect the royalty. Many dealers fail to do so for months or even years. Moreover, the law provides no right to information mechanism to monitor payment of artists' royalties. Thus, the only check on the seller is the artist, who, in most situations, must seek payment himself. This is insufficient for numerous reasons. First, this requires that the artist be aware of all resales—an unrealistic burden not placed on artists in other countries. Second, if the artist becomes aware that he has not been paid royalties due and request of payment made to the seller does not produce results, his only recourse becomes the pursuance of damages, an avenue artists are not often willing or financially able to take. What results is a resale system enforced by no one. While there have been a few cases where artists have taken sellers to court for non-payment, the general attitude of both artists and sellers seems to be evasion rather than compliance. The California Arts Council reports that not only has their inability to monitor art sales made it extremely difficult to enforce the royalty, but they are further hindered by the fact that the California Act itself also lacks any "teeth." Thus, neither party involved, not the state, the seller, nor the artist, is willing to enforce compliance with the California droit de suite legislation.

This lack of motivation to enforce the Act is merely compounded by the fact that California is the only state within the U.S. with measures in place to provide visual artists royalties, a situation likely to lead to forum shopping. As many critics argue, "art produced by California artists and resold within the state is subject to a substantial price penalty compared to comparable works sold in states where the royalty does not apply." This consequently negatively affects the California art market. By shifting art sales to venues outside of the state, affected artists receive no royalty income at all. This movement is so strong and the number of resales within the state is so small that "it is very unlikely that the cumulative effect of the royalty over time offsets even a modest initial price penalty."

102. MCANDREW & DALLAS-CONE, supra note 19, at 43.
103. Id. at 44.
104. Id. at 43-44; Pfeffer, supra note 5, at 559.
105. MCANDREW & DALLAS-CONE, supra note 19, at 47.
106. Id.
107. Sanford, supra note 23, at 8; Kemochan, supra note 9, at 1433-34.
109. Id. at 8.
110. Id.
It is clear the California Resale Royalty Act has been ignored and brushed under the carpet by all those in the California legal and art market. This failure, however, should not be seen as an indication of the failure of droit de suite in general, but should be viewed as an unsuccessful experiment in its implementation. Droit de suite has not failed in other countries and, as will be argued below, the EU Directive, incorporating many of the successful characteristics of the systems in these countries, may serve as model legislation for the United States at the federal level.

VI. The EU Directive on Droit de Suite: A Move Away From the Failures of the California System

Proposed initially in 1996, Directive 2001/84/EC, requiring member countries to implement droit de suite measures, did not go into force until October 13, 2001, and was not implemented until January 1, 2006. Its major goals are “to remove distortions in the internal market to remedy the unequal treatment of artists between different member states.” The Council of Europe took the initial common position that “a precondition for the proper functioning of the internal market was that distortions of competition and displacement of sales caused by differences in national provisions on the resale right should be eliminated.” The underlying intent was to create a level playing field amongst all artists in order to discontinue the race to the bottom occurring within the European Union.

At the time of the Directive’s enactment, four of the European Union’s fifteen member states had no droit de suite measures in place. The Directive, aimed at harmonization, removes from the United Kingdom, Ireland, Austria, and Holland the freedom of choice offered under Article 14 of the Berne Convention. It now makes mandatory legislation which has never been required among states. Countries, particularly the United Kingdom, which had failed to impose droit de suite measures on their own

111. MCANDREW & DALLAS-CONTE, supra note 19, at 15-16. Adoption followed much debate in which a few states, particularly the UK, actively opposed the proposal. The UK was particularly concerned that its art market would suffer and that art sales would be directed not only outside of London, but outside the EU. Finally, in 2001, however, the EU reached a unanimous compromise. Pfeffer, supra note 5, at 533.

112. Weatherall, supra note 12, at 8.

113. MCANDREW & DALLAS-CONTE, supra note 19, at 15.

114. Weatherall supra note 12, at 8; Pfeffer, supra note 5, at 540.

115. Belgium, Denmark, Finland, France, German, Greece, Italy, Luxembourg, Portugal, Spain, and Sweden had droit de suite measures in place. Ramanbordes, supra note 15, at 26, 28. The UK, Ireland, Austria, and the Netherlands did not have droit de suite measures in place at the time of adoption of the Directive. Pfeffer, supra note 5, at 537.

116. Lewis, supra note 11, at 308.
prior to the Directive, would no longer enjoy the advantages such failure brought them within the European art market.\textsuperscript{117}

The Directive, similar to the California Act, specifically determines the legal form and content of the resale right. In order for a right to the royalty to apply, the work, sale, and art must all qualify. The "work" must be an original work "of graphic or plastic art."\textsuperscript{118} The "sale" applies to public sales only; thus, it must involve an art market professional such as a saleroom, gallery, auction house, or dealer.\textsuperscript{119} And, in order for the "art" to qualify, the artist must be a national of a member state or of another country which has droit de suite provisions in place.\textsuperscript{120}

The minimum sale price at which the royalty applies may not be placed at more than 3,000 Euros.\textsuperscript{121} Set at this threshold the Directive allows for payment on a sliding scale beginning with four percent on works of art over 3,000 Euros to a quarter of one percent on works over 500,000 Euros.\textsuperscript{122} The right of the visual artist to receive these royalties under the Directive is inalienable and lasts seventy years beyond the artist's death, at which point it is transferable to his heirs.\textsuperscript{123} All member states had until January 1, 2006 to implement such legislation, however, those states without droit de suite measures in place prior to passage of the Directive may limit payment of the royalty to living artists until 2010.\textsuperscript{124}

As mentioned above, the Directive's main point of departure from the California Act is its allowance for a central collection agency at the state's discretion under Article 6.\textsuperscript{125} This provision allows for member states without droit de suite measures in place, or those few states with droit de suite measures but without a central mechanism for collection and distribution, to create a central institution for implementation under the Directive.\textsuperscript{126} This provision attempts to prevent the main weakness found in the California system, but, as the following will discuss, perhaps does not go as far as necessary.

\begin{enumerate}
\item \textsuperscript{117} Pfeffer, \textit{supra} note 5, at 541.
\item \textsuperscript{118} Directive, \textit{supra} note 16, at art. 2. Examples include pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs. \textit{Id.}
\item \textsuperscript{119} \textit{Id.} at art. 1(2).
\item \textsuperscript{120} \textit{Id.} at art. 7.
\item \textsuperscript{121} \textit{Id.} at art. 3.
\item \textsuperscript{122} \textit{Id.} at art. 4.
\item \textsuperscript{123} \textit{Id.} at art. 1(1), 6(1).
\item \textsuperscript{124} \textit{Id.} at art. 8(2); Also, a state may request a two year extension as to applying royalties to non-living artists. Pfeffer, \textit{supra} note 5, at 543.
\item \textsuperscript{125} Directive, \textit{supra} note 16, at art. 6(2); Member States may provide for the optional or compulsory collective management by collecting societies. \textit{Id.}
\item \textsuperscript{126} \textit{Id.}
\end{enumerate}
VII. The EU Directive as a Model for U.S. Federal Legislation: The Need for a Central Implementation Agency

Even before the passage of the EU Directive, commentators urged the adoption of a federal droit de suite statute in the United States. And, while it is certainly too early to commend or criticize the Directive’s successes or failures, its passage and implementation leads one to logically question: Will the United States finally be next? Certainly their history with droit de suite is questionable, yet, perhaps the Directive provides not only the final push needed, but a workable model on which the United States can build upon and use to create their own national legislation.

Amongst the various systems discussed thus far, there are many common factors (i.e., the threshold price, the minimum and maximum royalty rates, the applicability of the royalty to public and private sales, and etc.). And while these factors are vital to the implementation of the royalty, their inclusion does not seem to mark the success or failure of any particular system. As study of the California system indicates, in order for royalty legislation to be properly enforced the imperative element is provision for a single central agency entrusted with collection and distribution.

The United Kingdom discovered this as well. Following the passage of the EU Directive, they were forced to bring to an end their vigorous battle against droit de suite legislation. Having come to grips with the inevitable, it began to research the most effective and efficient methods of enforcing droit de suite. In 2000, the Arts Council began to examine current practices of collecting and distributing droit de suite in other countries. They studied the systems in Belgium, Denmark, Germany, Finland, France, and California. The Arts Council noted that Germany, Finland, France, and Denmark all use a “central agency to manage the royalty, whereas the other Member States have a number of societies involved in the collection procedure.” They purposely and accurately point out that California is a slightly different system as it is the seller’s obligation to find the artist and pay the royalty. In analyzing the results

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127. See Johnson, supra note 18, at 513-17. See also Kernochan, supra note 9, at 1434.
128. MCANDREW & DALLAS-CONTE, supra note 19, at 43-44.
129. See Id.
130. Id.
131. Id.
133. See MCANDREW & DALLAS-CONTE, supra note 19, at 45.
134. Id.
of these various practices, the Arts Council comes to the same conclusion that many other European countries presumably have as well: a central collection agency is the best method to implement droit de suite.\textsuperscript{135}

The Arts Council Report finds there to be many advantages to a centrally managed collection and distribution system. Most importantly, "it is easier to establish and maintain cooperation with artists and the art trade if one central agency has sole responsibility for collecting royalties."\textsuperscript{136} Thus, it also makes the job of matching the sale and the royalty to the artist more straightforward and inevitably easier.\textsuperscript{137} Moreover, "[w]hen only one society is looking after all resale rights this brings synergy and cost-savings. Handling a large pool of artists and sales gives the society experience of the procedures and art works involved, which allows them to gain knowledge and skills more quickly."\textsuperscript{138}

Further, a "central collecting society can gain sales information in a manner that is least disruptive to the art trade . . . Especially in the case of private dealers where individual resales may be hard to track."\textsuperscript{139} The Report also notes that when there is more than one collection agency, or no agency at all, efficiency decreases as does the ability to monitor and assess the system: "It is easier to gather and evaluate statistics on collection and distribution when there is only one central agency."\textsuperscript{140}

Finally, the Arts Council highly stressed the necessity of creating a mechanism that allows for a right to information by the collecting and distributing body.\textsuperscript{141} The artist and the central collection agency should be entitled to information from the seller, possibly as part of a regulated timely procedure.\textsuperscript{142} This would ensure compliance. The Arts Council recommends a system with "an ability to identify the auction houses and dealers making sales for which the royalty falls due; an open and transparent method of recording sales, including sales on the internet, the price agreed and the royalty due, by dealers and auction houses; the right of collection and/or distribution bodies to have information about sales . . . a record of the collection and distribution of royalty fees; . . . [and] a control system which ensures that all transactions and systems are transparent and accountable."\textsuperscript{143}

\begin{thebibliography}{1}
\bibitem{135} Id. at 64-65.
\bibitem{136} Id. at 45.
\bibitem{137} Id. at 46.
\bibitem{138} Id. at 46.
\bibitem{139} Id.
\bibitem{140} Id. at 46.
\bibitem{141} Id. at 47-48.
\bibitem{142} Id. at 12, 47.
\bibitem{143} Id. at 12.
\end{thebibliography}
For all intents and purposes, the Arts Council’s Report forecloses on the notion that for droit de suite to function properly a system similar to that of California can be adopted. Rather, the Report concludes that an open system with one central body for collection and distribution, as found in Germany, Denmark, and Finland, is ideal.\textsuperscript{144}

Thus, while federal legislation mimicking the EU Directive is a start, it is not the complete answer. Whether a national mechanism is created or the federal government requires each individual state to centrally manage their own royalty collection and distribution, it is clear from the inadequacy of the California Act that these tasks may not be left to the seller’s own devise. Moreover, if individual states in a federal system are allowed to choose their own collection and distribution systems (i.e., whether to centrally collect and distribute or not), forum shopping may persist.\textsuperscript{145} A seller may opt for purchases and sales in the California art market, for instance, whose system results in infrequent collection and distribution of royalty payments, over a state whose system diligently collects and distributes them.

Accordingly, what is needed is federal legislation that perhaps follows the structure of the Directive, but in addition makes mandatory a central body, at the state or federal level, that can monitor, collect, and distribute royalty payments. Certainly this will lead to additional administration costs; however, it is the only way to ensure the rights of visual artists to royalty payments are not only recognized, but also realized.

\textbf{VIII. Conclusion}

Implementation of effective droit de suite measures is necessary to provide visual artists equal and fair protection under intellectual property law. Provisions allowing for the participation of these artists in the increase in value of their work in the secondary market will alone provide the incentive essential to promote the continuance of creativity in the arts, a good from which the public as a whole will benefit.

This nation is part of an international community that is increasingly recognizing and requiring droit de suite legislation. Following the enactment of the EU Directive, the United States should be hard-pressed to implement its own federal measures. While the Directive provides a model superior California’s, the United States, however, could be the first to implement legislation at the federal level requiring a central collection

\textsuperscript{144} Id. at 10, 12.

\textsuperscript{145} Johnson, \textit{supra} note 18, at 498-99. Johnson mentions the several problems that may arise if states are allowed to choose their own collection methods; for example: conflicting state collection mechanisms, collusion, and duplicative effort among states. \textit{Id}.
mechanism among or within states—a model others in the future could follow when legislating their own droit de suite measures.