

*DROIT DE SUITE*: WHY THE UNITED STATES CAN NO LONGER  
IGNORE THE GLOBAL TREND

LARA MASTRANGELO

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“The art world has an ecology, its own set of inner relationships and interdependencies. As in other ecologies, what affects one part resounds throughout the system and is felt by all the others.”<sup>1</sup>

## INTRODUCTION

During an auction at Sotheby’s in 1973, a Jasper Johns cast for two Ballantine ale cans, bought in 1965 for \$960, was sold for \$90,000.<sup>2</sup> At the same auction a Rauschenberg painting, bought in 1958 for \$900, was sold for \$ 85,000.<sup>3</sup> A Larry Poons painting bought for \$1,000 was sold for \$25,000.<sup>4</sup> Finally, an Andy Warhol painting bought for \$2,500, was sold for \$135,000.<sup>5</sup> According to legend, at this auction Robert Rauschenberg drunkenly approached Robert Scull, an important American collector during the Sixties, shouting “I’ve been working my ass off just for you to make that profit!”<sup>6</sup> This is not the only occasion where the increased value of artwork ended up enriching the collector and not the artist. A more recent example is Pablo Picasso's "Garçon à la Pipe," sold in 1950 for only \$30,000, and then at a Sotheby's auction in 2004 for the extraordinary sum of \$104,168,000.<sup>7</sup>

These examples show how, traditionally, artists are viewed as the weak party in their relationships with dealers and buyers. This disparity led to the development of *droit de suite*, a resale royalty to the original artist. In fact, *Droit de suite* “remed[ied] the unfair plight of

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<sup>1</sup> JOHN HENRY MERRYMAN, *The Wrath of Robert Rauschenberg*, 41 *AM. J. COMP. L.* 105, 110 (1993).

<sup>2</sup> STUART PLATTNER, *High Art Down Home: An Economic Ethnography of a Local Art Market* 36 (1996).

<sup>3</sup> *Id.*

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

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Chris Wilson, *Scream at the Prices: Edvard Munch's Record-Breaker and the Top 10 Most Expensive Artworks to ever go Under the Hammer*, *MIRROR* (May 3, 2012, 15:44), <http://www.mirror.co.uk/news/uk-news/the-scream-sold-for-1199million-and-the-top-10-816579>.

the artist, forced to earn a living by his work and powerless vis-à-vis a greedy dealer. It responded to the need to readjust the balance of economic forces involved.”<sup>8</sup>

Artists’ *droit de suite* can be generally described as “a system of resale royalties that allows visual artists to share in the increase in value of their original works from subsequent sales.”<sup>9</sup> However, nowadays it would be naïve to refer to *droit de suite* as only “another stick in the bundle of intellectual property rights commonly referred to as . . . moral rights.”<sup>10</sup> In fact, this intellectual property right, even if formally placed within the group of moral rights, is now closer to an economic right.<sup>11</sup>

However, *droit de suite*’s traditional inclusion in the group of moral rights explain in part the European and American different outcomes: on the one hand a Directive implementing the resale right, on the other hand many attempts have been made, but policymakers are still reluctant to enact a final legislation.<sup>12</sup> The economic arguments against the resale royalty are strong and partially convincing; however, the United States cannot ignore that the rest of the world is moving towards the introduction of *droit de suite*.<sup>13</sup> Some argue that the heart of *droit de suite* is found specifically in France; that the *droit de suite* can only be applied in civil law countries; that it is incompatible with common law.<sup>14</sup> Despite these arguments, many non-European countries have introduced *droit de suite* in

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<sup>8</sup> LILIANE DE PIERREDON-FAWCETT, *The Droit De Suite In Literary And Artistic Property: A Comparative Law Study* 1 (Louise-Martin-Valiqueet trans., 1991).

<sup>9</sup> Toni Mione, *Resale Royalties for Visual Artists: The United States taking cues from Europe*, 21 CARDOZO J. INT’L & COMP. L. 461, 463 (2013).

<sup>10</sup> Elisa D. Doll, *The Equity for Visual Artists Act of 2011 (EVAA): Crafting an Effective Resale Royalty Scheme for the United States through Comparative Meditation*, 24 IND. INT’L & COMP. L. REV. 461, 462 (2014).

<sup>11</sup> SIMON STOKES, *Art and Copyright* 97 (Hart Publ’g 2d ed. 2012).

<sup>12</sup> See Katreina Eden, *Fine Artists’ Resale Royalty Right Should Be Enacted in the United States*, 18 N.Y. INT’L L. REV. 121, 127-36 (2005).

<sup>13</sup> See generally Alexander Bussey, *The Incompatibility of Droit de Suite with Common Law Theories of Copyright*, FORDHAM INTELL. PROP. MEDIA & ENT. L.J. VOL. 23 (2013).

<sup>14</sup> See generally Michael B. Reddy, *Droit de Suite: Why American Fine Artists Should Have a Right to a Resale Royalty*, 15 LOY. L.A. ENT. L.J. 509 (1995).

their legislations (although its enforcement is not effective everywhere).<sup>15</sup> Australia and New Zealand introduced legislation in 2009,<sup>16</sup> and now Brazil, Paraguay, Uruguay, Mongolia, Philippines,<sup>17</sup> Russia, India, and many others have also done so.<sup>18</sup> Thus, even if it is hard to develop a resale royalty legislation in such a way that is capable of avoiding the negative economic consequences of such rights, the United States' best option is to find a federal solution for the regulation of *droit de suite*.

This desirable solution, however, in considering the rationale of *droit de suite*, should vary from its tradition. There should be consideration for the big changes that have developed between the French art market, in which the resale right was born, and the modern art market, with its "relationships and interdependencies"<sup>19</sup> the most significant change is dealers' attitudes towards artists. In the Impressionism era, Paris was the heart of the art world and poor artists sold their paintings for nothing to "greedy" dealers, who then convinced the emerging bourgeoisie of the high value paintings.<sup>19</sup>

After World War II, the art market boom in New York attracted new buyers; buying art started to be viewed as an investment rather than a mere status symbol.<sup>20</sup> During this period, contemporary art auctions organized by Sotheby's and Christie's, two of the biggest auction houses, became frequent and regular.<sup>21</sup> However, today's art auctions are linked

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<sup>15</sup> Projet de loi relatif au droit d'auteur et aux droits voisins dans la société de l'information, *available at* <http://www.senat.fr/rap/105-308/105-30833.html>.

<sup>16</sup> Maryam Dilmaghani & Jim Engle-Warnick, *The Efficiency of Droit de Suite: an Experimental Assessment, Review of Economic Research on Copyright Issues*, vol. 9(1) 93, 95 (2012).

<sup>17</sup> See *supra* note 15.

<sup>18</sup> [Société des Auteurs dans les Arts graphiques et plastiques](https://www.adagp.fr/en/indicative-list-countries-whose-legislation-provides-resale-right), Indicative list of countries whose legislation provides for the resale right, *available at* <https://www.adagp.fr/en/indicative-list-countries-whose-legislation-provides-resale-right>

<sup>19</sup> Bussey, *supra* note 13, at 1073.

<sup>20</sup> Kawashima, *supra* note 20, at 233-34.

<sup>21</sup> *Id.*

with the secondary art market, which only interests artists who are already successful.<sup>22</sup> As far as the primary art market is concerned, instead, it is important to note that contemporary art dealers take a commission from art sales. This means that the “[d]ealer’s interests are no longer adversarial to those of the artist: the dealer only gets rich if the artists get rich.”<sup>23</sup> Taking into account these general features of the modern art market, the United States should try to create resale royalty legislation that enjoys the idea’s advantages, but avoids its negative aspects.

This paper will first examine the general history of moral rights and then explain more specifically the birth and history of *droit de suite*, emphasizing its French origin and connection with the common law tradition. The first part will conclude with an analysis of the *droit de suite* in the light of the two main theories of copyright. Thereafter, this paper will examine the general situation of the *droit de suite* today. The discussion will start from the European context harmonized by the EU Directive 2001/84/EC: an evaluation of its impact on the member states and the European art market with a particular focus on Italy and UK in the light of the recent Brexit. Then, it will move to the United States’ attempts to enact *droit de suite*, including both an overview of the legislative acts and an analysis of two important and controversial cases. Finally, this paper will critically review the pros and cons of introducing *droit de suite* legislation in the United States and argue why it is necessary today in a country that traditionally refuses it.

## I. A BRIEF HISTORY OF DROIT DE SUITE

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<sup>22</sup> Bussey, *supra* note 13, at 1073.

<sup>23</sup> *Id.*

## A. The concept of Moral Rights

To understand the doctrine of *droit de suite* and its implications, it is necessary to clarify that the right is traditionally included as part of a larger “moral rights” idea; *the droit de suite* is considered a natural right innate to the artist.<sup>24</sup> Moral rights “extend beyond ownership of economic control of works of authorship to encompass protections of the ‘personality’ of the author.”<sup>25</sup> The European doctrine of *droit moral* is bound to the personhood concept of copyright, with the consequence that moral rights “spring from a belief that an artist in the process of creation injects his spirit into the work and that the artist’s personality, as well as the integrity of the work, should therefore be protected and preserved.”<sup>26</sup> These rights include the right to attribution, integrity, disclosure, withdrawal, and resale royalties.<sup>27</sup> In spite of the enactment of the Berne Convention, in which Article 6bis(1) establishes moral rights,<sup>28</sup> the United States only recognized the moral rights of visual artists through the Visual Artists Rights Act of 1990 (VARA).<sup>29</sup> The reluctance to recognize the moral rights in the United States is due to a legal tradition that “seeks to protect

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<sup>24</sup> Jennifer J. Wirsching, *The Time Is Now: The Need for Federal Resale Royalty Legislation in Light to the European Union Directive*, 35 Sw. U. L. REV. 431, 434 (2006).

<sup>25</sup> ROBERT P. MERGES PETER S. MENELL MARK A. LEMLEY, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE*, Sixth Edition (Aspen Casebook Series) 6th Edition, at 594.

<sup>26</sup> *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995).

<sup>27</sup> Sarah C. Anderson, *Decontextualization of Musical Works: Should the Doctrine of Moral Rights be Extended?*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 869, 871 (2006).

<sup>28</sup> The Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S.TREATY Doc. No. 99-27, 828 U.N.T.S. 221, art 6bis (1): (“Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation”) [http://www.wipo.int/treaties/en/text.jsp?file\\_id=283698](http://www.wipo.int/treaties/en/text.jsp?file_id=283698)

<sup>29</sup> ROBERT P. MERGES PETER S. MENELL MARK A. LEMLEY, *supra* note 26, at 595, noting that “compared to moral rights protection in Europe, U.S. protection apply quite narrowly and are subject to significant exceptions”).

primarily the author's pecuniary and exploitative interests," which is in contrast with the European, and especially French, tradition.<sup>30</sup>

### *B. The Droit de Suite*

The nature of *droit de suite* is a bit different from other moral rights. In fact, it can be viewed both as a moral right and an economic right because it includes the right of paternity while considering future exploitation of an artist's work.<sup>31</sup> This right was first recognized in France in 1920, with the purpose of ensuring compensation to the families of artists who died during the First World War.<sup>32</sup> It seemed absurd that the artists' families could not claim any economic right as a result of sales of paintings.<sup>33</sup> The most famous anecdote is related to the French painter Jean - Francois Millet, whose painting *The Angelus*, was sold at auction for 800,000 gold francs while the artist's family lived in complete poverty.<sup>34</sup> Similar circumstances occurred frequently and in response the French Parliament enacted a law in 1920, which recognized and established, for the first time, *droit de suite* legislation.<sup>35</sup>

If compensating artists or their families was the original reason underlying the origin of *droit de suite*, its rationale has partially changed. Today, according to the European Directive 2001/84/CE, the right is now concerned with social justice and equality.<sup>36</sup> In fact, visual artists' works, namely paintings, sculptures and photography, as opposed to other copyrightable works, cannot be exploited through the right of reproduction and the right of

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<sup>30</sup> Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y 1, 3 (1980).

<sup>31</sup> Reddy, *supra* note 14, at 510.

<sup>32</sup> A. Maietta, *Il diritto di seguito nel panorama giuridico italiano*, in *Danno e Resp.*, 2009, 2, 121.

<sup>33</sup> *Id.*

<sup>34</sup> The legend tells that "his daughter was selling flowers in the streets of Paris the very same day as the auction". See M. Dilmaghani, *supra* note 16.

<sup>35</sup> Maietta, *supra* note 32, at § "Le origini e le ragioni della novellata disciplina".

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

representation, considering that a visual work of art is necessarily embodied in a tangible object, which constitutes the original and only copy.<sup>37</sup>

While compensation and equality are the basic legal justifications of *droit de suite*, another aspect deserves a certain consideration. Even if *droit de suite* is traditionally viewed as a French moral right, and therefore incompatible with Anglo-American copyright, “a closer examination of the historical origins of copyright law in France and England demonstrates that the copyright traditions of both nations share a common foundation in natural law.”<sup>38</sup> Thus, the historical origin indicates that the introduction of a resale royalty right in the United States does not represent a complete radical change from tradition.

The decision of the French Parliament to introduce *droit de suite* encouraged many other countries to do the same: Belgium was the first, but Germany in 1965, Spain in 1987, Denmark in 1990 and many other European countries followed suit.<sup>39</sup> In 1976 a *droit de suite* provision was included in the Tunis Model Law on Copyright for Developing Countries, and eleven other countries approved *droit de suite* legislation in response to a questionnaire distributed by UNESCO and WIPO in 1983.<sup>40</sup> However, the most important international recognition of *droit de suite* dates back to 1948, when Article 14ter was added to the Berne Convention for the Protection of Literary and Artistic Works.<sup>41</sup> Article 14ter includes an optional resale royalty provision:<sup>42</sup>

1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original

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

<sup>38</sup> Reddy, *supra* note 14, at 545-46.

<sup>39</sup> *Id.* at 518-519.

<sup>40</sup> BURNSE UNION, TUNIS MODEL LAW ON COPYRIGHT AND COMMENTARY, 169-70 (1976); *see also* Reddy, *supra* note 14, at 519-20.

<sup>41</sup> Doll, *supra* note 10, at 465.

<sup>42</sup> M. Elizabeth Petty, *Rauschenberg, Royalties, And Artists' Rights: Potential Droit De Suite Legislation In The United States*, 22 Wm. & Mary Bill Rts. J. 977, 985 (2014).

manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.

2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.<sup>43</sup>

Note that this article introduces for the first time the resale royalty right at an international level, but is still optional, “extremely vague and largely left to the signatory countries to ferret out.”<sup>44</sup> Thus, the Berne Convention model was so weak and could be so easily waived, that members of the European Union decided to create a system to make the first paragraph of the Article 14ter of the Berne Convention mandatory in order to guarantee uniformity within the market. The European Union did so through the issuance of the Directive 2001/84/EC.<sup>45</sup>

### *C. The Droit de Suite in the Light of the Two Main Theories of Copyright*

Before moving to *droit de suite* in the world today, an analysis of this right in connection with the two main copyright theories, distinguishing the European and American approaches, is needed. The French and continental European approach to copyright is rooted in the personhood theory.<sup>46</sup> In contrast, common law countries like the United States, base copyright law on a utilitarian rationale.<sup>47</sup> Of course, the reality is much more attenuated and

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<sup>43</sup> The Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S.TREATY Doc. No. 99-27, 828 U.N.T.S. 221.

<sup>44</sup> Doll, *supra* note 10, at 466.

<sup>45</sup> G. Magri, *Alcune riflessioni su diritto di seguito e mercato unico dell'arte contemporanea, alla luce della sentenza Christie's France c. Syndicat national des antiquaires, paragraph 1*, Aedon, (2015), <http://www.aedon.mulino.it/archivio/2015/2/magri.htm#4>.

<sup>46</sup> William Fisher, Copyright Theory, Berkman Klein Center for Internet & Society At Harvard University (2017), <http://cyber.law.harvard.edu/copyrightforlibrarians/Introduction#Personhood>,

<sup>47</sup> See U.S. CONST. art. I, § 8, cl. 8 (“To promote the progress of science and useful arts”).

a mix of both theories.<sup>48</sup> The personhood theory derives mainly from the Hegelian notion<sup>49</sup> that an artist should own intellectual property rights in his works because an intellectual product is an extension of the artist's identity.<sup>50</sup> On the other hand, utilitarian theory is the traditional basis for the Progress Clause in the U.S. Constitution, suggesting that the purpose of intellectual property rights is the maximization of economic wealth that is reached by promoting the progress of science and the creation of "useful art."<sup>51</sup>

The detractors of the introduction of *droit de suite* in the United States, apart from economic reason, argue that the resale royalty right is in contrast with the utilitarian basis of the Copyright Clause in the Constitution and that the common-law traditions are incompatible with this right.<sup>52</sup>

However, a deeper examination shows how arguments against *droit de suite* fail. First, the primary purpose of the Copyright Clause is the promotion of the creative activity of authors and inventors through an economic incentive. The purpose is similar to that of a resale royalty, which is to give to visual artists an economic incentive as a reward for the success and increased value of their works.<sup>53</sup> Therefore, *droit de suite* and the Copyright Clause are actually compatible.

Second, the idea of Anglo-American copyright law as a purely positive creation, at odds with the French copyright law rooted in natural rights, is due to a misreading of an

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<sup>48</sup> Bussey, *supra* note 13, at 1092.

<sup>49</sup> See generally G. HEGEL, *PHILOSOPHY OF RIGHT 1821* (T.M. Knox trans., Oxford University Press 1967) (1967).

<sup>50</sup> See Justin Hughes, *The Philosophy of Intellectual Property*, 77 *GEO. L.J.* 287, 330–34 (1988).

<sup>51</sup> U.S. CONST. art. I, § 8, cl. 8; see Bussey, *supra* note 13, at 1095 (explaining the concept of maximization of economic wealth); see Michael B. Reddy, *supra* note 14, at 535 (showing concept of creation of useful art).

<sup>52</sup> Bussey, *supra* note 13, at 1088-89, 1095-98.

<sup>53</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 482 (1984); see also Reddy, *supra* note 14, at 535-6.

important British copyright case<sup>54</sup> by the United States Supreme Court in *Wheaton v. Peters*.<sup>55</sup> A deeper and more careful analysis of the history of British and American copyright demonstrates their origin in natural law.<sup>56</sup>

In fact, not only were the debates that led to the enactment of the Statute of Anne in 1709 “filled with references to natural law and the ‘inalienable’ rights of authors”, but in *Millar v. Taylor*, one of the first copyright cases in Great Britain, the King’s Bench described copyright as a right that had always existed as part of the common law.<sup>57</sup> As a consequence, the Statute of Anne was only a way to codify a pre-existing right rooted in natural law. Five years later, in *Donaldson v. Beckett*, the court reached a partially different conclusion that copyright was a statutory privilege.<sup>58</sup> However, it still recognized “[t]hat the natural and common law were the sources for rights that had been incorporated into the Statute of Anne.”<sup>59</sup>

Two years after *Donaldson*, notwithstanding its misinterpretation, the American Revolution had its philosophical bases in natural law theories. The Founders’ ideas in writing the Declaration of Independence and the Constitution have been profoundly marked with those theories.<sup>60</sup> Madison wrote in the federalist No. 43 that “[t]he copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law.”<sup>61</sup> This brief analysis

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<sup>54</sup> *Donaldson v. Beckett* (1774) 1 Eng. Rep. 837 (K.B).

<sup>55</sup> Reddy, *supra* note 14, at 536.

<sup>56</sup> Robert C. Hauhart, *Natural Law Basis for the Copyright Doctrine of Droit Moral*, 30 CATH LAW. 53, 61-62 (1985).

<sup>57</sup> (1769) 98 Eng. Rep. at 202 (K.B).

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

<sup>59</sup> Hauhart, *supra* note 57, at 66.

<sup>60</sup> In *Wheaton v. Peters*, the Supreme Court read *Donaldson* as denying the common law nature of copyright, thus concluding that copyright exists thanks only to statutory protection. For the philosophical basis of the American Revolution. See Reddy, *supra* note 14, at 539-41.

<sup>61</sup> JAMES MADISON, THE FEDERALIST PAPERS: *THE POWERS CONFERRED BY THE CONSTITUTION FURTHER CONSIDERED* No. 43, § 1, (1788).

of copyright under common law shows its original link with the natural rights which cannot be denied.<sup>62</sup> This link can serve to partially reconcile the personhood and the utilitarian theories of copyright and thus support the adoption of *droit de suite* in the United States.

## II. MODERN ENACTMENTS OF DROIT DE SUITE

### A. Resale Royalties in the European Union

#### 1. Overview of Directive 2001/84/EC

Debates on authors' rights developed in the European Community from at least 1974, but the resale royalty gained a real force only when the EU Directive 2001/84/EC was introduced.<sup>63</sup> The royalty is there defined as "an unassignable 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>64</sup> It applies to "all acts of resale involving as sellers, buyers or intermediaries art market professionals [...]."<sup>65</sup> The Directive leaves to the states the possibility to establish the minimum sale price of 3,000€ and determines that the resale royalty does not apply to works sold by owners that were purchased from the author within the past three years, and are sold for less than 10,000€.<sup>66</sup>

Moreover, Article 4 provides an inverse scale of rates for the sum payable, "[w]here

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<sup>62</sup> See Gary Kauffman, *Exposing the Suspicious Foundation of Society's Primacy in Copyright Law: Five Accidents*, 10 COLUM.-VLA J.L. & ARTS. 381, 381 (1985).

<sup>63</sup> See Ferrario Andrea, *Il diritto sulle successive vendite dell'originale di un'opera d'arte figurativa nella legge italiana e nella direttiva 84/2001/CE*, in *Dir. Industriale*, 2004, 2, 189 (F.K.) (giving an overview of the previews debates); see Doll, *supra* note 10, at 467 (describing the enactment of the Directive)

<sup>64</sup> Directive 2001/84/EC of the European Parliament and of the Council on the Resale Right for the Benefit of the Author of an Original Work of Art, consideration 1, (27 September 2001) <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001L0084&from=EN>

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at Art 1 par. 3.

the percentage taken decreases as the sales price increases,” establishing a limit of 12,500€ to the total amount.<sup>67</sup> These two prepositions, Art 1 par. 3 and Art. 4, are the outcome of a difficult compromise with the detractors of the Directive. Some scholars criticize these provisions, on the ground that they make this right a marginal phenomenon because of the restrictive criteria.<sup>68</sup> However, others correctly underline that the absence of Art 1 par. 3 would lead to unfair enrichment for the artist by excessively increasing the price of the artwork. Furthermore, the decreasing percentages system balances the interests of artists, buyers, and sellers; thus, it avoids the inconsistency that characterized the European scene before the Directive.<sup>69</sup>

The purpose of the Directive was to harmonize as well as redress “[t]he balance between the economic situation of authors of graphic and plastic works of art and that of other creators who benefit from successive exploitation of their works.”<sup>70</sup> This purpose recalls us to the parallel discrepancy that still exists in the United States between the strong royalty scheme for authors and composers and the lack thereof for visual artists.<sup>71</sup> Despite the debates, the Directive came into force on January 1, 2006, but it allowed a transitional period for countries like the UK, which did not already have any resale right law. Accordingly, the Resale Right Directive was fully implemented by all member states only on January 1, 2012.<sup>72</sup>

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<sup>67</sup> Mione, *supra* note 9, at 479.

<sup>68</sup> Ferrario, *supra* note 64. (referring to J. Stanford, *Economic Analysis of the droit de suite* for a critic to the nature of compromise of the Directive and for an economic analysis of the *droit de suite*).

<sup>69</sup> MAGRI, *supra* note 46. (explaining how this system permits to avoid that high percentage in some states and low percentage in others would lead to the relocation of sales in the formers and thus the distortion of the market).

<sup>70</sup> Resale Right Directive, *supra* note 65, at Art. 3.

<sup>71</sup> Mione, *supra* note 9, at 478.

<sup>72</sup> *Id.*, at 479.

## 2. Enforcement of the Directive

To analyze the implementation of the Directive, we should start from the U.K, the largest European art market without a resale royalty right prior to the 2001 Directive and a fervent detractor of the Directive itself.<sup>73</sup> In fact, the U.K.'s biggest concern was that *droit de suite* would harm its art market by losing auction sales to royalty-free competitor markets like the United States and China.<sup>74</sup> For this reason the U.K. Intellectual Property Office commissioned an independent study on the consequences of the new law.<sup>75</sup> However, the study concluded that "the art market in the UK, either despite or because of the introduction of the artists resale royalty, appears to be doing well."<sup>76</sup>

The Intellectual Property Office's study suggested that there had not been a shift in locations of sales. Moreover, Article 11 of the Directive required another study on the effect of its implementation.<sup>77</sup> As a result, the European Commission published its *Report on the Implementation and Effect of the Resale Right Directive* on December 14, 2011.<sup>78</sup> The Commission found that the EU art market had not been damaged by the implementation of the *droit de suite* among its member states and emphasized that the art markets are influenced by many variables, such as taxation systems and changes in taste.<sup>79</sup>

More recent reports from London indicated that £15.5 million have been paid to living

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<sup>73</sup> CLARE MCANDREW, *TEFAF ART MARKET REPORT 2013: THE GLOBAL ART MARKET, WITH A FOCUS ON CHINA AND BRAZIL* 51 (2013). (identifying the U.K. as the third largest global art market in 2012).

<sup>74</sup> Bussey, *supra* note 13, at 1082.

<sup>75</sup> U.S. Copyright Office, *Resale Royalties: An Updated Analysis*, OFFICE OF REGISTER OF COPYRIGHTS (December 2013), <http://copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf>.

<sup>76</sup> Kathryn Graddy, *A Study Into The Effect On The UK Art Market Of The Introduction Of The Artist's Resale Right* (January 2008), [http://people.brandeis.edu/~kgraddy/government/ARR\\_Finalnc.pdf](http://people.brandeis.edu/~kgraddy/government/ARR_Finalnc.pdf).

<sup>77</sup> Mione, *supra* note 9, at 480.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

artists since 2006.<sup>80</sup>The European Commission reports show English, French, and German markets experienced varying degrees of increase in sales between 2010 and 2011, while contrary to expectations, Swiss and American markets declined.<sup>81</sup> Furthermore, the European Commission wrote that the “EU market share in the works of living EU artists has risen from 60 percent in 2002 to 66 percent in 2010, and the U.K. market share from 40 percent to 42 percent.”<sup>82</sup>Despite these numbers showing the U.K.’s fears were unwarranted, another critique of the Directive is that established artists do not need this further economic protection, since in the contemporary market they can make good profits on primary market sales.<sup>83</sup> However, as stated earlier, the scheme of the Directive and its inversely proportional system are good tools to ensure a fair distribution between market sellers and well-established artists.

Finally, a further critique concerns the administrative costs of *droit de suite*, especially because the collecting societies that in many countries take the royalties and deliver them to the artists can easily be the subject of poor administration and corruption.<sup>84</sup> This, however, is an administrative problem, that is not linked with the nature of *droit de suite* and should be addressed by well-designed national rules.

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<sup>80</sup> Daniel Grant, ‘*Droit de Suite*’ Debate Heats Up, *ARTNEWS* (Jan. 11, 2012), <http://www.artnews.com/2012/01/11/droit-de-suite-debate-heats-up/>, archived at <http://perma.cc/3WYV-C8VH>.

<sup>81</sup> SUBMISSION OF COMMENTS FOR THE EQUITY FOR VISUAL ARTISTS ACT OF 2011 BY AKKA/LAA 2 (September 2012), <http://perma.cc/A6HU-JV58> (containing commentary in response to Notice, 77 Fed. Reg. 58,175, notice of inquiry and Notice, 77 Fed. Reg. 63,342).

<sup>82</sup> EUROPEAN COMMISSION, REPORT ON THE IMPLEMENTATION AND EFFECT OF THE RESALE RIGHT DIRECTIVE (2001/84/EC) 5 (2011), <http://perma.cc/W2UP-9HLH>.

<sup>83</sup> MERRYMAN, *supra* note 1, at 107, 109.

<sup>84</sup> Mara Grumbo, *Accepting Droit De Suite 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*, 30 HASTINGS COMM. & ENT. L.J. 357, 362 (2008).

## 2.1. Italy

The consequences of poor administration were particularly clear in Italy even before the enforcement of the European Directive, evidence that the problems are not necessarily due to the Directive itself. In fact, Italy adopted the first law recognising the artists' resale royalty right on April 1942; in the wake of the German theory of intrinsic value, based on the idea that the greater value had always been latent in the work of art.<sup>85</sup> The complexity of the registration process, the inefficiency of a law based on the plus-value, and the bad financial situation of the society designated to collect the resale royalty shares (the Italian Society of Authors and Publishers, "SIAE"), created serious administrative problems, which led to noncooperation and indifference of artists and their heirs.<sup>86</sup> Thus, until the Directive 2001/84/CE, a resale royalty law has almost never been applied.<sup>87</sup> The Directive has been implemented with the Legislative Decree 118/2006, which amended artt. 144 et seq. of the Italian Copyright Law 22 April 1941, n. 633. These articles essentially reproduce the provisions of the Directive.<sup>88</sup>

However, the Directive, as a legislative act establishing the big framework but leaving the members free to set the more detailed provisions – led to different choices in different countries.<sup>89</sup> In particular, a brief analysis of the critical issues raised in Italy could be useful

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<sup>85</sup> Carole M. Vickers, *The Applicability of the Droit de Suite In the United States*, 3 B.C. Int'l & Comp. L. Rev. 442 (1980), <http://lawdigitalcommons.bc.edu/iclr/vol3/iss2/5>.

<sup>86</sup> A. Ferrario and F. Soddu, *Il diritto sulle successive vendite dell'originale di un'opera d'arte figurativa nella legge italiana e nella direttiva 84/2001/CE*, IL DIR. INDUSTRIALE, 2, 189 (2004).

<sup>87</sup> *Id.*

<sup>88</sup> Silvia Stabile & Enrico Del Sasso, *Il "diritto di seguito" nel mercato primario dell'arte contemporanea*, IL DIR. INDUSTRIALE, JUNE 2012, at 507.

<sup>89</sup> Cristiana Vergobbi, *Diritto Di Seguito: quali effetti genera nel mercato dell'arte?*, MASTER ECONOMIA E MANAGEMENT DELL'ARTE E DEI BENI CULTURALI (May 10, 2016),

<https://martebenicult.wordpress.com/2016/05/10/diritto-di-seguito-quali-effetti-genera-nel-mercato-dellarte>.

to highlight certain aspects a country may want to take into consideration when it introduces the resale royalty.

With the implementation of the directive, artists are entitled to shares based on decreasing percentage on the sale price (if the sale price exceeds 3.000€), as long as art market professionals are involved in the sale and SIAE collect the royalties on the behalf of artists.<sup>90</sup>

The first issue to consider is a cultural limit. Among the 2,008 art market professionals, of which there are 1,478 galleries, 86 auction houses and 444 art dealers, only 44.3 percent comply with their duty to pay *droit de suite*, as shown by the fact that since the implementation of the Directive in 2006, SIAE has collected only 59 million euros. Moreover, out of that sum, only 86 percent of the funds have been distributed to artists.<sup>91</sup> Not only is a culture recognizing artists' work lacking, but artists themselves often do not claim their right.<sup>92</sup>

Secondly, in Italy, galleries are involved both in the primary and in the secondary market.<sup>93</sup> As far as the primary market is concerned, often the artist places his works in the hands of the gallery, in order for the work to be sold (consignment agreement, or *commissione di vendita*),<sup>94</sup> The gallery organizes promotional activities as well, as exhibitions, press conference, participation to national and art fairs, but the ownership of the work remains in the hand of the artist.<sup>95</sup> From the implementation of the Directive in 2006,

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<sup>90</sup> Stabile & Del sasso, *supra* note 89.

<sup>91</sup> Marilena Pirrelli, *Il Diritto di Seguito ancora dimezzato*, IL SOLE 24 ORE, (Feb. 21, 2017), <http://www.ilsole24ore.com/art/arteconomy/2017-02-21/il-diritto-seguito-ancora-dimezzato-121535.shtml?uuid=AEazsRa>.

<sup>92</sup> *Id.*

<sup>93</sup> Stabile & Del Sasso, *supra* note 89.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

SIAE has always collected the resale royalties, claiming that it is due even by galleries involved in the primary market, because of the presence of an art market professional in the sale.<sup>96</sup>

On the other side, galleries in the first market assert that the ownership transfers directly from the artist to the buyer, thus – as a first sale – the royalty should not be due.<sup>97</sup> In other countries, the collecting societies do not collect the royalty when the sale occurs in the primary market.<sup>98</sup> For instance, the U.K. collecting society DACS is clear in its website, stating that the resale right applies only to the secondary market sales.<sup>99</sup> Despite many efforts, beginning in 2013 when galleries presented a joint request to SIAE, nothing has changed yet.<sup>100</sup>

Further data shows that even though the resale royalty finds its roots in the European Directive, the different implementation has brought a different degree of efficiency and growth to the art market. An example is that in Italy SIAE is a legal monopoly, while in the UK more collection societies contribute to create a more competitive environment.<sup>101</sup> Another critical point, against which the galleries are taking action is the importation tax that is much higher in Italy (10 percent) than in the UK (5 percent).<sup>102</sup> Consider also that the minimum selling price required to apply the resale royalty is 3000 € in Italy, while only 1000

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<sup>96</sup> Silvia Anna Barrilà and Marilena Pirrelli, *La raccolta dei diritti di riproduzione e di seguito per l'arte visiva cresce del 27,4%*, IL SORE 24 ORE , (May 27, 2017), <http://www.ilsole24ore.com/art/arteconomy/2017-05-27/la-raccolta-diritti-riproduzione-e-seguito-l-arte-visiva-cresce-274percento-063559.shtml?uid=AEspaDUB>.

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

<sup>98</sup> Stabile & Del Sasso, *supra* note 89.

<sup>99</sup> *Artis's Resale Right: In Detail*, DACS, March, 12, 2018, <https://www.dacs.org.uk/for-artists/artists-resale-right/in-detail>.

<sup>100</sup> Barrilà & Pirrelli, *supra* note 97.

<sup>101</sup> Vergobbi, *supra* note 90.

<sup>102</sup> Barrilà & Pirrelli, *supra* note 97.

€ in UK.<sup>103</sup> Nevertheless, “[t]he U.K. art market, in terms of auction and dealer sales is very much alive and flourishing,” according to the TEFAF Art Market report 2017.<sup>104</sup> Drawing conclusions, this data shows the resale royalty right will not negatively affect the art market as long as the administrative system and tax law are efficient.

The last consideration concerns privacy issues: on the SIAE website everyone can find data regarding *droit de suite*, which provides a great deal of information to agents, competitors, art collectors, and artists, leading to consideration as big data in the art market field.<sup>105</sup> Thus, a country willing to introduce *droit de suite* should take into serious consideration the balance between transparency, privacy, and a possible distorting effect on competition.

## 2.2 A closer look at the UK in light of Brexit

Unlike Italy and other European countries that already had an artist resale right (*droit de suite* legislation) in their jurisdictions before the Directive, the artist resale right entered in the UK in 2006 for the first time.<sup>106</sup> More precisely, even if the government had strongly fought against it, the UK implemented the Directive *partially* in 2006 – applying it only to sales of living artists’ works – and *fully* in 2012.<sup>107</sup>

This double-step procedure was the result of the battle carried by Tony Blair against the Directive, which allowed member states that didn’t have a pre-existent resale royalty

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<sup>103</sup> *Id.*

<sup>104</sup> TEFAF Art Market report 2017, available at <http://1uyxqn3lzdsa2ytyzj1asxmmmpt.wpengine.netdna-cdn.com/wp-content/uploads/2017/03/TEFAF-Art-Market-Report-20173.pdf>.

<sup>105</sup> Pirrelli, *supra* note 92.

<sup>106</sup> Christina Fleming, *Artists' resale rights - Brexit's positive impact?*, (Feb. 10, 2017), available at <https://www.charlesrussellspeechlys.com/en/news-and-insights/insights/commercial/2017/artists-resale-rights---brexits-positive-impact/>.

<sup>107</sup> *Id.*

system to postpone the implementation of the Directive to the heirs or the estates of artists deceased within 70 years of the date of sale up until January 1, 2012.<sup>108</sup> The UK government and some economists and journalists have noted that if the purpose of the European harmonization was to avoid distortion of competition, the Directive would have penalized the UK market “[u]nless the levy was also introduced outside Europe.”<sup>109</sup>

Since the resale right has been introduced, criticism has been unremitting and Brexit has further fueled the debate, especially among critics, who wish to repeal *droit de suite*. Critics point out that artists’ resale right “ . . . put the UK, and London in particular, at an immediate disadvantage compared to its key competitors in New York and Hong Kong, neither of which levy ARR on art sales.”<sup>110</sup> In other words, what they claim is that “*if you have a really expensive Picasso, you will sell it in New York.*”<sup>111</sup> To support this thesis (thus indirectly Brexit), in March 2016 the Spectator quoted a 2014 report, *The EU Directive on ARR and the British Art Market* by Dr. Clare McAndrew of Art Economics for the BAMF, which shows that the UK’s global art market share in post-war and contemporary (i.e. the sector most affected by the introduction of the resale right) fell from 35 percent in 2008 to 15 percent in 2013.<sup>112</sup>

Thus, many critics, among which Anthony Brown, chairman of the British Art Market Federation, see Brexit as an opportunity to “eliminate or reduce the regulatory burdens that

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<sup>108</sup> *Id.*

<sup>109</sup> Anthony Browne, *The UK art market can soar after Brexit*, (Sept. 20, 2016), THE TELEGRAPH, available at <http://www.telegraph.co.uk/news/2016/09/20/the-uk-art-market-can-soar-after-brexite/>.

<sup>110</sup> Becky Shaw, *What Might Brexit Mean For The Art Market?*, (April 4, 2016), available at <https://artlawandmore.com/2016/04/04/what-might-brexite-mean-for-the-art-market/>.

<sup>111</sup> *What might Brexit mean for the art market*, (April 4, 2016) available at <https://artlawandmore.com/2016/04/04/what-might-brexite-mean-for-the-art-market/>. (quoting *Antiques Trade Gazette*, 13 February 2016).

<sup>112</sup> *The EU Directive on ARR and the British Art Market*, 3 (2014), available at <http://tbamf.org.uk/wp-content/uploads/2014/09/ARR-Sector-Report-UK-2014.pdf>.

have piled up in recent decades, adding costs and compromising London's competitive position."<sup>113</sup> In the same article, Browne claimed that "[w]hile the UK still accounts for 21 percent of the global art market, this share has fallen in the past decade."<sup>114</sup>

Given these premises, a closer look to the available data seems necessary to give clarification. First, the TEFAF Art Market Report 2017 shows that in 2016 the UK was still ranked second in the global market, with 24% percent of share.<sup>115</sup> This means that it gained 3 points from 2015 (21 percent), and that there is not such a big difference even comparing it to the 2006 share, the year in which the artist's resale right was partially introduced (27 percent).<sup>116</sup> As for the post war and contemporary, the UK has significantly lost market share in the last decade, but note that in 2016 auction sales of post war and contemporary art dropped 35 percent in the US as well, and that a small contraction also affected China.<sup>117</sup>

Looking at the bigger picture, the art market in general, what appears from statistics and reports is that the contraction of the British art market did not benefit the UK and China.<sup>118</sup> In the last decade the most significant reduction of the market share has been experienced by US, from 46 percent in 2006 to 29.5 percent in 2016.<sup>119</sup> China's market share, even though drastically increased from 8 percent in 2006 to 30 percent in 2011, started to decrease from 2001, up to 18 percent in 2016.<sup>120</sup> Therefore, the absence or presence of the resale right does not seem to be the pivotal factor in these variations. Once again, the factors

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<sup>113</sup> Browne, *supra* note 110.

<sup>114</sup> *Id.*

<sup>115</sup> TEFAF Art Market report 2017, *supra* note 105.

<sup>116</sup> Leading countries in the global art market from 2006 to 2016, by market share, *available at* <https://www.statista.com/statistics/429885/market-share-of-the-global-art-market-leaders/>.

<sup>117</sup> TEFAF Art Market report 2017, *supra* note 105.

<sup>118</sup> Leading countries in the global art market from 2006 to 2016, by market share, *supra* note 117.

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

<sup>120</sup> *Id.*

playing in the art industry are many and complex, and *droit de suite* is interconnected with all the others.

In the aftermath of Brexit, opinions within the art market are even more divided. Some, as the British Art Market Federation and other key players in the market, who have always opposed *droit de suite* are likely to lobby the Government to entirely repeal the legislation implementing the Directive.<sup>121</sup> Others, especially artists, curators and artist societies not only support artists' resale rights and are likely to strongly oppose a repeal, but also fear the potential lack of EU funding.<sup>122</sup> Thus, the British Government's decision to scrap or keep the right certainly will not be either a fast nor an easy one.<sup>123</sup>

## B. *The Artist Resale Royalty Debate in The United States*

### 1. Early federal efforts

Starting from the basic idea that American law generally follows the first sale doctrine, under which artists usually control only the initial sale of an original work of art, and receive no compensation for subsequent resales of the work, it is easy to understand why the implementation of resale royalties in the United States has been the subject of much debate.<sup>124</sup> This first attempt at creating a federal resale royalty was the original version of

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<sup>121</sup>Azmina Jasani, *Brexit and the British Art Market*, (Aug 26, 2016), <http://www.wealthmanagement.com/valuations/brexit-and-british-art-market>.

<sup>122</sup> Fleming, *supra* note 107. UK, in fact, will lose access to €1.46 billion budget of the Creative Europe programme, <http://www.shlegal.com/news-insights/brexit-and-art-law>.

<sup>123</sup> For the concept that negotiations between EU and UK will take long see Dan Roberts, *Eight key points you need to know about the Brexit negotiations*, (March 29, 2017), THE GUARDIAN, available at <https://www.theguardian.com/politics/2017/mar/29/brexit-negotiations-eight-key-points-you-need-to-know>; for the idea that the government will have a hard time with lobbies by both parties see Jasani, *supra* note 122.

<sup>124</sup> For the concept that American law follows the first sale doctrine see Kate Lucas, *Ninth Circuit En Banc Decision Upholds Parts of California's Artist Royalties Law*, (May 14, 2015), <http://grossmanllp.com/art-law-blog/2015/05/ninth-circuit-en-banc-decision-upholds-parts-californias-artist-royalties-law/>. For the

VARA, introduced to Congress in 1978 and amended in 1986 and 1987,<sup>125</sup> whose purpose was “to provide for resale royalties” and other moral rights.<sup>126</sup> The original draft contained a *droit de suite* provision, but it was so controversial that it was finally deleted from the final bill: the Visual Artists Rights Act of 1990.<sup>127</sup> However, the VARA of 1990 assigned to the Copyright Office the task to determine the feasibility of implementing resale royalty legislation in the United States.<sup>128</sup> This report advised Congress not to adopt a resale royalty system, not because of a strong and absolute opposition to the right, but because at that time there was not enough empirical evidence as to its effectiveness.<sup>129</sup> Note, however, that the Report indicated that, if the EU harmonized its legislation on this subject, “Congress may want to take another look.”<sup>130</sup> This is indeed what happened with the Directive 2001/84/EC and, as a consequence, Congress “reopened the inquiry into possible resale royalty legislation.”<sup>131</sup> In December 2013, the U.S. Copyright Office issued a new report, which suggested that Congress consider some legislative options to protect artists, including *droit de suite*.<sup>132</sup>

## 2. California Resale Royalty Act and Case law

Beyond the failure of the federal attempts, in 1976 California passed the California Resale Royalty Act (CRRRA), becoming the first and sole state to impose *droit de suite*

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plurality of discussions and debates, see Julie Duperray, *The American Royalties Too (ART) Act: Will Droit de Suite be Implemented in the United States?*, available at <http://www.artassure.com/the-american-royalties-too-art-act-will-droit-de-suite-be-implemented-in-the-united-states/>.

<sup>125</sup> Toni Mione, *supra* note 9, at 484.

<sup>126</sup> Visual Artists Rights Amendment of 1986, S. 2796 at § 3(d)(1), 99th Cong. (1986).

<sup>127</sup> Toni Mione, *supra* note 9, at 484.

<sup>128</sup> U.S. COPYRIGHT OFFICE, DROIT DE SUITE: THE ARTIST’S RESALE ROYALTY (1992).

<sup>129</sup> Toni Mione, *supra* note 9, at 485.

<sup>130</sup> Toni Mione, *supra* note 9, at 495.

<sup>131</sup> M. Elizabeth Petty, *supra* note 43, at 990.

<sup>132</sup> U.S. Copyright Office, *Resale Royalties: An Updated Analysis* (2013), *supra* note 76.

legislation.<sup>133</sup> The Act requires that “[w]henver a work of fine art is sold and the seller resides in California or the sale takes place in California, the seller or the seller's agent shall pay to the artist of such work of fine art or to such artist's agent 5 percent of the amount of such sale.”<sup>134</sup> The CRRRA also requires agents of art sellers, such as dealers and auction houses, to “withhold 5 percent of the amount of the sale, locate the artist, and pay the artist.”<sup>135</sup> If the agent is not able to locate the artist, the sum then goes to the California Arts Council, which has the task to find the artist.<sup>136</sup> As soon as the statute was enacted, many artists supported the move and asked Congress to pass federal legislation, but dealers, collectors, museum officials and some young artists (whose concern was the possible ending of investments by collectors) contested the law.<sup>137</sup>

The first attempt to strike down the Act was a 1980 case, *Morseburg v. Balyon*.<sup>138</sup> There, Henry Morseburg, a Beverly Hills art dealer, sued the California Council for the Arts claiming that the 1909 Copyright Act preempted the CRRRA, because CRRRA interfered with federal law since it "impaired" his ability to "vend" an artwork and limited the transfer of a work of art under the 1909 Act.<sup>139</sup> The Ninth Circuit, however upheld the CRRRA, stating that the CRRRA was not preempted by the Copyright Act and that it was not at odds with the federal law, because nothing in the CRRRA technically restricted the transfer of the works.<sup>140</sup>

The court also found that the CRRRA did not violate the Contracts Clause, since the impairment it caused to Morseburg's contract was not severe and served a “generalized

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<sup>133</sup> M. Elizabeth Petty, *supra* note 43, at 990.

<sup>134</sup> CAL. CIV. CODE § 986 (a).

<sup>135</sup> *Id.* §986(a)(1-2).

<sup>136</sup> Kate Lucas, *supra* note 125.

<sup>137</sup> M. Elizabeth Petty, *supra* note 43, at 991.

<sup>138</sup> *Morseburg v. Balyon*, 621 F.2d 972-5 (9th Cir. 1980).

<sup>139</sup> M. Elizabeth Petty, *supra* note 43, at 992.

<sup>140</sup> *Id.* at 992-3.

economic or social purpose."<sup>141</sup> Therefore, in 1980 the Court upheld the CRRA and the Court's holding "was the first and only time a court ruled on the constitutionality of the CRRA until 2012."<sup>142</sup> In fact, in 2011, a group of artists filed a class action complaint against Sotheby's, Christie's, and eBay, alleging that the defendants, "acting as the agents for California sellers - sold works of fine art at auction but failed to pay the appropriate resale royalty provided for under the CRRA."<sup>143</sup>

In May 2012, Judge Jacqueline Nguyen dismissed the artists' claims, holding that the CRRA violated the Dormant Commerce Clause of the Constitution. The court explained that because royalties were due even if the sale occurred outside California, as long as the seller was a California resident, the CRRA attempted to regulate commerce occurring wholly outside the state's boundaries.<sup>144</sup> The plaintiffs then appealed to the Ninth Circuit and in October 2014 the court ordered that the case be reheard en banc.<sup>145</sup>

In the en banc decision, eight members of the panel held that "the royalty requirement, as applied to out-of-state sales by California residents, violates the dormant Commerce Clause", but the Court added that the invalid portion of the statute could be severed from the rest of the statute, since the remaining statutory scheme remains coherent and functional without it.<sup>146</sup> The final step of this lawsuit occurred this January, when the U. S. Supreme Court declined to hear the appeal.<sup>147</sup> Thus, the final outcome of this case is that

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<sup>141</sup> *Id* at 979.

<sup>142</sup> *Id.* at 993.

<sup>143</sup> For the artists involved, including Chuck Close, Laddie John Dill and the estate of Robert Graham, *see* M. Elizabeth Petty, *supra* note 43, at 993. For the lawsuit, *see* Estate of Graham v. Sotheby's Inc., 860 F. Supp. 2d 1117-9 (C.D. Cal. 2012).

<sup>144</sup> Kate Lucas, *supra* note 125.

<sup>145</sup> *Sam Francis Found. v. Christie's, Inc.*, 769 F.3d 1195 (9th Cir. 2014).

<sup>146</sup> Kate Lucas, *supra* note 125.

<sup>147</sup> Brian Boucher, *Supreme Court Declines to Hear Artists' Resale Royalty Suit—Who Wins?*, January 12, 2016, <https://news.artnet.com/art-world/supreme-court-declines-artists-resale-royalty-appeal-406106>.

the resale royalties will be paid only within the state's borders.

Even though both parties of the lawsuit have interpreted the result as weighing in their favor, as a practical matter this result could have the “undesirable effect of incentivizing players in the art market to take their transactions outside the state, in order to avoid the 5 percent royalty.”<sup>148</sup> Therefore, even though the Supreme Court's denial left the Ninth Circuit ruling intact, according to Nicholas M. O'Donnell, of Sullivan & Worcester, “[i]f you're a proponent of resale royalty, the Supreme Court declining to hear the case underscores the case that a national policy is needed.”<sup>149</sup> In fact, the problems raised by this case do not concern only the constitutionality of the statute, but also make clear how difficult it is to handle a state statute on *droit de suite* in a federal setting. Hence, it becomes even clearer that a right so unique and particular, such as *droit de suite*, needs to be considered in a unified perspective.

### 3. Recent Federal Legislation Attempts

Almost 20 years after the Copyright Office issued its 1992 report, Congressman Jerrold Nadler and Senator Herb Kohl tried to introduce new legislation- the Equity for Visual Artists Act (EVAA)- which added a resale royalty under Section 106 of the Copyright Act.<sup>150</sup> The EVAA, in short, “required the collecting society to set aside a royalty rate of 7% [*sic*] for resales in excess of \$10,000 at large auction houses, half of which would go to the

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<sup>148</sup> For the consideration that both parties have interpreted the result as favorable for them see Brian Boucher, *supra* note 148. For the possible undesirable effect see Kate Lucas, *supra* note 125.

<sup>149</sup> Boucher, *supra* note 148.

<sup>150</sup> Jacqueline Pasharikov, *Edvard Munch's "The Scream" Screams For Droit De Suite: Why Congress Should Enact A Federal Droit De Suite Statute Governing Artists' Resale Rights In The United States*, 26 U. Fla. J.L. & Pub. Pol'y 383 (2015), at 404.

visual artists, and the other half to nonprofit art museums in the United States.”<sup>151</sup> Eventually, however, Congress did not enact the EVAA mostly because of two critical aspects.<sup>152</sup> First, the EVAA was applicable only to large auction houses, with the consequence that a great number of sales would have shifted within the private sector to avoid the royalty.<sup>153</sup> Secondly, the artist would have been compensated with less than 3 percent of the total royalty because of the subtractions provided by the law (for administrative costs and for the museum fund escrow).<sup>154</sup> In 2013, the Copyright Office updated its report based on several changes and developments occurring since 1992, such as the European Directive, the introduction of *droit de suite* in many other countries, the problems raised by the resale right at the state level, and the increasing growth and transparency of the art market itself. The report did not find legal or policy impediments to the enactment of a resale royalty legislation in the United States.<sup>155</sup> Importantly, the Copyright Office also provided a list of recommendations for effective implementation of the resale right.<sup>156</sup>

On the heels of the 2013 Report, Nadler introduced the Resale Royalties Too Act of 2014, but this attempt also failed.<sup>157</sup> However, on April 16<sup>th</sup> 2015, the American Royalties Too Act (“ART”) of 2015 was introduced.<sup>158</sup> Like the 2014 version, the ART would grant a 5 percent royalty on works sold for \$5,000 or more, up to a total of \$35,000 in total royalty

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<sup>151</sup> *Id.* at 405.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 406.

<sup>154</sup> *Id.*

<sup>155</sup> U.S. Copyright Office, *Resale Royalties: An Updated Analysis* (2013), *supra* note 76 at 2-3, 13-26.

<sup>156</sup> *Id.* at 73.

<sup>157</sup> Nicholas O'Donnell, *With New Congress, Resale Royalties Bill and Foreign Cultural Exchange Jurisdictional Immunity Clarification Act Are Dead (Again)*, (January 5, 2015 at 9:49 AM), <http://blog.sandw.com/artlawreport/2015/01/05/with-new-congress-resale-royalties-bill-and-foreign-cultural-exchange-jurisdictional-immunity-clarification-act-are-dead-again/>.

<sup>158</sup> Nicholas O'Donnell, *Third Time a Charm? New Resale Royalty Bill Filed in Congress*, (April 23, 2015 at 9:27 AM), <http://blog.sandw.com/artlawreport/2015/04/23/third-time-a-charm-new-resale-royalty-bill-filed-in-congress/>.

payments.<sup>159</sup> The fact that it has been introduced earlier than the last two attempts, in which the Congressional session expired before the bills became law, did not make any difference in passage of the Act, and instead confirmed that “the 16 months immediately prior to a Presidential election is rarely a period of great compromise and legislative efficiency.”<sup>160</sup> After more than two years no action has been taken.

A general positive consideration that the bill follows, at least partially, the recommendations of the 2013 Report of the Copyright Office. In fact, it makes the right to receive the royalty inalienable, unassignable and unwaivable, as required by the 2013 report, which underlined that doing so would create consistency between the EU and the United States, and thus avoid the risk of criticisms and conflicts.<sup>161</sup> The bill also stipulates that the minimum requirement for artwork sold is \$5,000, respecting the range stated by the report (from \$1,000 to \$5,000).<sup>162</sup> Finally, it establishes a reasonable remedies provision and the resale royalty percentage is 5 percent, perfectly within the range recommended.<sup>163</sup> The only argument with merit that ART’s opponents could raise is its narrow scope, targeting only auction houses, considering that the ART defines “auction” as a “public sale of visual art to the highest bidder run by an entity that sold at least \$1 million of works of visual art during the previous year.”<sup>164</sup>

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> For the content of the Act see H.R.1881 - American Royalties Too Act of 2015, 114th Congress (2015-2016) available at <https://www.congress.gov/bill/114th-congress/house-bill/1881>. For the 2013 Report see U.S. Copyright Office, *Resale Royalties: An Updated Analysis* (2013), *supra* note 76, at 79.

<sup>162</sup> For the content of the Act see H.R.1881 - American Royalties Too Act of 2015, 114th Congress (2015-2016). For the 2013 Report see U.S. Copyright Office, *Resale Royalties: An Updated Analysis* (2013), *supra* note 76, at 74.

<sup>163</sup> H.R.1881 — 114th Congress (2015), *supra* note 162.

<sup>164</sup> *Id.*

## CONCLUSION

It is hard to predict if Congress will pass ART (it does not seem a priority in the current administration). As for the coalitions, they are pretty much the same as in 2014: on one side, the ART of 2015 is supported by the Copyright Office, celebrities, Artists Rights Coalition and the Artists Rights Society, while on the other side major auction houses, such as Christies, Sotheby's, the online platform eBay, and the Internet Association are lobbying against the Act.<sup>165</sup> Both sides have strong arguments, but the positive consequences of implementing *droit de suite* in the United States outweigh the fears of the resale right's adversaries. As already demonstrated, (1) the resale royalty is not the major factor influencing the market (the American and Chinese art markets have lost significant market share in recent years) (2) it is consistent with the U.S. Constitution, (3) it will allow American artists to enjoy the reciprocity benefits of the Berne Convention, (4) a federal statute is needed because case law has proved that its implementation at a state level is too problematic and, above all, as proponents of the rights have argued, (5) the United States should not ignore the global trend. Not only has every European country implemented *droit de suite*, but many Latin and South American countries have done so as well. Brazil, Chile, Costa Rica, Ecuador, and Morocco all have a form of *droit de suite* legislation and China and Canada may adopt such rights in the future. Therefore, the United States should align with the rest of the world, because the art market is a global market.

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<sup>165</sup> Cohen Patricia, *Lobbyists Set to Fight Royalty Bill for Artists*, N.Y. Times, March 23, 2014, <https://www.nytimes.com/2014/03/24/arts/design/auction-houses-taking-no-chances-on-american-royalties-too-act.html>.