

# **Implementing Droit de Suite (artists' resale right) in England**

Clare McAndrew and Lorna Dallas-Conte

**THE ARTS COUNCIL OF ENGLAND**

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*Marjorie Allthorpe-Guyton*

Director of Visual Arts, Arts Council of England

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## List of Acronyms

### United Kingdom

AAH	Association of Art Historians
ACRR	Artists' Campaign for the Resale Right
ADAGP	Association for the Defence of Graphic and Plastic Arts, France
AGBI	Artists' General Benevolent Institution
ALCS	Authors' Licensing and Collecting Society Limited
AOI	Association of Illustrators
AOP	Association of Photographers
BAMF	British Art Marketing Federation
BCC	British Copyright Council
BECTU	Broadcasting Entertainment Cinematograph and Theatre Union
BIPP	British Institute of Professional Photographers
BMR	British Music Rights
CJoJ	Chartered Institute of Journalists
CISAC	International Confederation of Societies of Authors and Composers
CLA	Copyright Licensing Agency Ltd
DACS	Design and Artists' Copyright Society Limited
DPRS	Directors and Producers Rights Society
ERA	Educational Recording Agency Ltd
EVA	European Visual Artists, Belgium
GPA	Greenwich Printmakers Association
HVAF	Hertfordshire Visual Arts Forum
IFRRO	International Federation of Reproduction Rights Organisation
IMI	Institute of Medical Illustrators
MAA	Medical Artists' Association of Great Britain
MCPS	Mechanical-Copyright Protection Society Ltd
MPA	Music Publishers Association
MTIC	Market Tracking International Company Limited
MU	Musicians' Union
NAA	National Artists Association
NUJ	National Union of Journalists

PA	Publishers Association
PAMRA	Performing Artists' Media Rights Association
PLR	Public Lending Right scheme
PLS	Publishers Licensing Society Limited
PPL	Phonographic Performance Limited
PRS	Performing Rights Society
RAA	Royal Academy of Arts
VPL	Video Performance Limited

### **Europe**

ARAPB, Belgium	Royal Association of the Professional Artists of Belgium
KUVASTO, Finland	Visual Artists' Copyright Association
SABAM, Belgium	Company of Authors specialised in Visual Arts
SACAM, France	Société des Auteurs, Compositeurs et Editeurs de Musique
SOFAM, Belgium	Company of Authors specialised in Visual Arts

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## **Preface**

During 2000–01 the Arts Council of England introduced new funds and policies on behalf of individual artists across all artforms which have implications for copyright collection and distribution. Among these is a pilot programme for a new publications and recordings fund. The Arts Council is also increasingly engaging with artists and producers within the commercial, digital and broadcasting realm. As part of this focus on the individual artist, the Arts Council advocates better methods of collection and distribution of reproduction and secondary rights (Eastop, 2000). Some organisations (the Association of Art Historians (AAH), Art Libraries Society/UK and Ireland (ARLIS) and the National Artists Association, to name three) have expressed concerns about current collection methods of secondary and reproduction rights, as well as about a lack of clarity in the distribution of accumulating funds to living artists. With the implementation of the European Union’s Directive on Droit de Suite these concerns became even more pertinent. This report clears the ground for consideration of these issues and of best practice.

## **Executive summary**

Droit de Suite or resale royalties are the rights of visual artists to receive a percentage of the revenue from the resale of their works in the art market. In the EU, 11 of the 15 Member States currently have this right, although it is effectively enforced in only eight. The United Kingdom (UK), Ireland, the Netherlands and Austria do not have Droit de Suite legislation.

The possible trade distortion in the internal market caused by the absence of the levy in some Member States, together with the varying ways it is administered, led to the proposal to harmonise Droit de Suite within the EU. The European Commission proposed a Directive in 1996, which was adopted by the Council in July 2001. The Directive allows for the introduction of royalties on the basis of a sliding scale starting at 4% for works of art over 3,000 Euro to 0.25% on works worth over 500,000 Euro or up to a maximum limit of royalties payable of 12,500 Euro. It is applicable to all professional resales and can be transferred to heirs for up to 70 years after the artist's death. The Directive must be implemented in the UK from 1 January 2006 to benefit living artists, and this must be extended to benefit heirs and estates of deceased artists by 1 January 2012. Options exist for Member States to introduce the right before these deadlines.

In preparation for the implementation of Droit de Suite in the UK, the Arts Council of England commissioned two researchers to carry out:

- an examination of models of best practice for collecting and distributing Droit de Suite in countries other than the UK
- a review of existing models of the collection and distribution for other rights in England
- an assessment of the capacity and mechanisms needed for the successful implementation of Droit de Suite in the UK, and
- an exploration of possible models for the implementation of Droit de Suite.

### **Examination of Droit de Suite in six countries**

Information was collected on the collection and distribution of Droit de Suite in five European countries: Belgium, Denmark, Finland, France and Germany and in California, USA. The key features of the royalties system in these six countries are summarised in Table 1.

### **Review of the operation of other rights in England**

The review of the operation of other rights in England, such as copyright, performing rights and public lending rights, showed a great deal of variety in the operation of collection and distribution systems.

- The membership of collection and distribution organisations sometimes consisted of individual authors, writers or performers and sometimes of organisations.
- Some rights are collected on an individual basis, others are collected automatically through the obligation of the user to declare the use, while still others are collected through a licence fee which represents a calculation of usage.
- Distribution may be direct to the creator or to a distribution organisation which then distributes the monies to the beneficiaries.
- Most rights are distributed periodically, although the frequency varies considerably; from monthly through quarterly or twice yearly to annually. Payments can be made automatically direct to bank accounts or through cheque runs.
- Some organisations use the services of an external body in the event of a disagreement about rights; others refer disputes to their Board of Directors. Some rely on information exchange and good systems, or on members to ensure that all rights are collected and distributed.
- Administrative costs for collecting and distributing rights vary from 5% to 20%, a common range being 10 to 15%.

**Table 1 Key features of royalty systems in six countries: 1998**

<b>Country</b>	<b>Belgium</b>	<b>Denmark</b>	<b>Finland</b>	<b>France</b>	<b>Germany</b>	<b>California</b>
<b>Size of the art market (Euro)</b>	77 million	50.3 million	12.3 million	2,843 million	485 million	5,540.1 million (Total USA)
<b>Proportion of EU sales</b>	0.8%	0.5%	0.1%	31%	5%	Not applicable
<b>Nature and duration of Droit de Suite</b>	Inalienable, life + 70 years	Inalienable, life + 70 years	Inalienable, life + 70 years	Inalienable, life + 70 years	Inalienable, life + 70 years	Inalienable, life + 20 years
<b>Heirs</b>	All heirs	Family only	Family only	Family only	All heirs	All heirs
<b>Works of art covered</b>	Original paintings, sculpture drawings and engravings	Original works of fine art, photos, lithographs, prints, applied art	Works of fine art	Original works of graphic and plastic arts	Original works of fine art	Original paintings, sculpture, drawings, glass art
<b>Sales in scope</b>	Auction sales	Dealer and auction sales	Dealer and auction sales	Auction sales	Dealer and auction sales	All public and private sales by Californian residents
<b>Base</b>	Gross price – no deductions	Price including auction fee minus VAT	Price less VAT	Gross price – no deductions	Gross price – no deductions	Gross price
<b>%</b>	4%	5%	5%	3%	5%	5%
<b>Minimum (Euro)</b>	1,240	268	252	15	51	2,181

<b>Country</b>	<b>Belgium</b>	<b>Denmark</b>	<b>Finland</b>	<b>France</b>	<b>Germany</b>	<b>California</b>
<b>Proportion of all art sales which incur Droit-de-Suite</b>	9% of total sales (20% of auction sales)	16% of total art sales (5% of dealer sales, 30% of auction sales)	8%	3% of all sales (7% of auction sales)	9%	
<b>Proportion of EU sales of Droit-de-Suite eligible items</b>	4%	5%	1%	42%	25%	Not applicable
<b>Value of Droit-de-Suite eligible items sold (Euro)</b>	6.8 million	8.3 million	1.8 million	76.2 million	44.7 million	
<b>Number of Droit-de-Suite eligible items sold</b>	2,750	2,507	1,053	9,000	8,000	
<b>Amount collected in 1998</b>	0.3 million	0.4 million	0.4 million	2.3 million	2.2 million	Unavailable
<b>Central collection</b>	No	Yes	Yes	Yes	Yes	No
<b>Rights to information</b>	Partial	Partial	Full	Partial	Full	None
<b>Administrative costs</b>	15%	15%	25%	20%	10%	n/a

## **Implementing Droit de Suite in the UK**

An assessment of the capacity and mechanisms needed for the successful implementation of Droit de Suite in the UK identified a number of requirements.

These are:

- an ability to identify the auction houses and dealers making sales for which the royalty falls due
- an open and transparent method of recording sales, including sales on the internet, the price agreed and the royalty due, by dealers and auction houses
- the right of collection and/or distribution bodies to have information about sales (the Directive entitles collecting bodies to receive this information if the option to provide for compulsory collective management is exercised)
- an identified effective method of centralising the contact/bank details of artists and their heirs, and of maintaining this data
- a method of linking a piece of work with the correct artist's contact and bank details
- a record of the collection and distribution of royalty fees
- a procedure for dealing with royalties collected but not distributed where it has not been possible to trace the artist or their heirs
- a method of disposing of royalties that remain unclaimed and undistributed after other avenues have been exhausted, possibly for the benefit of needy or young artists
- a control system which ensures that all transactions and systems are transparent and accountable, and
- an ability to administer the right on an international basis.

*Whoever is chosen to act as the collection and/or distribution body for Droit de Suite in the UK will need to demonstrate that they can meet these requirements and to have rigorous and transparent processes for administering the right.*

## **Recommendations**

Based on the experience of the countries analysed in the report, the following recommendations can be made:

- legislation and procedures involved with Droit de Suite should be formulated as simply and clearly as possible to avoid disruption and confusion among art buyers, sellers, and producers
- collection of Droit de Suite should be carried out by one central institution to maximise efficiency and ease of reporting and minimise administration and other collection costs
- where possible, the collection agency should be the national authors' society, to make the most out of cost savings from economies of scale
- to meet the mandatory requirement of the Directive that Droit de Suite is administered on a reciprocal basis between all Member States, all collection societies should belong to a network or umbrella organisation to enable reciprocal exchanges of rights and funds for artists internationally at a low cost through the use of common administrative systems
- from the experience of the German system, among the most efficient, a legal obligation for dealers and auctioneers to periodically report turnover in eligible works of art and possibility of payment in a lump sum is desirable
- the German system, whereby the levy also includes contributions to an artists' social fund, should be fully examined for its benefits for both artists and agents, and its feasibility for implementation in the UK
- to ensure maximum revenues collected from the royalty, the collecting society should have legal rights to inspect the accounts and documentation of selling agents within the bounds of respect for their confidentiality. This right should be backed with the threat of potential sanctions to ensure compliance
- systems should be put into place for ongoing monitoring, evaluation and review of the legislation itself and methods of implementation.

# 1 Introduction and background

*Clare McAndrew, Lorna Dallas-Conte and Ann Bridgwood*

## 1.1 Introduction: the context for Droit de Suite

The term ‘intellectual property’ was first coined to cover literary, dramatic, musical and artistic works (Wall, 2000). The four main types of intellectual property are:

- patents for inventions: new and improved products and processes that are capable of industrial application
- trade marks for brand identity of goods and services allowing distinctions to be made between different traders
- designs for shape and appearance: either functional or aesthetically pleasing articles or surface decoration, pattern or ornament
- copyright for material: literary and artistic material, music, films, sound recordings and broadcasts, including software and multimedia: [www.intellectual-property.gov.uk](http://www.intellectual-property.gov.uk)

Intellectual property rights are protected by laws designed to prevent the unauthorised use or exploitation of the owner’s work, design or invention (Wall, 2000). Copyright, for example, gives the creators of a wide range of material, such as literature, art, music, sound recordings, films and broadcasts, economic rights enabling them to control use of their material in a number of ways, such as by making copies, issuing copies to the public, performing in public, broadcasting and use on-line. It also gives moral rights to be identified as the creator of certain kinds of material, and to object to distortion or mutilation of it ([www.intellectual-property.gov.uk](http://www.intellectual-property.gov.uk)).

Visual artists in the United Kingdom (UK) are protected by copyright laws, but do not currently enjoy rights on the resale price of their work. The Droit de Suite, or resale royalty right, entitles artists in the visual arts (or their heirs up to 70 years after their deaths) to a certain percentage of the resale price of their works after the original sale, whenever they are resold by commercial dealers or auctioneers. The resale royalty right is typically inalienable and lasts for the life span of the artist and 70 years beyond; it therefore affects only trade in contemporary art, which makes up a share of

35% to 60% in West European auction markets (Becker et al, 1995). The right was originally provided for in Article 14bis *ter* of the Berne Convention for the Protection of Literary and Artistic Works 1948; it was, however, an optional right and subject to the rule of reciprocity.<sup>1</sup> Of the 15 European Union (EU) Member States, 11 have the levy. It is effectively enforced in Belgium, Denmark, France, Germany, and Finland and, on an irregular basis, in Portugal. Spain has experienced some difficulties with the information released on sales by auction houses, but VEGAP (the collecting society) hopes that this will be resolved by the clause in the Directive to obtain information. In Sweden, the right was initially administered by a consortium of auction houses and galleries; this was not successful and the right is now administered by BUS (the collecting society for visual artists).

The possible trade distortion in the internal market caused by the absence of the levy in some Member States, together with the varying ways in which it is administered, has been a concern of the EU, due to the potentially negative impact on the ‘proper functioning of the internal market in works of art’ (Council of the European Union, 2000). The Council of Europe took the common position that a precondition for the proper functioning of the internal market was that distortions of competition and displacement of sales caused by differences in national provisions on the resale right should be eliminated. This view led to the proposal of a new Directive to harmonise Droit de Suite.<sup>2</sup> This covers not only the introduction of the royalty in the states without it, but also the task of bringing uniformity in rates and transactions to be covered by resale royalty rights. The European Commission’s proposal dates back to 1996 and was adopted by the Council in July 2001 (see European Commission [2001] for a record of the negotiations). The agreement is made up of a compromise deal on uniform royalties within the EU based on a sliding scale,<sup>3</sup> starting at 4% for works of

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<sup>1</sup> France was the first to apply Droit de Suite in 1920, followed by Belgium in 1921.

<sup>2</sup> To create a ‘level playing field’, Droit de Suite had to be applied uniformly throughout the EU or abolished in all Member States. The commission decided to pursue the former option, as 11 out of the 15 Member States either applied the royalty or had the legislation in place. The latter option was therefore unlikely to attract majority support. See Browne (2000) for further discussion.

<sup>3</sup> Four per cent for works up to 50,000 Euro; 3% for works between 50,000.01 and 200,000; 1% for 200,000.01 to 350,000; 0.5% for 350,000.01 to 500,000; 0.25% for works over 500,000.

art over 3,000 Euro<sup>4</sup> to 0.25% on works worth over 500,000 Euro or up to a maximum limit of royalties payable of 12,500 Euro.<sup>5</sup> The inalienable royalty right lasts for 70 years after the artist's death and refers to any professional sale (auctions and dealers). When the Directive is adopted, it will not have to be enforced for living artists until 1 January 2006, while the UK, Ireland, the Netherlands and Austria are allowed a further six-year derogation in implementing measures to extend benefits to artists' heirs.<sup>6</sup> Appendix 1 gives further details of the Directive.

During 2000–01 the Arts Council of England introduced new funds and policies on behalf of individual artists across all artforms which have implications for copyright collection and distribution. Among these is a pilot programme for a new publications and recordings fund. The Arts Council is also increasingly engaging with artists and producers within the commercial, digital and broadcasting realm. As part of this focus on the individual artist, the Arts Council advocates better methods of collection and distribution of reproduction and secondary rights (Eastop, 2000). Some organisations (the Association of Art Historians, ARLIS/UK and Ireland and the National Artists Association,<sup>7</sup> to name three), have expressed concern with current collection methods of secondary and reproduction rights, as well as the lack of clarity in the distribution of accumulating funds to living artists. With the implementation of the EU Directive on Droit de Suite these concerns become even more pertinent. This report clears the ground for consideration of these issues and of best practice.

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<sup>4</sup> The minimum price to which the royalty can be applied is 3,000 Euro, reduced from 4,000 after conciliation. (The commission had suggested 1,000, while the UK's attempt to bring in a 10,000 Euro minimum considerably swayed the figure of 4,000 in the original Directive).

<sup>5</sup> Member States are free to set a minimum sales price as long as it does not exceed 3,000 Euro. Again this cap on the artist's royalty is likely to bring opposition given that such maximum limits do not exist in music royalties or any other copyright law.

<sup>6</sup> Claims to royalties from heirs account for around 90% of all Droit de Suite applications (telephone conversation with Jens Gaster, DG Internal Market, European Commission).

<sup>7</sup> It should be noted that NAA mandates DACS as its agent to collect and distribute secondary rights income on behalf of its members.

## **1.2 The research project**

Against this background, the Arts Council of England decided in 2000 to commission a research project to inform the introduction and implementation of Droit de Suite in the UK. The research comprised several elements:

- an examination of models of best practice of collecting and distributing Droit de Suite in countries other than the UK. The research covered the European countries of Belgium, Denmark, Germany, Finland, and France. In addition, information was collected about California, USA
- a review of existing models of the collection and distribution of other rights in England
- an assessment of the capacity and mechanisms needed for the successful implementation of Droit de Suite in the UK, and
- an exploration of possible models for the implementation of Droit de Suite.

The review of practice in other countries was carried out by Clare McAndrew of Trinity College, Dublin (McAndrew, 2000, 2001), while the other elements were undertaken by Lorna Dallas-Conte of Views Limited, Kent (Dallas-Conte, 2000, 2001).

### **1.2.1 Methodology**

The review of current practice in the operation of Droit de Suite was carried out using desk research; a review of existing literature; correspondence and reports from the various collection societies in Europe and California as well as with the various Cultural Ministries and Arts Councils.

Information about the collection and distribution of existing rights in the UK was collected in telephone interviews and meetings with representatives of more than 50 arts organisations, rights organisations, trade bodies, galleries, government departments and individual artists between July 2000 and March 2001 (see Appendix 3). Information was also collected through internet searches and e-mail queries, and relevant published and private documents were consulted and analysed.

### **1.3 Structure of the report**

The next chapter of the report outlines some of the perceived benefits and drawbacks of introducing Droit de Suite to the UK. This is followed by a survey of current practice in five European countries and in California. Chapter 4 examines current collection and distribution procedures in England for a variety of rights, and outlines the requirements of the successful implementation of Droit de Suite. It then assesses whether the capacity to implement Droit de Suite currently exists in the UK. The final chapter makes recommendations.

## 2 The debate about Droit de Suite

*Clare McAndrew and Lorna Dallas-Conte*

An assessment of the advantages and drawbacks of Droit de Suite can be considered from the point of view of artists, and that of representatives of the art market, although the interests of these two groups are not, of course, necessarily in conflict.<sup>8</sup>

The rationale behind Droit de Suite is that artists should participate in the increasing value of their art. First, it is argued that this is a result of artists' continued efforts as they build a reputation and it is only fair to let them share the appreciation of their products,<sup>9</sup> particularly over time (National Artists Association, 1996). Second, the introduction of the right removes an inequity vis-à-vis authors and composers who profit from increased value of their works through increased sales or performances of their works (Schlatter-Kruger, 1995). Moreover, it is said to counter the uneven bargaining situation of young artists vis-à-vis gallerists and collectors which can lead to unfair prices.

These claims have, however, come under severe criticism, the main argument being that resale royalties will only lower the initial sales price by the art works' expected present value. This shifts part of the risk concerning the future sales price back to the artist and therefore reduces artistic production to the extent that potential artists are risk-averse. As a consequence of this risk-sharing, successful artists will gain while unsuccessful artists will lose from the Droit de Suite. Moreover, if levied on gross sales prices, this resale royalty right will obviously discourage transactions and thereby produce the usual distortion of a turnover tax. The consensus among economists is that the Droit de Suite runs counter to its intended effect: if anything, it discourages artistic production and does not support needy (rising) artists but rather increases the incomes of already established artists.

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<sup>8</sup> The debates over the benefits and costs of Droit de Suite are well covered in the economic and legal literature. See especially Alderman (2000), Bogle and Ginsburgh (1998), Filer (1984), Ginsburgh (1996), Hansman (2000), IFO (1995), O'Hagan (1998), Perloff (1998) and Solow (1998).

It is also anticipated that dealers and auction houses will pass on the costs of administering Droit de Suite, thereby reducing the amount received by the artist. Collection costs on a potential £9.9 million royalty revenue may be as much as £1.68 million (Market Tracking International, 1999). This figure does not include the possible compliance costs which, based on countries that currently levy Droit de Suite, are estimated at £440,000.

In attempting to evaluate the implications of Droit de Suite on the art market, it is important not to overlook the fact that the market is subject to a range of historical, political, economic and legal influences. Legal and fiscal constraints influence the trade in art directly, and Droit de Suite is only one feature among many others. It is important, however, that its potential effects on the trade are not ignored, especially in consideration of other constraints such as VAT and other taxes, which can cumulatively affect the competitiveness of an art market. The possibility of disruption to the art trade due to both the cost and administrative burden of the royalty is a particular concern for states such as the United Kingdom (UK) which have never had it in place.

The UK is the largest art market in the European Union (EU), with sales in 1998 of £3,287 million or 4765.1 million Euro, representing over 60% of the EU art trade (MITC, 2000). Internationally, it is rivalled only by New York, but there are fears that factors such as the increased costs and ‘red tape’ associated with Droit de Suite and other EU-imposed regulations, rather than eliminating the trade distortions discussed in Chapter 1, might slowly tip the balance of trade in 20th-century art towards New York or elsewhere outside the EU as vendors try to avoid the higher costs of selling in London.<sup>10</sup> Droit de Suite has only local coverage and applies to all EU artists alike, i.e. whenever a work by an EU artist is sold in a country with resale

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<sup>9</sup> A related argument has been put forward by Solow (1998). As the artist takes a financial interest in the value of her sold works, she has a credible incentive to maintain their value when making later production decisions.

royalty rights, the royalties are due regardless of the legislation of the artist's home country.<sup>11</sup> It is argued that a shift abroad would impact particularly on smaller dealers and auctioneers in the UK because the larger houses already have access to these markets and would be able to follow the trade. There is also a risk that more sales will be driven into the private arena where the royalty will not be levied.

The extent to which such relocation would take place is debatable. Opponents of the royalty, such as the British Art Market Federation (BAMF), claim that by 2005, introduction of the royalty could lead to a loss of sales of as much as 78% or nearly £60 million per annum and will put between 5,000 and 8,000 jobs in the art trade at risk (BAMF, 2000).<sup>12</sup> Others contend that these fears for the British art trade are grossly exaggerated. Mr Bolkestein, the spokesman of the commissioner responsible stated, for example, that:

*'Britain's worries are not sufficiently well-founded... The fear that... the resale right would lead to relocation of sales and job losses is very, very exaggerated' (Art Bulletin, 2000).*

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<sup>10</sup> Ginsburg (1996) provides anecdotal evidence for this trade distortion: a painting to be sold was displayed on TV screens in Belgium to attract buyers, but physically stored in Luxembourg in order to avoid resale royalties. Steps have been taken to implement the right in Switzerland and the USA; if this happened, the threat of an art-market drain would be eliminated (personal communication from DACS).

<sup>11</sup> Previous to the Phil Collins case of 20 October 1993, resale royalties were granted according to the reciprocity principle, i.e. only to residents of those countries that had a resale royalty legislation in place. This was ruled to be inconsistent with the non-discrimination principle of Article 7 of the EEC Treaty by the European Court of Justice (See also IFO, 1995:43-45) [ECR I-5145] The reciprocity principle prevails for non-EU countries.

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<sup>12</sup>

See also Bogle and Ginsburgh (1998), who argue that the introduction of the resale royalty would only drive business away from the EU to New York and Switzerland. It is worth noting here that the data on art sales are plagued by inconsistencies. The primary source of data in this report are Market Tracking International Company (MTIC) (2000) estimates which are the only estimates available for dealer sales and are regarded as the best available by experts in the art market. Using MTIC estimates, however a 78% fall would imply a drop of just under £3,000 million, rather than £60 million as reported above in the BAMF statement. The differences in reporting stem from what each source classifies as a 'work of fine art'. MTI (2000) classify 'fine art' as: paintings, works on paper, decorative art, antiques and others. The Art Sales Index (ASI) and other sources use a narrower classification in reporting auction sales; for example ASI (2000) refer only to: paintings, works on paper, prints, sculptures/miniatures and photographs). Another important difference is that ASI data do not include buy-ins, yet these are included as part of auction-house turnover in the MTIC estimates. Although these may explain some of difference it is unlikely to be the sole attributable cause and inconsistencies in reporting sales do exist. The problems of art-trade data are discussed in detail in McAndrew (2001).

In addition, the British art trade has considerably diversified its risks; contemporary and modern art is just one of many specialisations, and one which has never been dominant, given the central status of New York for this sector of art trade in recent history.

It is hypothetical at best to estimate the extent of trade diversion due to Droit de Suite. Some insight can be gained from considering the position of a seller faced with paying the royalty or shipping the goods to an extra-EU destination for resale. Based on estimates for a German seller sending an item to New York for sale and including all shipping costs, i.e. freight (packing and handling), insurance, customs clearance and order processing costs, MTIC (2000) estimate that shipping the goods for sale to avoid the levy would only become viable for works over 50,000 Euro. Below this, shipping costs would outweigh the amount of Droit de Suite saved. In reality, therefore, only the UK and French markets are likely to lose any significant trade, as they are the only states that sell Droit de Suite eligible works over 50,000 Euro. In 1998 1,090 eligible items over this price were sold in the UK, worth some 317.7 million Euro. In France 266 such items were sold, worth 37.2 million Euro. If these goods were shipped to New York, the loss to the EU art trade would be in the order of 355.5 million Euro (48% of the total), as well as a loss of approximately 7.5 million Euro in the Droit de Suite that would have been due.

Whether and to what extent Droit de Suite influences the international competitiveness of the UK art market, it is certain that it is only one of several fiscal and legal factors that affect trade and the art market and influence sellers' decisions on which geographical locations they will use to trade art. Various taxes, commissions charged, contributions to artists' funds, import, export and other regulations all have trade effects, many much more significant than Droit de Suite. The 7th Directive on VAT introduced in 1995 has, like Droit de Suite, sparked concerns over diverting trade from the EU. The introduction of a 5% minimum for import VAT was a particular concern to the UK as a large importer of works of art from third countries. Due to the extensive lobbying from various sectors of the UK art trade a temporary derogation was allowed for the UK to apply a 'super-reduced rate' of 2.5%; however, this was brought into line with the rest of the EU on 1 July 1999 after the European Commission reported that the introduction of VAT from zero

to 2.5% had not significantly damaged the UK art trade. An overview of the VAT situation in the EU is given in Appendix 2.

As well as diverting trade, the introduction of Droit de Suite may encourage dealers to sell more work on a commission basis, where VAT is only payable on the commission earned and the seller will take the royalty (Smith, 1996), in preference to buying and reselling the work,<sup>13</sup> where VAT may be incurred in full and Droit de Suite would become payable by the dealer.

The UK art market may, however, not be as vulnerable to price as is being predicted. In 1992 and 1993, the two principal auction houses (Sotheby's and Christie's) increased their buyer's premium by 5% (from 10% to 15%), a greater increase than the proposed levy, and there was no negative impact on sales (Gimpel, 1996). There is also an argument that stresses that art is not a commodity, its process is rarely affected by competition, and consumption is controlled by an irrational market (Lydiate and Gimpel, 1996). Daines (1992) argues that any system that improves the accountability of the very traditional trading practices of the London art market would be good for the profession.

It is very difficult to address, collect opinions from and disseminate important information to the artist community as a whole in the UK. Artists do not need to belong to representative bodies or associations, unlike in other European countries where, for example, registration is essential for health care. Existing representative organisations have often been established on an ad hoc basis; DACS, for example, was set up to support the growing need of a small group of artists and their estates to protect and exploit their copyright opportunities. Most of the individual artists approached for this research did not reply to initial enquiries, which appears to support the criticism of 'artists' lethargy'. There is also a low level of awareness of Droit de Suite in arts organisations; seven of the 25 interviewed for this research were unaware of the right, and ten did not know whether it would apply to their membership. Artists are not currently benefiting from other rights such as the

Exhibition Payment Right, a right that acknowledges the service artists provide when work is exhibited at a public venue, by paying them a fee.

A number of individual artists and arts organisations banded together in 1994 as The Artists' Campaign for the Resale Right (ACRR), to support the introduction of Droit de Suite to the UK. Activities have included linking with mainland European organisations to lobby and campaign in both the UK and Europe. However, the artists were more fragmented and less experienced in their ability to lobby, and lacked the critical support, resources and influence available to other representative bodies such as The Society of London Art Dealers. In some of the supporting organisations the lasting impact of the campaign seems to have been short-lived; when contacted for this research, one artists' forum, for example, said they were unaware of Droit de Suite. However, other supporting organisations<sup>14</sup> have continued to lobby and campaign and are currently developing a new strategy to continue their strategic role in campaigning and lobbying on behalf of the visual artist.

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<sup>13</sup> The Directive (Article 1) states that the royalty shall be paid by the seller and provides an option for Member States to provide for 'one of the natural or legal persons...other than the seller shall alone be liable or shall share liability with the seller for payment of the royalty'.

<sup>14</sup> The Artists' Campaign for Resale Right is mandated to represent 26 national and regional artist representative and development organisations.

### 3 Droit de Suite: current practice in Europe and California, a country-by-country analysis

*Clare McAndrew*

#### 3.1 Introduction

This chapter examines the legislation and practices of a sample of six countries that currently enforce Droit de Suite. Eleven European Union (EU) countries currently have Droit de Suite legislation; those without are the United Kingdom (UK), Ireland, Austria and the Netherlands. Of the 11 states which have the legislation, only eight actually collect the royalty. Italy has had the legislation in place for over 50 years but no royalties have ever been collected. Table 3.1 summarises the current state of Droit de Suite in the EU.

**Table 3.1 Droit de Suite within the EU**

State	Rate	Basis	Threshold value	Whether collected	Type of Transactions
Austria	None	--	--	--	--
Belgium	4%	Sales price	>50,000 BFr	Yes	Auction sales only
Denmark	5%	Sales price	>2,000 DKr	Yes	Auction and Dealer sales
Finland	5%	Sales price	>1,500 Fim	Yes	Auction and Dealer sales
France	3%	Sales price	>100 FFr	Yes	Auction sales only
Germany	5%	Sales price	>100 DM	Yes	Auction and Dealer sales
Greece	5%	Sales price	>100 DM	No	Auction and Dealer sales
Ireland	None	--	--	--	--
Italy	1-10%	Margin	Varies	No	Not collected in practice
Luxembourg	3%	Sales price	None	No	Not collected in practice
Netherlands	None	--	--	--	--
Portugal	6%	Sales price	None	No	Auction and Dealer sales
Spain	3%	Sales price	>300,000 Pta	No	Auction and Dealer sales
Sweden	5%	Sales price	>1,800 CS	Yes	Auction and Dealer sales
UK	None	--	--	--	--

*Source: Christie's 1998/MTIC 2000*

In 1998, sales of Droit de Suite eligible items in the EU came to 180 million Euro, of which approximately 87% came from auction sales (MITC, 2000). France accounted for the largest proportion of eligible sales, with 42% or 76 million Euro, followed by Germany with 25% or 44.7 million Euro of eligible sales. In 1998, 6.4 million Euro was collected in royalties in the EU, 83% of which came from auction sales. Table 3.2 shows that France collected the largest amount of royalties (2.3 million Euro or 36% of the total) followed by Germany (with 2.2 million Euro or 35%).

**Table 3.2 Droit de Suite collected in the EU in 1998 (thousand Euro)**

State	Auction sales	Dealers' sales	Total	% of EU total
France	2286.9	None	2286.9	36.00%
Germany	1460.0	769.2	2229.2	35.09%
Sweden	520.3	106.5	626.8	9.87%
Denmark	344.5	70.5	415.0	6.53%
Belgium	409.9	None	409.9	6.45%
Spain	190.2	100.2	290.4	4.57%
Finland	76.5	15.7	92.2	1.45%
Greece	1.3	0.7	2.0	0.03%
<b>EU Total</b>	<b>5289.6</b>	<b>1062.8</b>	<b>6352.4</b>	<b>100%</b>

Source: MTIC, 2000

Figures for distribution of the royalty to artists are not available on a consistent basis. However estimates can be made based on the amount collected, minus the administrative costs of collection agencies in states with the royalty.<sup>15</sup> Based on these estimates, the cost of collecting the royalty throughout the EU in 1998 was approximately 1.1 million Euro, leaving a maximum of approximately 5.2 million Euro to be distributed to artists.<sup>16</sup>

<sup>15</sup> Figures for costs are arrived at based on the average of administration costs for states in the EU with Droit de Suite (18%) based on questionnaire conducted with the help of Carol Streul (EVA), 2000.

<sup>16</sup> The British Art Market Federation conducted a study on the UK art market which estimated that the minimum administrative cost to members of the trade to collect resale royalties would amount to around £40 or 58 Euro per transaction. Given that there were some 29,201 items sold in eligible countries sold in 1998, this would produce a higher estimate of the cost to the EU art trade at 1.7 million Euro.

## **3.2 Germany**

The German art market is the third largest art market in the EU with sales in 1998 amounting to 485 million Euro or around 5% of EU art-market sales.<sup>17</sup>

### **3.2.1 Nature and duration of rights**

In Germany resale royalties are contained in Article 26 of the Authors Rights Law 1965, which was modified in 1972. The right is inalienable: the artist may not transfer it to another person or institution during their lifetime. However rights are transferred after the artist's death to their heirs for up to 70 years. In Germany there are no provisions in the law regarding inheritance entitlement. In other words, the artist can decide who he wants to transfer these rights to, as is the case with all authors' rights under German law.

### **3.2.2 Scope of Droit de Suite**

The law covers all sales by German artists in Germany plus works sold by foreign artists living in the state on the basis of reciprocity. It applies to 'works of fine art' which must be either original paintings, drawings or sculptures that were produced as once-off originals and not in a standardised manner. Works of applied art and works of architecture are expressly excluded in the German legislation.<sup>18</sup>

Both public and private sales are liable for Droit de Suite under German law; in practice, however, the royalty is only enforced on public sales via dealers and auction houses. The basis of assessment for the royalty is sales revenue yielded by the sale of the work of art; i.e. the gross sales price with no deductions (such as commission fees or other costs to the seller). On this price the royalty is charged at a rate of 5%. The minimum price for a sale of a work of art at which Droit de Suite becomes due is currently 100 Deutsch Marks (DM) or 51 Euro (from 500 DM or 255 Euro in 1972).

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<sup>17</sup> The largest is the UK with sales of 4,790.5 million Euro (MTIC, 2000).

<sup>18</sup> Works of applied art refer to those which have useful and artistic properties. It is of course difficult in practice to separate the components of applied art or to attempt to put a value on them.

### 3.2.3 Collection and distribution procedures

In Germany, payments due to Droit de Suite are collected directly, i.e. the seller or his agent subtracts the royalty due from the sales price and passes it to the author or his representative. Under the 1972 Law, artists are entitled to information from art dealers and auction houses concerning works of art they have sold. (This is restricted to the name and address of the seller and the sales price.)<sup>19</sup> Rather than making numerous individual requests, the right to information is exercised by the authors' society VG Bild-Kunst. This society has the right to inspect the seller's accounts or other documents of the seller if there are justified doubts concerning the completeness or correctness of the information.

The Bild-Kunst is also responsible for the actual collection of the Droit de Suite payments. To facilitate the collection of the levy, VG Bild-Kunst concluded a blanket agreement in 1980 with the Association of German Art Dealers and Auctioneers, along with other gallerists and art publishers to aid the administrative process. Under this agreement each sale must be reported to a commonly instituted independent body '*Ausgleichsvereinigung Kunst*',<sup>20</sup> which calculates the sums due to artists and their successors. The levy is collected as a lump sum from sellers who pay a standardised percentage of their annual net sales of art created after 1900. The lump sum is calculated as a percentage of the volume of sales ranging between 0.8% and 1.3% for galleries and 1.3% to 3% for auction houses (Duffield, 2000). The sum is easy to calculate and declare as it forms part of the normal tax declarations that every auctioneer or dealer has to provide to the tax authorities.

The levy collected is made up of two parts:

- the actual Droit de Suite or resale royalty due
- contributions due to '*Kunstler Sozialkasse*' (KSK),<sup>21</sup> an official, partially publicly funded social-security scheme for self-employed artists in Germany which

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<sup>19</sup> The art dealer or auctioneer can refuse to disclose the name and address of the seller if they pay the levy due to the artist.

<sup>20</sup> Art dealers and auctioneers are legally obliged to inform *Ausgleichsvereinigung* about their sales, the main advantage of the German system for artists.

<sup>21</sup> The KSK scheme was established in the 1970s for artists as they were not eligible for the normal employer-contribution schemes (covering health, pensions, etc.).

obliges, inter alia, art dealers, gallerists and auctioneers to provide for health insurance and pension schemes for living fine artists.

*Ausgleichsvereinigung* then transfers the money to VG Bild-Kunst, who distribute levies due to artists under their distribution scheme, which is guided by their obligations under the Law of Collecting Societies. After deducting 10% for their administration expenses further obligatory deductions are made for two separate funds:

- the ‘*Sozialwerk*’ scheme: this is a separate and additional social-security bond scheme which does not contribute to the official pension scheme but is designed for those outside the official scheme or ‘artists in need’. The main recipients are elderly artists who are not entitled to a pension under KSK insurance because they were too old when the system came into existence and who do not receive enough monthly support. Recipients are also artists suffering acute problems or crises (such as accidents or a studio burned down, but not, for example, help to exhibit works). A supervisory board made up of members of VG Bild-Kunst decides which applications for support will be accepted
- the ‘*Kulturwerk*’ scheme: this is a scheme to foster and support contemporary fine arts (e.g., promotions, competitions, exhibitions, etc).<sup>22</sup>

The distribution scheme differentiates between the various recipients of the levy as follows:

- for *living artists* – a further 10% deduction for Sozialwerk and a 10% deduction for Kulterwerk, i.e. the artist receives 80% of the net contribution
- for *artists’ estates/heirs* – a 10% deduction for Kulterwerk but no deductions for the *Sozialwerk* scheme, i.e. the estate receives 90% of the net contribution<sup>23</sup>

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<sup>22</sup> Becker et al (IFO, 1995) estimates that in 1992 this could have amounted to up to around 15% of the sums gathered from the art trade.

<sup>23</sup> In 1999, the amount of Droit de Suite collected by the distribution scheme of Bild-Kunst was 4,862,000 DM. A further 340,000 DM was collected from dealers and auctioneers outside the blanket agreement, i.e. direct payments to Bild-Kunst rather than via *Ausgleichsvereinigung*. From this, 30,000 DM was directed to the *Sozialwerk* scheme and 318,000 DM to the *Kulturwerk* scheme.

- for *foreign artists* collecting royalties in Germany under the International Confederation of Societies of Authors and Composers (CISAC) – no further deductions, i.e. the artist receives 100% of the net contribution.

If the society feels that the sums paid are insufficient to meet the claims of its members, it renegotiates with the relevant dealer.

While auctioneers' catalogues and dealers' sales reports are easy to evaluate for those included in the agreement, around 20% of galleries, auction houses and dealers did not join in 1980. VG Bild-Kunst is therefore involved in ongoing surveys of art sales and in pursuing claims for information and payment of the levy. Most agents are, however, cooperative and few cases have ended in court (VG Bild-Kunst, 2000).

### **3.2.4 Amounts collected and distributed**

In 1998, around 8,000 items liable for Droit de Suite were sold in Germany, amounting to a value of 92 million DM or 44.7 million Euro. Approximately 60 million DM worth of these sales were via auction houses, with the remaining 32 million DM through art dealers (Market Tracking International Company (MTIC), 2000). These sales represented around 9% of total art market sales in Germany and around 25% of sales eligible for Droit de Suite in the EU. According to MTIC (2000) estimates, the average sale price of eligible items was 5,410 Euro or 11,160 DM. Given the 5% levy, the total levy collected in 1998 is estimated to be 2.2 million Euro or 4.6 million DM<sup>24</sup> (3 million DM from auction houses and 1.6 million from dealers). Figures for the amounts collected from 1991 to 1999 are given in Table 3.3. Amounts collected have risen steadily, with a peak in 1997; due possibly to a few unusually high-priced sales in that year.

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<sup>24</sup> Figure from VG Bild-Kunst state the amount collected that year was 4.8 million DM (VG Bild-Kunst, 1999).

**Table 3.3 Amount of Droit de Suite collected by VG Bild-Kunst (mill DM)**

1991	1993	1995	1997	1999
4.1	4.2	4.3	7.2	4.9

*Source: Bild-Kunst Annual Report 1999*

VG Bild-Kunst deducts a 10% administration fee so, given the amounts collected, an estimated 4.1 million DM (or 2.1 million Euro) of the levy was distributed to artists in 1998.

Regarding the distribution of the levy to artists, it is claimed that a problem with the German system is that it primarily benefits artists' heirs rather than the artists themselves. In 1998, the collecting society represented 7,454 German artists, but only 274 artists and 206 heirs shared in the Droit de Suite collected. BAMF (2000) estimate that living artists were paid a total of around 509,940 DM (247,544 Euro), whereas heirs were paid 3,602,879 DM (1,748,970 Euro) or some seven times more than payments to living artists.

### **3.3 France**

The French art market is the second largest art market in the EU, with sales in 1998 amounting to 2,843 million Euro or approximately 31% of EU art-market turnover (MITC, 2000).

#### **3.3.1 Nature and duration of rights**

France was the first country to introduce Droit de Suite in its Statute of May 1920. This legislation was updated in the Intellectual Property Law of May 1957 which is currently covered under the Code de la Propriété Intellectuelle (CPI) of July 1992 (Article 42 of the Copyright Law 1992). Again the right is inalienable but only direct heirs, i.e. artists' relatives, can obtain the royalty after the artist's death for a period of up to 70 years. All chosen or testamentary heirs are excluded. French artists are eligible for Droit de Suite as are, under the decree of 1956, foreign artists, if they have 'played a part in the artistic life of the country and had lived there for over five years' (IFO, 1995).

### **3.3.2 Scope of Droit de Suite**

The Law covers ‘works of graphic and plastic arts’. Works of art must be original and the criteria for the original status of engravings, prints and lithographs are defined in agreements between the authors’ societies and auctioneers. Works of applied art are generally not included in the legislation; however, there are certain exceptions given to original book bindings and tapestries.<sup>25</sup>

In France, Droit de Suite applies to public auction sales only. Following the 1954 agreement between authors’ societies and auctioneers and art galleries, galleries were exempted from the royalty as they agreed to pay the Artist Social Security Employers’ Contribution.<sup>26</sup> The basis of assessment for the royalty is sales revenue or gross sales price (with no deductions), and the levy is charged at a rate of 3%. The minimum price threshold for a sale to become liable to Droit de Suite is 100 French Francs (FFr) or 15 Euro.

### **3.3.3 Collection and distribution procedures**

In France, as in Germany, payments of the Droit de Suite levy are collected directly. There is one main collecting society: ADAGP (Association for the Defence of Graphic and Plastic Arts). In addition, Succession Matisse and Succession Picasso exist exclusively to manage the rights for these two artists. As royalties are only paid on auction sales the collection procedure is set out in an agreement between the society and the Chambre Nationales des Commissaires-Priseurs (National Chamber of Auctioneers). This states that ADAGP must inform auctioneers of every new artist on their books and all works involving these members before the sale. (The National Chamber of Auctioneers makes all auctioneers’ sales catalogues and specialist journals available to the society so that they can obtain information on any sales concerning their members.) The auctioneers then send back a form with the results of

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<sup>25</sup> According to the IFO in Munich (1995), on the basis of an agreement between auctioneers and the collecting societies, tapestries are liable to payment due to Droit de Suite on one third of their sales price if they were produced on the basis of an original sketch by the artist.

<sup>26</sup> The Law of March 1957 on the Droit de Suite also introduced the royalty for sales via art dealers but it never came into force as the relevant authorities neglected to have it published. (IFO, 1995).

the auction and payment due which ADAGP distributes quarterly, bi-annually or annually at the artist's request (ADAGP, 2000).

### **3.3.4 Amounts collected and distributed**

In 1998, France sold the most Droit de Suite eligible items in the EU, with a total of around 9,000 items worth 522.9 million FFr or 76.2 million Euro. This represents around 7% of auction sales and 3% of total sales in the French art market, and 42% of sales eligible for Droit de Suite in the EU. France collected the most Droit de Suite in the EU in 1998 at around 15.7 million FFr or 2.3 million Euro. ADAGP reports administrative costs of 20%; the maximum amount of Droit de Suite distributed to artists was therefore approximately 12.6 million FFr or 1.8 million Euro. ADAGP's figures for 1999 state that the society collected 13.7 million FFr worth of Droit de Suite of which 11.0 million FFr was distributed to artists (ADAGP, 2000).

In a report by Deputé Douyere to the Assemblée Nationale in late 1999, it was stated that only 2,000 artists benefited from Droit de Suite and 2 to 3% of these received 43% of the levy collected in the period 1993–5. Each of the remaining 1,950 artists was paid on average 3,000 FFr (457.3 Euro) which, once 20% collecting charges were deducted, amounted to 2,400 FFr or 365.9 Euro (Browne, 2000; MITC, 2000).

As in Germany, a large proportion of funds collected also goes to heirs rather than to the living artist. BAMF (2000) reports that 70% of the royalties collected in 1996 were paid to the families of six or seven artists.

## **3.4 Belgium**

Art sales in Belgium in 1998 totalled 3.3 billion Belgian Francs (BFr) or 77 million Euro which represents less than 0.8% of the share of art sales in Europe (MITC, 2000).<sup>27</sup>

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<sup>27</sup> Note that 0.8% of sales were accounted for by Belgium and Luxembourg together.

### **3.4.1 Nature and duration of rights**

Belgium first adopted the French Law of Droit de Suite in 1921 and the royalty now comes under the June 1994 legislation which was adopted in February 1999. The right is inalienable under Belgian Law and transferable to heirs for 70 years after the artist's death. As in Germany, the artist is free to decide to whom he wishes to transfer the right after his death. The law covers all sales by Belgian artists in Belgium, plus works sold by foreign artists living in Belgium on the basis of reciprocity. The law applies to original paintings, sculptures, drawings, and engravings and excludes reproductions, works of architecture and works of applied art.

### **3.4.2 Scope of Droit de Suite**

Under Belgian law only public sales by auction are liable to Droit de Suite. The basis for assessment is gross sales price (with no deductions), on which a royalty of 4% is levied. The minimum price for a sale to be liable for Droit de Suite is 50,000 BFr or 1,240 Euro. Before 1999 the royalty was applied on a sliding scale with a rate of 2% applied to works ranging from 2,000 to 10,000 BFr, 3% for those between 10,000 and 20,000 BFr, 4% for 20,000 to 50,000 BFr and 6% for works priced above 50,000 BFr. This scale was abolished when the application decree was passed in 1999 to aid more effective enforcement.

### **3.4.3 Collection and distribution procedures**

Prior to 1999, Belgium used an indirect collection system. An official of the Ministry of Culture, the 'Receveur du Droit de Suite' was responsible for collecting the levy. Auctioneers were required to send the levy and sales invoice to the Ministry within eight days of the sale, and it was then up to the artist, or his agent if represented by an authors' society, to come and claim his share. The Ministry did not charge a fee to the artist for this service. The new Belgian Law has, however, abolished the 'Receveur du Droit de Suite'. The auctioneers now have an obligation to report and pay one of the three recognised collection societies in Belgium: the Company of Belgian Authors (SABAM), the Royal Association of the Professional Artists of Belgian (ARAPB) and the Company of Authors specialised in Visual Arts (SOFAM) – or to the artist directly. Generally the collecting society will verify the catalogues and lists before an auction and indicate to the auctioneer which artists and works they represent. The

auctioneers then have a three-month period to report the auction price and pay the levy due. Distribution to the artists is then carried out on an intermittent basis; for example, SABAM distributes the levy to artists biannually in February and August (SABAM, 2000).

#### **3.4.4 Amounts collected and distributed**

In 1998 2,750 Droit de Suite eligible items were sold in Belgium, with a value of 291.1 million BFr or 6.8 million Euro. This represents around 20% of auction sales in Belgium and 9% of total sales (and 4% of Droit de Suite eligible sales in the EU). Given the 4% levy, a total of around 11.6 million BFr or 272,000 Euro was collected in Droit de Suite in 1998. SABAM report collection of 6.2 million BFr or over 53%. Data is not available on the total sums paid out for Droit de Suite, as the sums are received by the three societies as well as the individual artists themselves. SABAM (2000), however, report their administration cost as 15%; therefore, an estimate of the maximum royalties distributed, given the amount collected, would be in the region of 9.86 million BFr or 231,200 Euro.

### **3.5 Denmark**

The Danish art market is the sixth smallest in the Europe with sales amounting to 50.3 million Euro in 1998, approximately 0.5% of total art-market sales (MTIC, 2000).

#### **3.5.1 Nature and duration of rights**

Droit de Suite was introduced into Danish Law in 1989 under Section 38 of the Danish Copyright Act. Under this Act, the Minister of Culture set out provisions concerning the calculation and collection of the royalty. (Executive Order no. 274 of 18 April 1996 concerning Calculation of Droit de Suite Remuneration in connection with Commercial Resale of Works of Art). The artist's right is inalienable under Danish Law and transferable after the artist's death to their spouse or other family heir for 70 years. As in French law, testamentary heirs and recipients of transferred or assigned rights are excluded and, if the artist has no heirs or spouse, the right of remuneration passes to the recognised collection agency. The law covers the sales in Denmark of Danish artists, nationals of the EU and any other artists who have their habitual residence in a country that has acceded to the Berne Convention and which

has implemented a Droit de Suite provision in their national law (Danish Ministry of Culture, 1998).

### **3.5.2 Scope of Droit de Suite**

The law covers works of fine art (including paintings, sculpture, drawings, graphical works, picture textiles), photographic works, lithographs, prints and works of applied art unless they are produced in several identical copies (including original goldsmiths' and silversmiths' work and ceramics).<sup>28</sup> Resales of architectural works are excluded in the legislation.

Any resales for commercial purposes within the art trade, including both public and private transactions, are liable to Droit de Suite. Only private transactions without the participation of a commercial seller or someone who arranges the sales of works of art are excluded under Danish Law. The basis of assessment for the royalty is the sales price of the work, including the auction fee if applicable, but excluding VAT. The royalty is charged at a rate of 5%. Remuneration is only payable to the artist if the sales price exceeds 2,000 Danish Kroner (DKK) (excluding VAT) or 268 Euro.

### **3.5.3 Collection and distribution procedures**

Under the Danish Copyright Act claims for Droit de Suite can only be advanced by an organisation which has been approved by the Ministry of Culture. Copy-Dan was given this role in 1990 and is solely responsible for the collection and distribution of the royalty for artists. Copy-Dan collects Droit de Suite for all artists in Denmark, regardless of whether they are members of the society or not. In other words, although an artist is not obliged to have the royalty collected paid to him, he cannot actually prevent it being collected on resales of his works. When Droit de Suite was established in 1990, Copy-Dan set up the collection system by compiling a list of artists' societies or individual artists who approached them. Anyone who sells works of art commercially is under a legal obligation to forward an annual statement of the sales (certified by a state-authorised public accountant or registered accountant) to

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<sup>28</sup> The Law of 1989 states that the levy is not applicable to applied or other art when produced in a series of identical copies; however, certain reproductions in a limited edition are subject to the remuneration.

Copy-Dan. Copy-Dan also monitors auction sales through reviewing auction catalogues, although the society has no right to inspect the books of private dealers. The beneficiaries' claim for payment from Copy-Dan lasts three years from the end of the year in which the sale took place.<sup>29</sup> If the claim lapses after three years the money is retained by Copy-Dan and used to reduce administration costs and for other benevolent funds for artists.

### **3.5.4 Amounts collected and distributed**

In 1998, 2,507 Droit de Suite eligible items were sold in Denmark, with a combined value of 61.9 million DKK or 8.3 million Euro. Dealers' sales accounted for 17% (10.5 million DKK or 1.4 million Euro) of these eligible sales, while auction sales accounted for the remaining 83% (51.4 million DKK or 6.9 million Euro) (MTIC, 2000). Droit de Suite eligible sales make up around 16% of total art sales in Denmark (5% of total dealer sales and 30% of auction sales) and nearly 5% of Droit de Suite eligible sales in the EU.

Table 3.4 shows figures for Droit de Suite collected and distributed from 1990 to 1999. The amount of the royalty collected has increased over the period by 3.3 million DKK or over 300%. There was a noticeable decrease in 1992–93; this, however, coincided with a period of crisis in the art market, which may explain the downturn. The number of artists receiving the royalty has increased considerably, doubling over the nine-year period. Amounts of the royalty distributed to artists are also reported to have increased over the period by 2.68 million DKK or nearly 300%. The Danish Ministry of Culture (1998), however, reports that most artists receive only small payments. For example, in 1996, 327 or around 70% of artists received payments of 100–499 DKK (13–67 Euro), but only nine, less than 2% of artists received more than 50,000 DKK or 6,708 Euro. In addition, a large percentage of payments go to artists' heirs rather than the artists themselves. In 1998, for example, of the Droit de Suite payments made to Danish artists, 86% were paid to the artist's estate and only 14% to the artist themselves.

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<sup>29</sup> This period can be extended by written demand from the beneficiary (Danish Ministry of Culture, 1989).

**Table 3.4 Collection and distribution of Droit de Suite in Denmark  
1990–1996**

	<b>Amount collected</b>	<b>Amount distributed</b>	
<b>Year</b>	<b>DKK million</b>	<b>Number of artists</b>	<b>DKK million</b>
<b>1990</b>	1.7	298	0.94
<b>1991</b>	3.1	378	1.88
<b>1992</b>	2.3	365	1.29
<b>1993</b>	1.7	339	0.89
<b>1994</b>	2.3	394	1.74
<b>1995</b>	3.4	426	2.40
<b>1996</b>	4.0	472	2.81
<b>1997</b>	4.0	520	2.81
<b>1998</b>	6.3	530	4.87
<b>1999</b>	5.0	593	3.62

*Source: Danish Ministry of Culture, 1998; Copy-Dan, 1999*

Copy-Dan reports that, in 1998, Droit de Suite collected in Denmark amounted to 843,387 Euro or 6.3 million DKK. Of this, 83% or 700,011 Euro came from auction sales, with the remaining 17% or 143,376 Euro collected from dealer sales. It should be noted that this estimate is considerably larger than the estimates of MTIC (2000) given in Table 3.2. This reflects in part the fact that payments to foreign authors societies are included in Copy-Dan's figures, as well as the general problem of the considerable variability in recording of statistical data pertaining to Droit de Suite. Copy-Dan's administrative costs for distributing the levy have fluctuated between 30 to 45% since it was introduced. Their most recent figures estimate administration costs at 15% (Duffield, 2000). It is estimated that around 655,967 Euro or 4.9 million DKK was distributed in Droit de Suite to artists in 1998, with 530 artists and heirs benefiting. Approximately 84% of those artists were Danish and of those, 62 or 14% were living.

## **3.6 Finland**

The Finnish art market is relatively small: the fourth smallest in the EU with sales of 12.3 million Euro in 1998, representing 0.1% of EU art trade (MTIC, 2000).<sup>30</sup>

### **3.6.1 Nature and duration of rights**

In Finland, the legislation on Droit de Suite is contained in the Finnish Copyright Act, Law no. 404 of 1961. This was amended by Law no. 748 of 1998 and the Finnish Copyright Decree No. 574 of 1995 which introduced resale royalties into the copyright legislation. The resale right contained in the Act is inalienable but transferable to heirs for 70 years after death. 'Heirs', as defined by Article 41 of the Copyright Act, can be the surviving spouse, direct descendants, or adopted children and their descendants. If there are none of these heirs surviving the author, the remunerations are put into a communal fund for artists. The law covers all Finnish artists' sales in Finland, plus sales of foreign artists whose habitual residence is in Finland.

### **3.6.2 Scope of Droit de Suite**

The law covers all 'works of fine art' but expressly excludes works of architecture, photographic works, and products of artistic handicraft or industrial art which have been produced in a plurality of identical copies. Unique works of artistic handicraft and industrial art are entitled to the royalty upon resale and the evaluation of what is considered 'unique' is carried out for each work of art or artist individually rather than according to any set criteria in the legislation (KUVASTO, 2000).

All professional and public resales of works of fine art, which includes both auction and dealers' sales, are liable to Droit de Suite. The basis of assessment for the royalty is sales price excluding VAT, on which a royalty of 5% is due. The minimum price for the royalty to become due is 1,500 Finnish Marks (Fim) or 252 Euro.

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<sup>30</sup> Only the Irish, Greek and Portuguese markets rate below Finland in terms of art-market sales.

### **3.6.3 Collection and distribution procedures**

In Finland, under Article 26j of the Copyright Act, collection of Droit de Suite is the responsibility of an organisation representing authors and artists approved by the Ministry of Education. The Visual Artists' Copyright Association KUVASTO has been approved to collect the royalty under the Ministry of Education mandate. KUVASTO was founded in 1987 by the Artists' Association of Finland (AAF) and began to collect royalties in 1995 when Droit de Suite was brought into law. The organisation represents around 860 Finnish rights holders and represents some 24,000 foreign artists whose works are sold in Finland on the basis of agreements entered into with international sister organisations. Payment of the royalty is the obligation of the seller or middleman in the sale of the work of art. The seller is obliged to submit an account of sales of works annually to KUVASTO. For closed deals, in practice, collection is based on information which professional art dealers submit to the organisation four times a year. KUVASTO may also request the dealer or other seller to submit any information necessary for the verification of the correctness of the payments made on sales for a maximum of three calendar years preceding the year of the payments. If KUVASTO experiences any difficulties obtaining the required information from an art trader they can ask the county government of the area to compel the seller to fulfil their obligation under threat of a fine. The county government also has the right to inspect the business premises of the seller, along with any documents or correspondence concerning the sale in question.

The resale royalties collected by KUVASTO are distributed to artists and their estates according to the 'accounting rule' of KUVASTO which is simply after the close of accounts each year. KUVASTO retains 25% administration cost from collected remunerations (KUVASTO, 2000).

### **3.6.4 Amounts collected and distributed**

In 1998 around 1,053 items were sold in Finland that were liable to Droit de Suite with a combined value of 1.8 million Euro or 11 million Fim which represents around 8% of sales of works of art in the national market that year (and 1% of Droit de Suite eligible sales in the EU). Around 83% of these sales took place via auctioneers with the remaining 17% (in value terms) through dealers (MTIC, 2000). Given the levy of 5%, MTIC (2000) estimates of amounts of Droit de Suite collected in 1998 are around

2.5 million Fim or 0.4 million Euro.<sup>31</sup> Given that KUVASTO reports that they retain 25% of the royalty in administration costs, the amount distributed to artists in 1998 was approximately 1.0 million Fim or just under 0.3 million Euro.

### **3.7 California**

The United States of America (US) is the second largest international art market after Europe, with sales in 1998 of 5,540.1 million Euro, 56% of which were sales through auction houses and 44% dealer sales (MTIC, 2000). The share of international trade is divided between the EU at 31%, the US with 24% and other art markets accounting for the remaining 45% (European Commission, 1998). The US art market is growing at the fastest rate internationally, with an increase of 81% in sales between 1994 and 1998 compared with an average growth over the period of only 26%.<sup>32</sup> Statistics are not available for the size or turnover for the Californian art market.<sup>33</sup>

#### **3.7.1 Nature and duration of rights**

California is the only state in the US to have resale royalties legislation. Royalties for visual artists were introduced by State Statute in 1976 and came into effect via the California Resale Royalties Act (Civil Code Section 986) on 1 January 1977.<sup>34</sup> As in the EU, the right to the 5% resale royalty is inalienable; in practice, it may be waived under the legislation only by a contract in writing providing for an amount in excess of the 5% of any resale to the artists. The artist may also assign the right to collect the royalty payment to another individual or entity; however, this does not constitute a waiver of the levy under the law.<sup>35</sup> On the death of the artist, the resale right is transferred to the artist's heirs, legatees or any other personal representative chosen by the artist under their Will or Trust for 20 years.<sup>36</sup> To qualify for the royalty, the seller must be a Californian resident or the resale must take place in California. The artist

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<sup>31</sup> This could, however, be an over-estimate as KUVASTO (2000) reports collection of royalties in 1998 at 1.3 million Fim or 0.2 million Euro.

<sup>32</sup> The second fastest growth in sales was in the UK, with an average increase from 1994 to 1998 of 40% (MTIC, 2000).

<sup>33</sup> According to Kusin (1999), this lack of statistics actually derives from the royalties in place in California as most traders will move works out of the state to sell, to avoid payment.

<sup>34</sup> The artists' resale contract is also sometimes called a 'Projansky Contract' after lawyer Bob Projansky, who was responsible for its rather controversial introduction.

<sup>35</sup> California Resale Royalty Act 1977 – Civil code section 986. Part (a).

<sup>36</sup> This right of transfer to heirs only applies to artists who die after 1 January 1983.

must either be an American citizen or have been a resident of California for three years previous to the resale.

### **3.7.2 Scope of Droit de Suite**

The law defines works of art eligible for the royalty as original paintings, sculptures, drawings or original works of art in glass (excluding works of stained-glass artistry when attached to real property, but including works of sculpture or statutory on or within real estate).<sup>37</sup>

Both public and private sales that take place in the State of California or where the seller is a resident of California, are liable to the resale royalty. The basis of assessment for the royalty is the resale price, on which a royalty of 5% is due. The royalty is not applicable, however, if the gross resale price is less than the purchase price paid by the seller. In the 1976 Resale Royalties Act the royalty was also not applicable to the resale of an art work by an art dealer to a purchaser within ten years of the initial sale of the work by the artist to an art dealer, provided all intervening resales are between art dealers. In 1982 an amendment was made to the Act such that resale transactions made within two years of the prior sale are exempted from the royalty. The minimum price for a sale of a work to become liable to the royalty is \$2,000 (gross sales price) or 2,181 Euro.

### **3.7.3 Collection and distribution procedures**

Under Californian Law, it is the obligation of the seller both to locate the artist and pay the royalty due. If the seller or agent is unable to locate and pay the artist within 90 days of the sale, they are then required to pay the 5% royalty due to the artist to the Californian Arts Council where amounts received are kept in an account in the Special Deposit Fund in the State Treasury. The California Arts Council must then attempt to locate the artist and administer the levy due. If the Council is unable to find the artist, the levy is held for a period of seven years, after which time the artist's right terminates and the money reverts to the Council for use in acquiring fine art for its Art in Public Buildings Programme. If a seller fails to pay the artist the royalty due or

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<sup>37</sup> The California Arts Council (2000) gives the example of a \$5,000 royalty paid in 1981 to the creator of a fountain in Ghiradelli Square in San Francisco when the square was sold.

transfer it to the Arts Council, the artist can bring damages within three years after the date of the sale or one year after the discovery of the sale, whichever is longer. Under the Resale Royalties Act, an artist is entitled to recover reasonable attorney's fees if a successful lawsuit is brought to recover the royalty.

The California Arts Council states that the collection and distribution procedure is problematic. It is often difficult to locate the artist and there is no system whereby artists register with the Council or any connections to unions or other organisations for visual artists. The Council has no means of monitoring who is paying the royalty or not and has no designated funding to run the system but must take it from existing staff and budgets. The Arts Council's responsibility is merely to hold on to money for artists; it is not an enforcement agency that tracks the amounts of art sold or by whom. The Council does not retain any administration costs for locating artists or track the amount of time or money spent locating artists and administering the levy. A large part of the reason for this is that the Council receives money very infrequently. An average of the past seven years shows annual payments to artists of \$802 or 927 Euro (Correspondence with California Arts Council, 2000).

While many major dealers and auction houses may set aside funds to pay the levy due on resales of eligible works, the levy is usually not paid until or unless the artist concerned seeks payment. Kusun (1999) reports that major Californian dealers and auction houses which have sale venues outside the state typically export eligible works to avoid incurring the cost and complications of paying the royalty.<sup>38</sup>

### **3.8 Policy implications of the current operation of Droit de Suite**

Having surveyed the operation of Droit de Suite in a number of countries, the report now considers the implications of current practice for the implementation of the right in the UK. The EU Directive largely determines the legal form and content of the resale right, but aspects of collection and distribution have been left to the discretion of Member States. The Directive states that it is designed 'without prejudice' to the

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<sup>38</sup> Kusun (1999) states that one of the major auction houses actually has an internal directive requiring that all works potentially liable to the Californian royalty be exported to avoid the complication perceived by its major consignors.

arrangements Member States engage in for collection, distribution and general management of the royalty system (apart from the fact that they must ensure artists actually get the levy they are due). It is in this area that Member States such as the UK which have never had the levy have the most discretion and the most potential to learn from the experiences of others. Three key features of the collection systems described in the previous section are summarised in Table 3.5.

**Table 3.5 Droit de Suite collection systems**

	Belgium	California	Denmark	Finland	France	Germany
<b>Central collection</b>	No	No	Yes	Yes	Yes	Yes
<b>Rights to information</b>	Partial	None	Partial	Full	Partial	Full
<b>Administrative costs</b>	15%	n/a	15%	25%	20%	10%

### 3.8.1 Central collection

The first feature is ‘central collection’, i.e. collection and distribution of the royalty by one central authors’ society. Article 6 of the Directive states that Member States may decide whether collective central management of the royalty is compulsory or optional. Germany, Finland, France, and Denmark use a central agency to manage the royalty, whereas the other Member States have a number of societies involved in the collection procedure. California is slightly different again as it is the seller’s obligation to find the artist and pay the royalty or else the levy is paid to the Arts Council.

From the analysis of the previous section and interviews with key informants in the various collection societies, there appear to be several advantages of central collection.

- It is easier to establish and maintain cooperation with artists and the art trade if one central agency has sole responsibility for collecting royalties. It is easier to maintain a register of artists and art sellers if they all have to subscribe or report to

one central agency. This inevitably makes the job of matching the sale and the royalty to the artist more straightforward.

- There are learning-curve and scale-effects in collection. When only one society is looking after all resale rights this brings synergy and cost-savings. Handling a large pool of artists and sales gives the society experience of the procedures and art works involved, which allows them to gain knowledge and skills more quickly. There will also be economies of scale in monitoring and administration costs from dealing with a larger quantity of artists and sellers, making the collection system more efficient and cost-effective. These savings are particularly enhanced if there is one general society for all authors (as is the case with the German society VG Bild-Kunst and KUVASTO in Finland) as the greater the number of artists or other areas of the art trade included the further costs fall.
- A central collecting society can gain sales information in a manner that is least disruptive to the art trade. It is easier for dealers and other sellers to report sales and turnover to a single organisation, for example, on the basis of a compulsory annual report. Especially in the case of private dealers where individual resales may be hard to track, it gives the organisation the possibility of charging sellers a levy on the basis of overall turnover and paying royalties due in a lump sum as in the German system.
- When there is more than one collection society, there will be competition to get artists on their books. As royalty rates are fixed by the law and administration costs do not differ greatly between agencies within a nation, rather than generating positive competition effects for the artists, the process tends to increase costs and erode the scale and learning effects discussed above.
- It is easier to gather and evaluate statistics on collection and distribution when there is only one central agency. Article 11 of the Directive, the 'revision clause', allows for the possibility of periodic adjustment of thresholds and rates. The European Commission must report on the implementation of the Directive and the effects it is having on different aspects of the art trade to the Council, the European Parliament and the Economic and Social Economic Committee not later than 1 January 2009 and thereafter every four years. It will be much easier to assess the impact on the competitiveness of the EU market versus those without Droit de Suite with reports from a single body in each Member State.

### **3.8.2 Rights to information**

The main purpose behind a collection agency is to allow the artist to claim their rights and to do this the agency must solve the 'information problem' for artists. The artist needs to know if they have a right to a particular claim in the most simple and efficient manner possible. To be able to assess which sales take place, which are liable to Droit de Suite and ensure the highest collection of revenues possible, the collection society should be entitled to information from the seller. This right should be preferably be granted to one central collection society to avoid the disruption to art traders confronted with a mass of requests for information on behalf of a multitude of individual beneficiaries. An efficient system could then be put into place such that demands for information on resales become a regulated procedure, occurring once a year or at some other suitable interval.

An example of best practice in this regard is the German system. Auctioneers are obliged to notify the collection society of all sales, there are blanket agreements with dealers to submit a percentage of their annual turnover, and there is the right to examine records of sellers to ascertain prices and the identity and location of the seller. The only other country in this study that has the right to information in national law is Finland, where the central collection society KUVASTO is able to request any other information it requires for verification of correct payment from the sellers. Again the fact that there is just one national society making requests for information is less disruptive to the normal functioning of the art trade than a number of requests from individual artists or agencies.

In France and Belgium, the royalty is only levied on auction sales, and while auctioneers have an obligation to report sales, the law does not give the collecting societies any investigative rights. Similarly in Denmark, Copy-Dan has no rights to inspect the documentation of private dealers. In California, the onus is on the seller to find the artist or report the sale. Although there are a few notable cases where artists have taken sellers to court for non-payment, the general attitude of both artists and sellers appears to be avoidance rather than compliance. The California Arts Council reports that one of the reasons it has been so difficult to enforce the law, apart from the inability to monitor sales is the lack of 'teeth' in the law. The comments of a Californian art dealer seem to summarise the attitude of many in the art trade towards

the royalty ‘... nobody’s paid, nobody’s sued, everybody’s avoiding it...people are not paying attention to the law...’ (Filer, 1984).

The right to information has been recognised as important by the EU and is included in Article 9 of the Directive. This article states that the collection society or artist has the right to obtain information from any professional art seller which is necessary to secure payment of the royalty for a period expiring three years after the date of the resale. The Directive does not specify how to execute this right but there needs to be a real threat to sellers to ensure compliance. Some form of sanctions in the event of non-compliance would also be desirable in order to ensure payments are not evaded; however, these do bring their own costs of monitoring, detection and enforcement.

### **3.8.3 Administrative costs**

Droit de Suite is useless and runs counter to its purpose if the costs of administering it completely or partially offset the gains in artists’ income. Administration costs vary at present between 10% and 30%, depending on the importance of the market and the state of organisation of the collecting society. There will obviously be lower costs in larger art markets due to economies of scale, but this is not the only factor that reduces costs. For example, France has a larger art market than Germany and sold more Droit de Suite eligible items in 1998, yet the average administrative costs for collecting Droit de Suite were double those of Germany.<sup>39</sup> This may be due to a variety of reasons but the cost-saving and efficiency of having a centralised collection agency for all authors is likely to be a factor.

Germany has the lowest cost, despite including both auction and dealer sales. This results from a combination of the positive efficiency features of the system, plus the benefits of a large, well-developed and transparent art market. The lump-sum system scheme involving 80% of sellers in Germany has proved to be particularly easy to implement and reduces monitoring costs for VG Bild-Kunst. It has also minimised inconvenience and disruption to the art trade as it involves very little extra effort on behalf of traders, being part of their regular tax information obligations. The system

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<sup>39</sup> France did distribute 0.8 million more than Germany according to Market Tracking International Company (2000) estimates.

has led to high levels of positive cooperation between the collecting society and art dealers which has helped maximise collection and reduce costs.

Finland has central collection, but relatively high costs. A contributing factor is likely to be relative inexperience and small market size; at 0.1% of EU art trade, the market is too small to provide economies of scale in monitoring and collection. Denmark is also a small market (0.5% of EU art trade), but has reduced its costs significantly since the introduction of the royalty system in 1990. The Danish system has compulsory collection which should have a reducing effect on costs. On the one hand, the additional funds that are collected but not distributed to artists can be used to reduce administration costs, but on the other it is more costly to track sales of all artists. The main reason given for this system is that it ensures that one artist does not have competitive advantage over another; however, it can be argued that it is more democratic to let artists themselves decide. In Belgium, SABAM's administration costs dropped to 15%. The removal of the indirect collection system and simplifying the levy to a single percentage have contributed to this decline in cost.

## **4 The implementation of Droit de Suite in the United Kingdom**

*Lorna Dallas-Conte*

Having surveyed the current operation of Droit de Suite in Europe and California, the report now turns to considering how to introduce and operate it in the United Kingdom (UK) at the lowest possible cost and with the least possible disruption to the art trade. As outlined in the Introduction, the research project included a review of existing models of the collection and distribution of other rights in England, an identification of the capacity and mechanisms needed for the successful implementation of Droit de Suite in the UK and an exploration of possible models for the implementation of Droit de Suite.

Information about the collection and distribution of existing rights in the UK was collected in telephone interviews and meetings with representatives of more than 50 arts organisations, rights organisations, trade bodies, galleries, government departments and individual artists, through internet searches and e-mail queries, and analysis of relevant published and private documents (see Appendix 3 and the list of websites consulted).

### **4.1 The collection and distribution of other rights in England**

As noted in Chapter 1 of the report, although Droit de Suite is not currently in force in the UK, artists enjoy other rights designed to protect intellectual property. It is therefore useful to review how these work in practice.

#### **4.1.1 Authors**

Rights for authors<sup>40</sup> are collected by four organisations: the Authors' Licensing and Collecting Society Limited (ALCS), The Copyright Licensing Agency Ltd (CLA), the Educational Recording Agency Ltd (ERA), and the Public Lending Right (PLR) scheme. Rights are collected in a variety of ways: directly through arrangement,

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<sup>40</sup> 'Authors' here refers to 'writers'.

through a system of licences or by sampling. For example, the ALCS collects fees from various blanket licensing schemes when it is difficult, time-consuming or legally impossible for individual authors or their representatives to do so, and distributes the funds to members on a quarterly basis. In contrast, the CLA issues licences to institutions, government and corporate sectors to enable people to copy books, periodicals and journals, using a complex fee structure. The fees collected are distributed to the ALCS, the Publishing Licensing Society (PLS) and the Design and Artists' Copyright Society Limited (DACs), who in turn distribute them to their members. The PLR is calculated by using a changing annual sample of 30 libraries throughout the UK. Patterns of borrowing are multiplied up to give a total earning for an author, and the amount is paid annually in February. The minimum payment is £5 and the maximum £6,000 per author. The most recent distribution benefited 17,678 authors, with over 100 receiving the maximum payment.

#### **4.1.2 Performers and musicians**

Rights for performers and musicians are collected by six organisations, the Educational Recording Agency Ltd (ERA), Equity, the Musicians' Union (MU), the Performing Artists' Media Rights Association (PAMRA), Phonographic Performance Limited (PPL) and Video Performance Limited (VPL).

ERA rightsholder is made up of 12 organisations, including television companies and performers' and visual artists' organisations. It licenses educational establishments make off-air recordings of TV programmes broadcast on the five UK terrestrial channels; collection of the fees is automatically generated. The fees are distributed 3 to 4 times a year to members such as Equity and the MU, who then distribute them to their respective members and rights owners. The MU makes payment by monthly cheque run. Once monies have been passed to members, they are no longer the responsibility of ERA. PPL and VPL, who draw their members respectively from record companies and people who own 100% copyright on pop videos or promos, also have automated systems for collection and distribution. Some musicians' rights are generated automatically because it is a requirement to return records of airplays and it is therefore easy to identify the performers. The administrative costs of collection and distribution range from 'very small' to 'less than 10%'.

### **4.1.3 Directors and producers**

Rights are collected from TV and Cable companies through the monitoring of 17 European channels. Monies are distributed twice yearly.

### **4.1.4 Features of collection and distribution systems**

An analysis of the information provided by a range of organisations showed variation in some key features of existing collection and distribution systems in the UK.

#### ***Membership***

Organisations have a variety of different types of memberships. Some, such as the ALCS, Equity and the MU, recruit individual authors, writers or performers. Others, such as the CLA, have a membership made up of organisations. In this case, the CLA represents three sets of rightsholders: writers, publishers and artists through the ALCS, the PLS and DACS respectively.

#### ***Collection methods***

Some rights, such as some of those collected by the ALCS, are collected for individual authors from licensing schemes. Others are collected automatically through the obligation of the user to declare the use; the rights collected by the Performing Rights Society (PRS) are one example. Still other rights income is collected through a licence fee which represents an indication of usage based on surveys such as those collected by the CLA and the ERA. In some cases, the performer claims rights, as is the case for some of those collected by the PAMRA.

#### ***Distribution methods***

Distribution may be direct to the creator, as is the case for some of the rights collected by the MU, or to a distribution organisation who will distribute the monies to the beneficiaries, as happens with the ERA.

#### ***The frequency of collection and distribution***

Most rights are distributed periodically, although the frequency varies considerably. The MU, for example distributes monies monthly, while the PLS makes payments ten times a year. Other payment periods are quarterly (the ALCS and the PRS), 3 to 4 times per year (the ERA), twice yearly (the Directors' and Producers' Rights Society

(DPRS)) and annually (Video Performance Limited (VPL)). Payments may be made automatically direct to bank accounts or through cheque runs.

### *Aspects of control*

Collecting societies may be asked to defend an action brought to the Copyright Tribunal by consumers but cannot themselves make use of the services of the Tribunal. The DPRS asks the Advisory Council of Distinguished Film and TV Directors to mediate on disputes, while the ALCS refers disputes to their Board of Directors. The ERA requires the consent of the Department of Trade and Industry to make changes to contracts and agreements. Some organisations rely on information exchange and good systems (the MU) or the performers themselves (PAMRA) to ensure that all rights are collected and distributed.

### *Administrative costs*

Organisations report a range of administrative costs for collecting and distributing rights income. The MU, for example, levies fees of 5% to 10% from producers. The MCPS charges fees varying from 4.75% to 20%. A common range of administrative costs is 10% to 15%; from the 9.5% charged by PAMRA, through the 10% levied by the ERA, 12.5% by the DPRS and 14% by the PRS.

## **4.2 Requirements for the implementation of Droit de Suite in England**

This section of the report considers the specific requirements for collecting and distributing Droit de Suite in England. On the basis of the models outlined above, the attributes of a collecting body are:

- a constitution that allows for the activity
- recognition of the authority of the body by auction houses and dealers
- good relations with the art sector in general and with auction houses and dealers in particular
- the ability to identify eligible sales for the collection of the royalty
- a viable organisation with transparent and accountable systems in place and capacity to take on the additional volume of work

- the ability to collect royalties in a cost-effective manner to keep administrative costs to a minimum
- experience in the collection of rights
- good relationships with other arts and rights-related organisations such as the British Copyright Council and with the UK Arts Councils.

The attributes of a distribution body are:

- a constitution that allows for the activity
- an ability to make contact with the beneficiary artists and their heirs
- good relations with the art sector in general and with the beneficiary artists and their heirs in particular
- an ability to distribute royalties in a cost-effective manner to keep administrative costs to a minimum
- experience in the distribution of rights.

DACS was nominated by a number of organisations interviewed as suitable to act as a collection and distribution body. DACS (the Design and Artists' Copyright Society Limited), is responsible for administering the rights of visual artists in the UK; it already collects Droit de Suite on behalf of UK member artists from abroad. It is currently the only collecting society for visual artists in the UK. DACS believes that their administrative costs to administer the right would be under 15%, after some possibly higher initial start-up costs (Duffield, 2000). Given that it already has much of the needed infrastructure in place, DACS estimates that costs could fall as low as 10%, with only one to two full-time staff needed for administration of Droit de Suite.

Other organisations that expressed an interest in the collection and distribution of Droit de Suite were Axis, and the National Artists Association (NAA). Although the NAA has had experience of receiving copyright income in the past, they have passed responsibility for this activity to DACS. The body does not represent significant numbers of members and is short of resources to develop the databases and systems necessary for a collection and distribution body. Axis has the database potential; it already holds artists' records and contact details and visual images for its website, and

purports to be the largest database of visual artists in the country. As an organisation, however, it is not currently set up for this activity. Art Law, the Directors of which established DACS, was also suggested by some interviewees, although it ceased trading some years ago.

The research carried out for the Arts Council of England concluded that DACS can demonstrate some key strengths suitable for a collection and/or distribution body such as good networking, powerful negotiation skills, a legal understanding of rights and a reputation in some quarters of being a suitable body to collect and distribute the royalty. The organisation's role as the only body representing the copyright interests of visual artists since 1983 must be acknowledged, and its experience drawn upon. However, DACS's ability to act as the collection and distribution body for Droit de Suite was questioned by some of the organisations interviewed for the research, and there is evidence that many artists are still unaware of DACS's services. DACS published its first three-year Strategic Plan in 2001, which recognised and set out to address some of the concerns raised by interviewees. Whoever is chosen to act as the collection and/or distribution body for Droit de Suite in the UK will need to demonstrate that they can meet the requirements set out in this chapter and to have rigorous and transparent processes for administering the right.

### **4.3 Implementing Droit de Suite in the UK**

In order to ensure the smooth implementation of Droit de Suite in the UK, with minimum disruption to the arts market and maximum benefit to artists, a robust system of collection and distribution needs to be in place. The steps in the procedure, and some of the questions to be resolved, are summarised in Table 4.1.

**Table 4.1 Requirements and procedures for implementing Droit de Suite**

<b>Requirement</b>	<b>Procedure</b>
Collection	Who will collect it? What is the best method of collection?
Distribution	Who will distribute it? What is the best method of distribution?
Benefit	Minimum disruption to the art trade Maximum benefit to artists

#### **4.3.1 Requirements of a collection and distribution system**

The overall requirements listed in Table 4.1 can be further refined into more specific needs. These are:

- an ability to identify the auction houses and dealers making sales for which the royalty falls due
- an open and transparent method of recording sales, including sales on the internet, the price agreed and the royalty due, by dealers and auction houses
- the right of collection and/or distribution bodies to have information about sales (the Directive entitles collecting bodies to receive this information if the option to provide for compulsory collective management is exercised)
- an identified effective method of centralising the contact/bank details of artists and their heirs, and of maintaining this data
- a method of linking a piece of work with the correct artist's contact and bank details
- a record of the collection and distribution of royalty fees
- a procedure for dealing with royalties collected but not distributed where it has not been possible to trace the artist or their heirs
- a method of disposing of royalties that remain unclaimed and undistributed after other avenues have been exhausted, possibly for the benefit of needy or young artists
- a control system which ensures that all transactions and systems are transparent and accountable
- an ability to administer the right on an international basis.

Ideally, collection and distribution systems would be automated, to reduce administrative costs and improve the efficiency of reporting. It has recently become possible, for example, to send electronic returns of VAT reports via the internet. There would need to be some form of penalty system for late returns and payments to ensure that the artists received the benefit of the right as speedily as possible. Standard documentation (similar in nature to the various standard forms for Registration of Companies' stationery) could be developed.

#### **4.3.2 Possible models for implementing Droit de Suite**

An analysis of existing methods of collection and distribution of other rights and of interviews with representatives of different bodies was used to develop three possible models for the collection and distribution of Droit de Suite.

#### **4.3.3 Model 1**

This model is a simple and direct system, in which dealers or auction houses would be responsible for collecting Droit de Suite and distributing it directly to artists.

**Table 4.2 Elements of Model 1 for collection and distribution**

Requirement	Procedure		What is the appropriate mechanism?
	Question	Answer	
Collection	Who will collect it?	Auction houses and dealers	From sale proceeds
	What is the best method of collection?	At the point of sale	
Distribution	Who will distribute it?	Auction houses and dealers	Cheque or bank transfer, less standard administration costs
	What is the best method of distribution?	On close of sale direct to the artist/artist's estate	
Benefit	Disruption to the art trade	Administration fee received for their own account	
	Benefit to artists	Receive monies direct at time of sale, less a standard administration cost	

This model would require an agreement between representatives of the auction houses and dealers to agree on a standard administrative fee. This could be negotiated and agreed with support from another organisation such as the British Copyright Council, the Patent Office or the Arts Council of England.

An additional role for an organisation such as the Design and Copyright Artists' Society Limited (DACs) in this model might be to collect and audit the returns from the auction houses and dealers. This auditing process could be used to produce an annual report on the collection and distribution of the right. This activity would need to be funded either from central sources or through a registration fee payable by the auction houses and dealers (similar to the registration fee levied for the deposit of returns to Companies House).

A drawback of this model would be that dealers and auction houses would be required to deal with a large number of artists in order to distribute royalties; sending all the royalties due to one central distribution body would ease the administrative burden on the trade.

#### **4.3.4 Model 2**

In this model both collection and distribution would be carried out by the same organisation. This is similar to the system used by rights collection and distribution organisations such as the Musicians' Union (MU) and in addition, as outlined in Chapter 3, to the use of one central body in Germany, Denmark and Finland. This model is favoured by DACS, which already receives and distributes Droit de Suite on behalf of their members from sister organisations in countries where the royalty is enforced.

**Table 4.3 Elements of Model 2 for collection and distribution**

Requirement	Procedure		What is the appropriate mechanism?
	Question	Answer	
Collection	Who will collect it?	A collection and distribution body	By invoice, based on licence or individual sales
	What is the best method of collection?	From auction houses and dealers	
Distribution	Who will distribute it?	The same collection and distribution body	By cheque or bank transfer, less administrative costs
	What is the best method of distribution?	At regular intervals	
Benefit	Disruption to the art trade	Regular returns plus monies sent to one body instead of to individual recipients	
	Benefit to artists	Artists receive monies from one source, less one set of administration costs	

This central body would be recognised and would have the authority to collect and distribute the royalty. It would hold information on relevant sales and the sellers (auction houses and dealers) and on those entitled to receive the royalty and their heirs. It would need a relationship with auction houses and dealers, as well as with artists and their heirs, and may need to include representatives of dealers, auction houses and artists. This body would set administrative fees and decide on other matters of system and procedure.

### 4.3.5 Model 3

This model is more complex, as it separates the tasks of collection and distribution. It is based on the models of the Mechanical-Copyright Protection Society Ltd (MCPS) and the Copyright Licensing Agency Ltd (CLA). These two organisations only collect the right, passing monies onto member organisations for distribution.

**Table 4.4 Elements of Model 3 for collection and distribution**

Requirement	Procedure		What is the appropriate mechanism?
	Question	Answer	
Collection	Who will collect it?	A collection body	By invoice, based on licence or individual sales, less administrative fee
	What is the best method of collection?	From the auction houses and dealers	
Distribution	Who will distribute it?	A separate distribution body	By cheque or bank transfer, less second set of administrative costs
	What is the best method of distribution?	At regular intervals	
Benefit	Disruption to the art trade	Regular return plus monies returned to one body instead of multiples. Two sets of administration costs	
	Benefit to artists	Artists receive monies from one source, less two sets of administration costs	

This model is potentially the most expensive because the number of different organisations handling the transactions would increase time and costs. The opportunity for specialisation may, however, also reduce time and costs. This model is a possible compromise situation whereby a new body, representing all the interested parties, could be created to manage the collection along the lines of the organisation described in Model 2. A body such as DACS could handle the distribution of the

right, using existing administrative processes. The advantage of this arrangement would be that only one aspect of the new royalty would be delivered by a new organisation. It would also avoid overloading an existing organisation by asking them to take responsibility for both the collection and the distribution of the right.

#### **4.3.6 Alternative systems for the collection of the royalty**

A further simplification to the collection of the royalty would be an arrangement similar to the Public Lending Right scheme. This would require a representative national selection of auction houses and dealers to be sampled for the collection process to determine the range of artist's work sold over a period of time. The collection and distribution house would charge a licence fee to all auction houses and dealers, based on turnover. The proceeds of the licence fee would be distributed to the representative artists according to the findings of the sample with a minimum and maximum payment. The sample would change each year and would attempt to represent the range of businesses nationally in the auction house and dealer community.

The advantage of sampling would be that only a representative range of artists would benefit, thereby possibly reducing administrative time and costs. A disadvantage would be that, unlike public libraries, which tend to stock a similar range of books, some artists would only be represented by one dealer or auction house and might miss out on royalty payments if they were not sampled. In addition, sampling is a reliable method of assessing use when it is impossible to identify every individual use; as Droit de Suite is a transactional right, there should in theory be a record of every transaction which should render the use of sampling unnecessary.

Further suggestions from interviewees were to amend existing systems of registration and reporting, such as quarterly VAT returns, to include returns and a payment method for Droit de Suite. The benefits to dealers and auction houses would be less additional paperwork and fewer payment processes. Another suggestion would be the development of a licensing scheme, similar to the licensing of vehicles, whereby the dealer or auction house would pay for a licence. Richard John V. Verrill has suggested a model for a three-way distribution of funds to acknowledge the inter-related nature of business, the artist and the administrator (Richard Verrill, 1999).

Finally, funds collected either individually or through a licensing system could be pooled and used as a special fund for the benefit of living artists, which would enable a larger number of artists to benefit from the success of a few.

## 5 Conclusions and recommendations

The preceding chapters have outlined the current operation of Droit De Suite in six countries, reviewed the operation of other rights in England and assessed the organisational capacity needed to introduce the right to the United Kingdom (UK).

To minimise the diversion of trade from the UK discussed in Chapter 2, it is now crucial to introduce and administer the royalty in as efficient a means as possible with minimal disruption to trade, while ensuring this essential authors' right is properly acknowledged. The experience of the current operation of Droit de Suite in the six countries surveyed makes it clear that the legislation and procedures concerning Droit de Suite in the states implementing it for the first time should be formulated as simply and clearly as possible to avoid disruption and confusion among art buyers, sellers, and producers. Given that many features of the royalty are determined in the Directive, Member States should concentrate on the crucial areas of collection and distribution where discretion is allowed. On balance the following basic recommendations seem appropriate:

- collection of Droit de Suite should be carried out by one central institution to maximise efficiency and ease of reporting, and minimise administrative and other collection costs
- where possible, the collection agency should be the national authors' society,<sup>41</sup> to make the most out of economies of scale and cost savings
- to meet the mandatory requirement of the Directive that Droit de Suite is administered on a reciprocal basis between all Member States, all collection societies should belong to a network or umbrella organisation to enable reciprocal exchanges of rights and funds for artists internationally at a low cost through the use of common administrative systems<sup>42</sup>

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<sup>41</sup> 'Authors' is here used in the widest sense of the term to include visual artists. DACS is currently the only collecting society for visual artists in the UK.

<sup>42</sup> CISAC (the International Confederation of Societies of Authors and Composers) is a non-profit, non-governmental organisation embracing 165 collecting societies representing creators in 90 countries. It was founded in 1926 in Paris where its headquarters still exist (CISAC, 2000).

- from the experience of the German system, currently the most efficient, a legal obligation for dealers and auctioneers to periodically report turnover in eligible works of art and pay in a lump sum is desirable
- the German system, whereby the levy also includes contributions to an artists' social fund, should be fully examined for its benefits for both artists and agents, and its feasibility for implementation in the UK
- to ensure maximum revenues collected from the royalty, the collecting society should have full rights to inspect the accounts and documentation of selling agents within the bounds of respect for their confidentiality. This right should be backed with the threat of potential sanctions to ensure compliance.

Finally an important measure to ensure that Droit de Suite is meeting its objectives in the most efficient manner possible on an EU-wide level is ongoing monitoring and evaluation. Once the royalty has been put into place, it is important that both the legislation itself and methods of implementation are reviewed regularly. Only by continuous review and learning through experience can the effects of Droit de Suite be fully assessed in terms of the competitiveness of national markets, the competitiveness of the EU as a whole compared to art markets without the royalty, and its effects on artists and art production.

The review of the operation of existing rights in England showed that a variety of methods of collection and distribution is employed. Payments are made at a range of intervals, and typically incur administrative costs of 10% to 15%. The report identified a set of prerequisites for the successful introduction of Droit de Suite in the UK and concluded that whoever is chosen to act as the collection and/or distribution body for Droit de Suite in the UK will need to demonstrate that they can meet the requirements set out in Chapter 4 and that they have rigorous and transparent processes for administering the right.

# **Appendix 1 Provisions of the Directive of the European Parliament and of the Council of Europe on the resale right for the benefit of the author of an original work of art**

*Clare McAndrew*

The main provisions of the Directive can be summarised as follows:

## **A.1.1 The ‘right’ itself and its applicability**

Under the Directive the resale right is unassignable and inalienable. Inalienability is already enshrined in the legislation of all of the EU states and in practice in California. It has been argued that this property is at odds with one of the aims of introducing Droit de Suite, namely to put visual artists on a par with authors and composers, who are free to sell their works for a lump sum and waive the right to future royalties. However the arguments in favour of inalienability, especially those that go beyond mere paternalism towards artists, have swayed most legislators in favour of its retention.<sup>43</sup>

The right is transferable under the Directive to heirs for up to 70 years after the death of the artist. This legislation is in place in the EU states as it forms the basis of other copyright laws. There are arguments against the length of succession rights, given what has transpired in the royalty system in most states. Extending the right to life plus 70 years has primarily benefited heirs of artists, particularly of the most famous, rather than the living artists themselves.<sup>44</sup> Partially due to the opposition this has aroused and to give states a chance to adapt their legal systems, countries such as the UK that do not currently apply the royalty are given a four-year derogation, after 1 January 2006, from extending the right to heirs. This can be extended for a further two years, if the Member State requests it, subject to a consultation and transparency

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<sup>43</sup> A particularly strong argument is that inalienability reinforces the artist’s incentive to consider the effects of his actions on his art and artistic career as a whole including works he has already sold. Others include possible asymmetric information between emerging artists and experienced art dealers and the fact that inalienability promotes scale effects and efficiency in the collection of the royalty. For a full discussion of the debate, see Hansmann (2000).

<sup>44</sup> *Art Business Today* (2000), for example, argues that ‘... Droit de Suite...(is)... little more than a hand-out to the rich descendants of famous artists...in France 43% of the levy is paid to 0.025 of those eligible, mostly the descendants of Picasso, Chagall and Matisse...’.

mechanism. On the basis of equity with other artists, arguments against the 70-year rule overlook the fact that there is no other area of copyright where creators whose works are used most extensively do not achieve the highest earnings; copyright automatically benefits well-known artists of all kinds.<sup>45</sup>

The Directive does not specify which heirs may be included; this is left to the discretion of individual states. France, Denmark and Finland restrict the law of succession to family members of the deceased, whereas Germany, Belgium and California leave the artist the legal right to assign heirs. The latter system is more appropriate in that it is in keeping with most other inheritance legislation; the former does not comply with the principles generally recognised in any other copyright law.

### **A.1.2 Works covered and liable sales**

The Directive states that resales of works covered by the right must be original works of graphic or plastic art. This includes pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics and glassware and photographs – provided they are all original or copies ‘considered to be original’, i.e. copies made by the artists or under their authority in limited numbers. The legislation in all states conforms with the Directive regarding ‘originality’ and the art forms outlined cover those in national laws. The Directive in some cases expands the range of works covered; for example, Finland expressly excluded photographic works. Over the last ten years, however, these have evolved into a specialised sector of the art market, reaching prices on a par with, and often superior, to other forms of fine art (Pfennig, 1997).

All resales that involve any art-market professionals are covered under the Directive. (An exception is made for private sales to non-profit public museums.) In principle, all public and private sales should be covered by the legislation but the practicalities

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<sup>45</sup> Filer (1984) also points out that if the right was only to apply during the artist’s lifetime and a short period after, sellers might avoid the royalty through transferring the work on the basis of a long-term lease with an option to buy at a time after the right has ceased. Pfennig (1997) also argues that the rapid turnover of works of art as a result of the frequent change in art preference trends increases the number of resales, particularly in the sector of the living generation of artists. He estimates around two-thirds of the turnover in art trade involves works of contemporary artists.

and cost of monitoring all private transactions make this unrealistic. In all the countries analysed, in actual practice, royalties are only collected on public sales through auctions or dealers. France and Belgium further limit the royalty to auction sales only. The rationale is that works achieve the highest prices at these auctions and sellers, auctioneers, experts, and any other middlemen make substantial profit whereas the artist, the reason for the success, makes nothing. Royalties therefore address this imbalance to some extent, and are easy to monitor, being publicly announced and notified. However in order to prevent competitive distortions and reallocations of turnover within a national art market between different sellers, all professionally based sales must be included. The German system is able to monitor both auction sales and collect lump-sum royalties from dealers at less cost than France or Belgium, implying that an efficient system covering all public sales need not incur higher costs if collection procedures and monitoring are kept simple.

Finally, an optional clause is included in the Directive that Member States may exempt professional sellers who buy directly from the artist and resell the work within three years from the royalty. This is similar to the two-year exemption in California, and is designed to encourage dealers to continue to invest in emerging and young artists who may be more risky when it comes to resale. To ensure that the interests of these emerging artists are still accounted for, particularly where there may be asymmetric information in relation to experienced dealers regarding their value and potential, this exemption only applies to resales where the price is below 10,000 Euro.

### **A.1.3 Basis of assessment, rates and minimum price**

The basis of assessment for the royalty is gross sales price net of tax. All of the countries discussed use sales price, albeit with some variation in deductions allowed, mostly because of the practical difficulties that other measures involve. For example, under Italian law, the basis of assessment is margin or appreciation in value. Under this system the artist not only gets a share of the actual appreciation from the initial sale, but also benefits whenever the work is sold at a price below the initial one providing the price was even lower at the preceding sale. Practically too, it is virtually impossible to track all price transactions and the procedure is further complicated by inflation, devaluations or any other factors affecting nominal prices.

The costs of using this base would outweigh the income gained by it and has made the Italian system unworkable in practice.

The royalty provided in the Directive consists of a tapering scale of rates of several price bands ranging from 4% for resales up to 50,000 Euro up to 0.25% for those with a value over 500,000 Euro, but with a maximum royalty payable of 12,500 Euro. The effect of the scale is that artists producing lower-priced works will receive a proportionately higher payment than those with higher priced works. The system is designed to be skewed towards less well-established artists. The upper cap also limits what already well-established, and presumably wealthy, artists and their heirs can receive. The tapered scale is also defining the levy as far as possible to ensure that artists receive an appropriate share while the burden on the art trade is minimal and the potential for trade diversion reduced. A concern remains, however, in putting this scale into practice given the experience of Belgium which changed from a similar scale to a single rate to increase the efficiency of enforcing the royalty. At the very least, the system will mean extra calculations will have to be made by collecting societies which could increase administrative costs and also make it more difficult to enforce simple alternative arrangements with dealers and other sellers such as lump sum payments based on fixed percentages of annual sales. It may also provide incentives for artificial price manipulation in order to fit into a more favourable royalty bracket.

A minimum price is included in the legislation of all of the countries analysed. The idea behind this is that royalties should not be collected on resales below this threshold as the administration and collection costs would outweigh the small amount of income generated for the artist. No royalty is paid up to the threshold but when the sales price exceeds the minimum price then payment of the levy is due on the full amount. The minimum sales price in the Directive was 4,000 Euro, reduced to 3,000 Euro after conciliation. Table A.1.1 shows the minimum thresholds in the six countries analysed. The EU's minimum is set well above any of those currently in operation in the EU or California. Because of this and under the principle of subsidiarity, Member States are allowed under the Directive to establish national thresholds below the community threshold. This is to allow states to promote the interests of new artists or artists who work in media such as lithographs, drawings or

ceramics that, by their nature, may command lower prices than paintings. Germany and especially France have particularly low thresholds but report the administration cost of collection at only 10% and 20% respectively. It may be possible that a number of very low-priced eligible sales may have the levy uncollected as it would be very costly to monitor and collect royalty payments for all resales above such low minima. Especially for low-priced private sales, parties involved in the transaction would lack incentives to declare the transaction, and information costs would be excessively high for a collection society to gain knowledge about each transaction. An alternative could be to insist on registration of ownership but this would be likely to bring about problems over rights to privacy as well as generating its own costs to set up the system (Bogle and Ginsburgh, 1998).

**Table A.1.1 Current minimum thresholds for Droit de Suite (Euro)**

**(a)**

Belgium	California	Denmark	Finland	France	Germany
1240	2181	268	252	15	51

*(a) Exchange rate: Inter-bank exchange rate 18/8/00*

#### **A.1.4 Collection and distribution**

The Directive states that it is designed ‘without prejudice’ to the arrangements Member States engage in for collection, distribution and general management of the royalty system (apart from the fact that they must ensure artists actually get the levy they are due). Collection arrangements are discussed in Section 8 of Chapter 3.

## Appendix 2 VAT and works of art in the European Union

*Clare McAndrew*

Value added taxation (VAT) within the EU is governed by the destination principle, i.e. the exporting country exempts export goods from VAT and the importing country taxes imports at the same rate as domestic goods.<sup>46</sup> Trade thereby remains undistorted. This, however, is not the case for the art trade where – as an exception to the rule – the origin principle prevails (European Commission, 1995). This principle was introduced with the seventh VAT Directive, which obviously places high VAT countries at a disadvantage. Other things being equal, they should export less art, as buyers will have to pay a higher duty on purchase.

Works of art pose a special problem compared with other goods in the application of VAT in that they are mainly turned over on secondary markets, i.e. they are traded between former and future consumers (private collectors, dealers, museums) rather than between producers and final consumers. Standard taxation procedure would imply that the same good is taxed the total VAT accruing on the sales price with each transaction. To account for this, the EU introduced in the seventh VAT Directive special rules concerning the taxation of second-hand goods, objects of art and antiquity and collections. It establishes the system of taxing the profit margin made by taxable dealers rather than the full price, i.e. the difference between the selling price charged by the dealer for the good and the purchase price. This avoids double taxation and ensures that VAT is levied only on the ‘real’ value added. The scheme is only available to taxable dealers and the rate of VAT charged is generally the standard rate applicable in each state, i.e. greater than 15%.<sup>47</sup> The seventh VAT Directive also introduced the origin principle to establish VAT rates due on the margin where the rate applicable is that of the state initiating the sale. The margin system also applies

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<sup>46</sup> The only exception is cross-border shopping, where consumers pay the VAT of the country of origin (this is not true however for mail order and car sales, where again the destination principle applies).

<sup>47</sup> Certain exceptions are made in some states where the reduced rate applies notably to books and supplies by creators and their families or heirs.

to sales by public auction such that VAT is charged on the auctioneer's fee and not the value of the object.<sup>48</sup>

Another important provision introduced by the seventh Directive concerns rules on the import of works of art from third countries. For such imports, Member States can apply VAT at the reduced rate of at least 5%. A special case was made for the UK – Europe's biggest art market - which was given a derogation until 6 June 1999 to apply a super-reduced rate to imports of works of art of 2.5%. Prior to 1995, imports to the UK were tax-exempt and this increase to 2.5% and now to 5% is therefore considered detrimental to the UK trading position, particularly vis-à-vis the competing extra-EU markets of Switzerland and the US which maintain zero VAT on imports.<sup>49</sup> The Directive did not interfere with the tax-exempt status of temporary imports to the EU, but increased the period in which they become due for re-export from six months to two years. Nor did it interfere with the arrangements for the exemption from VAT of works of art imported by museums (European Commission, 1995).<sup>50</sup>

VAT regulations are not uniform for all classes of works of art. Table A.2.1 provides an overview of the differences between value added taxation on works of art in the EU states. Regarding import VAT, the states with the lowest rates include the UK and France, which are also the two largest markets in the EU. Finland and Portugal choose not to apply the reduced rate on imports and use standard rates for intra and extra-EU sales. Also, some states do not use a reduced rate on the import of antiques, with Germany, Luxembourg, the Netherlands, and Sweden all differentiating this class of goods through applying the higher standard rate.

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<sup>48</sup> According to the Directive, sales between individuals are not subject to VAT or to any formality throughout the EU with the price paid once and for all at the place of purchase (European Commission, 1995).

<sup>49</sup> Selwood (1998) reports that after the first year of VAT being introduced even at this super-reduced rate, UK imports of works of art from key non-EU countries of the US, Switzerland and Japan fell by approximately 33% or £197 million. She argues that measures such as this increase in import VAT threaten the UK's position as one of the largest art and antiquities markets in the world and the loss of its over £2 billion annual turnover to other trading centres without such regulations.

<sup>50</sup> Museums are generally exempt from VAT for 3rd country imports; however, if they purchase goods from other Member States above a certain threshold, they must identify themselves for VAT and account for this in their annual declarations (Hayes, 1999).

Certain countries such as Austria and Germany allow professional dealers to reclaim import VAT paid against domestic VAT costs if the item is sold outside the margin scheme, so that effectively dealers are charged zero import VAT. Temporary import rules may also be used where a dealer can delay payment of import VAT for a period of two years. If the item is re-exported within this time it is exempt from any import VAT. The European Commission (1999) reports that the use of temporary import has increased by a factor of 13 between 1995 and 1998 and that almost all imported works of art sold by auction are covered by these arrangements. Around half the works of art entered into the temporary import arrangements in the UK remain within the EU, with VAT becoming due.

The VAT rates on intra-EU sales vary, with the highest rates in Denmark and Sweden. Luxembourg and Germany are the only two states applying the minimum of 15%.

Those opposing the harmonised VAT Directive, particularly the increase in the UK's import VAT, claim that VAT, along with Droit de Suite, not only makes the EU as a whole less attractive to non-European vendors and increases costs for European collectors and institutions to buy on world markets, but is largely ineffectual as a fund-raising tax (Browne, 2000). Calculations of the amount of import VAT collected in the EU are problematic as countries have different rules concerning which items are eligible for VAT and the rates paid by different agents such as a professional dealer versus a private collector.

**Table A.2.1 VAT rates due on works of art in the EU**

Member State	Import VAT on					VAT on margin for domestic sales
	Paintings %	Antiques %	Collages %	Sculpture %	Collections %	All categories <sup>g</sup> %
Austria	10 <sup>a</sup>	10 <sup>a</sup>	10 <sup>a</sup>	10 <sup>a</sup>	10 <sup>a</sup>	20
Belgium	6 <sup>b</sup>	6 <sup>b</sup>	6 <sup>b</sup>	6 <sup>b</sup>	6 <sup>b</sup>	21
Denmark	5 <sup>c</sup>	5 <sup>c</sup>	5 <sup>c</sup>	5 <sup>c</sup>	5 <sup>c</sup>	25
Finland	22 <sup>d</sup>	22 <sup>d</sup>	22 <sup>d</sup>	22 <sup>d</sup>	22 <sup>d</sup>	22
France	5.5	5.5 <sup>e</sup>	5.5	5.5	5.5 <sup>e</sup>	20.6
Germany	7	15	7	7	7	15
Greece	8	8	8	8	8	18
Ireland	12.5	12.5	12.5	12.5	12.5	21
Italy	10	10	10	10	10	19
Luxembourg	6	15	6	6	15	15
Netherlands	6	17.5	6	6	6	17.5
Portugal	17	17	17	17	17	17
Spain	7 <sup>f</sup>	7	7	7	7	16
Sweden	12	25	12	12	12	25
UK	5	5	5	5	5	17.5

Source: Christie's (1998) Hayes (1999) MTIC (2000)

MTIC (2000) carry out estimates for import VAT collected on pictures, making the assumption that all are imported by dealers. The results are given in Table A.2.2.

<sup>a</sup> Exceptions are made in some states for works sold by their creators/heirs on which the reduced rate is applied.

<sup>b</sup> 10% is the rate applied to imports from outside the margin scheme. If imported items sold within the scheme 20% applies.

<sup>c</sup> Dealers and artists heirs are charged 6% whereas 21% is the full rate of import VAT.

<sup>d</sup> The taxable value of works of art and antiques is reduced on import to 20% and then the standard rate of VAT is applied which means in practice an effective rate of 5% applies.

<sup>e</sup> Works of art exempt if owned by the artist.

<sup>f</sup> Certain items that are classified as art are charged at the full VAT rate, namely jewellery, manuscripts, and furniture less than 100-years old.

<sup>g</sup> Dealers are charged 7%, whereas the full import VAT is 16%.

**Table A.2.2 Import VAT collected on pictures in the EU in 1998**

State	Eligible imports (Euro million)	'Effective' import VAT rate	Amount raised (Euro million)
Austria	7.0	0 <sup>aa</sup>	70
Belgium	27.8	6 <sup>bb</sup>	1668
Denmark	0.9	5 <sup>cc</sup>	45
Finland	4.1	22 <sup>dd</sup>	902
France	75.5	5.5 <sup>ee</sup>	1373
Germany	220.3	0 <sup>ff</sup>	0
Greece	2.0	8	160
Ireland	1.6	12.5	200
Italy	12.5	10	1250
Netherlands	54.1	6	3246
Portugal	0.6	17	102
Spain	32.0	7 <sup>gg</sup>	2240
Sweden	3.4	12	408
UK	1226.7	2.5 <sup>hh</sup>	30668
Total	1668.5	-	42262

Source: MTIC (2000)

The estimated total import VAT collected, taking account of special rates and the ability of dealers to reclaim VAT, stands at around 42 million Euro. This is naturally likely to be a conservative estimate as some proportion of imports will be via private collectors; however, it does illustrate that amounts raised are relatively small.

The full effects of the rise to 5% of UK import VAT on the UK art trade are still to be seen, especially now with the introduction of the further constraint of Droit de Suite. However, the Commission remains hopeful that the effects will not be overly disruptive. They claim that if VAT were to have an impact on the competitiveness of the Community art market that this would have been evident in a state where import VAT was first introduced, as was the case for the UK in 1995. However the value of

<sup>aa</sup> Dealers can reclaim VAT against normal VAT returns; therefore effective rate is zero.

<sup>bb</sup> For dealers only.

<sup>cc</sup> The taxable value of works of art and antiques is reduced on import to 20% and then the standard rate of VAT is applied, which means in practice an effective rate of 5% applies.

<sup>dd</sup> Only VAT exempted if owned by artist.

<sup>ee</sup> Certain items that are classified as art, namely jewellery, manuscripts and furniture less than 100 years old, are charged at the full VAT rate.

<sup>ff</sup> Dealers can reclaim VAT against normal VAT returns therefore effective rate is zero.

<sup>gg</sup> For dealers only.

sales in the UK increased by more than 50% between 1993–4 (when imports of art works were VAT-exempt) and 1996–7 (at which time art imports were subject to 2.5% VAT) while worldwide sales increased by 36% over the same period. Imports did decline, however, by around 45% from 1994–5 to 1996–7. The sudden growth of 113% from 1997–8 could also be explained by the fact that this was the last year before import VAT was increased again, to the EU minimum of 5% (MITC, 2000). It is possible that a significant factor in this rise was a rush by dealers and collectors to bring paintings into the country before the cost of doing so doubled.

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<sup>hh</sup> Import VAT was applied at 2.5% in 1998.

## **Appendix 3 List of individuals and organisations contacted for the research**

### **A.3.1 Arts and arts-related organisations and artists**

AN Magazine

Artichoke Print Workshop

Artists' Campaign for the Resale Right

Artists' General Benevolent Institution

Association of Art Historians

Association of Illustrators

Association of Photographers

Axis

British Institute of Professional Photographers

Broadcasting Entertainment Cinematograph and Theatre Union

Cartoonists' Club of Great Britain

Brian Catling

Comic Creators' Guild of Great Britain

Design and Artists' Copyright Society Limited

Designer Bookbinders

Farrer & Co

Florence Trust

Foundation for Women's Art

Gimpel Fils Ltd

Greenwich Printmakers Association

Hales Gallery

Hertfordshire Visual Arts Forum

Institute of Medical Illustrators

Henry Lydiate

Medical Artists' Association of Great Britain

Metier

National Artists Association

Royal Academy of Arts

Royal Society of British Sculptors

Tate

### **A.3.2 Rights organisations**

Association for the Defence of Graphic and Plastic Arts, France

Authors' Licensing and Collecting Society Limited

California Arts Council, US

Copy-Dan, Denmark

Copyright Licensing Agency Ltd

Design and Artists' Copyright Society

Directors' and Producers' Rights Society

Educational Recording Agency Ltd

Equity

European Visual Artists, Belgium

International Confederation of Societies of Authors and Composers

International Federation of Reproduction Rights Organisation

KUVASTO, Finland

Mechanical-Copyright Protection Society Ltd

Musicians' Union

Performing Artists' Media Rights Association

Performing Rights Society

Phonographic Performance Limited

Public Lending Right scheme

Publishers Licensing Society Limited

SABAM, Belgium

VG Bild-Kunst, Germany

Video Performance Ltd

### **A.3.3 Other rights-related organisations**

British Copyright Council

British Music Rights

Chartered Institute of Journalists

Library Association

Music Publishers Association

National Union of Journalists

Publishers Association

Society of Authors

Writers' Guild of Great Britain

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