




3-23-2017

# No More Starving Artists: Why the Art Market Needs a Universal Artist Resale Royalty Right

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## Recommended Citation

Schten, Allison (2017) "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.  
Available at: <http://scholarship.law.nd.edu/ndjicl/vol7/iss1/6>

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# NO MORE STARVING ARTISTS: WHY THE ART MARKET NEEDS A UNIVERSAL ARTIST RESALE ROYALTY RIGHT

ALLISON SCHTEN \*

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## INTRODUCTION

Pablo Picasso's *Les femmes des Algiers* sold for a record-shattering \$179,365,000 at a Christie's auction in May 2015.<sup>1</sup> Although this sale made *Les femmes des Algiers* the most expensive painting of all time, its record will no doubt be broken in the future. Buying and selling art has long been seen as a

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<sup>1</sup> Shane Hickey, *Picasso Painting Breaks the Record for the Most Expensive Artwork Sold at Auction*, THE GUARDIAN (May 12, 2015), <http://www.theguardian.com/artanddesign/2015/may/12/pablo-picasso-work-sets-record-for-most-expensive-artwork-sold-at-auction>.

hobby of the wealthy, and though the market can be volatile, pieces highly regarded by critics generally continue to appreciate in perpetuity.<sup>2</sup>

It should come as no surprise that the art game was alive and well in the nineteenth century. French artist Jean-Francois Millet remains a giant in art history today, known for his works featuring peasant farmers and his role in both the Realism and Barbizon art movements. His work, however, was not greeted by contemporaries with the enthusiasm it garners today.<sup>3</sup> One of his most striking paintings, *L'Angelus*, features the figures of two peasants working in a field, heads both bowed in prayer. *L'Angelus* initially sold for a paltry 1,000 francs in 1860, but by the end of the nineteenth-century, works by Barbizon school painters had become quite en vogue. In 1889, fourteen years after Millet's death, *L'Angelus* sold at auction for 553,000 francs.<sup>4</sup> For the time, it was the most expensive painting ever sold.

Yet, Millet's family, "completely destitute at the time," never saw a penny from this sale.<sup>5</sup> The families of preeminent post-Impressionists Paul Cézanne and Paul Gauguin suffered similar fates, drawing the attention of the French government.<sup>6</sup> Their plight exposed the fundamental problem of the art market: An artist is entitled to earnings only from the initial sale of his work. Art tends to appreciate over time, and frequently changes hands, but market structure prevents any of this from trickling back to the artist or his family. Thus, in 1920, France became the first country to introduce a legal remedy for this problem—*droit de suite*, the moral right of an artist to receive resale royalties for his work.<sup>7</sup>

A new treaty whose aim is to impose universal baselines for artist resale royalty rights could significantly address the unevenness of the international art market, increasing its transparency and improving the plight of the artist. Part I will examine the development of *droit de suite*. Part II will look to recent implementations of royalty schemes for insights into the process. Part III will explore the two biggest outliers, the United States and China. Part IV will investigate the impacts of royalty schemes and their disparate application on the international art market. And finally, Part V will discuss and suggest possible routes for legal reform.

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<sup>2</sup> Abigail R. Esmán, *Ten Expert Tips for Investing in the Art Market*, FORBES (Mar. 26, 2012), <http://www.forbes.com/sites/abigailesman/2012/03/26/ten-expert-tips-for-investing-in-the-art-market/>.

<sup>3</sup> Bradley Fratello, *France Embraces Millet: The Intertwined Fates of The Gleaners and The Angelus*, MUTUALART (Dec. 2003), <http://www.mutualart.com/OpenArticle/France-Embraces-Millet--The-Intertwined-/65DB908A334354D8>.

<sup>4</sup> *Id.*

<sup>5</sup> Tiernan Morgan & Lauren Purje, *An Illustrated Guide to Artist Resale Royalties (aka 'Droit de Suite')*, HYPERALLERGIC (Oct. 24, 2014), <http://hyperallergic.com/153681/an-illustrated-guide-to-artist-resale-royalties-aka-droit-de-suite/>.

<sup>6</sup> Alexander Bussey, *The Incompatibility of Droit de Suite with Common Law Theories of Copyright*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1063, 1068 (2013).

<sup>7</sup> Morgan & Purje, *supra* note 5.

I. DEVELOPMENT OF *DROIT DE SUITE*

The image of artists dying “in misery at a time when their paintings were bringing enormous sums”<sup>8</sup> proved politically salient in nineteenth-century France. Its passage of the first *droit de suite* law was quickly followed by Belgium in 1921 and Czechoslovakia in 1926.<sup>9</sup> The artist's right to receive royalties for subsequent sales of their works was deemed inalienable, unwaivable, and nonassignable.<sup>10</sup> That is to say, the right is a moral one: “[T]he artist cannot sell works that are free of the obligation to pay a resale royalty,” and “the right to collect resale royalties in a given work cannot be transferred by the artist to another person.”<sup>11</sup> *Droit de suite* has also been defended as both an economic right and an extension of the personhood theory of copyright, “which suggests that the creator of a work never really gives up all of the property interests in the work, as it is actually a part of the creator’s personhood.”<sup>12</sup>

The reasoning comes from an unavoidable distinction between visual artists and other types of artists: “[U]nlike writers, filmmakers, and musicians, artists don’t benefit from derivative or reproducible income (such as screenplay rights or soundtrack licensing). . . . This is because the art industry places a massive premium on uniqueness.”<sup>13</sup> This “premium on uniqueness” is a double-edged sword; visual artists cannot benefit from derivatives or reproductions, but their work does tend to enjoy appreciation in value more so than that of other artists. Again, this tendency highlights the resale problem: Without *droit de suite*, artists are prevented from benefitting whatsoever from the rising value of their work. Furthermore, artists cannot simply sit on their work waiting for it to appreciate, either. The art market is too volatile to predict when or to what extent a piece may rise in value, if it does so at all, and without exposure to the public, dealers, and others, it may never garner enough attention to gain much value at all.

Enough countries were persuaded by France’s reasoning that in 1948, the Berne Convention for the Protection of Literary and Artistic Works was amended to include the moral right of the artist to receive resale royalties. This amendment did not make *droit de suite* mandatory, however.<sup>14</sup> Although the idea was attractive, countries were slow to actually implement it in their own legislation.<sup>15</sup>

The formulation of *droit de suite* statutes naturally varies from country to country, but its fundamental components look largely the same. A typical case might proceed as follows: An artist produces a painting and sells it to a dealer for \$100. That dealer then sells it for \$500 to a private collector. Years later, that private collector sells it for \$10,000 to a museum. Without *droit de suite*, the

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<sup>8</sup> Stephanie B. Turner, *The Artist’s Resale Royalty Right: Overcoming the Information Problem*, 19 UCLA ENT. L. REV. 329, 335 (2012).

<sup>9</sup> Morgan & Purje, *supra* note 5.

<sup>10</sup> Turner, *supra* note 8, at 336.

<sup>11</sup> *Id.*

<sup>12</sup> Bussey, *supra* note 6, at 1066–67.

<sup>13</sup> Morgan & Purje, *supra* note 5.

<sup>14</sup> Bussey, *supra* note 6, at 1069.

<sup>15</sup> *Id.*

artist receives \$100 for work that he produced, and the story ends there. With a *droit de suite* statute, however, the story might end a little differently. Say the statute provides that, for every sale of a piece of art valuing \$500 or more, the artist is entitled to a five percent resale royalty. Thus, for the dealer's sale to the private collector, the artist would receive a \$25 royalty. And years later, the artist (should he survive) or his estate would be entitled to receive a \$500 royalty.

Such a system makes sense considering the intellectual property right of a work—the copyright—is usually inherited and thus retained by the artist's family (subject, of course, to the limits of copyright law—eventually the work will enter the public domain).<sup>16</sup> The resale royalty system merely allows the artist or his estate to reap the financial benefits attached to the work. In modern formulations, *droit de suite* statutes typically apply only to public sales, such as those through auction houses or professional dealers, and usually impose a three to seven percent resale royalty rate.<sup>17</sup>

## II. CURRENT STATUS OF ARTIST RESALE ROYALTY LAWS

### A. Droit de Suite in the European Union

Leading the pack in artist resale royalty laws is the European Union, which in 2001 implemented the Artist Rights Directive (“the Directive”).<sup>18</sup> The Directive declared that “[i]n the field of copyright, the resale right is an unassailable and inalienable right, enjoyed by the author of an original work of graphic or plastic art, to an economic interest in successive sales of the work concerned.”<sup>19</sup> It mandated several specific policies: Member states were permitted to set their own minimum prices which would trigger the resale liability, but such minimum price could not exceed 3,000€.<sup>20</sup> If a member state set the minimum at a price less than 3,000€, the member state could not set the royalty rate at anything less than four percent up to that 3,000€ threshold.<sup>21</sup> To clarify by example, say member state X set the minimum price at which the resale rate was triggered at 2,000€. This satisfies the Directive's threshold requirements. That means any secondary sale of art in the price range of 2,000–3,000€ is entitled to a four percent royalty for the artist. Currently, member states have set their minimums at various amounts, ranging from Germany at 400€ and France at 750€ to Austria at the maximum 3,000€.<sup>22</sup>

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<sup>16</sup> RIGHTS & REPRODUCTIONS: THE HANDBOOK FOR CULTURAL INSTITUTIONS 26 (Anne M. Young, ed., 2015) [hereinafter RIGHTS & REPRODUCTIONS HANDBOOK].

<sup>17</sup> Morgan & Purje, *supra* note 5.

<sup>18</sup> 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) 32–36, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32001L0084> [hereinafter Directive 2001/84/EC].

<sup>19</sup> *Id.* pmb1.

<sup>20</sup> *Id.* ch. II, art. 3.

<sup>21</sup> *Id.* ch. II, art. 4.

<sup>22</sup> *The Resale Rights Directive*, VG BILD-KUNST, <http://www.bildkunst.de/en/copyright/resale-right/resale-right-in-the-european-union.html>.

The Directive also established a sliding rate scale, capping the total amount of the royalty from any resale at 12,500€.<sup>23</sup> A four percent royalty rate would apply for sale prices up to 50,000€, three percent for sales between 50,000.01 and 200,000€, one percent for sales between 200,000.01 and 350,000€, 0.5% for sales between 350,000.01 and 500,000€, and 0.25% for sales exceeding 500,000€.<sup>24</sup> These sale prices are considered net of tax.<sup>25</sup> Member states were also permitted to apply a five percent royalty rate for sales up to 50,000€ should they so choose.<sup>26</sup>

The Directive was not binding upon all member states upon its adoption in 2001. It included a provision granting "a generous transitional period," allowing member states until 2005 to fully implement it.<sup>27</sup> Additional extensions were allowed, and there was a struggle to include a reluctant United Kingdom, but as of 2012 "the resale right has been fully harmonized across the European Union, i.e. indiscriminately vesting artists and their heirs with such rights."<sup>28</sup>

The United Kingdom's 2016 referendum to exit the European Union may prove to undermine these harmonization efforts. Many see it as an opportunity to "eliminate or reduce the regulatory burdens that have piled up in recent decades, adding costs and compromising London's competitive position against its principal rivals: New York, Hong Kong, and Switzerland's art trade centres."<sup>29</sup> Such speculation, however, is merely that—speculation. The United Kingdom (U.K.) "ranked second in the global art market last year, behind the United States and slightly ahead of China."<sup>30</sup> Although the U.K.'s market share has fallen, this trend exists over the last *decade*<sup>31</sup>—suggesting that the source of this decline is not a direct result of harmonization with the Directive. The full impact of the U.K.'s exit from the European Union (E.U.) on the art market (and on the survival of its resale royalty right) is, therefore, unclear.

One general criticism of the right that still persists to an extent is the "cascade effect." The Directive attempted to preclude this issue by recommending the elimination of differences between various countries' resale laws "where they have a distorting effect on the functioning of the internal market."<sup>32</sup> It addressed the cascade effect by mandating that the resale royalty "shall be payable by the seller."<sup>33</sup> The cascade effect appears where dealers take advantage of different resale laws in different countries to avoid paying *any* resale royalty, or, alternatively, get stuck paying the royalty twice.<sup>34</sup> This occurs because some

<sup>23</sup> Directive 2001/84/EC, *supra* note 18, ch. II, art. 4.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* ch. II, art. 5.

<sup>26</sup> *Id.* ch. II, art. 4.

<sup>27</sup> *The Resale Rights Directive, supra* note 22.

<sup>28</sup> *Id.*

<sup>29</sup> Anthony Browne, *The UK Market Can Soar After Brexit*, THE TELEGRAPH (Sept. 20, 2016), <http://www.telegraph.co.uk/news/2016/09/20/the-uk-art-market-can-soar-after-brexit/>.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Directive 2001/84/EC, *supra* note 18, pmbl.

<sup>33</sup> *Id.* ch. I, art. 1.

<sup>34</sup> EUROPEAN COMM'N, KEY PRINCIPLES AND RECOMMENDATIONS ON THE MANAGEMENT OF THE AUTHOR RESALE RIGHT 1 (Feb. 17, 2014), [http://ec.europa.eu/internal\\_market/copyright/docs/resale/140214-resale-right-key-principles-and-recommendations\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/resale/140214-resale-right-key-principles-and-recommendations_en.pdf).

countries made the resale royalty payable to the artist by the seller, but others made it payable by the buyer. Thus, a dealer could buy at an auction in a country where the *seller* pays the royalty. The dealer would be the buyer in this transaction, and therefore owe no royalty. Then, the dealer could sell at an auction in a country where the *buyer* pays the royalty. In this transaction, the dealer would be the seller, and therefore owe no royalty. In this way, savvy art dealers are able to evade royalty liability entirely. Conversely, an unfortunate or not-so-savvy dealer could buy at an auction in a country where the buyer pays the royalty, then sell at an auction in a country where the seller pays the royalty—paying it twice.

Regardless of the Directive's "seller pays" provision, the cascade effect problem was not ameliorated or eliminated due to the contractual freedom that exists between the various players in the art market.<sup>35</sup> For example, auction houses might stipulate in a contract with a private buyer that the buyer will be charged the value of the resale royalty—so although the seller still pays, the money comes from the buyer's pocket, allowing the cascade effect to persist. One of the several reports spawned by the Directive, the *Key Principles and Recommendations on the Management of the Author Resale Right*, was signed in 2014 by seventeen collective management organizations (CMOs); auctions houses, art dealers, and galleries (AMPs); and trade associations.<sup>36</sup> This report recommended guidelines for transparency, sharing of information, and cooperation between the different players in the art market, including the CMOs, AMPs, and trade associations.<sup>37</sup> The signatories agreed to gather more data to determine the pervasiveness of the problem and agreed to address it in a report set to be published late 2015.<sup>38</sup>

The problem of the cascade effect demonstrates, however, the extent to which *droit de suite* has been accepted as a fundamental right in the E.U. Criticisms and improvements have not been focused on the right of the artist itself, but rather on its impact and how to make it most effective. Thus the E.U. and its Directive represent one of the most extensive case studies of implementation of *droit de suite*.

### B. Droit de Suite in Australia

Like the E.U., Australia has also implemented a *droit de suite* scheme. Australia passed the Resale Royalty Right for Visual Artists Act 2009 ("Act 2009"), which took effect June 9, 2010. Its terms are similar to those of the E.U. Directive, stipulating that "artists receive five percent of the sale price when eligible artworks are resold commercially for \$1000 or more."<sup>39</sup> The Act 2009 applies to "original artworks by living artists and for a period for 70 years after an

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Resale Royalty Scheme*, AUSTRALIAN GOVERNMENT DEPARTMENT OF COMMUNICATIONS AND THE ARTS, <http://arts.gov.au/visual-arts/resale-royalty-scheme> (last visited Oct. 14, 2015).

artist's death."<sup>40</sup> Its stated objectives are “to provide visual artists with: (1) recognition of their ongoing rights in their art, and (2) additional income through royalties derived from commercial resales of their art.”<sup>41</sup> Thus, the Act 2009 aligns with both the personhood theory of copyright and the notion of *droit de suite* as an economic right.

Australia originally set out to address the problem in 2002, when the *Report of the Contemporary Visual Arts and Craft Inquiry* (“Myer Report”) found “that the incomes of contemporary visual artists and craft practitioners in Australia [were] lower than that of the general workforce, and of artists in other fields.”<sup>42</sup> Further impetus to establish a royalty scheme came from concern for Australia’s indigenous peoples. The Myer Report noted:

[T]he disadvantaged position of Indigenous visual arts and crafts practitioners in the market, and the extensive financial and social obligations of indigenous artists to the community arising from communal ownership of cultural property and traditional imagery, has strengthened the call for the introduction of resale royalties in Australia as a tool for increasing the income of indigenous artists.<sup>43</sup>

The development of *droit de suite* in Australia thus provides a compelling contrast to the development of *droit de suite* in Europe. Harmonizing resale laws across all of Europe drew its urgency from the difficulties of managing an economic market spread among many countries. Australia's resale laws were an outgrowth of concern for its domestic market. Thus, considering the two examples together suggests that there are vital reasons, both external and internal, for countries to impose royalty schemes.

### C. Droit de Suite in Canada

Canada, though a signatory of Article 14 of the Berne Convention recognizing the inalienable right of the artists to benefit from the resale of his work, does not currently have its own royalty scheme.<sup>44</sup> Two private groups, the Canadian Artists’ Representation/Le Front des artistes canadiens (CARFAC) and the Regroupement des Artistes en arts visuels du Québec (RAAV), together “represent all artists in Canada, as sanctioned by the Status of the Artist Act,” and have been lobbying the Canadian government for decades in an effort to “improve[e] the economic condition of visual artists, and to help them achieve a

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> RUPERT MYER, REPORT OF THE CONTEMPORARY VISUAL ARTS AND CRAFT INQUIRY 60 (2002).

<sup>43</sup> *Id.* at 158–59.

<sup>44</sup> CAN. ARTISTS’ REPRESENTATION LE FRONT DES ARTISTES CANADIENS & LE REGROUPEMENT DES ARTISTES EN ARTS VISUELS DU QUEBEC, RECOMMENDATIONS FOR AN ARTIST RESALE RIGHT IN CANADA 1 (2010), [http://www.parl.gc.ca/Content/HOC/Committee/411/CC11/WebDoc/WD5401532/403\\_C32\\_Copyright\\_Briefs%5CCanadianArtistsRepresentationE.pdf](http://www.parl.gc.ca/Content/HOC/Committee/411/CC11/WebDoc/WD5401532/403_C32_Copyright_Briefs%5CCanadianArtistsRepresentationE.pdf).



living income.”<sup>45</sup> CARFAC’s efforts led to the passage of a 1988 amendment to the federal Copyright Act, “which recognizes artists as the primary producers of culture, and gives artists legal entitlement to public exhibition royalties.”<sup>46</sup>

Like Australia, one of Canada’s largest concerns is the economic status of its own indigenous people, the Inuit. In its lobbying efforts, CARFAC points to examples like the case of Inuit artist Kenojuk Ashevak, who sold a piece in 1960 for \$24, and received nothing in compensation when it was later resold for \$58,650.<sup>47</sup> CARFAC notes that “Canada’s Indigenous artists in particular are losing out on the tremendous profit being made on their work in the secondary market. Many artists living in isolated northern communities live in impoverished conditions, while their work dramatically increases in value.”<sup>48</sup> A growing sense of urgency has emerged as Canada’s art market has expanded to a point where “auction sales break new records every year.”<sup>49</sup> A 2010 economic impact study found that an estimated \$52 million is spent on Inuit art annually, yet the Inuit artists receive no compensation from the thriving market for their work.<sup>50</sup>

Due to push back from some auction houses, however, efforts to implement a royalty scheme in Canada have stalled. Stephen Ranger, vice president of the auction house Waddington’s, responded to CARFAC’s “confrontational tack” by pointing out that while in theory the artist deserves compensation for his work, auction houses worry about fair administration and roll-out across the industry.<sup>51</sup> He suggests that a possible way forward for Canada would be active cooperation between auction houses and CARFAC, rather than CARFAC lobbying unilaterally with no input from players in the industry.<sup>52</sup> Ranger has also expressed skepticism that a royalty scheme would truly benefit artists, and has questioned whether enough art appreciates that resales constitute an actual market issue.<sup>53</sup>

However, much of the data on Canada’s art market hugely undermines Ranger’s attempts to downplay the plight of the artist—for instance, “[i]n Canada, resale accounts for a staggering 98% of all auction house transactions.”<sup>54</sup> Canadian art industry experts argue that “[t]he security of a *droit de suite* would incentivize younger generations to pursue careers in art, and help aging artists to

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Help Bring the Artist’s Resale Right to Canada* CAN. ARTISTS’ REPRESENTATION LE FRONT DES ARTISTES CANADIENS, <http://www.carfac.ca/initiatives/help-bring-the-artists-resale-right-to-canada/> (last visited Jan. 9, 2017).

<sup>48</sup> *Id.*

<sup>49</sup> *Inuit Artists to Miss Out on Resale Right Payments at Coming Auctions*, CAN. ARTISTS’ REPRESENTATION LE FRONT DES ARTISTES CANADIENS (Nov. 1, 2012), <http://www.carfac.ca/news/2012/11/01/inuit-artists-to-miss-out-on-resale-right-payments-at-coming-auctions/>.

<sup>50</sup> *Id.*

<sup>51</sup> Sky Gooden, *Canada’s Artists and Auction Houses Face Off in Fight over Resale Royalties*, BLOUIN ARTINFO (Nov. 27, 2012), <http://www.blouinartinfo.com/news/story/843144/canadas-artists-and-auction-houses-face-off-in-fight-over#>.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Chris Ling, *Guarding the Avant-garde: The Canadian Artist’s Resale Right*, OPENWIDE (Dec. 9, 2013), <http://openwidezine.com/2013/12/09/guarding-the-avant-garde-the-canadian-artists-resale-right/>.

earn a consistent living without the need for additional sources of income.”<sup>55</sup> Thus, although Canada does not have a royalty scheme in place, its situation appears remarkably similar to that of Australia, suggesting that it might face similar results.<sup>56</sup>

### III. THE OUTLIERS: THE UNITED STATES AND CHINA

#### A. Droit de Suite *in the United States*

Copyright has long been a part of American law. The first United States copyright statute was passed in 1790.<sup>57</sup> It has been revised many times in subsequent years, most recently and thoroughly in the Copyright Act of 1976, codified in U.S.C. Title 17.<sup>58</sup> Traditionally, United States law has “focused exclusively on protecting economic rights”<sup>59</sup> of the artist, giving only limited lip-service to the notion of moral rights of the artist.

In 1990, the United States passed the Visual Artists Rights Act (VARA), which was the first American legislation to recognize and grant protections for the moral rights of artists.<sup>60</sup> It was passed in order to get the United States in compliance with the Berne Convention for the Protection of Literary and Artistic Works, of which the United States became a signatory March 1, 1989.<sup>61</sup> VARA expanded the Copyright Act, U.S.C. Title 17, to include three moral rights of the artist: “(1) the right of attribution, (2) the right of integrity, and (3) the right to prevent destruction of works of ‘recognized stature.’”<sup>62</sup> VARA sets the term of protection to be the duration of the artist’s life,<sup>63</sup> which is notable because it is shorter than the standard length of copyright protection, which is the life of the author plus seventy years.<sup>64</sup> The rights granted by VARA are nontransferable but are waivable via an express agreement to waive “in a written instrument signed by the author.”<sup>65</sup> That a moral right can be waived suggests that the United States does not emphasize the moral aspects of artist protections as much as the economic aspects. However, Congress did demonstrate some awareness of the economic plight of the artist in its debates over VARA, and members did express concern that moral rights of the artist could be waived:

The Committee recognizes that these rights are personal to the author and that, because of a relatively weak economic position,

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<sup>55</sup> *Id.*

<sup>56</sup> The impact of Australia’s royalty scheme on the art market is discussed below. *See infra* Part IV.

<sup>57</sup> RIGHTS & REPRODUCTIONS HANDBOOK, *supra* note 16, at 30.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> 17 U.S.C. § 106A (2015).

<sup>61</sup> RIGHTS & REPRODUCTIONS HANDBOOK, *supra* note 16, at 33–34.

<sup>62</sup> RayMing Chang, *Revisiting the Visual Artists Rights Act of 1990: A Follow-Up Survey About Awareness and Waiver*, 13 TEX. INTELL. PROP. L.J. 129, 134 (2004).

<sup>63</sup> 17 U.S.C. § 106A (2015).

<sup>64</sup> Chang, *supra* note 62, at 135–136.

<sup>65</sup> 17 U.S.C. § 106A(e)(1) (2015).

the author may be required to bargain away those rights. It also recognizes that routine waivers of the rights will eviscerate the law. On the other hand, the Committee believes that to proscribe waiver would be to inhibit normal commercial practices.<sup>66</sup>

In spite of VARA and the discussion it inspired, the United States has not implemented a national artist resale royalty scheme. In 2014 the American Royalties Too Act was introduced in Congress but ultimately failed to pass.<sup>67</sup> Its proposed terms would have imposed a five percent royalty rate on public sales of \$5,000 or more, capping the maximum royalty at \$35,000.<sup>68</sup> Sotheby's and Christie's, two of the largest auction houses in the world, allegedly spent more than \$1 million in lobbying efforts against the bill.<sup>69</sup>

The United States does have one lone standout in terms of *droit de suite*, however—California. The state of California is the only jurisdiction in the United States to have a royalty scheme, and it has been the source of considerable controversy.<sup>70</sup> Under the California Resale Royalty Act of 1976 (CRRRA), artists have a right to receive a five percent royalty on any resale of their artwork valued at \$1,000 or more—unless the artist expressly waives the right to receive a royalty via contract.<sup>71</sup> The protection “continues for the life of the artist plus 20 years.”<sup>72</sup>

The CRRRA (and subsequent federal legislative attempts) came into being due to the story of one particular artist, Robert Rauschenberg, much as the original French *droit de suite* was famously inspired by the story of Jean-Francois Millet.<sup>73</sup> Rauschenberg originally sold his 1958 painting *Thaw* for \$900, only for the painting to be resold at auction some years later for \$85,000.<sup>74</sup> Furious that he and other artists in similar positions never saw any benefit from the appreciation in value of their works, Rauschenberg “vigorously campaign[ed] for resale royalty rights for artists” in the United States.<sup>75</sup>

The CRRRA has been controversial, however, because it imposes the royalty scheme not only upon in-state auctions, but also upon out-of-state auctions if the seller is based in California.<sup>76</sup> Recently, artists Chuck Close and Laddie John Dill and the estate of Robert Graham “filed a lawsuit against Christie's and Sotheby's

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<sup>66</sup> Chang, *supra* note 62, at 138 (citing H.R. REP. NO. 101-514 at 18 (1990)).

<sup>67</sup> Coline Milliard, *No Artist Resale Rights for U.S., for Now*, ARTNET (Jan. 14, 2015), <https://news.artnet.com/market/no-artist-resale-rights-for-us-for-now-220318>.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Judith B. Prowda, *Assessing Artist's Resale Rights Legislation*, N.Y. L.J. (Jan. 23, 2012), <http://www.newyorklawjournal.com/id=1202539351744/Assessing-Artists-Resale-Rights-Legislation?slreturn=20150911180833>.

<sup>71</sup> CAL. CIV. CODE § 986.

<sup>72</sup> Prowda, *supra* note 70.

<sup>73</sup> Morgan & Purje, *supra* note 5.

<sup>74</sup> Diana Wierbicki, *Is Global Trend on Artist Resale Royalties Right for U.S.?*, LAW360 (Mar. 7, 2014), <http://www.law360.com/articles/515958/is-global-trend-on-artist-resale-royalties-right-for-us>.

<sup>75</sup> *Id.*

<sup>76</sup> CAL. CIV. CODE § 986(a).

demanding resale royalties from past auctions.”<sup>77</sup> The Ninth Circuit found the CRRRA partially unconstitutional, holding that “the provision regulating out-of-state sales violates the dormant Commerce Clause but that the provision is severable from the remainder of the Act.”<sup>78</sup> Thus the CRRRA remains effective for public art sales taking place within the state, even though the Ninth Circuit limited its scope. Proponents of a national royalty scheme have largely viewed this result as positive foreshadowing, in that the Ninth Circuit did not strike the substantive provisions of the CRRRA granting artists much greater moral rights and protections than granted by federal law.<sup>79</sup>

Despite the failure of the 2014 American Royalties Too Act, the federal government has recently made some pronouncements that suggest a national royalty scheme may not be too far-fetched. In December 2013, the United States Copyright Office published an adjunct to a 1992 report published by the Copyright Office entitled *Droit de Suite: The Artist’s Resale Royalty*. Published within the 2013 report was a letter from Register of Copyrights Director Maria Pallante to Congressman Jerrod Nadler, one of the sponsors of the 2014 American Royalties Too Act. Pallante summarized the conclusions reached by the Copyright Office in the 2013 report:

[T]he Office has concluded that certain visual artists may operate at a disadvantage under the copyright law relative to authors of other types of creative works. Visual artists typically do not share in the long-term financial success of their works because works of visual art are produced singularly and valued for their scarcity, unlike books, films, and songs, which are produced and distributed in multiple copies to consumers. Consequently, in many, if not most instances, only the initial sale of a work of visual art inures to the benefit of the artist and it is collectors and other purchasers who reap any increase in that work’s value over time. Today more than seventy foreign countries—twice as many as in 1992—have enacted a resale royalty provision of some sort to address this perceived inequality.<sup>80</sup>

Unpacking this statement reveals quite a lot about the state of United States law regarding *droit de suite*. First, it shows an acceptance of the inequality and inadequacy of current protections for artists. Second, it clearly and unequivocally points out to Congress the distinction between visual artists and other artists which demands federal intervention. And lastly, it draws attention to how far behind the United States is from the rest of the world on this issue. Perhaps, as

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<sup>77</sup> Benjamin Sutton, *California Artists’ Resale Royalty Law Survives Court Ruling, with Small Change*, HYPERALLERGIC (May 6, 2015), <http://hyperallergic.com/204871/california-artists-resale-royalty-law-survives-court-ruling-with-small-change/>.

<sup>78</sup> *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1326 (9th Cir. 2015).

<sup>79</sup> Sutton, *supra* note 77.

<sup>80</sup> U.S. COPYRIGHT OFFICE, *RESALE ROYALTIES: AN UPDATED ANALYSIS* (Dec. 2013), <http://copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf>.

with VARA, the United States needs the urgency of complying with an international agreement to finally take comprehensive action.

### B. Droit de Suite *in China*

Understanding the Chinese art market is an endeavor unto itself. First and foremost, the market has “grown tremendously over the past few years.”<sup>81</sup> In 2012, it posted \$14 billion in sales, making it second only to the United States in size.<sup>82</sup> It accounts for more than twenty-five percent of international auction revenues.<sup>83</sup>

Thus, the typical narrative of an artist selling for a low price early in his career only to see his work later resold for a much higher value has been occurring extremely frequently. One author has noted how the resale problem has manifested itself much more quickly and drastically in the Chinese market than it did in Western markets, observing:

It is a story that is common across the art world, and in particular in the contemporary Asian market, which has developed at a meteoric pace in recent years compared to mature Western markets. Even for established midcareer artists, the secondary market prices now quickly outrun those on the primary market. This leaves both the artist and gallery in something of a dilemma: if they “chase” the auction prices for sales of new works, they risk unsustainable prices and ultimately a ruined career. If they do nothing, the sense of frustration at money “left on the table” can demotivate artists and strain relationships between artist and gallery.<sup>84</sup>

China, like the United States, does not have an artist resale royalty scheme. But in light of descriptions of the state of its art market, imposing a royalty scheme to protect the moral and economic rights of the artist seems almost imperative just for the sake of controlling a potential bubble in the market, not to mention for the benefit of the artists themselves.

Complicating things, of course, are the auction houses—namely, the Poly Group, a “\$40 billion state-owned enterprise” which “oversees activities ranging from arms dealing” to art auctions.<sup>85</sup> Since its first foray into art auctions in 2005, the Poly Group has become the world’s third largest auction house, after

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<sup>81</sup> *Understanding the Chinese Art Market*, SOTHEBY’S (Feb. 12, 2015), <http://www.sothebys.com/en/news-video/blogs/all-blogs/eye-on-asia/2015/02/understanding-china-art-market.html>.

<sup>82</sup> Graham Bowley & David Barboza, *A Culture of Bidding: An Art Power Rises in China, Posing Issue for Reform*, *New York Times* (Dec. 16, 2013).

<sup>83</sup> Barbara Pollack, *China’s Growing Auction Giant*, *ARTNEWS* (Oct. 21, 2013), <http://www.artnews.com/2013/10/21/chinas-growing-auction-giant/>.

<sup>84</sup> Antony Dapiran, *How (Droit de) Suite is It?*, *ARTASIAPACIFIC* (June/Aug. 2013), <http://artasiapacific.com/Magazine/84/HowDroitDeSuitesIt>.

<sup>85</sup> Pollack, *supra* note 83.

only Christie's and Sotheby's.<sup>86</sup> While China has not entertained any notion of imposing a royalty scheme, any contemplation of such an act must undoubtedly consider the role of such a powerful player, especially in light of Christie's and Sotheby's success in stalling royalty legislation in the United States. That the Poly Group is also state-owned throws a further wrench into the works. Therefore, while the United States for all its reluctance seems at least open to implementing a royalty scheme, China has not even begun the process of considering it—something any international effort to harmonize royalty schemes must keep in mind.

#### IV. ARTIST RESALE ROYALTY SCHEMES IN PRACTICE AND THEIR DISPARATE IMPACT ON THE INTERNATIONAL ART MARKET

##### A. Criticisms of Droit de Suite

Criticisms of *droit de suite* are plenty and of varying credibility. Three of the most legitimate concerns involve the administrative burden of implementing the scheme and insuring meaningful compliance, questions over whether *droit de suite* actually accomplishes what it seeks to achieve, and lastly whether *droit de suite* runs contrary to widely accepted understandings of certain legal principles.

Administrative burden includes the effort to actually set up the law and make all parties in the art market aware of its existence and its process. It also includes the equally important effort of ensuring that all parties comply, a difficult task in the notoriously murky art market. Enforcement of any such regulation must overcome “the wall of silence that surrounds the art market.”<sup>87</sup> Uneven enforcement of royalty schemes across different countries could result in the same problems that exist with the current piecemeal implementation of *droit de suite*. If one country tightly regulates the process, and another is more relaxed in insuring compliance with paying the royalty, then sales may move into those countries where paying the royalty is, in effect, optional due to poor enforcement.

This post-implementation effect, which probably represents the most significant barrier to achieving effective international *droit de suite*, tends to take the backseat in discussions surrounding initial implementation, however. Countries considering implementing a royalty scheme worry more about the day-to-day impact of regulating a difficult and complex market. These concerns were summarized by John Robertson, a former commercial art gallery manager in London, who noted that figuring out and consistently applying the letter of the law “involved a great deal of time if not money. ‘Most of my contemporary art transactions were at the level of 1,000 to 3,000 pounds. . . . Paying 4 percent on that amount wasn’t as much the problem as the time it would take to do everything the law requires. . . .’”<sup>88</sup> Robertson estimated that he handled 400 to

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<sup>86</sup> Bowley & Barboza, *supra* note 82.

<sup>87</sup> Turner, *supra* note 8, at 350.

<sup>88</sup> Daniel Grant, *The Royalty Treatment*, NEW YORK OBSERVER (Apr. 2, 2014), <http://observer.com/2014/04/the-royalty-treatment/>.

500 such sales annually; at that scale, compliance could certainly become a headache.

These problems are not insurmountable. Functioning administrative schemes already exist and could serve as models for countries to build their own upon. For example, the U.K. requires royalties to be collected by a collecting society. Many of these organizations, such as the Design and Artist Copyright Society (DACS) and the Artist Collecting Society (ACS) already exist for the purpose of keeping track of artists and their estates for copyright reasons, and also “collect [artist resale royalties] on behalf of registered members.”<sup>89</sup> These organizations take some of the regulatory burden off of the shoulders of the government, and seem to have found some success; for example, “DACS paid out over £14 million (\$22.5 million) in royalties to 19,000 artists and estates in 2013” alone.<sup>90</sup>

Basically, the parties making transactions fear expending disproportionate resources on the difficult process of tracking and locating artists in order to distribute the royalty. But they need not worry, because that is precisely the focus of collecting agencies. “When DACS is notified of a royalty arising from a sale of art work by an artist who is not represented by DACS, or another collecting society, we will seek to collect the royalty and find the artist, or their heirs, in order to distribute the royalty to them.”<sup>91</sup>

Additionally, royalty schemes serve to increase transparency in the art market, rather than exacerbate its pervasive “secrecy norms.”<sup>92</sup> By attaching payment to resales of a work of art, royalties also attach “recognition of [the artist’s] continuing link to their work as well as providing a measure of transparency as to its destination and ownership.”<sup>93</sup> Thus, auction houses and galleries could no longer rely on anonymous seller and purchasers and questionable provenance; the necessity of securing royalty payment and distributing it to the artist would implicitly create a visible trail of purchase. This benefit has been acknowledged by the International Confederation of Authors and Composers Societies (CISAC) and many at the World Intellectual Property Organization (WIPO): “[T]he resale right also maintains the essential link between the creator and their work. It enables the visual artist to follow their work.”<sup>94</sup> And in doing so, it allows parties in the market to follow the work as well.

Other critics question whether royalty schemes actually achieve their purpose of improving the plight of “starving artists.” Several studies seem to suggest that the royalties do little for the underdogs, and instead distribute royalties mostly to relatively famous artists with established resale markets, like Picasso and

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<sup>89</sup> Morgan & Purje, *supra* note 5.

<sup>90</sup> *Id.*

<sup>91</sup> *Artist’s Resale Right Distribution Policy*, DESIGN AND ARTISTS COPYRIGHT SOCIETY (Sept. 2013), <http://www.dacs.org.uk/about-us/distribution-policies/artists-resale-right-distribution-policy>.

<sup>92</sup> Turner, *supra* note 8, at 355.

<sup>93</sup> SAM RICKETSON, PROPOSED INTERNATIONAL TREATY ON DROIT DE SUITE/RESALE ROYALTY RIGHT FOR VISUAL ARTISTS 20 (June 2015).

<sup>94</sup> *Renowned Visual Artist Ousmane Sow Takes the Campaign in Favour of a Global Resale Right to WIPO*, CISAC (Oct. 9, 2015), <http://www.cisac.org/Newsroom/Articles/Renowned-Visual-Artist-Ousmane-Sow-Takes-the-Campaign-in-Favour-of-a-Global-Resale-Right-to-WIPO> [hereinafter *Renowned Visual Artist*].

Matisse.<sup>95</sup> “A 2010 report on artists’ resale royalties, commissioned by the European Art Market coalition, found that in continental Europe, 74 percent of all royalties collected went to artists’ heirs, 20 percent to the collecting agencies, and only 6 percent to living artists.”<sup>96</sup> And a study conducted by the Intellectual Property Institute of the University of Southern California School of Law “found that most payments to artists ‘are quite small and the median payment to artists based on auction house data is 256 pounds.’”<sup>97</sup> In a study prepared for the 2015 International Literary and Artistic Association (ALAI) colloquium, law professor Sam Ricketson admitted that resale royalty rights are indeed “open to the objection that sums collected tend to be relatively small and concentrated among a narrow band of artists and their descendants.”<sup>98</sup>

Fortunately, the reality differs from this bleak picture. The international consensus agrees that overall, royalty schemes do help a wide range of artists. More recent studies demonstrate a much more encouraging prognosis for resale rights. “While the sums collected may still be relatively modest, they are not insignificant and their distribution is becoming more widely dispersed among living artists.”<sup>99</sup> At the same ALAI colloquium, Ricketson concluded these types of objections—that royalty schemes do not do enough to help the actually-disadvantaged artists—are not unique to the payment of visual artists, and present merely a straw-man argument against *droit de suite*:

None of the above objections, however, is peculiar to [the Resale Royalty Right], or rather they apply just as readily in the case of any of the other exclusive rights accorded to authors, whether these be rights of reproduction, public performance, or communication, or moral rights. Authors’ rights generally provide no guarantee of return to the other or that these returns will be equitably shared. At most, they provide the promise of return, subject to the vagaries of public taste and need.<sup>100</sup>

As an organization directly involved in the distribution side of *droit de suite*, statistics offered by DACS also undermine the notion that resales only benefit the estates of already-famous artists: “[L]iving artists received 57% percent of fees in 2014, compared with 43% going to artists [sic] estate. . . . Over half of artists and estates paid in 2014 received less than £500, suggesting that the scheme ‘does not only benefit artists whose work sells for a lot of money.’”<sup>101</sup>

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<sup>95</sup> Grant, *supra* note 88.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> RICKETSON, *supra* note 93, at 18.

<sup>99</sup> *Id.* at 19–20. For example, in 2013, France reported collecting €12,442,901, “from 24,293 relevant transactions affecting 1,938 artists of whom 45% were still living. In the U.K., in 2013 £8.4 million was distributed to over 1,400 artists and artists’ estate: this was the second year of full implementation of the EC Directive in that country and represented almost a doubling from the previous year (£4.7 million).”

<sup>100</sup> *Id.* at 18.

<sup>101</sup> Anny Shaw, *Will Artist Royalty Rights Go Global?*, ART NEWSPAPER (Aug. 28, 2015), <http://theartnewspaper.com/market/art-market-news/will-artist-royalty-rights-go-global/>.



Furthermore, royalty schemes give agency to artists, a group otherwise at severe bargaining disadvantage against the extreme wealth and influence of auction houses, galleries, private collectors, and museums. In a stunning reversal of its historical position on the matter, the United States Copyright Office recently embraced the idea of *droit de suite*, acknowledging the imbalance in bargaining power inherent to the art market. Writing in a December 2013 report, it expressed support of resale royalties “as one option to address the historic imbalance in the treatment of visual artists. . . . Given most artist’s comparative lack of bargaining power[,] . . . some level of congressional involvement may be necessary for these negotiations to achieve meaningful results.”<sup>102</sup>

Lastly, some critics contend that *droit de suite* violates traditional principles of alienability of property and contradicts copyright law doctrine.<sup>103</sup> Before engaging too much with these contentions, it is imperative to clarify that art does not abide by many of the rules of property. Art complicates or even defies basic property law concepts because each work is a unique object, and the entire history of art transactions is dominated by theft and looting, dating back to Roman times, making issues of good-faith purchaser, conversion, replevin, and so on, impossible to answer.<sup>104</sup> Plenty has been written about these concepts, and to focus on them too much would distract from the focus of this article. The important thing, however, is that imposing a resale royalty right no more violates the notion of alienability of property than a sales tax. Pilar Ordovas, the former head of Christie’s contemporary art department in London and now a gallery owner, explained that prior to the U.K. implementation of *droit de suite*, “the auction house conducted a ‘study of comparative taxes in the United States, such as the New York City sales tax, which is pretty comparable to the artist resale royalty, which suggested that the impact would be pretty minimal.’ Her own experience is that the ‘law hasn’t really changed things. At most, it is a cost absorbed by the dealer.’”<sup>105</sup> That is to say, *droit de suite* is no more incompatible with the art market than sales taxes are incompatible with economies in general.

#### B. *Evaluating the Effects of Existing Droit de Suite Schemes on their Domestic Art Markets*

Perhaps the loudest concern with implementing *droit de suite* laws involves the potential for an additional cost of transaction to damage sales by imposing an additional transaction cost on top of existing transactions costs such as research “to verify titling, authenticity, attribution,” and so on.<sup>106</sup> Rather surprisingly, much of the worry comes from the United States, one of the few significant art markets left without a royalty scheme. California, however, has had a

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<sup>102</sup> Morgan & Purje, *supra* note 5.

<sup>103</sup> Bussey, *supra* note 6, at 2.

<sup>104</sup> See generally Gregory Day, *Explaining the Art Market’s Thefts, Frauds, and Forgeries (And Why the Art Market Does Not Seem to Care)*, 16 VAND. J. ENT. & TECH. L. 457 (2014) (discussing the unique nature of the art market as opposed to the market for other types of tangible goods).

<sup>105</sup> Grant, *supra* note 88.

<sup>106</sup> Day, *supra* note 104, at 486.

controversial royalty scheme in place since 1976,<sup>107</sup> which has been both a helpful and harmful illustration for understanding how a royalty scheme affects the art market.

The example of California and the rest of the United States represents on a small-scale what some critics fear could play out in the larger international market should adoption of *droit de suite* continue to be so piecemeal. Though California adopted the artist resale right in 1976, a recent federal case has inspired a new wave of concern over the distorting effects that a non-universal royalty scheme imposes on the broader market, resulting in sensationalist headlines such as *9th Circ. Royalty Case to Drive Art Resales Out of Calif.*<sup>108</sup> The Ninth Circuit overturned part of an earlier decision that had held the entire act unconstitutional, due to violating the commerce clause. But on appeal, the court found that the provision requiring out-of-state sales was severable from the rest of the act, and “upheld the requirement that fine-art sellers must pay royalties to artists on sales that occur in California.”<sup>109</sup>

Experts warned that the California art market would plummet: “No other state has a resale royalty law, so galleries outside of California will be able to sell works of art for five percent less than could a California gallery. . . . Or owners could accept five percent less if they want their art sold in a California gallery.”<sup>110</sup> Whether or not such a reduction in the resale market actually occurred remains open to debate: “[T]here have been very few studies on the impact of the CRAA. . . . Nevertheless, Sotheby’s refused to conduct contemporary art auctions in Los Angeles after the enactment of the CRAA.”<sup>111</sup> Reports have also noted that, since the adoption of the CRRA, “only 400 artists have received a royalty for a total of \$328,000.”<sup>112</sup>

This example illuminates two keys to understanding the ways in which artist resale rights encourage or discourage sales in particular areas. First, piecemeal implementation of *droit de suite* does, even if only to a small extent, distorts the market. Players prefer to deal in locations with low transaction costs, including low administrative burdens and lower costs, even if both of those things are negligible in the grand scheme of the art trade. The way to overcome this problem is to implement *droit de suite* universally, making those transaction costs an intrinsic and inescapable part of art dealing. Second, the California example reveals compliance issues; that is, artists or their estate are frequently difficult to track down, and thus galleries would be forced to expend disproportionate resources on what should be a routine part of a transaction. However, as implementation of *droit de suite* in the U.K. has made clear, this is a hurdle that is easily overcome.

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<sup>107</sup> See *supra* Part III.

<sup>108</sup> Erin Coe, *9th Circ. Royalty Case to Drive Art Resales Out of Calif.*, LAW360 (May 5, 2015), <https://www.law360.com/articles/652038/9th-circ-royalty-case-to-drive-art-resales-out-of-calif> (discussing *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320 (9th Cir. 2015)).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Diana Wierbicki, *Is Global Trend on Artist Resale Royalties Right for US?*, LAW360 (Mar. 7, 2014) <http://www.law360.com/articles/515958/is-global-trend-on-artist-resale-royalties-right-for-us>.

<sup>112</sup> *Id.*

The U.K. provides a more optimistic picture, but much of that is tied to the U.K.'s relationship to the larger E.U. market, which has a harmonized royalty scheme. E.U. harmonization was motivated in part by concerns similar to those held in the United States with regard to California and market distortions. The E.U. fully acknowledged that without harmonization, there existed a real possibility that art sales would simply move to royalty-free states.<sup>113</sup> The lesson of California and the United States, therefore, could only be a valuable condemnation of *droit de suite* if all the States were similarly harmonized under a baseline royalty scheme.

As it stands, the success of the U.K. within the E.U. royalty scheme bodes well for international implementation of a universal royalty scheme. Director of London's Victoria Miro Gallery Glenn Scott-Wright reported that "[s]ales have been as healthy as before the law came into effect. . . . Clients haven't indicated they were unwilling to buy because of the royalty."<sup>114</sup> The law, once in effect, has been non-controversial, even though its implementation was a struggle.<sup>115</sup> Scott-Wright's experience is not merely anecdotal, but is in line with what the British auction houses have observed as well.<sup>116</sup>

Australia has also found some success with its recent *droit de scheme* law. Although it has only been in effect since 2010 "and has been restricted to resales of works . . . acquired after the commencement of the scheme," from June 2010 to May 2013, "there have been 6,801 eligible resales that have generated over \$1.5 million in royalties for 650 artists."<sup>117</sup>

### C. Speculating on the Effects of Droit de Suite on the International Art Market

These examples of positive effects in the domestic art markets of countries with *droit de suite* could be undermined if the net effect on the international market was resoundingly negative. As hinted at in evaluations of royalty schemes' effects on their domestic art markets, the most pressing concern for international implementation involves the potential for distortion of the world market. While universal implementation seems to be the solution, it does not fix some of the inherent problems of royalty schemes. Echoing the concern about difficulties with enforcement, compliance must be equally universal, or else market distortions may persist. For example, even in a world where every country imposes some minimal royalty scheme, dealers may flock to countries that do little to enforce it, recreating the same tensions that currently exist between states that do and do not have royalty schemes. Perversely, countries may be incentivized toward lax enforcement, in an effort to attract resales. Any international agreement on the subject of *droit de suite* must address compliance and enforcement as well as the right and rate structure itself.

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<sup>113</sup> RICKETSON, *supra* note 93, at 18.

<sup>114</sup> Grant, *supra* note 88.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> RICKETSON, *supra* note 93, at 20 n.53.

Some studies suggest that strict compliance may not be such a force in driving sales away; for example, “there is no evidence that [resale royalties have] diverted business away from the U.K., where the size of the art market has grown as fast, if not faster, than the art market in jurisdictions where [resale royalties are] not currently payable.”<sup>118</sup> Sarah Percy Davis, chief executive of the Association of Art & Antique Dealers in London, has stated that any damage to the E.U. art market has been “negligible,” describing it as “more theoretical than actual.”<sup>119</sup> Market distortion—that is, the flow of sales out of the E.U. and into non-royalty countries—has also been negligible. “Following implementation of resale royalty laws in the European Union, the European Union found little evidence that prices in the primary art market in Europe decreased or that the secondary resale market was shifted to countries without resale royalty laws, such as Switzerland or China.”<sup>120</sup>

The most important impact of *droit de suite* on the international art market involves setting an overall global balance and addressing reciprocity concerns. Establishing a universal baseline would “[go] some distance towards correcting the imbalance that otherwise exists between the rights of visual artists and those enjoyed by other categories of authors. . . . Global adoption would also offset the disparities that creators face when their works are sold in countries that do not recognize the resale right.”<sup>121</sup> This touches on an issue reminiscent of the cascade effect. Say, for example, that an artist lives in country X, which does not have a resale royalty right. One of the artist’s works is sold at public auction in country Y, which does have a resale royalty right. The way the law functions now, the artist is not entitled to any resale royalty, even though his work was sold in a country that protects such a right. This is the reciprocity problem.

Marie-Anne Ferry-Fall, Director General of the Société des Auteurs dans les Arts graphiques et plastiques (ADAGP), stated at a WIPO session in October 2015 that “[t]he Resale Right operates on a reciprocity condition so is only granted to the artist when their country recognizes it—this creates a huge imbalance between authors globally.”<sup>122</sup> The reciprocity problem, above all, is why *droit de suite* cannot continue to be implemented at whim by individual countries, but should be addressed in a universally applicable international agreement aiming to even out the playing field. As artist Gordon Cheung has pointed out, “So many sales take place in countries that don’t recognize the right, such as the United States or China. This unfairly disadvantages artists based in these countries, as well as artists whose work sells in other countries.”<sup>123</sup>

A global mandate for *droit de suite* would go a long way in providing a solution. Universal adoption would also ameliorate possible market distortions (provided, as discussed above, that enforcement and compliance are equally

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<sup>118</sup> Grant, *supra* note 88.

<sup>119</sup> *Id.*

<sup>120</sup> Wierbicki, *supra* note 111.

<sup>121</sup> *Proposed International Treaty on the Resale Royalty Right for Visual Artists*, CISAC (June 30, 2015), <http://www.cisac.org/Cisac-University/Publications/Proposed-International-Treaty-on-the-Resale-Royalty-Right-for-Visual-Artists> [hereinafter *Proposed International Treaty*].

<sup>122</sup> *Renowned Visual Artist*, *supra* note 94.

<sup>123</sup> Shaw, *supra* note 101.

prioritized). Leaders in the legal industry seem to be arriving at the same conclusion: “[I]ncreasing voices within WIPO . . . believe this topic should be placed on the agenda of the Standing Committee on Copyright and Related Rights. Our goal is simply to ensure that wherever they are in the world, all visual artists get the same fair share in the success of their works.”<sup>124</sup> Establishing a baseline resale royalty right is also of special importance in an age of rapid globalization and ease of trading art across borders. At the June 2015 session at the WIPO in Geneva, Hervé di Rosa, artist, vice-president of ADAGP, and chair of the International Council of Creators of Graphic, Plastic, and Photographic Arts (CIAGP), expressed frustration at “how an artist justly benefitting from a sale in one territory but being denied his right in another is entirely contradictory to the realities of the global art market that exists today.”<sup>125</sup> Harmonization has become the international consensus; the next question is how to achieve it.

## V. SUGGESTIONS FOR REFORMS

The first step towards implementing a global visual artist resale royalty scheme requires choosing the instrument to do so. Two reasonable possibilities exist: an amendment to the already extant right within the Berne Convention, or a new multilateral treaty.

Amending the Berne Convention appears at first glance to be the simplest and most effective answer. Since 1948, *droit de suite* has been enshrined in Article 14*ter* (“Droit de Suite in Works of Art and Manuscripts”) of the Berne Convention. It includes three provisions establishing the existence of the right, defining it as “inalienable,” and making clear that it was not mandatory, but optional—that is, no artist had the right to invoke it unless *droit de suite* had been adopted by legislation in their country.<sup>126</sup>

Thus, it seems logical to simply amend the Berne Convention to make the right mandatory rather than optional. However, this is simply not a feasible option due to the particularities of the Convention’s amendment process. Articles 26 and 27, governing amendments and revisions respectively, require that three-fourths of the members of the Assembly vote to adopt the amendment.<sup>127</sup> For a revision to be successfully adopted, there must be “unanimity of the votes cast” among those members.<sup>128</sup> Industry experts, such as ADAGP, recognize the “difficulty” of such a process.<sup>129</sup> However, even if the voting members agree unanimously on an amendment making Article 14*ter* mandatory, “[r]evisions . . .

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<sup>124</sup> *Renowned Visual Artist*, *supra* note 94.

<sup>125</sup> *Proposed International Treaty*, *supra* note 121.

<sup>126</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 821 U.N.T.S. 221.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Manon Resson, *WIPO Asked to Create New Treaty on the Resale Right (Droit de Suite) for Works of Art*, KNOWLEDGE ECOLOGY INTERNATIONAL (Dec. 16, 2013), <http://keionline.org/node/1856>.

have been typically directed at revision of the Convention as a whole, rather than just one provision, while a further factor that has made revisions impossible in recent years has been the fault lines that have emerged between developed and developing countries.”<sup>130</sup> Thus, for amendment to the Berne Convention to be feasible, three fourths of its members would have to agree to a vote, that vote would have to be unanimous, and the revision would have to be packaged with other proposed revisions that survived the same amendment adoption process. On top of all that, the rift between developed and developing countries would have to suddenly resolve itself, even though it has been creating significant problems for the Convention since 1967.<sup>131</sup>

That does not mean that Berne cannot provide some guidance for how to proceed. Article 19 provides that “[t]he provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union.”<sup>132</sup> The resale royalty right “is readily susceptible to treatment under a separate international agreement consistently with the requirements of Article 19 of the Berne Convention. . . . This has already occurred in the area of public communication and other rights under the WIPO Copyright Treaty 1996 . . . .”<sup>133</sup> In light of the provisions of the Berne Convention, a new treaty appears to be the most viable means of harmonizing *droit de suite* globally.

The idea of a multilateral *droit de suite* treaty already has notable international support. “The issue was officially added to [WIPO’s] agenda on 3 July 2015—a significant first step towards negotiating a global treaty. China, Iran, Sudan, Kenya and Tanzania, none of which currently has legislation, voiced support for the adoption of royalty rights.”<sup>134</sup> Other countries who have passed legislation, such as Senegal, Ivory Coast, Brazil, and the members of the EU, likewise “backed a universal solution.”<sup>135</sup> ADAGP concurs that “a mandatory instrument (a treaty) is necessary.”<sup>136</sup>

The next question, naturally, is what such a treaty might look like. First, treaties do not automatically establish laws in the nations of their signatories. In this situation, a treaty would bind each signatory to enact its own national legislation on the subject. A treaty would also set baselines, minimums, and certain features that each state’s national legislation should contain. In a study for a proposed international *droit de suite* treaty produced for CISAC, law professor Sam Ricketson laid out a comprehensive model treaty.<sup>137</sup> Some of the provisions proposed there should certainly be part of any discussion of a potential treaty.

First, there must be reassurance of the inalienability of the right.<sup>138</sup> Inalienability of the right means that artists cannot sell or waive their right to

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<sup>130</sup> RICKETSON, *supra* note 93, at 49.

<sup>131</sup> *Id.*

<sup>132</sup> Berne Convention for the Protection of Literary and Artistic Works, *supra* note 126.

<sup>133</sup> RICKETSON, *supra* note 93, at 24.

<sup>134</sup> Shaw, *supra* note 101.

<sup>135</sup> *Id.*

<sup>136</sup> Resson, *supra* note 129.

<sup>137</sup> See RICKETSON, *supra* note 93, 56–72.

<sup>138</sup> See *id.* at 39.

receive a resale royalty. This is an important measure due to the disadvantaged position of bargaining power of artists in the market compared to industry giants such as auction houses, etc. Inalienability derives from the personhood theory of copyright law, “which suggests that the creator of a work never really gives up all of the property interests in the work, as it is actually part of the creator’s personhood.”<sup>139</sup> This feature of the right should extend to the artist’s estate for similar reasons; “it appears logical that it should be held by the nominated successors of the author and not become a tradable commodity: this is at least consistent with the traditional justifications of [resale royalty rights] as being for the benefit of the author’s impecunious heirs.”<sup>140</sup> Thus, inalienability must be retained as a baseline in any attempt at harmonization in order for the purposes of *droit de suite* to be achieved—that is, protection of the artist’s right in his own work.

Next, any multilateral treaty must provide adequate definitions. For example, “artist” must be defined, and such definition must clarify confusion about things like “artist-patron” or “artist-team” relationships. Furthermore, estate questions must be addressed; that is, if an artist passes his estate not to his family but to a foundation or charity, are those organizations eligible to collect the resale royalty proceeds? What constitutes an “artwork” must also be defined, as must what constitutes a “sale,” especially in light of the rise of online art trading. Furthermore, it would be prudent to set if not a minimal rate, at the very least a range of permissible rates that countries may set in their national legislation. And lastly, a treaty should decide whether to follow the U.K. model or not—that is, determining whether artists or their estates should collect the royalty proceeds from resales directly, or whether they should be collected and distributed by artist societies such as DACS and ACS.

These possible provisions provide plenty of room for disagreement, and enacting a multilateral treaty would certainly be a project of enormous scope. However, considering the global trend towards adoption of *droit de suite*, and the need to smooth over market distortions caused by piecemeal implementation, it is certainly a necessary project for the international community to take on.

## CONCLUSION

The concept of *droit de suite* caught political attention with the plight of Jean-Francois Millet in nineteenth-century France and has continued to gain traction over the years, especially in the most recent few decades. Over eighty countries have passed some form of national legislation securing the right of the visual artist to earn a royalty on resale of his original artwork, including large players in the art market such as the E.U. and Australia.

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<sup>139</sup> Bussey, *supra* note 6, at 2–3.

<sup>140</sup> RICKETSON, *supra* note 93, at 39.

Yet, there are notable outliers, including China and the United States, who represent the second and third largest art markets in the world, respectively. This uneven application of *droit de suite* led some industry experts to fear distortion in the global market that artificially encourages more sales in royalty-free states while discouraging resales in states with royalty schemes in place. Although this phenomenon has not occurred in any meaningful capacity, it draws attention to other imbalances that persist in the global art market due to inconsistency between states that do and do not possess royalty schemes. Reciprocity is one of the most important such issues, in that artists may be shut out from benefitting from the resales of their works if their country of residence has no *droit de suite* law in effect, even if the sale took place in a jurisdiction that *did* have a royalty scheme.

Therefore, the international community should consider a multilateral treaty in the context of Article 19 of the Berne Convention. This treaty should seek to provide baseline protections for artists, including establishing the inalienability of *droit de suite* and mandating that signatories implement their own national resale royalty schemes, taking into account agreed-upon minimum terms in the treaty. In this way, artists can be given more of a chance to earn reasonable income for their life's work, while the global art market can carry on its multi-billion dollar enterprise with more transparency and consistency.