

# DROIT DE SUITE IN A NEW ZEALAND CONTEXT

A Discussion Paper<sup>1</sup>

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**BANKSIDE** CHAMBERS

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## 1. SUMMARY OF CONCLUSIONS

- 1.1. New Zealand should now consider adopting of Droit de Suite. It is timely having regard to our national and international circumstances.
- 1.2. Droit de Suite is well established in many countries, especially those with civil law histories. Common law countries such as ours have not been so ready to adopt the concept due to their traditions of freedom of contract and first sale exhaustion. That said the incentive for creative endeavour provided by continued economic interest in the exploitation of a work is the foundation of copyright in civil and common law countries from earliest times.
- 1.3. With adoption by the United Kingdom and consideration by Australia and the United States of America it appears these and probably other common law countries are increasingly likely to adopt Droit de Suite.
- 1.4. Art engages a lot of New Zealanders and their visitors. It employs a growing number of our working population. Consequently it is economically valuable as a result. The incentive of copyright payment is accepted as increasing artistic and creative endeavours. If that is correct then the direct benefits of greater rewards to visual artists would multiply the returns and justify a greater cost of collection.
- 1.5. At present the below average incomes of artists and primary income earners practicing as artists suggests a disparity in economic recognition. Droit de Suite may well adjust that without requiring state welfare. The right rewards the successful whilst providing an incentive for the developing artist.
- 1.6. Droit de Suite is conventionally held by the artist for their life then for 50 years by their heirs. That duration may increase in line with other copyright.
- 1.7. It seems, by virtue of our involvement in the Berne Convention, TRIPS, the World Trade Organisation and the Australia New Zealand Closer Economic Relations Trade Agreement, at least arguable that our Treaty obligations are to adopt the right. If Australia's deliberations lead to adoption, then Closer Economic Relations make adoption here more likely, and to achieve reciprocity, prudent.

- 1.8. Droit de Suite is best collected by an independent collection society responsive to the interests of its stakeholders and of sufficient size to offer economies of scale. That society must have a right to compel provision of sales information to have a prospect of being effective. Competition law issues arise.
- 1.9. Droit de Suite royalties should be within international norms of 3% - 5%. To be readily collected it should be imposed as a percentage of the sale price rather than the theoretically attractive percentage of profit. Those countries which have sought to apply royalties on profits have failed.
- 1.10. Commercial reality makes a minimum transaction value unnecessary. The maximum payable should reflect the level of a realistic and readily reviewed cost of transferring the transaction to a jurisdiction free of the right.
- 1.11. In New Zealand, where there are only two significant auction houses, consideration should be given to collecting royalties based on sales by all dealers, including auction houses, similar to the United Kingdom and German models.
- 1.12. The economic benefit that might flow to artists from Droit de Suite is debatable and made uncertain by a lack of economic data. History suggests the market will absorb Droit de Suite as they have absorbed increases in commissions at auction. This could be the subject of an analysis period by a suitable independent and confidential entity.
- 1.13. The right should be reciprocal to those who offer New Zealand artists reciprocity.
- 1.14. A statutory provision voiding any contractual dealings with the royalty entitlement should be implemented. Exceptions could be considered for approved charities. Transfers to a trust and transfers inter vivos or by will require consideration. Testamentary dispositions require consideration. Testamentary disposition to other than a natural person also requires some consideration.
- 1.15. An inquiry including a period of consultation and information gathering should precede any attempted law change.

## 2. INTRODUCTION

- 2.1. Droit de Suite in the context of visual arts is the phrase used for the right of the artist to further participate in sales of works after having sold the work. Droit de Suite translates to 'Right to follow up' or 'Right of following on'.
- 2.2. As a legal phrase it originated in French Real Property Law where in some circumstances the original owner has the right to follow the property even into the hands of a bona fide purchaser for value.
- 2.3. The purpose of this paper is to facilitate consideration of whether or not New Zealand visual artists should participate financially in the second or subsequent sales of their works. This could be by receiving a percentage of the profit or the sale price possibly with refinements such as minimums and caps.
- 2.4. There are issues which require other inputs and further investigation before any logical decision could be made. The politics, while interesting, are beyond the scope of this paper.
- 2.5. Rights of this kind are usually an incident of intellectual property rights. Intellectual property is a broad term the boundaries of which continue to evolve. Those boundaries include creative ideas. Protectable intellectual property is usually the manifestation of those ideas.
- 2.6. Protection is achieved by a combination of legal and commercial techniques. The public legal techniques are in the form of governments making statutory provisions. The other legal techniques are private and usually contractual.
- 2.7. The diversity of these techniques is primarily a result of differences between common law countries compared to civil law countries; which favour the commercial and the creative interest respectively. The net exporters of intellectual property and the net importers favour strong and enduring rights or compressed and readily exhausted rights respectively.
- 2.8. The refinements within a given country tend to reflect the latter of these two broad influences subject to the relevant negotiations at times of statutory review.

- 2.9. Increasingly the considerations are interactive. For example, less developed countries are invariably net importers of intellectual property and require access to sell their primary produce to more developed countries or require aid from those countries. Those more developed countries, in turn, require stringent intellectual property protection for their creative and economic rights exporters as a pre requisite for such access or aid.
- 2.10. Many intellectual property rights relate to creations that are infinitely reproducible where it is really of no consequence if one holds the original or the millionth version.
- 2.11. Other creations or "works" as they are usually known in this context have most value in the original and only rarely some value as a copy. These items tend to be fine art such as sculpture and paintings. A useful term for such items is 'visual art'.
- 2.12. Visual art is invariably legally protected from reproduction or adaptation of the original. Questions arise where the original is traded. Should the creator or "author" of such works participate financially in that sale? If an author should participate, why, on what basis and for which visual arts?
- 2.13. Many of these questions have been answered in broadly similar ways by most countries in the European Community, some South American Countries and some states including California in the United States of America. They continue to be discussed in many other countries.
- 2.14. The opportunity of a Visiting Fellowship at Wolfson College and at the Faculty of Law, Cambridge University, England has allowed the time and distance to consider the issue and write this paper. I thank both the College and the faculty. Many have helped, especially Carole, my wife. I thank them. The mistakes are my own; especially where I have strayed from my core discipline of the law.

### 3. HISTORY OF DROIT DE SUITE OVERSEAS

- 3.1. In the United States of America the term used is 'artists proceeds rights', in Germany it is 'Folgerecht' and 'Diretto de Sequencia' in Italy.

#### France

- 3.2. Authors attribute the introduction of the concept to Albert Vanois in an article 'Chronique de Paris' in 1893. In 1903 'La Societe des Amis du Luxemburg' was formed to lobby for the right.<sup>2</sup> This campaign coincides with a period 1850 to 1930 when the value of paintings increased quite dramatically upon the death of the creator.<sup>3</sup> Subsequently the campaign led to legal recognition of Droit de Suite in France in 1920.<sup>4</sup>
- 3.3. This law allowed artists to claim a percentage of the gross sale price of each public sale of the original works. 'Original' was used to distinguish reproductions from items such as lithographs, engravings and similar works where the original plate or engraving is rarely sold.
- 3.4. There was no reason in principle to exclude manuscripts of literary or dramatic works or musical compositions.
- 3.5. Whether it was part of copyright or a new right would become an important aspect of the discussion. Apart from manifesting a continuing interest in the work the right is conceptually different from copyright and concessions to the contrary seem to have been negotiated rather than principled.
- 3.6. Multiple editions are included in French Droit de Suite for example 8 sculptures<sup>5</sup>, 100 signed engravings and 6 signed and numbered tapestries.
- 3.7. The French right is transmittable to heirs by blood and their heirs by blood. The families of Monet,<sup>6</sup> Utrillo and Braque have been involved in litigation on this aspect.

<sup>2</sup> Filer R. A Theoretical Analysis of the Economic Impact of Artist Resale Royalties Journal of Cultural Economics, V.8 No 1.1984

<sup>3</sup> Morrison W.G. Artists and Automata; Two Essays Concerning The Evolution and Distributing of Property Rights Doctoral Thesis Simon Fraser University June 1993,pp19-21.

<sup>4</sup> Law of May 1920. JL Duchemin Le Droit de Suite des Artistes (1948) Rita. E Hauser, 'French droit de suite: the problem of protection for the underprivileged artist under the copyright law (1959) 6 Bull Cop Soc USA 94.

<sup>5</sup> *Rodin* Case judgment of 18 March 1986 Cour'de Cassation, 1<sup>st</sup> Civ.129 Revue Internationale du Droit d'Auteur 138 (July 1986)

- 3.8. The French collection society AGAP income was 70% Droit de Suite, 30% account representation and reproduction rights. The flat rate of 3% on sales over FF100 yielded US \$ 9.4m in 1990.

### **Germany**

- 3.9. Germany introduced Folgerecht in 1965 having studied the topic for more than 50 years. Famous artists such as Paul Klee, Emil Nolde, Ernst-Ludwig Kirchner signed a petition opposing it.<sup>7</sup>
- 3.10. The rationales of relative disadvantage compared to literary authors and composers, the Berne Convention and the moral issue seen to arise as works increased in value proportional to their age were adopted in the debate.<sup>8</sup>
- 3.11. Simplicity and privacy considerations lead Germany to apply the right to sale price rather than profit. The rate started at 1% increasing later to 5% on all sales over 100 German Marks<sup>9</sup>
- 3.12. German artists enjoy the right for their lives plus 50 years the same as copyright. Claims must be made within 10 years which is the period Germans are obliged to retain accounting records.
- 3.13. Folgerecht applies to dealers when involved in any capacity and auctions. It was inalienable. The provision in relation to dealers proved unenforceable in the absence of a right to information which was not introduced until 1973. Even then dealers refused to pay and threatened to boycott artists who joined the collection agency Bild Kunst.
- 3.14. Eventually payments flowed due to agreements made in 1980 between the relevant associations and Bild Kunst. This provided for flat rate percentages of 1% on all contemporary art sales. The proceeds are applied half to royalties and half to the German Social Security Artists Social Security Fund. This annual payment has largely replaced the 5% droit de suite legislated for.

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<sup>6</sup> Pierredon – Fawcett, The Droit de Suite in Literary and Artistic Property 11 – 12 (1941)

<sup>7</sup> Max-Planck-Institute für ausländisches und internationales Patent, Urheber- und Wettbewerksrecht, The droit de suite in German law in Legal protection for Artists, VI, VI-35 (M.Mimmer ed 1971) (“Max Planck Study”) at VI-18 and 19

<sup>8</sup> Max Planck Study VI-26

<sup>9</sup> German Copyright Act s26

- 3.15. Bild Kunst's then Managing Director Gerhard Pfenning advised the US copyright Office inquiry that the 1% was used as follows: 10% to pay its costs, 10% for young artists and 10% to a social fund and 70% distributed as Droit de Suite. 66% goes to German artists with the balance distributed significantly to French artists.

### **Other Countries**

- 3.16. Belgium, Czechoslovakia, Poland, Uruguay and Italy soon followed France. There are more than 30 countries with Droit de Suite most of which belong to the Berne Union.<sup>10</sup>
- 3.17. By 1 January 2006 all members of the European Union were to have adopted the right. It is significant that included the United Kingdom as well as those other members of the European Union that have not yet adopted Droit de Suite despite them nearly all being Members of the Berne Union.
- 3.18. The adoption by other common law countries such as the United Kingdom, Australia and the United States is relevant as to the effect of reciprocity of Droit de Suite in relation to New Zealand artists.

### **United Kingdom**

- 3.19. The United Kingdom fought a lengthy rearguard action to minimise the extent to which it adopted Droit de Suite and postpone its adoption. On 13 February 2006 The Artist's Resale Right Regulations 2006 (2006 No 346) became law. The next day a photograph 'The Pond-Moonlight' by Edward Steichen sold in the United States for a new world record price of £1.6 million. Had it sold in England Steichen's estate would have been entitled to £9,000.<sup>11</sup>
- 3.20. The United Kingdom Regulations seem to be a contemporary starting point for detailed consideration of legislation to introduce Droit de Suite in New Zealand.

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<sup>10</sup> The Berne Convention and Beyond: International Copyright and Neighbouring Rights Agreements from 1886 to the present, Professors Sam Ricketson and Jane Ginsberg, Oxford University Press, February 2006. [fn. Algeria(1973), Belgium(1921), Brazil(1973),Burkina Faso, Cameroon, Chile(1970), Congo(1982), Costa Rica(1981), Czechoslovakia (1926). Ecuador, France(1920), Germany(1965), Guinea(1980), Holy See, Hungary(1978), Italy(1941), Ivory Coast(1978). Luxembourg (1972), Madagascar, Mali (1977), Morocco (1970), Peru, Philippines (1973), Portugal (1966-1985), Rwanda(1983) Senegal(1973), Spain, Tunisia (1966), Turkey (1951), Uruguay (1937), and Yugoslavia (1978). See de Pierredon-Fawcett.

<sup>11</sup> Michael Simkins Early Warning 24/2/2006.

- 3.21. Those regulations provide for a sliding scale with no minimum transaction but capped at a maximum royalty of € 12,500. All professional second sales are caught. Collection must be by a collection society which has a right to information.
- 3.22. Work is defined as "graphic or plastic art such as a picture, a collage, a painting, a drawing, an engraving, a print, a lithograph, a sculpture, a tapestry, a ceramic, an item of glassware or a photograph." Copies are only included if a limited number have been made by the author or under the control of the author. Buildings, stained glass windows and manuscripts are not included.
- 3.23. The right is not assignable or chargeable, waived or shared but may be transferred to a charity or a trust. It passes by will or intestacy to a natural person or a charity.
- 3.24. The right is reciprocal with 22 nations.

### **United States of America**

- 3.25. In the United States of America, pleas for Droit de Suite began in the late 1930s and early 1940s.<sup>12</sup> Grant Woods painter of 'Daughters of the Revolution' is acknowledged as the first major American artist advocate of the right in 1940.<sup>13</sup>
- 3.26. The issue came to a public head again in 1973 when Robert Rauschenburg publicly objected to the sale of his painting 'Thaw' by collector Robert Scull for a 9,333% profit. He was quoted as saying to Scull "I've been working my ass off just for you to make that profit!"<sup>14</sup> Commentators respond that the return was no more than for IBM shares over the same period.<sup>15</sup>
- 3.27. California hotly debated then enacted the first state law in the United States of America in September 1976 with effect from 1 January 1977. It entitled the artist to a 5% share of the sale price, payable by the seller if the seller resides in California or the sale occurs in California.<sup>16</sup> The Californian definition did not include fine print, tapestries or books. Claims had to be made within 3 years of

<sup>12</sup> Baldwin 'Art and Money: the Artist's Royalty Problem, Art in America' 20, 21 (March-April 1974).

<sup>13</sup> US Copyright Office, A droit de Suite: The Artists Resale Royalty: a report of the Register of Copyrights of the Library of Congress Compiled by the General Counsel's staff of the Copyright Office ("US Copyright Office Report") (1992).

<sup>14</sup> Roger Ricklefs, Artists Decide They Should Share Profits on Resale of Paintings, Wall St. J. 11Feb74, at 1

<sup>15</sup> Bolch, B.W., Damon, W.W. and Hinshaw, C.E., Visual Artists Rights Act of 1987: A Case of Misguided Legislation, The Cato Journal, 8, 1988, pp71-78

<sup>16</sup> California Civil Code 986 operative 1 January 1997.

the artist discovering the sale. There is an exception from the royalty for stained glass windows installed in a building.

- 3.28. There is an unresolved question as to whether the 1976 amendment to the Federal Copyright Act, in particular s 301 of that Act which reserves copyright for legislative purposes to Congress, has the effect of pre-empting the California Act. *Morseburg v Balyon*<sup>17</sup> was a case that ran for some 3 years, including appeals, in which Howard Morseburg an art dealer sold two paintings and was required to pay royalties. This case serves to remind us that copyright used to be ineffective unless registered in the United States of America. Advantages still accrue from registration. The issue of pre-emption by the Federal Law was discussed in the decisions but only with reference to the 1909 Copyright Act.
- 3.29. Academic commentary suggests this remains a live issue with the new Copyright Act.
- 3.30. In 1976 Georgia enacted a limited resale royalty provision whereby the State agreed to pay a royalty from resale of any art purchased with public funds other than as part of a sale of a building.<sup>18</sup> Other states have their own versions of such law.<sup>19</sup> In 1988 Puerto Rico passed a comprehensive moral rights law allowing 5% resale royalty.<sup>20</sup>
- 3.31. In New York the State Assembly has had resale royalty legislation under consideration at least since 1993.<sup>21</sup> This Bill has been referred to the New York State Assembly Committee on Tourism, Arts and Sports Development which appears to be doing nothing with it. Attempts to secure comment from Assemblyman Brodsky, the Chair of that committee were not responded to.
- 3.32. In 1977 Representative Waxman introduced to the House of Representatives the draft Visual Artists Residual Rights Act on 8 March 1978. It proposed a 5% royalty on all but limited excepted sales of visual art. It was revised and died in committee.

<sup>17</sup> 621F, 2d 972 (9<sup>th</sup> CIR. 1980).

<sup>18</sup> GA. Code Ann. s 91-507(c)(Michie 1991).

<sup>19</sup> US Copyright Office, *A Droit de Suite: The Artists Resale Royalty: a report of the Register of Copyrights of the Library of Congress Compiled by the General Counsel's staff of the Copyright Office ("US Copyright Office Report")* (1992).

<sup>20</sup> 31 Puerto Rico Civ. Code s 1401(h) (1991).

<sup>21</sup> 1641 of (1993–1994), A. 282 (1995–1996), A. 132 (1997-1998), A. 307 (1999-2000), A. 1318 (2001-02), A. 1115 (2003-2004), A. 03513 and s 5571.

- 3.33. In 1987 the Federal Visual Artists Rights Act was introduced by Senator Edward Kennedy and Representative Robert Markey in the 100<sup>th</sup> Congress. The Bill would have amended the Copyright Act to provide rights modelled after both *droit morale* and *droit de suite*. This provided for a 7% royalty on the profit element. It was to be inalienable. This bill was not passed in that form.
- 3.34. On 31 October 1988, President Regan signed the Berne Convention Implementation Act ("BCIA") which required adherence to its provisions by the United States after 1 March 1989. It was however characterised as an executory treaty requiring implementation legislation before it took effect. Although Congress in the passing of the BCIA said there was no need to legislate additional moral rights protections, they ultimately enacted Visual Artists Rights Act<sup>22</sup> 2 years later.

### **The Resale Royalty Draft in the United States**

- 3.35. The Visual Artists Rights Act of 1990<sup>23</sup> protected moral rights of fine artists and required the Register of Copyrights to report on *Droit de Suite*.<sup>24</sup> That report was issued in due course.<sup>25</sup> It comprised four hundred pages in two volumes divided into five parts with an Appendix volume and an executive summary. Part I discusses the rights in countries such as France, Belgium, Germany, Uruguay and Czechoslovakia, as well as efforts to enact *Droit de Suite* internationally. Part II deals with the American experiences including California and Federal. Part III analyses the oral and written testimony given in San Francisco and New York. Part IV analyses the arguments. Part V summarises conclusions and recommendations. The Appendix contains the evidence. This report recommended that more evidence regarding the possible effects of a resale royalty on artists in the art market be gathered and it ultimately recommended against the adoption of the *droit de suite*. It advised the United States to wait and see whether European harmonisation of intellectual property laws included the right. The Register's report provided a model resale royalty system if it were later decided to adopt it.

<sup>22</sup> S.1198, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess., 135 CONG.REC.S6811 (1989); H.R.2690, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess., 135 CONG.REC. E2199 (1989). H.R.2690 passed the House on 5 June 1990. S1198 was approved by the Senate Subcommittee on Patents, copyrights and trademarks on 28 June 1990.

<sup>23</sup> Pub. L. No. 101-650, TIT. VI, 104 Stat. 5128 (codified as amended in scattered sections of 17U.S.C.)

<sup>24</sup> Ibid at s 608(b) (codified at 17U.S.C. s 106A) 1976 & Supp. 1972).

<sup>25</sup> US Copyright Office, *A droit de Suite: The Artists Resale Royalty: a report of the Register of Copyrights of the Library of Congress Compiled by the General Counsel's staff of the Copyright Office ("US Copyright Office Report")* (1992).

- 3.36. Commentators and academics have attacked the Register's report as biased in favour of those against the right.<sup>26</sup> Time has now passed and European harmonization is virtually complete.

### **Conclusion as to the United States of America's Position on Adopting Droit de Suite**

- 3.37. As the United States is a signatory to the Berne Convention,<sup>27</sup> it will be confronted with dealing with the historic trend of the Convention towards increased protection for authors including moral rights.
- 3.38. The US Constitution<sup>28</sup> declares that "all.....treaties ... shall be the supreme law of the Land ...".
- 3.39. It would appear that the adoption of Article 14ter of the Berne Convention and moral rights may become increasingly difficult for the United States to defer. As a leader in the WTO and as a country seeking to engage others in bilateral arrangements going further than TRIPS ("TRIPS plus"), these issues are now being brought to the negotiating table.
- 3.40. The Australian climate for Droit de Suite is favorable following the Meyer Report which is discussed in more detail later in this paper.
- 3.41. The favourable view of the Myer Report may well have lead to the acceptance of Chapter 17.4.6 of the 2004 Australia United States of America Free trade Agreement. This protects the transferability of copyright subject to changes incidental to the adoption of the Droit de Suite obligations of Art 14ter of Berne. The Treaty also affirms Berne and TRIPS as well as contemplating the extension of the duration of copyright to life of the Author plus 70 years.
- 3.42. This in turn increases the chances of Closer Economic Relations with Australia being a factor in New Zealand's position on Droit de Suite.

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<sup>26</sup> The droit de suite: why American fine artists should have the right to resale royalty. MB Reddy:1995 15 Loy.L.A. Ent L.J. 509, 1995 WL 424102 (ILP), Copyright: droit de suite: an artists is entitled to royalties even after he's sold his soul to the devil. J.B.Johnson, 1992, 45 Okla. L.Rev.493, 1992 WL 501928(ILP), Shira Perlmutter, Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report, 40 J. Copyright Soc'y 284 (1993); Carol Sky, Report of the Register of Copyrights Concerning Droit de Suite, The Artist's Resale Royalty: A Response, 40 J. Copyright Soc'y 315 (1993).

<sup>27</sup> 1 March 1989 (Paris Act).

<sup>28</sup> US Const. Art. VI, CL. 2.

**Lessons from other countries**

- 3.43. There are no effective Droit de Suite regimes that collect a percentage of the profit. The profit based approach appeals in fairness and logic by capturing only profits and excusing works that depreciate or remain static. As most works do not resell for more than the price at first sale it would mean many sales would not be liable.
- 3.44. The reason profit focused systems fail seems to be the pragmatic difficulty of monitoring transactions so as to be effective in enforcement. It also means issues such as holding costs including insurance, conservation, financing and costs of sale are relevant. Where those issues are brought to the debate the systems seem to have succumbed to their own weight.
- 3.45. Only Germany has effectively collected from galleries, initially voluntarily and only for the artists welfare fund. This was a collateral benefit of a fixed rate of 1% based on turnover of all sales of contemporary art derived from tax accounts. While France had a law providing a basis for such collection dating from 1957 it has not implemented any mechanism for collecting from galleries. Perhaps this is because galleries pay artists social security subscription by a voluntarily treating them as employees and paying a percentage of their turnover.
- 3.46. The multi-tiered systems of calculating payment on sale price have, in practice, been substituted for by a fixed rate based on turnover. This enables annual accounting saving costs and formalities.
- 3.47. Only countries with one or more collective collection society have effectively benefited artists with their system. Such societies must be able to compel disclosure of information from sellers or their agents. Competition issues with collection societies must be addressed but balanced with cost savings from scale.
- 3.48. Most countries have a rate between 3% and 5%. Many have minimums that are directed to avoiding costs in small transactions. In countries where collection is only from auction sales or dealers it seems likely that only commercially realistic transactions would occur.

- 3.49. The arguments for and against Droite de Suite are consistent and often fail to attract conclusive answers due to lack of financial and other data.
- 3.50. Most countries make the right inalienable except for the purposes of assignment to collection societies. The carve out from free transfer of such rights in the Australia USA FTA is a sign of their views on the matter. Complexities such as assignment by way of charge, disposition to ones bankrupt estate, corporate copyright owners and testamentary dispositions of the right require consideration. Generally they may not be shared, waived or transferred during the life of the Author, then disposed of by will. Sometimes assignment to a charity and/or collection society is permitted.
- 3.51. The duration of copyright is usually adopted as the duration for Droit de Suite.
- 3.52. The subject matter of the right is usually derived from some other piece of legislation. Whether buildings are included is a difficult question in principle. All buildings have a creative input but are frequently divorced from the architect in creation. With buildings, the scale of payments and the personal sales compared to business sales would be an issue. Transfer prices for buildings are no longer part of the Land Transfer Registry record. Literary manuscripts, musical manuscripts, furniture and design works are variously treated.
- 3.53. Limited multiple editions closely connected to the artist are often allowed and are consistent with artists practise.
- 3.54. International implementation is seen as likely to reduce trade distortions particularly the perceived competitive disadvantage of countries with Droit de Suite as an art market.

#### 4. THE RELEVANT INTELLECTUAL PROPERTY LAW OF NEW ZEALAND AT PRESENT

4.1. To consider the place of Droit de Suite it may be useful to have regard to the other law more particularly relevant to artists. New Zealand has a conventional common law intellectual property regime broadly similar to other common law countries. The principal legislative instruments are:-

- Copyright Act 1994;
- Patents Act 1953;
- Designs Act 1953;
- Trademarks Act 2002;
- Fair Trading Act 1986.

4.2. For present purposes, the Copyright Act and to a minor extent the Fair Trading Act are relevant.

4.3. In New Zealand parties are entitled to sell or otherwise alienate rights created for their benefit unless statutorily prohibited as in consumer protection legislation or legislation protecting parties suffering from a disability. In some instances the Courts will decline to uphold or enforce such alienation if there are current public policy grounds for doing so. Such occasions are rare and not fixed.

4.4. The law of defamation is also relevant. One's right to one's reputation ceases on death.

##### **Copyright Act 1994**

4.5. This Act gives the owner of copyright a statutory monopoly to specified acts in relation to the work. The economic interest thus created endures after sale of the actual work unless specifically contracted for. In this sense we echo the civil law of European origins.

- (1) The owner of the copyright in a work has the exclusive right to do, in accordance with sections 30 to 34 of this Act, the following acts in New Zealand:
- (a) To copy the work:
  - (b) To issue copies of the work to the public, whether by sale or otherwise:
  - (c) To perform the work in public:
  - (d) To play the work in public:
  - (e) To show the work in public:
  - (f) To broadcast the work or include the work in a cable programme service:
  - (g) To make an adaptation of the work:
  - (h) To do any of the acts referred to in any of paragraphs (a) to (f) of this subsection in relation to an adaptation of the work:
  - (i) To authorise another person to do any of the acts referred to in any of paragraphs (a) to (h) of this subsection. “

4.6. Section 16(1)(c),(d),(e) and (f) are not relevant to visual arts. The present discussion will touch on the argument that visual artists are disadvantaged compared to other creators such as musicians whose work does not depend on possession of an original to have full value.

4.7. Copyright is recognised in original artistic works<sup>29</sup> which are broadly defined in s 2.

"artistic work—

(a) Means—

- (i) A graphic work, photograph, sculpture, collage, or model, irrespective of artistic quality; or
- (ii) A work of architecture, being a building or a model for a building; or
- (iii) A work of artistic craftsmanship, not falling within subparagraph (i) or subparagraph (ii) of this definition; but

(b) Does not include a layout design or an integrated circuit within the meaning of section 2 of the Layout Designs Act 1994:

graphic work includes—

- (a) any painting, drawing, diagram, map, chart, or plan; and
- (b) any engraving, etching, lithograph, woodcut, print, or similar work:

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<sup>29</sup>

s 14(1)(a).

sculpture includes a cast or model made for purposes of sculpture:

### **The Owner of Copyright?**

- 4.8. The first owner of the copyright in the artistic work is the Author unless the work is that of an employee in the course of employment or it is commissioned by another.
- 4.9. Often the owner of copyright is not the creative force behind the work. This separation occurs because the Author has employee status; the work was commissioned; or there was a sale or other dealing with the copyright. Treatment of ownership of copyright in commissioned works varies nationally. In New Zealand ownership of copyright in visual arts moves from the author to the commissioner automatically while in the United Kingdom, Ireland and Canada it does not. In Australia the Commissioner gets ownership but is constrained to foreseen uses. New Zealand treatment of ownership of commissioned works is the subject of a discussion paper.<sup>30</sup>
- 4.10. The term "Author" is itself defined to encompass those who make the arrangements to make an artistic work that is a computer generated work as for example, a film.<sup>31</sup>
- 4.11. Otherwise the definition is somewhat elliptical as being the person who creates the work.
- 4.12. 'Work' itself is not defined.
- 4.13. The Act recognises joint authorship<sup>32</sup> as being a collaboration of two or more where the independent contribution is not distinct. Confusingly, it is said to only occur where the respective contributions are substantial enough to potentially comprise a work in itself. Similar considerations would arise with Droit de Suite.

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<sup>30</sup> "The Commissioning Rule, Contracts and The Copyright Act 1994" Regulatory and Policy Branch, Ministry of Economic Development, March 2006

<sup>31</sup> s 5(a), (b).

<sup>32</sup> s 6.

- 4.14. Copyright is enforceable by the copyright owner and the exclusive licensee.<sup>33</sup> It is able to be assigned or transmitted by document signed by the copyright owner or by will or by operation of law.

#### **Duration of Copyright**

- 4.15. It expires 50 years after the death of the author. During those 50 years the artist's executor has a right for the credit of the artist's beneficiaries. Those beneficiaries will often be family but need not be to the extent there is family and testamentary freedom. In the event the author is unknown, the duration is 50 years from the date the work is first exhibited in public. The trend overseas is towards extending this term by an additional 20 years.

#### **Moral Right and Right to Attribution**

- 4.16. The Author has a right to object to any addition to, deletion from, alteration to or adaptation of the work that is derogatory.
- 4.17. Derogatory is not defined but must be more than a private mutilation. There is little decided law to assist in interpreting this right. The worldwide lack of litigation on this subject may be significant, but ambiguous, variously evidencing the lack of an artist's enforcement power or the insignificance of the right.
- 4.18. Provided an author appropriately asserts a desire<sup>34</sup> to be identified as the author of that work, this extends to reasonably prominent and clear identification whenever:
- (a) The work is exhibited publicly;
  - (b) A visual image is broadcasted including cable;
  - (c) A film including the images showing publicly;
  - (d) Copies of the film are issued to the public;

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<sup>33</sup> ss 120,123.  
<sup>34</sup> s 96.

- (e) Copies of a graphic work representing a photo of the work issued to the public.
- 4.19. There are some logical exceptions such as incidental appearances of the work.<sup>35</sup>
- 4.20. Persons are also entitled not to have works falsely attributed to them.<sup>36</sup> Those rights last as long as other copyrights except the false attribution provisions which last 20 years after the death of the author.
- 4.21. The Fair Trading Act prohibits false or misleading statements of origin<sup>37</sup> although only if the transaction is in trade as defined which would involve an art professional but not a private sale without the involvement of such a person.
- 4.22. The rights of attribution and identification are relevant to the identification of entitled parties if resale royalties are adopted.
- 4.23. Moral rights, the right to attribution and not to be the subject of false attribution may be waived in writing prospectively or retrospectively, particularly or by general description. They are not assignable but may be left by will.<sup>38</sup> They are particular to each author and where artistic works are jointly authored, must be waived by each author. Moral rights co-exist with a body of law that tends to allow the artist a right to decide when a work is complete for contractual delivery with only damages available for non-delivery.
- 4.24. The issue of waiver of moral rights will be discussed further in the context of waiver of droit de suite.

### **Summary of the Current Copyright Position in New Zealand for Visual Arts**

- 4.25. A self-employed artist who funds the creation of that artist's own work retains copyright after selling the object such as the painting or sculpture. The work could be sold to an individual or a corporate purchaser. The Author does not retain any other property interest in the work as freedom of contract allows for complete alienation of property rights on sale. No continuing interest in that object is retained except for it be identified as their work and for it not to be

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<sup>35</sup> s 97(3) and s 41.

<sup>36</sup> s 102 and 104.

<sup>37</sup> s9 and 14.

<sup>38</sup> Copyright Act ss118, 119.

subject to derogatory treatment. The Author therefore has no legal interest in the proceeds of sale after the first sale. The Author does retain the continued exclusive right to reproduce, etc. The owner of the object has no obligation to account in any way to the author from a resale unless some interest has been retained contractually.

- 4.26. That same Author does not lose the right to control and possibly be paid for reproduction or adaptation of the works. These acts do not require a sale of the original. These rights continue, unless assigned by the owner, for the life of the artist and for the benefit of the artist's estate for 50 years thereafter. They may be charged and taken by creditors. They also are devolved on the death of the owner to heirs by will or the rules of intestacy.
- 4.27. There is no right to participate in revenues generated by the public showing of the work.<sup>39</sup> There is little prospect of being rewarded for the educational use of the work provided the use falls within the confines of the Act.
- 4.28. These arrangements mean that the artist who creates a work that might change in value, be transferred several times, exhibited to gallery visitors does not share in those uses or benefits. Only if the work is copied, adapted or reproduced is there any practical chance of subsequent economic benefits after the first sale.

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## 5. NEW ZEALAND'S INTELLECTUAL PROPERTY TREATY OBLIGATIONS

- 5.1. International interactivity of rights has already been the subject of comment in this paper.
- 5.2. Rights affect other rights; rights in one country affect those in others (reciprocity), obligations or needs affect political will or countries' obligations; trade needs, treaties or obligations.
- 5.3. Communications and travel create a global community and market for the visual arts as they do for most creative endeavours.
- 5.4. While the internet has not yet substituted for exhibition and personal examination of a work, it has changed the way ideas and goods are exchanged. It has enabled communication and marketing of a scale previously only within reach of the wealthiest. ArtPrice.com claims to have created the largest art market in the world; a virtual fine art shopping centre.
- 5.5. Protagonists in intellectual property debates sometimes refer to New Zealand's treaty obligations. Caution is required in understanding this difficult area of law.
- 5.6. Those treaty obligations and indeed our treaty participation need cautious consideration in a country where international treaties are not an everyday concern of a practising lawyer. It may also be that such arrangements are not subject to the same consultation process with the New Zealand Law Society and similar bodies, as national law is.
- 5.7. There were two sources of information that were particularly helpful as to these issues. The World Intellectual Property Organisation website<sup>40</sup>, the World Trade Organisation website<sup>41</sup>, and the United Nations website.<sup>42</sup>

### **Berne Convention for Protection of Literary and Artistic Works**

- 5.8. Originating on 9 September 1866, the Berne Convention subsequently evolved. In Rome in 1928 there was a second conference to revise the Berne Convention.

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<sup>40</sup> <http://www.wipo.int/portal/index.html.en>.

<sup>41</sup> <http://www.wto.org/>.

<sup>42</sup> <http://www.un.org/Depts/dhl/resguide/>.

- 5.9. A resolution proposing droit de suite, subject to reciprocity, was advocated. Differences as to whether Droit de Suite was a copyright or a moral right led to a modified text being adopted. This was passed due to significant abstentions.<sup>43</sup>
- 5.10. "The conference expresses the desire that those countries of the Union which have not yet adopted legislative provisions guaranteeing to the benefit of artists an unalienable right to a share of the proceeds of successive public sales of their original works should take into account the possibility of considering such provisions."<sup>44</sup>
- 5.11. The next scheduled revision of the Berne Convention was to be in Brussels in 1936 but was eventually postponed until 1948. Work on Droit de Suite continued and the debate as to the correct characterising of Droit de Suite also continued. Was it a moral right or a copyright?
- 5.12. A compromise at Brussels led to inclusion of a paragraph requiring two preconditions of claim; first, that it was part of the national law of the claimant author and secondly, that it was allowed as a reciprocal right by that author's nation.<sup>45</sup> The Berne Convention was later revised by the Stockholm (1967) Act and the Paris (1971) Act. The relevant provision, 14bis, was unchanged except for: being renumbered as 14ter, "transfer" was substituted for "disposable" in para (1) and "extent" for "degree" in para (2).<sup>46</sup>
- 5.13. The Berne Convention is said by WIPO to be the oldest international treaty in the field of copyright. It is open to all states. Instruments of accession or ratification are deposited with the Director General of WIPO.<sup>47</sup> All countries to which the Convention applies are members of the Berne Union with full voting rights.<sup>48</sup> New Zealand acceded to the Rome Act (1928) on 4 December 1947. That version, the Rome Act, of the Convention is not subject to a precondition of reciprocity and in isolation created interesting possibilities.

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<sup>43</sup> e.g. UK, Hungary, The Netherlands, Norway and Switzerland).

<sup>44</sup> Duchemin at 252ff.

<sup>45</sup> Documents 1948, 363.

<sup>46</sup> **[to come]**.

<sup>47</sup> Art 29(1).

<sup>48</sup> Art 29(1).

## WTO, GATT and TRIPS

- 5.14. However those interesting possibilities overlook that New Zealand has been a participant in the General Agreement on Tariffs and Trade ("GATT") since 30 January 1948.
- 5.15. When New Zealand signed the World Trade Organisation ("WTO") Agreements those arrangements extended GATT. Following the Uruguay Round of negotiations<sup>49</sup> New Zealand became one of the 148 members of the WTO on 1 January 1995 together with its key trading partners such as Australia.<sup>50</sup> There are reportedly 25 Countries in negotiation to join the World Trade Organisation to take advantage of its multilateral trade arrangements. Of the member countries and political organisations the 25 member European Union negotiates as a block pursuant to the European Community Treaty.<sup>51</sup> The Union acts through a Committee which meets in Brussels weekly.<sup>52</sup> It accordingly was and is influential. Attached to the Agreement Establishing the WTO is an Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS").<sup>53</sup>
- 5.16. This recognises intellectual property rights as private rights and the "underlying public policy objectives of national systems for the protection of intellectual property". It does not elucidate on what these might be.
- 5.17. Giving effect to TRIPS is mandatory with discretion reserved as to its method of implementation.<sup>54</sup> This includes copyright. It is national in the same way as the Berne Convention (1971) and cumulative with it.<sup>55</sup> Members are obliged to comply with Articles 1 to 21 of the Berne Convention Paris Act (1971) and the Appendix except Art 6 bis which is moral rights. It shall only extend to the expression not the idea.
- 5.18. The protection minimum, if not indexed to the life of a person, is not less than 50 years from the publication or if not published the making of the work.

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<sup>49</sup> 1986 to 1994.

<sup>50</sup> [www.wto.org](http://www.wto.org) → Members and Observers.

<sup>51</sup> Article 133.

<sup>52</sup> [http://europa.eu.int/comm/trade/issues/newround/index\\_en.htm](http://europa.eu.int/comm/trade/issues/newround/index_en.htm).

<sup>53</sup> Annex 1(c).

<sup>54</sup> Part 1, Art 1(1).

<sup>55</sup> Annex 1(c) Art 1, Art 1(3), Art 2(2), Art 3(1).

- 5.19. Section 8, Article 40 provides for the possibility of anticompetitive use of intellectual property and obliges concerned members to consult. This is relevant to intellectual property rights ("IPR") in general and some aspects of collections organisations in particular.
- 5.20. This suggests that New Zealand shares with its trading partners a wish to adopt the intellectual property regime of the current version of the Berne Convention including the provisions as to droit de suite.
- 5.21. It is also consistent with close formal and administrative ties between the United Nations, WIPO and WTO, all of which New Zealand belongs to. A New Zealander, the Hon. Michael Moore, a former Prime Minister, being head of the WTO for a period.

### **The Terms of the Berne Convention**

- 5.22. There are 38 parts or Articles to the Berne Convention Paris Act 1971 as amended 28 September 1979 together with an Appendix of six articles.
- 5.23. Article 1 establishes a union of countries "for the protection of the rights of authors in their literary and artistic works".
- 5.24. Protected works are described inclusively in Article 2(1):-
- "The expression ... artistic works shall include every production in the ... artistic domain, whatever may be the mode or form of its expression such as ... works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three dimensional works relative to geography, architecture or science."
- 5.25. Article 2 preserves to each country the right to determine the extent to which ideas might be so protected. TRIPS makes mandatory New Zealand's current requirement of material fixation before protection.
- 5.26. Article 2(6) provides that the works protected shall be protected in all countries of the Union. The protection shall operate for the benefit of the author and that author's successors in title.
- 5.27. Article 2(7) reserves to individual countries the application of protection to applied art, industrial designs and models. New Zealand chose to enact the Designs Act 1953 dealing with applied art or the aspects of industrial works that

are not purely functional.<sup>56</sup> The application of the protection to the functional aspects of industrial designs and to models will be the subject of later consideration. This may provide a rationale from excluding buildings from Droit de Suite.

5.28. Articles 3 and 4 require that for protection, either the author must be a national or habitual resident of a member country and have voluntarily published the work appropriately in a member country. It is likely that consent would be implied if the work was so published by the owner of the copyright as distinct from the author. Some form of qualification for the benefit of Droit de Suite would need to be evolved.

5.29. Article 5 makes the Convention rights a minimum and cumulative with national rights.

5.30. Article 6 allows a reduction in protection where the claimant author seeking benefits comes from a country that does not offer adequate protection itself.

4.1 Article 6bis, the moral rights section, has been largely adopted in New Zealand.

5.31. Article 7 provides that the term of protection shall be the life of the author plus 50 years except for anonymous works where the rights shall be 50 years from publication. Jointly authored works calculate the date from the death of the last author to die.

5.32. Article 10 allows use of the works for teaching provided such utilisation is compatible with fair practice and both the author source are acknowledged.

5.33. Article 6bis allows reproduction of images of artistic works to report current events.

5.34. Article 14ter states:

(1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.

(2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to

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<sup>56</sup> See Designs Act 1953 s 2 definition of "design".

which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.

(3) The procedure for collection and the amounts shall be matters for determination by national legislation.

- 5.35. It has been argued that 14ter(2) reservation of national treatment has the effect of making the provision of Droit de Suite a matter of national decision. Clearly the subsection recognises differences in detail will arise; for example inclusion of applied art and buildings. A more purposive interpretation is that countries which fail to meet the obligation to introduce the right can not expect their own authors to have the benefit of the right.
- 5.36. Article 33 provides for disputes between members to be determined in the International Court of Justice subject to the right to opt out. New Zealand supports that forum. Sir Kenneth Keith formerly a Judge of the New Zealand Supreme Court is New Zealand's first appointee to that Court.
- 5.37. Article 35 allows countries to opt out of the Berne Convention completely.
- 5.38. The Appendix to the Convention deals with special provisions regarding developing countries. New Zealand is not a developing country as defined; that is a developing country in conformity with the established practice of the General Assembly of the United Nations.

### **Conclusion as to Treaty Obligations**

- 5.39. It seems arguable that New Zealand has treaty obligations to adopt Droit de Suite into its national law and give reciprocity to others who have done likewise. Article 2.7 may allow the exception of buildings from the ambit of the right.

## 6. NEW ZEALAND INTEREST AND ACTIVITY IN THE VISUAL ARTS MARKET

- 6.1. Consideration of Droit de Suite requires information as to the benefits that might flow to artists, some assessment of their relative financial circumstances and the consequential burden on others. Any discussion on this aspect suffers from definitional mismatches and lack of precision in statistics.<sup>57</sup> It also is diminished in force by reliance on reported data. It does now seem that New Zealand is improving its gathering of data in relevant areas.
- 6.2. Statistics New Zealand, the Government Department that gathers official statistics, pursuant to the Statistics Act 1975, has published some special reports that are relevant. These have been completed in conjunction with the Ministry of Culture and Heritage. They are:-
- A Government Spending in Culture 2000-2004;
  - Cultural Experiences Survey 2002;
  - Employment in the Cultural Sector 2005;
- 6.3. They give some insight. The employment report identifies one group as 'visual artists: sculptor, painter and related artists'. That is broadly similar to other countries statistical catchments.
- 6.4. Visual artists: sculptor, painter and related artists; is a Cultural Occupation from the New Zealand Standard Classification of Occupation (NZSCO) and Art Dealers are described as Cultural Industry within the framework category Visual Arts. The information is derived from the 2001 census.
- 6.5. That census disclosed a New Zealand population of 3,737,277 comprising 1,823,007 men and 1,914,273 women. Of those 1,727,268 are employed. This term includes self-employed.<sup>58</sup> Fulltime means cumulatively over 30 hours employed per week. There were 2,677 sculptors, painters and related artists. These followed the general employed population regarding ethnicity and gender. The total was an increase of nearly 50% between 1996 and 2001, the

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<sup>57</sup> See for comment on this issue New Vision; A Critical View of New Zealand's Visual Arts Infrastructure. McDermott Millar Limited Wellington 1998, Dr Michael Volkerling "...reliable statistical data was imply not available. In many ways our research became an object lesson in the unreliability of existing cultural statistics." Para 6.1.

<sup>58</sup> Employment in the Arts Sector (ibid) page 51, table 5.01.

largest increase being men in fulltime employment followed by women in part-time employment. Women sculptors, painters and related artists were over-represented in the part-time employment at 48% compared to 23% of men.

- 6.6. This is similar to other countries. Artistic jobs in France in the 1990s were 64% part-time. Painters, Sculptors and other visual artists, including visual art teachers and instructors, were 34% part time workers in Canada.<sup>59</sup> In France the more days that were worked in the year, the more employers were reported.

“In view of this irregularity, it becomes difficult to talk of a career. Artistic activities thus become a process where the concept of enterprise replaces the concept of employment, with the artist becoming more of a business organisation rather than an isolated worker.”<sup>60</sup>

- 6.7. The New Zealand sculptor painter is more likely to have post-school qualifications than the general employed population<sup>61</sup> and will be older.<sup>62</sup> Their median annual personal income is \$15,900 compared to \$27,700 with only 7% receiving over \$50,001 compared to 17% in the general employed population. 61% receive less than \$20,000 per annum compared to 34% of the general employed population.
- 6.8. This profile reflects the large proportion of part-time employment<sup>63</sup> and the low income of those in full-time employment.
- 6.9. The French experience and anecdotal evidence suggest that these figures understate those engaged in the visual arts and overstate the relevant income. The census only captures the main job. Second jobs and voluntary work are therefore not included and would be a common feature of the sculptor and painter population, especially those who are not yet established. Nor does it capture those between jobs. In Canada in 2000 of the 12500 Painters, Sculptors and other visual artists 92% claimed to be self employed. In Canada the total number of such persons increased by 20% 1990-2000 which was much greater than the population growth over the same period of about 5%.<sup>64</sup>

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<sup>59</sup> Canada Artists' Profile 2000 Labours Force Survey.

<sup>60</sup> Arts and Artists from an Economic Perspective, Xavier Griffe, UNESCO Publishing, paras 2002.

<sup>61</sup> 46%/39%.

<sup>62</sup> Under 40 is 38% compared to 50%.

<sup>63</sup> 35%/23%.

<sup>64</sup> 1996 and 2001 Census of Canada

- 6.10. Creative New Zealand (2003) found that 32% of artists experienced one or more periods without paid work at some time over the 2 years ended March 1999
- 6.11. Over the same period the number of people in paid cultural employment grew 17% almost three times the growth of the total employment over the same period. The total was 107,347 or one in seventeen persons.
- 6.12. The Cultural Industries employed 78,858 people of whom 64% were in non-cultural occupations.
- 6.13. The term "cultural occupation" includes early learning teachers and libraries so needs to be considered in that context. Of those employed in Cultural Occupations 46% work in non-cultural industries (e.g. librarian in a law office).
- 6.14. It is consistent with the European experience of artistic employment described by Greffe:-

"Irregularity is the basic characteristic of all artistic activity. It is also responsible for the low average earnings of the majority of artists."<sup>65</sup>

- 6.15. There is evidence that artistic earnings are below average in a working population. In the United States the difference is about 6.9% and it is about the same in England and Germany. In France the difference is between 10% and 30% depending on the area of activity. Even in the Federal Republic of Russia, where artists have long enjoyed a privileged position, their earnings were about 30% lower than average in the early 1980s and about 40% during the 1990s.

"However surveys generally err towards optimism since they study only established artists and not all of those who want to be artists or are already artists. The survey conducted by Wassel and Asper on Contemporary Artists in New England shows that their earnings from art constitute only 46% of their total earnings. Their average earnings are 1.6% less than those other workers whereas the level of their qualifications is 16.6% higher than that of the rest of the population."<sup>66</sup>

- 6.16. The impact of a joint initiative between creative New Zealand and Work and Income New Zealand called the pathway to arts and cultural employment ("PACE") programme introduced in 2001 is not reflected in the census data.

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<sup>65</sup> Ibid 113 and Greffe ex L'emploi Culturel a L'âge du Numerérique, Paris: Anthropes-Economika. Chapter 3.

<sup>66</sup> Ex Greffe ibid, page 118.

### **Pathways to Arts and Cultural Employment “PACE”**

- 6.17. PACE includes<sup>67</sup> a resource pack for registered job seekers who have listed their preferred job choice in the arts and creative sector. It contains national and regional information about assistance and funding available for arts and cultural job seekers. It describes its purpose as:

“The purpose of this resource is to assist Job seekers to strengthen their professional networks, increase their awareness of project funding sources and help them to identify other sources of professional development support. It will also assist arts and cultural workers and Work and Income Case Managers to develop individual Job Seeker Agreements that are relevant to pursuing and developing a career in the arts and cultural sector.”

- 6.18. When announcing this programme<sup>68</sup> Social services and Employment Minister Steve Mahary MP identified two benefits from PACE:<sup>69</sup>

“Firstly, it identifies the vital role that Work and Income plays in supporting artists and creative clients to develop their careers, and fully equips case managers with a customised service for these clients. Secondly, it allows artists and cultural workers to register ‘art’ as their first career choice.”

- 6.19. The Associate Minister for Arts, Culture and Heritage, the Hon Judith Tizard MP, added:

“PACE recognises that art is real work,”

- 6.20. In summary in, notably Dunedin, Nelson and Central Auckland, Work and Income and arts organisations were said to have already formed relationships to offer specialised assistance to budding artists, such as the Dunedin Arts Employment Service and the Arts Work Project in Auckland.

- 6.21. In a press release dated 18 June 2003, the Hon Judith Tizard MP reported that more than 1200 beneficiaries had found work with help from PACE since it began. Of those, 77% were said to have found long term employment. It was operating in all 13 Work and Income regions and was expected to be most successful in most parts of New Zealand where there are strong creative sectors. For example, 375 job seekers using PACE had found work in Central Auckland, with just under half (181) moving into employment in creative industry.

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<sup>67</sup> <http://www.workandincome.govt.nz/documents/find-a-job/pace-resource-pack-2006.doc>

<sup>68</sup> <http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=12287>.

<sup>69</sup> Hon Steve Mahary 9 November 2001

- 6.22. As at the date of the press release 2127 job seekers were using the PACE scheme.<sup>70</sup>
- 6.23. The Hon Judith Tizard MP went on to say:
- “Industry New Zealand research tells us that job growth in the creative sector is running at 3.5% a year. More than 50,000 already work in the sector, along with many ancillary and support positions. PACE is filling a real need by boosting the skills of those working for work to take up an arts career.”
- 6.24. The breakdown was aspirant crafts people (269), musicians (269), film and television production staff (207), actors (171), sculptors and painters (150), and graphic designers (144).
- 6.25. Of the national figures of 1230 job seekers using PACE, a little over a third (436) found work in a creative sector while the remaining group have decided to pursue other career options (794).
- 6.26. In another press release on 4 October 2004, the Hon Judith Tizard reported that the Ministry of Social Development had reported PACE as having achieved over 2500 placements into employment since it was launched; over a 1000 in the last 12 months.<sup>71</sup> A request for a copy of that report has not been met and it is not available on the Ministry website.

### **Artists' Costs**

- 6.27. It seems costs for artists are high and in many cases exceed earnings. The presence of a small number of artistic superstars tends to inflate average earnings. It is not easy to analyse costs for a visual artist. Working by deduction from exhibition or gallery prices is difficult and misleading. Typically the gallery will charge between 40 and 50%. There is often a cost of accumulating the subject matter. Arrangements as to who pays for the publication of invitations, mailing, catalogues, framing, photography and insurance vary between artists and galleries.
- 6.28. Established artists secure better arrangements than others; the gallery recognises a reduction in risk on those occasions.

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[www.beehive.govt.nz/viewdocument.cfm?documentid-17103-29k](http://www.beehive.govt.nz/viewdocument.cfm?documentid-17103-29k).

<sup>71</sup>

[www.beehive.govt.nz/viewdocument.aspx?documentid-21106](http://www.beehive.govt.nz/viewdocument.aspx?documentid-21106).

- 6.29. There are also difficulties for Artists with taxation arrangements in estimating and providing for provisional tax with uncertain and uneven income.
- 6.30. The cost of production is perhaps informed by the estimate by Statistics New Zealand that New Zealand households spent<sup>72</sup> 30,000,000 purchasing material and equipment for arts and craft activities, an increase of 55% from 1990/91.

### **Interest in the Visual Arts**

- 6.31. Interest in cultural experiences has increased as has participation in such experiences. Unsurprisingly, the correlation between education, interest and participation is close. Participation especially purchasing works of art follows disposable incomes as well. Cultural experiences are powerful attractions for tourists and to a lesser extent for domestic visitors. This seems to be consistent with other countries and logically so having regard to the consistent presence of tourists as a factor.
- 6.32. The Statistic New Zealand survey estimates its calculations for the period 12 months prior to the Cultural Experiences survey.
- 6.33. 1.34 million New Zealanders or 48% of those surveyed had visited an art gallery or museum. 51% being women, 46% men. 56% of those had a tertiary qualification compared to 33% of those not so qualified.
- 6.34. Proportions of those who visited increased with levels of income; 45% with incomes under \$30,000 to 59% of those with incomes over \$50,000 per annum.
- 6.35. 64% visited once or twice, 30% three to six times and 7% seven or more times.
- 6.36. 277,000 viewed art over the internet, highest at 17% was the 15-24 year old age bracket.
- 6.37. 269,000 purchased original art works, 10% of adult New Zealanders peaking at age 45 to 54 (13%), typically tertiary educated. 13% of those who purchased art were tertiary educated compared to 9% with secondary education and 4% without. Purchases went up with disposable income, usually over \$50,000 per annum.

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<sup>72</sup>

A Measure of Cultural Experiences and Cultural Spending in New Zealand 2001.

- 6.38. Of the 269,000, 127,000 would have liked to purchase more but, significantly, 89% said cost was a barrier. A total of 2.5 million had not purchased art, 369,000 were interested in doing so but 85% cited cost as a barrier. Nearly half purchased direct from the artist (133,000), 53% women and 44% men.
- 6.39. New Zealand households spent an estimated \$109m on visual arts and craft objects in the year ended 2001 from 1990 to 1991. It decreased by 4% to 2000/2001 from a peak of 129,000 in 1995/1996.<sup>73</sup>
- 6.40. Peter Webb Galleries which describes itself as New Zealand's largest fine arts auctioneer reported of their September 2005 sales that the market was 23.5% down on the "lofty heights" reached in 2003. Despite this their most recent sale achieved record levels.

### **Tourism and Art**

- 6.41. Tourists seem to be very interested in cultural experiences including visits to art galleries and artists' studios. A survey commissioned by Tourism New Zealand conducted by Colmar Brunton focused on internet users.<sup>74</sup>
- 6.42. Internet users have been identified as the most fruitful group to market New Zealand tourism to.<sup>75</sup> Of these, 46% have an interest in arts craft market, 25% in art galleries. Culture and history ranked second after scenery. Domestic visitors are interested as to 26% in arts and craft market and 12% in art galleries. Museums and art rank high in importance to visitors and seem to deliver well in satisfaction.<sup>76</sup> The cultural sector is identified as having untapped potential and would benefit greatly from further development.

### **Overseas Patterns regarding Tourism**

- 6.43. Greffe identified museum tourism as having provided almost 40,000 jobs in Paris alone.<sup>77</sup> He found there were three classes of cultural tourists; first, specialists who are directly motivated by culture when making travel plans representing 10%-15% of tourists surveyed. Secondly, motivated tourists who do not travel for cultural reasons but are prepared to make significant changes in their itinerary to include cultural sites, representing 30-40% of the tourists

<sup>73</sup> Statistics New Zealand Household Economics Survey.

<sup>74</sup> Demand for Cultural Tourism – Summary of Research Findings 2003.

<sup>75</sup> [www.tourismnewzealand.com](http://www.tourismnewzealand.com) 'Why does New Zealand target the Interactive Traveller®'.

<sup>76</sup> Tourism New Zealand 'What does the Interactive Traveller do on Holiday?'.

<sup>77</sup> Greffe ex (2002) Managing our Cultural Heritage, New Delhi, Aryan Books International pp 154-8.

surveyed. Thirdly, the casual or occasional tourist, basically on vacation who in the course of their holiday may periodically indulge in cultural tourism, if the site is within 50 kilometres from where they are staying. They constitute 45 to 60% of tourists surveyed.<sup>78</sup>

- 6.44. Cultural tourism is not devoid of negative effects. Greffe examines examples such as Glasgow. Land prices increase, land speculation occurs and existing residents' businesses including traditional craftsman may be displaced

#### **Culture as a Public Good**

- 6.45. Successive Governments in New Zealand have accepted social cohesion as desirable policy/objective. Economic analysis of the role of culture in this good is relevant. Dr George Barker in his monograph "Cultural Capital & Policy"<sup>79</sup> examined this. His conclusions are that culture is a public good. His particular focus was film but the arguments advanced hold for visual arts such as painting and sculpture.

#### **Conclusions as to Cultural Employment and National and International Benefits**

- 6.46. Art engages a lot of New Zealanders and their visitors. It also employs a growing number of our working population. It is economically valuable as a result. The incentive of payment is accepted as increasing artistic and creative endeavours. If that is correct then the direct benefits of greater rewards to visual artists would multiply the returns and justify a greater cost of collection.

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<sup>78</sup>

Greffe X Arts and Artists from an Economic Perspective p 40.

<sup>79</sup>

Centre for Law and Economics Australian National University Wellington 2000.

## 7. TRANSMISSION, TRANSFER AND CHARGE OF DROIT DE SUITE.

### Dealing with copyright in New Zealand.

7.1. Copyright, including future copyright, can be dealt with in New Zealand in the same way as other private property rights.

7.2. Section 113 of the Copyright Act states:

- "113 Transmission of copyright  
 (1) Copyright is transmissible, as personal or moveable property, by—  
 (a) Assignment; or  
 (b) Testamentary disposition; or  
 (c) Operation of law.  
 (2) A transmission of copyright may be partial, that is, limited so as to apply—  
 (a) To one or more, but not all, of the things the copyright owner has the exclusive right to do:  
 (b) To part, but not the whole, of the period for which the copyright is to exist....."

7.3. These arrangements must be recorded in writing and signed by the author.<sup>80</sup>

7.4. This means that the copyright may be transferred or devised by will to persons or corporate entities and may be charged to or seized by creditors. They may also be placed in trust, gifted to charities or others.

7.5. It is assumed contractually that Artists are a full contractual capacity, even in relation to moral rights. Many of the arguments for aspects of Droit de Suite turn on the assumption inequality of bargaining between Artist and those who buy their art.

7.6. Indigenous artists often have a different approach to ownership of their images and devolution of that ownership<sup>81</sup>. Commentators have suggested that they stand to benefit to a greater extent from Droit de Suite. Perhaps due to a view that they are more economically disadvantaged. Treatment of indigenous art in this context requires care and consultation.

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<sup>80</sup> Section 114.

<sup>81</sup> Darrell A Posey and Graham Dutfield 'Beyond Intellectual Property: Towards traditional resource rights for indigenous peoples and local communities' International development Research Centre 1996; Silke Radde Droit de Suite: The Artist's right to a resale royalty and the implications for New Zealand New Zealand Intellectual Property Journal, May 2001, 354; Waitangi Claim WAI 262 [http://www.med.govt.nz/templates/Page\\_\\_\\_\\_\\_1207.aspx](http://www.med.govt.nz/templates/Page_____1207.aspx).

### International trends in dealing with Copyright

- 7.7. "Click Wrap" and "Click-Thru" are licences widely used to modify default copyright arrangements. Although approved in the United States of America, they have not yet been considered in New Zealand.<sup>82</sup> Limitations or exceptions found in copyright legislation are an aspect of the balancing between the rights of Authors and users.
- 7.8. The Ministry of Economic Development Discussion Paper<sup>83</sup> identifies a trend towards restricting the contractual amendment of copyrights, exceptions and limitations.
- 7.9. In the United States of America, the concept of "copyright misuse" has been discussed in at least two cases<sup>84</sup>.
- 7.10. Section 296A of the Copyright Designs & Patents Act 1988 of the United Kingdom avoids certain contracting out in relation to computer programmes. Other statutory restrictions to contracting out are found in the Belgium Copyright Act 1994 following the European Copyright Directive<sup>85</sup>. Similar types of provisions are to be found in Ireland. In Australia there is one statutory provision<sup>86</sup>.
- 7.11. There was a review of such arrangements by the Australian Copyright Law Review Committee as to the relationship between copyright and contract<sup>87</sup>.
- 7.12. This report recommended restrictions on contractual limitation of copyright exceptions. However the Australia United States of America Free Trade Agreement of 8 February 2004 (Chapter 17.4.6) makes it clear that restrictions on the transfer of copyright may only be implemented in the introduction of Droit de Suite.

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<sup>82</sup> *ProCD v Zeidenburg* 86F 3d 1447 (1996)

<sup>83</sup> Ministry of Economic Development, Regulatory and Competition Policy Branch, The Commissioning Rule, Contracts and the Copyright Act 1994, March 2006.

<sup>84</sup> *Lasercomb America Inc v Reynolds*, 911F. 2d 970 (4<sup>th</sup> Cir 1990); *DSC Communications Corp v DGI Technologies Inc* 81F. 3d 597 (5<sup>th</sup> Cir 1996)

<sup>85</sup> Directive 96/9/EC of the European Parliament and Council of 11 March 1996 on the legal protection of data bases.

<sup>86</sup> Australian Copyright Act 1968 (Cth) section 47H.

<sup>87</sup> Copyright Law Review Committee, Copyright and Contract (2002) and [http://www.ag.gov.au/agd/www/clrHome.nsf/Page/Overview Reports Copyright and Contract](http://www.ag.gov.au/agd/www/clrHome.nsf/Page/Overview%20Reports%20Copyright%20and%20Contract).

**Conclusion as to restrictions on dealing with Droit de Suite**

- 7.13. It would not be inconsistent with international trends to restrict the alienation of the rights derived from Droit de Suite. It would however be a change from the New Zealand approach.

## 8. THE CONTRACTUAL OPTION

- 8.1. There may be ways of achieving the same arrangements as Droit de Suite by private bargaining. It may also be possible to enhance the position of the artist by private bargaining generally. The sufficiency of that possibility turns on legal issues and informed equality of bargaining. The internet facilitates standard form contracting out of default copyright arrangements.<sup>88</sup>
- 8.2. Private bargaining does not require a rationale. Most art transactions between artists and purchasers lack formality. There is a strong influence of custom of contractual arrangements in the sale of art. While artists regard themselves as well-informed as to relevant legal issues,<sup>89</sup> this may be a misconceived view. Certainly the arrangements with galleries are frequently oral, conventionally focusing on a narrow range of issues. These include the amount of commission, who pays for framing, publicity, hanging, openings and costs. There may be agreement as to the selling price.
- 8.3. There are many significant aspects that are not the subject of agreement; these include consignment sale arrangements, the cost of negotiated discounts, and the possibility of closure of the gallery.
- 8.4. An artist complaining about dealers is commonplace and views vary as to whether those complaints are justified.<sup>90</sup>
- 8.5. The artist has a legitimate commercial legal concern on a number of issues. Adherence to past practices is rationalised in various ways. Artists in New Zealand seem to rarely use agents unlike many other creative industries where it usually works with a degree of success. To the contrary nearly half New Zealand art purchasers, presumably first sales are made direct from the artist.<sup>91</sup>

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<sup>88</sup> The Commissioning Rule, Contracts and the Copyright Act 1994, A Discussion Paper, March 2006, Ministry of Economic Redevelopment, Regulatory and Competition Policy Branch March 2006. Part Three page 21

<sup>89</sup> Portrait of the Artist: A Survey of Professional Practising Artists in New Zealand, Creative New Zealand December 2003.

<sup>90</sup> JB Cahn, Copyright and Works of Art (1956) (Artists Equity Association); 2d Hearings on Art Fraud Investigation, Office of the New York Attorney-General at 69-70; United Kingdom Culture Media & Sport Select Committee Report 2004-2005 'The Market for Art': Evidence of Rebecca Salter see paragraphs 28 and 29 and the Evidence of Sir Tom Lighton, former Chairman of the Society of London Art Dealers and Managing Director of Waddington Galleries.

<sup>91</sup> A Measure of Culture: Cultural Experiences and Cultural Spending in New Zealand. Statistics New Zealand and Ministry for Culture and Heritage 1 July 2000 and 30 July 2001.

- 8.6. The dealer as the exhibitor and effective agent may have different short or long term plans from the artist. Negotiating for a resale right or terms of use for display would likely be unwelcome to a dealer.
- 8.7. Many believe artists lack bargaining power to achieve change. Acceptance of that proposition makes it likely to prove true. It is not inherently correct. Powerful artists can make powerful bargains. Picasso retained ownership of many of his works including 'Guernica' when he loaned it to the Museum of the Modern Arts in New York. He and other artists invested in themselves by retaining works. Reportedly, the owner of a substantial gallery in Los Angeles retained the reproduction right to works he sold, recalling those works to photograph them and reproducing them in the form of prints for interior decorators without sharing the profits with artists.<sup>92</sup> The New York Times reports intense competition to sign budding graduate artists from leading Universities.<sup>93</sup>
- 8.8. The first item that would desirably be the matter of private contract would be the contracting out of the effect of the commissioning rule. If a work is made to order, perhaps even as a version, clarity as to rights is highly desirable.
- 8.9. Second, would be the arrangements regarding dealer practices. What will be the advertising budget, how often will shows be scheduled, what hours will the gallery keep, will there be solo shows, will there be group participation, what will the works be sold for compared to what the artists get? Should there be a register able to be inspected by the artists? Should there be interest on late payment? Who bears the credit risk on sales? How is the price for discount allocated when works are bundled in one transaction or works are traded? Who bears the discount to a gallery's valued customer? Will works be loaned and if so, for how long? If an artist changes gallery, by choice or otherwise what should be the arrangements? Has the gallery purchased or taken on consignment and what are the consequences for the parties?
- 8.10. Is there a need to register the works under the Personal Property Securities Act so as to avoid the adverse effect of credit or seizure?<sup>94</sup>

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<sup>92</sup> Government Policy and Economic Security for Artists: the case for Droit de Suite; Munroe E Price, the Yale Law Journal, Volume 77: 1269, 1968, 1333 at 1358.

<sup>93</sup> Nytimes.com/5 April 2006

<sup>94</sup> King Robb Ltd (in Liq) Re Sleepyhead Manufacturing Co Ltd v Dunphy & Anor (23 February 2006 High Court Auckland CIV 2005-404-1691 Harrison J)

- 8.11. Having carefully chosen a gallery, forsaking all others, what if the gallery fails? Should there be a notice period of termination or closure and if so, for how long? The artists need time to relocate and may have an interest in the assets of the galleries such as the records of who purchased their works and who is on the mailing list for their shows. Depending on other arrangements, they may have an interest in the accounts receivable or the location of actual works.
- 8.12. Recently the Artists Alliance in New Zealand has published some contractual guidelines<sup>95</sup>. The efficacy or indeed the legality of these are yet to be decided.<sup>96</sup>
- 8.13. As frequent resale will be rare for most artists, a strong contractual provision in the first sale dealing with a resale right may achieve a practical and significant benefit. In this context of actual privity with full consideration the provision could readily be for a share of the profit. It would only bind a seller and not any art professional involved but should be effective to that extent. Retention of title would make the interest registrable under the Personal Property Securities Act 1999. Droit de Suite is however likely to be practically unenforceable due to cost or perceived reputation risk and may still be assigned to a collection agency as a matter of commercial judgment.
- 8.14. Galleries and auction houses have a legitimate interest in such arrangements. Galleries usually deal in first and subsequent sales for the artist they represent. They, like the artists, have an interest while the relationship continues, in procuring growth in the sale prices in both sectors to ensure one does not damage or cannibalise the other.
- 8.15. Examples of contractual arrangements to procure a resale right have occurred over time although are apparently little used. In the US, a well-known example is the artist's reserve rights transfer and sale agreement for 'Projansky Agreement'. It was drafted by the New York Art lawyer, Robert Projansky.<sup>97</sup>
- 8.16. The well-known New Zealand artist, Michael Smither, procures agreement to art proceeds rights terms. This is pursuant to a written agreement with the purchaser. This, like the US examples, was drafted by a well-known arts

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<sup>95</sup> [http://www.artistsalliance.org.nz/html/p\\_code.php](http://www.artistsalliance.org.nz/html/p_code.php)

<sup>96</sup> Irish Competition Law Authority Decision as to Actors Collective Bargaining. Decision No E/04/002 31 August 2004.

<sup>97</sup> Leonard D Duboff, 'The Desk Book of Art Law' 862 (1<sup>st</sup> ed 1978).

lawyer, indeed author in her own right, Judith Fyfe. It is similar in content to a Projansky Agreement.

- 8.17. The Belgian conceptual basis for Droit de Suite is said to be the civil law concept of enrichment sans cause or unjust enrichment.<sup>98</sup> That the works appreciates due to the artist's post sale activities and reputation without the artist participating. Related is the concept of imprevision or hardship due to changed circumstances, where continuation of the contract would result in hardship to one of the parties the civil law would permit it's revision.
- 8.18. The difficulties with this approach are in two broad areas. First many other factors are involved in the appreciation in value of art, the general state of the market being most significant, inflation, fashion, the volume of work by an artist for sale and even the death of the artist. Secondly in our law concepts associated with unjust enrichment only arise in the event of a wrong by the benefiting party at the date of the contract. For 300 years our courts have resisted invitations to inquire into the adequacy of consideration. A very high threshold is applied to attempts to argue a contracting party was subject to effective duress.

#### **Conclusions as to Private Contractual Arrangements.**

- 8.19. There are a number of ways that an artist could enhance their economic circumstances by private arrangement. Those arrangements do not preclude Droit de Suite being adopted. The consistent difference and perhaps difficulty with that approach is the artist usually must personally insist on these benefits. Droit de Suite collected through a collection society is abstracted from the person of the artist and is more readily implemented and accepted as a result.

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<sup>98</sup> Sherman Incorporation of the Droit de Suite into United States Copyright Law, 18 Copyright Law Symp. (ASCAP) 50,54 (1968); Pierre Recht Has "Droit de Suite" a place in Copyright?, 3 Unesco Copyright Bulletin 51, 55 (1950).

## 9. ARGUMENTS AGAINST DROIT DE SUITE

- 9.1 The first is that it will hurt artists by depressing initial prices; those who purchase art will factor in the eventual need to pay resale royalties.
- 9.2 This argument has been consistently advanced over a number of jurisdictions over many years. It requires careful consideration.
- 9.3 The US Copyright Register 1992 Report cited two leading opponents of the right, Stephen Weil<sup>99</sup> and Professor John Merryman.<sup>100</sup> They both advanced this argument.
- 9.4 The United Kingdom opposition to the European Union Directive, making Droit de Suite mandatory, is similar and as repeated in the hearings before the House of Common Select Committee for Culture, Media and Sport, would have a "serious adverse effect on the market".<sup>101</sup> Sir Thomas Lighton, former Chairman and currently special adviser to the Society of London Art Dealers and Managing Director of Waddington Galleries emphasised the importance of a healthy art market including significant art auctions sales which bring museum curators to London. He suggests this was to the advantage of emerging artists.
- 9.5 They pointed to the notional Japanese investor choosing where to sell several multi-million works and choosing New York to avoid the resale royalties.
- 9.6 Sir Thomas warns that New York and Switzerland are showing little interest in Droit de Suite and the market and London will therefore lose competitively. Certainly universal application of Droit de Suite would minimise this risk. There must be reasons why all such transactions do not occur in obscure tax havens; these are not addressed in most such arguments. Logically they will include the presence of critical authorities, expert sellers and buyers, insurers, financiers.
- 9.7 In Australia, the Australian Federal Government funded Contemporary Visual Arts and Craft Inquiry submitted on 14 June 2002 ("Myer Report") which provided some statistics as to the size and nature of the Australian arts market. In 2001 A\$70M art was sold in Australian auctions. This was considered likely

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<sup>99</sup> Stephen E Weil, Resale Royalties: Nobody Benefits, ARTNews, Mar 1978 at 58.

<sup>100</sup> John Henry Merryman, The Wrath of Robert Rauschenberg, 40 J. Copyright Soc'y of the USA 241 (1992) and Thinking About the Elgin Marbles Kluwer Law International 2000 p352.

<sup>101</sup> Report paragraph 4.

to be second or subsequent sales. Art sold through commercial galleries in 1999 to 2000 was A\$218M of which A\$106M was first sales sold on commission including but not limited to contemporary visual arts and craft.

- 9.8 Like many countries, Australia has discussed Droit de Suite for at least 20 years but a recent example had stimulated further debate.
- 9.9 That was the sale of 'Water Dreaming at Kalipinyapa's' by an indigenous artist Johnny Warangkulu Tjurrula for A\$486,500 in July 2000 after its original purchase price in the seventies of A\$150. Interestingly the Department of Environment and heritage shows this as a work for which permission to export was refused. This is an example of state appropriation of some rights in relation to the work.<sup>102</sup> The artist died in difficult financial circumstances on 12 February 2001.<sup>103</sup>
- 9.10 The Myer report found the effect on the art market to be unclear. The authors of the report were aware of views in the United Kingdom that Droit de Suite would create incentives for the transfer of high value works to jurisdictions without it.
- 9.11 It also identified that for the majority of transactions the royalty payment would not be enough to warrant that transfer.
- 9.12 Meyer considered that Australian art would achieve its highest prices in Australia. It further recognised that the cost of shipping art between Europe and America, likely New York and London, would be higher than between Australia and New York or Geneva.
- 9.13 The report found that while logic might suggest Droit de Suite would have a negative impact on the secondary market, it is unlikely that resale royalties of the "order of magnitude commonly discussed" will have a great impact on demand. This reflected the US Copyright Office Report which said " [W]hen all said and done though, the royalty may be absorbed, like other costs associated with art transactions, without causing a ripple in the art market."<sup>104</sup>

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<http://www.deh.gov.au/heritage/movable/refused.html>.

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<http://www.aboriginalartonline.com/forum/articles3.php>; c.f. <http://www.uthaboriginalart.com.au/Artist.asp?Artist=Johnny%20Warangkula%20Tjurrula#>; <http://www.smh.com.au/articles/2003/11/14/1069027174339.html>.

<sup>104</sup>

Executive Summary XI.

- 9.14 They found that as major auction houses had imposed a buyer's premium on sales in 1993 on top of the established seller's premium, it was evidence of the volatility of the market and that the secondary market would not be affected. They found that it could have positive effect on the primary or first sale market.
- 9.15 It is likely that in keeping with other places in the world the auction houses rarely participate in the first sale market. Auctions are unlikely to be affected.
- 9.16 The United Kingdom inquiry reached the same conclusion, similarly influenced by the successful imposition of a buyers' premium by auction houses and that going from 10% to its recent levels of 20% in some cases. This was in addition to VAT which went from 2.5% in 1999 to 17.5% when it was said that the UK was the only country to levy it at that rate on all living artists.<sup>105</sup> It also seems possible VAT on imports of artistic works to the EU will increase to 17.5%.
- 9.17 In the Lords Hansard debate Lord Jenkins of Putney, oblivious to the benefits dealers bring to artists, said:
- "Droit de Suite is an excellent institution. It has developed well. It benefits the artists, not the fat cats. That may be one reason why the fat cat dealers oppose it."<sup>106</sup>
- 9.18 In New Zealand details of the market on relevant aspects remain to be ascertained. It is known that nearly half the primary or first sale market is direct from artists. Also auctioneers have successfully introduced buyers' premiums of amounts that vary from sale to sale but seem to be about 10% plus GST on that 10% premium.<sup>107</sup> There is no data; however it seems likely that New Zealand art will sell for its best price in New Zealand. Similarly, the cost of getting works to another market will be higher than shifting between markets in Europe and America.
- 9.19 Any such assessment is incomplete without inclusion of relevant tax matters. In New York resale to a New York resident attracts tax of 8%. This was sufficient to lead to avoidance ruses. The District Attorney brought enforcement proceedings recovering US\$13M in unpaid taxes and fines to the city and states. About 20 art dealers had their records subpoenaed in the probe.<sup>108</sup> This was because city tax varied from 0 to 4.25% and both state and city tax

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<sup>105</sup> UK Parliament; Lords Hansard 18 May 1998.

<sup>106</sup> 18 May 1998: 1272 Lords Hansard.

<sup>107</sup> Peter Webb Galleries Limited website – buying and Cordy Limited website – conditions of sale clause 2.

<sup>108</sup> Art Business News September 2003.

were imposed on the basis of the purchaser's residence. The total for New York City sales tax sales to New York residents, 8.25%, is the highest in the US.<sup>109</sup> In Switzerland VAT is 7.5% plus Canton tax.<sup>110</sup> Art imported in France bears VAT between 5.5% and 19.6% but the change in balance in power in the French Parliament suggestions of a reduction in VAT on art and indeed the application of droit de suite have some interest and support.<sup>111</sup> The EU directive will constrain that. There may be a VAT distinction between primary and secondary sale art in France. The aspect of VAT is highly relevant and will vary from jurisdiction to jurisdiction as to whether it is claimable on the other side of the transaction, whether it is refunded on re-export and significant other aspects.

- 9.20 In other analyses the amount an individual or household is willing to pay to acquire or use artistic goods or services suggest the conclusions of the UK Parliament and the Myers Report are correct. It seems logical that the assessment by potential consumers is based on information which may be obtained from four sources: the current market price, the label, certification by critics and existence of prior conventions.<sup>112</sup> This is also consistent with the basic evaluation being closely tied to authenticity as opposed to aesthetics. The focus is "*this is not a painting painted by the artist you said*"; as opposed to "*this is not as well painted as you said*". This is further endorsed in litigation as to painting sales. The cases are not about quality but secondary indications of quality.
- 9.21 The art market seems to be internationally extremely healthy. Three art indices are relevant. Two are respected sources often quoted by media. The Mei Moses Fine Art Index is compiled from sale on sale data by two Associate Professors of the New York University Leonard M Stern School of Business is as follows:

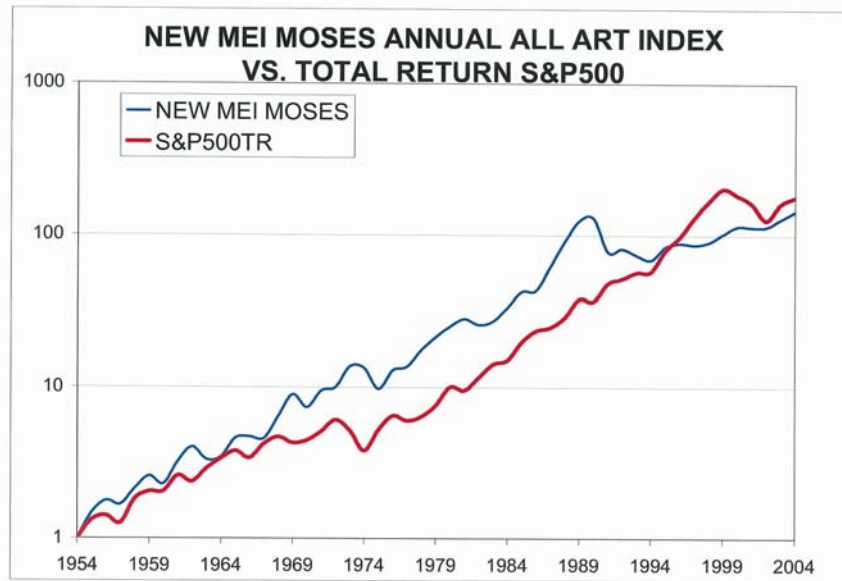
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<sup>109</sup> New York Fine Arts Interactive – Ask Artemisia.

<sup>110</sup> Department of Economy, Labour and Foreign Affairs, Geneva, September 2004.

<sup>111</sup> The ArtNewspaper.com 30 October 2005.

<sup>112</sup> X Griffe; Art and Artists from an Economic Perspective, Chapter 2.



Another frequently quoted source ArtPrice.com asserts that the turnover from fine art auctions was up 10.2% year on year between 1 January and 18 July at US\$2.23 billion essentially due to London's increase by 19% generating US\$854M compared with US\$833M in the USA. This is said to give a UK a dominant 38.2% share of the global market. It has reportedly seen 724 lots sell at auction for more than £100,000 compared to 564 last year. The USA only had 686. If the sale of Picasso's 'Garçon à la Pipe' at US\$93M was extracted, the increase in New York would have only been a 2.9% increase. In New Zealand the market seems to be in good health reflecting overall optimism at any given time. Index Group, involving art financier, sometime JB Were Consultant and former New Zealand test cricket keeper Adam Parore, has released figures that assert that investment in high profile New Zealand artists outperforms other investment outperforming the NZSE 40. The contemporary works account for more than 51% of sales and the overall market in New Zealand works has grown to almost \$10M when it was less than \$300,000 in 1990.<sup>113</sup> ArtPrice.com and the Inex Group are commercially interested in a buoyant art market. Reuters reported booming art prices with worldwide auction sales of fine art rising 15% to \$6.8 million in 2005 an increase of 58% in the past 10 years with contemporary art up 31%. Reuters source for some of these figures is ArtPrice.com<sup>114</sup>

<sup>113</sup> The big idea-visual arts: research shows art outperforms NZSE 40.

<sup>114</sup> New Zealand Herald 18 April 2006 Reuters: Sophie Hares.

- 9.22 Some of this information does not sit so comfortably with Baumol<sup>115</sup> who examined resale prices of art works by the most famous painters of the world over a 300 year period and found an annual compounded rate of return of .55% in real terms with no adjustment for sales commissions, maintenance, costs, etc.
- 9.23 Whatever the figures are the contribution to that market state is a function of many factors. It appears to closely track the general economy and house prices in particular. The contributors to the market itself are not limited to artists. One description of the market is to be found in John Henry Merryman's article on Droit de Suite (fn See footnote 78 at p354 of the Elgin Marbles Book ) He makes the point that dealers, auctioneers, collectors, museums, and their professional personnel, art historians, art critics and the art press are also main components.
- 9.24 "The art world has an ecology, its own set of inner relationships and interdependencies. As in other ecologies, what effects one part resounds throughout the system and is felt by the others. Responsible policy making for the art world accordingly considers the effects of proposals like the droit de suite on all the players."

### **The Economist's View**

- 9.25 This paper does not purport to be an economist's view but there is a significant body of relevant literature on this subject with a considerable weight of opinion suggesting that experienced theoretical analysis shows that Droit de Suite will not produce any net benefit to artists and may adversely affect them.
- 9.26 It is clear an absolute sale is transferring to a purchaser more than a sale in which a resale royalty is reserved to the artist. It is equally clear that if Droit de Suite were transferable, it should be separately priced.
- 9.27 There is no evidence that this logical assumption is correct. There is no evidence that the transfer of copyright with the object would yield a higher price than without it. It does seem logical that it would. The absence of evidence may indicate no value being attributed to such factors by buyers.

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Baumol William J. "Unnatural Value: Or Art Investment as a Floating Crap Game". American Economic Review 76 (May 1986): 10-14.

- 9.28 If the artist was the vendor, the artist would likely defer present payment for future income contingent on satisfactory scale and frequency of resale.
- 9.29 This deferral of income causes exposure to risks such as collection or credit risks, the fixed term effect, for example, of the copyright period, legislative change, changes in the costs of collection such as the percentage charged by a collection agency and the maintenance or enhancement of the artist's reputation.
- 9.30 This is the same risk musicians and literary authors take when negotiating the balance between advance and royalty. The argument for Droit de Suite that relies on visual artists being advantaged by comparison to musicians and literary authors overlooks this factor.
- 9.31 For the vendor, a lower purchase price reduces the risk associated with any reduction in the value. Conversely, it reduces the reward for having purchased an item that escalates in value having taken the risk of purchase.
- 9.32 If there is a present reduction in the sale price which accommodates a largely accurate analysis for the future royalty payments, the exchange may well moderate risk for the artist as well by retaining some chance of increase in value, albeit statistically lower. Net present value after collection costs would need to be factored in the equation.
- 9.33 It would not be predictable for tax purposes.
- 9.34 The cost of collection of payments would be carried by the artists and would need to be factored into the theoretical calculation.
- 9.35 There is said to be an imbalance between artists seeking representation and galleries willing to represent them.<sup>116</sup> Over 600 art galleries and museums existed in New Zealand in 1998 of which only 33 principal ones exhibit an interest in contemporary New Zealand art and only 7 are only dedicated to its exhibition and presentation. It appears there may be less competition to represent artists in New Zealand than is reported in the United States for Graduate artists.

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<sup>116</sup>

'New Vision: A Critical View of New Zealand's Visual Arts Infrastructure', McDermott Millar Limited, Wellington 1998, paragraph 8.4.

- 9.36 It is likely any price drop on first sale prices consequent on Droit de Suite would be largely borne by the artist rather than dealer. This assumption may change dependent on competition to sell living artists compared to deceased artists and established versus emerging artists. The consequences of reduced profits might lead to problems for emerging artists in finding galleries willing to take the higher risk of representing them or lead to artists generally getting less income. Any transaction involving art is likely to involve an assessment of how many paintings are likely to be available from that artist, particularly in that style. It also involves an assessment of likely changes in the reputation of the artists. The death of an artist does not perfect knowledge of the stock of an artist's works as there needs also to be some record of output whilst that artist lived. The effects on second sales will more directly affect dealers and auctioneers.
- 9.37 Ironically an artist may well receive Droit de Suite royalties on sales of forged works or be better placed to detect forgeries in the event of the implementation of a system to collect resale royalties.

### **Canadian Approach**

- 9.38 Since 1972 Canada's Federal Arts Agency, the Canada Council for the Arts have operated an Art Bank.
- 9.39 As at 6 May 1999, the Art Bank had 18,000 works<sup>117</sup> of which 7,000 were rented for public display. After 3 years artists can buy back their works for the greater of sale price plus 20% or plus \$50 plus any special costs. It is reported that only 150 or 1% of the works have been repurchased pursuant to that right. If the artists were aware of an opportunity to resell art at a better price than that, they would likely exercise the right more frequently.<sup>118</sup> This appears to be evidence of the rarity of increases in value.

### **Generally**

- 9.40 A profitable sale may bring to current price level all works of a similar style by an artist. It is in their mutual benefit for there to be a high sale price known to the market. The dealer and the artists have varied arrangements as to who bears the responsibility for marketing the artist's works and the artist. While the

<sup>117</sup>

<sup>118</sup>

[www.canadacouncil.ca](http://www.canadacouncil.ca) – News Release Ottawa, 6 May 1999 and 2003-4 Annual Report.  
Artists and Automata: two essays concerning the evolution and distribution of property rights; WG Morrison 1993, Simon Fraser University, Part Doctoral Thesis.

artist bears a pure risk for the sale of his own works and his ongoing reputation, the dealer can spread that risk over several artists. Neither the dealer nor the artist are able to predict the quality, acceptability and quantity of the artist's future output.

### **Conclusion as to Arguments Against**

- 9.41 In the frequently stated economist's view assuming an informed rational purchaser and vendor, the market is likely to shift so as to accommodate the retained rights of the artist; the artist bearing the risk as to the value of those retained rights. As most economists' views are predicated on the basis of a zero collection cost, if there is a collection cost, and there will be, some might say ranging up to 20%, this will effectively produce a reduction in the amount artists receive. Further work could well be useful on this aspect.
- 9.42 The effect of placement of works for sale in a Droit de Suite free market is unlikely to be material due to localisation of the best market and cost of shipment. It may be that reciprocity would benefit those few artists with international reputations to an extent exceeding negative effects.
- 9.43 The comparison between the situation of visual artists and that of musicians and literary authors is fraught. Depending on their reputation and negotiating skills those whose works are exploited by multiple and infinite reproduction and adaptation receive advance payments then some share of income. For most this will mean a small advance if any and the rest dependant on the performance of the output. Until the last item is sold they do not know how much this will be. Traditionally the visual artist receives all the payment in advance and shares no risk that the item will be successful later. Both pay transactional costs at the initial point.
- 9.44 The benefits of droit de Suite flow mostly to successful artists who have established themselves over a long career. In Germany 30% goes to Estates, 20% to artists of great reputation and the balance is shared among the rest. There is nothing inconsistent, with a capitalist system, in that occurring.

## **10. COLLECTION OF ROYALTY PAYMENTS**

- 10.1 Collection of payments due to authors is a central issue in whether a royalty right could be effectively introduced with benefits outweighing the transaction cost imposed on those involved. It features in arguments against Droit de Suite in the following ways: that a principled royalty system will have collection costs sufficient to remove any net benefit to the artist, be unenforceable, impose excessive transaction costs on others in the art market and that the consequential invasion of privacy is wrong in principle and chilling of the art market.
- 10.2 Advocates of Droit de Suite say it can be done cost effectively with an intermediary collection society providing a privacy filter. They argue that imposition on the gross resale price introduces efficiencies to procure enforceability and lower complexities of calculation so as to mitigate the imposition on those from whom it is collected
- 10.3 Which is more correct will depend on whether Droit de Suite introduced is directed to the gross sale price, thereby imposing a cost on a reseller even if that reseller is not making any profit or even making a loss. It also depends on whether any such royalty should be imposed to all secondary sales or just to auction sales giving a comparative advantage of dealers and private sellers.

### **Individual Collection**

- 10.4 Copyright enforcement by individuals may provide some lessons. The copyright owner and an exclusive licensee have the status and right to restrain breaches of copyright in New Zealand. They also may assign or licence those rights. This is practically ineffective in the case of most creative artists acting alone as is evidenced by the failure of copyright owners to enjoy proper returns from the reproduction of visual arts or public performances of music in cafes and restaurants.
- 10.5 Furthermore, for visual artists the collection will usually be from those with whom dealings on other matters occur; for example collections from auction houses for publication and catalogues, from authors of text books and from dealers who carry out the primarily important first sales as well as second sales of their works. This may provide an incentive to the parties to co-operate or a disincentive to vigorously pursue such rights.

- 10.6 Which ever it is; the garnering of the administrative and legal expertise is peripheral to an artist's focus even if business is as vital to them as anyone else. There is also a difficulty in detecting copyright uses. The result is that many artists do not identify events for which they are entitled to payment and frequently users will not have identified that they are using such a right.

### **Collection Societies**

- 10.7 Collection societies are widely accepted to gather copyright royalties. Musicians have long participated in such schemes. More recently authors of literary works have engaged with them.
- 10.8 This had led to pursuit of performing right payments from public entertainment venues and reproduction payments from educational institutions.
- 10.9 The reach and depth of these societies' activities have led to acceptance for the role both by rights owners and rights users.
- 10.10 An authors' society was formed under Beaumarchais in 1777 for dramatic rights, Balzac, Dumas, Hugo and others formed one for literary authors in 1837<sup>119</sup> and began lobbying and collecting on behalf of their members. In 1847 three author patrons of 'Les Ambassadeurs' Café in Paris refused to pay for the meals when they heard their works being performed by the orchestra and for which they had not been paid. A court supported their stand.<sup>120</sup> They went on to form Société des Auteurs, Compositeurs et Éditeurs de Musique ("SACEM"). This was the first musical collection society which administered and enforced rights for members.
- 10.11 Collection societies progressively expanded; new media create new opportunities to collect. As societies are used for some rights it is easy and practical to extend their role into new rights when they are created. The presence of such a joint representation provides opportunities for the users to negotiate with one source the rights clearances leading to economic and reliable outcomes. Rationally those societies are engaged and motivated to lobby for expansion of authors rights.

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<sup>119</sup> Société des Auteurs et Compositeurs Dramatiques ("SACD").  
Société des Gens de Lettres ('SGDL").

<sup>120</sup> Trib de Commerce, Seine 8 September 1847.

### Competitive Implications

- 10.12 In effect or law the collection societies often hold a monopoly in their area. They interact with similarly strong user groups.<sup>121</sup> Usually they have reciprocal relationships with other societies in other Countries. Observers have identified co-ordinated efforts to influence the market and governmental policies. In any inquiry involving the creative fields these societies provide well resourced lobbies; the Myer inquiry in Australia and the Committee for Sports, Arts and Culture in the United Kingdom, being recent examples.
- 10.13 The large memberships and international ties lead to larger revenues and licence fees.
- 10.14 For example, the International Confederation of Societies of Authors and Composers ("CISAC"), as of 2004, numbers 210 authors societies from 109 countries directly and indirectly representing over 2 million creators. In 2003 CISAC collected \$10.5098 billion.
- 10.15 This really reflects the extent to which various rights organisations have aggregated under umbrellas to produce greater efficiency.
- 10.16 These bodies:-
- (a) collectively manage members' rights and distribute the net proceeds;
  - (b) produce transactional efficiency;
  - (c) meet the market power of user groups by acquiring similar if not greater powers;
  - (d) utilise undistributed funds for the purposes of their industry. For example MCPS-PRS Alliance in the UK has about £4m per annum that it applies to foster young musicians.

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<sup>121</sup> SM Besen, SN Kirby and SC Salob: An Economic Analysis of Copyright Collectives (1992) 78 Virginia Law Review 383; and SM Besen and SN Kirby 'Compensating Creators of Intellectual Property: Collectives that Collect '(Rand Corporation 1989).

### Controlling Collection Societies

- 10.17 In most legal systems monopolies attract interventions of some kind. There are two rationales for intervention by governments. First, to address any anti-competitive effects such as inequitable licence fees and to regulate the author society relationship.
- 10.18 The United Kingdom provides for minimal supervision of such societies, apart from the general law of regulating private business and the provision of the Copyright Designs and Patents Act 1988<sup>122</sup> which provides the Copyright Tribunal with wide powers to deal with 'licensing schemes' and the terms on which licences will be granted. It has no power in the areas of members' relationships with the society. The Secretary of State receives applications for certification of licensing schemes, such as educational purposes.
- 10.19 The United Kingdom Government and its National Competition Authority have willingly investigated monopolistic activities of these organisations.<sup>123</sup> Distinctively different is the common EU model of continuous supervision by a particular ministry. They licence the societies on terms. Although onerous duties are imposed including mandatory welfare and assistance schemes, their tasks are facilitated legally. In Germany the burden of proof is advantageously changed and presumptions adopted. For example, societies are presumed to represent all holders of relevant rights unless a user can prove otherwise.
- 10.20 In France, the supervision extends to members' rights. 10% of the members can have experts to enquire into and report on the affairs of the society.<sup>124</sup>
- 10.21 Often the emphasis will reflect the civil or common law origins of the legal system. In the EU there is a push towards harmonisation of rights management. Users advocate this as do the EC Commission.<sup>125</sup> One of the dispute resolution models being discussed in the European Union is the

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<sup>122</sup> ss 112-116.

<sup>123</sup> MMC Report, Collective Licensing: a Report on Certain Practices in the Collective Licensing a Public Performance and Broadcasting Rights in Sound Records, Cm 530 (HMSO, London 1988).  
MMC Report, Performing Rights: a report on the supply in the UK of the services of administering performing rights and film synchronisation rights, Cm 3147 (HMSO, London 1996).

<sup>124</sup> UK House of Commons Select Committee of Culture, Media and Sport – HC 468-I, 22 July 1999.

<sup>125</sup> Law No 66 – 537 on Commercial Companies of 24 July 1966.

<sup>125</sup> Green Paper on Copyright and Related Rights in the Information Society, COM (95) 382 Final, 19 July 1995.

Directive 2001/29/EEC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society. European Bureau of Library, Information and Documentation Associations (COM) 2004 (261 Final, Brussels, 16 April 2004).

Copyright Tribunal of the United Kingdom. Little has been done to implement these directives. The trade inefficiencies were identified in a KPMG paper.<sup>126</sup>

- 10.22 Hearings on collective management held before the EC Commission in November 2000 led to the Commission considering legislative action. In April 2004, the Commission issued a request for submissions on a legislative framework for collection societies' governance.<sup>127</sup>
- 10.23 On 7 July 2005, a European Commission staff working document: Study on Community Initiative on the Cross Border Collective Management of Copyright was published.<sup>128</sup> This proposed for consideration three possibilities, first to do nothing, the second suggested improvements to cross border co-operation and third was to allow each author to choose their own society for the whole of Europe. This latter suggestion caused some societies to review their more onerous policies.
- 10.24 This followed concerns expressed in European Commission statements as to the collective licensing and music copyrights for online use which produced concessions from the Dutch and Belgian collection societies.<sup>129</sup>
- 10.25 Unless the authors retain the ability to opt out of the collective management of their rights, issues as to price, use of rights, etc will remain.

### **Digital Technology**

- 10.26 This has enabled the more efficient database management for collection societies. It has however enabled the contractual interface between suppliers and individual users with click in software, etc and that removes some incentives for collective management.

### **Collection Societies in New Zealand**

- 10.27 New Zealand follows the United Kingdom, in all models. The terms of sections 149 and 150 of the Copyright Act 1994 are substantially similar to the Copyright Designers and Patents Act 1988 (UK). In Australia the equivalent sections are ss 154 and 155 of the Copyright Act 1968 (CWLTH).

<sup>126</sup> 'Single Market Review Series, Subseries II. Impact on Services; Audio Visual Services and Production; European Commission Document, December 1996.

<sup>127</sup> IP/04/492 Brussels 19 April 2004.

<sup>128</sup> Commission of the European Communities, Brussels 7 July 2005.

<sup>129</sup> IP/05/1056 Brussels 17 August 2005.  
IP/04/586 Brussels 3 May 2004.

10.28 Section 2 of our Copyright Act defines 'licensing body':-

licensing body means a body of persons (whether corporate or unincorporate) that, as copyright owner or prospective copyright owner or as agent for a copyright owner,—

- (a) negotiates copyright licences; and
- (b) grants copyright licences, including licences that cover the works of more than one author:

10.29 'Licensing scheme' is defined in the same section:-

licensing scheme means a scheme setting out—

- (a) the classes of cases in which the operator of the scheme, or the person on whose behalf the operator acts, is willing to grant copyright licences; and
- (b) the terms on which copyright licences would be granted in those classes of cases;—

and for the purpose of this definition a scheme includes anything in the nature of a scheme, whether described as a scheme or as a tariff or by any other name:

10.30 'Copyright licence' means 'a licence to do or authorise the doing of a restricted act'. The latter refers to any of the activities described in s 16 which include copying a copyright works. Droit de Suite may require some legislative inclusion to ensure there is no argument that it does not fit within s 148; in particular as not being a copyright. The arrangements could then be applied.

10.31 Consideration could be given to allowing reference to the Copyright Tribunal by members of the collecting society in relation to their rights apropos the society.

### **Members' Rights**

10.32 The influence and rights of members in collecting societies is a function of their contractual terms with the organisation. They would typically be set out in the assignment of rights.

10.33 An example is the Australasian Performing Rights Associations Limited which operates in New Zealand through its wholly owned subsidiaries APRA New Zealand Limited. This is simply a duly incorporated private company subject to the Companies Act 1993. Although called members, the authors who assign their rights for enforcement and collection are simply contracting parties. Similarly, Australasian Mechanical Copyright Owners' Society Limited operates

through its wholly subsidiary AMCOS New Zealand Limited and lacks even a New Zealand director.

- 10.34 Viscopy Limited the logical Trans-Tasman collector is a duly incorporated company limited by guarantee of A\$2 per member. Its constitution allows the board sweeping powers of delegation to smaller groups, alternates, proxies and management. A quorum for an Annual General Meeting is five members although directors may be orally nominated and elected at that meeting. Two of the Board must be members, three nominated by the National Association for the Visual Arts Limited (“NAVA”) and two “Independent Directors” elected by the other board members subsequent to their election. One of the non Member Board members shall be Aboriginal or Torres Strait Islander. Quorum for their meetings is three although they may meet electronically, appoint proxies and alternates. They may also delegate to committee and to the Managing Director. The Company indemnifies and insures the directors. NAVA itself is an arts lobby through which some Government support is channelled.
- 10.35 The members’ rights to accounting are to prompt accounting for their rights revenue net of any special levies and expenses of running the Company. There is no express provision for audits at the behest of Members or interest paid on revenues. The disposition of surpluses including unallocated revenues seems to be at the Directors’ discretion. A retired High Court Judge has a supervisory role which is not regulated by the constitution. None of this is surprising or indeed improper but it does have the result that those interested in the affairs of the company can readily control it. Although presented as a co operative it’s members have little control and have few rights to be consulted. In the context of an artistic predisposition that leads to collection societies arguing any resale royalty should be inalienable this characteristic warrants reconsideration. Whether that reconsideration is by a sanctioning government or prospective Member Artists remains to be determined.
- 10.36 In New Zealand the arrangements for collection societies and the supervision of the Copyright Tribunal have been subject to some relevant decisions. The Audio-Visual Copyright Society Limited referred a matter to the Copyright Tribunal then appealed first to the High Court and subsequently to the Court of Appeal.<sup>130</sup> This decision clarified that it was not necessary for an affected party

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*Audio Visual Copyright Society Limited v The University of Auckland and Others* CA8/02, 21 October 2002.

to have joined in the scheme for the assistance of the Copyright Tribunal to be invoked.

### **Conclusions as to Collection Arrangements**

- 10.37 There appears to be almost universal acceptance that collective management of copyright is the most effective system. That society requires the power to require the supply of information from relevant persons such as auction houses and vendors.
- 10.38 The structure of collection societies needs consideration to ensure they remain to the benefit of their members. This could be using the vehicle of a company, an incorporated society or a co-operative.
- 10.39 Competition law issues suggest more than one society, monitoring by a suitable entity perhaps the registrar of societies or the Commerce Commission.

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## ATTACHMENT 1

## STATUTORY INSTRUMENTS

## 2006 No. 346

## INTELLECTUAL PROPERTY

## ARTISTS

## The Artist's Resale Right Regulations 2006

*Made**13th February 2006**Coming into force in accordance  
with regulation 1(1)*

The Secretary of State is a Minister designated for the purposes of section 2(2) of the European Communities Act 1972<sup>[1]</sup> in relation to the right of artists to receive a payment on the sale of their works<sup>[2]</sup>.

A draft of this instrument was laid before Parliament in accordance with paragraph 2(2) of Schedule 2 to that Act and approved by a resolution of each House of Parliament.

Accordingly the Secretary of State, in exercise of the powers conferred upon him by section 2(2) of that Act, makes the following Regulations:

**Citation, commencement and extent**

1. —(1) These Regulations may be cited as the Artist's Resale Right Regulations 2006 and shall come into force on the day after the day on which they are made.

(2) These Regulations extend to the whole of the United Kingdom.

**Interpretation**

2. In these Regulations—

- "author", in relation to a work, means the person who creates it;
- "collecting society" has the meaning given in regulation 14(5);
- "contract date", in relation to a sale, means the time at which the contract of sale was made (and "contract of sale" has the meaning given in section 2 of the Sale of Goods Act 1979<sup>[3]</sup>);
- "copyright" has the meaning given in section 1 of the Copyright, Designs and Patents Act 1988<sup>[4]</sup>;
- "EEA state" means a member State, Iceland, Liechtenstein or Norway;
- "qualifying body" has the meaning given in regulation 7(4);
- "qualifying individual" has the meaning given in regulation 10(3);
- "resale" is to be construed in accordance with regulation 12;
- "resale right" has the meaning given in regulation 3 (and, unless the context otherwise requires, includes a share in resale right);
- "resale royalty" has the meaning given in regulation 3;

"sale" has the meaning given in section 2 of the Sale of Goods Act 1979;  
 "sale price" has the meaning given in regulation 3(4);  
 "trustee in bankruptcy" means, in relation to Scotland, an interim or permanent trustee appointed under the Bankruptcy (Scotland) Act 1985<sup>[5]</sup>;  
 "work" has the meaning given in regulation 4;  
 "work of joint authorship" has the meaning given in regulation 5(4).

#### **Artist's resale right**

**3.** —(1) The author of a work in which copyright subsists shall, in accordance with these Regulations, have a right ("resale right") to a royalty on any sale of the work which is a resale subsequent to the first transfer of ownership by the author ("resale royalty").

(2) Resale right in a work shall continue to subsist so long as copyright subsists in the work.

(3) The royalty shall be an amount based on the sale price which is calculated in accordance with Schedule 1.

(4) The sale price is the price obtained for the sale, net of the tax payable on the sale, and converted into euro at the European Central Bank reference rate prevailing at the contract date.

(5) For the purposes of paragraph (1), "transfer of ownership by the author" includes in particular—

(a) transmission of the work from the author by testamentary disposition, or in accordance with the rules of intestate succession;

(b) disposal of the work by the author's personal representatives for the purposes of the administration of his estate; and

(c) disposal of the work by an official receiver (or, in Northern Ireland, the Official Receiver for Northern Ireland) or a trustee in bankruptcy, for the purposes of the realisation of the author's estate.

#### **Works covered**

**4.** —(1) For the purposes of these Regulations, "work" means any work of graphic or plastic art such as a picture, a collage, a painting, a drawing, an engraving, a print, a lithograph, a sculpture, a tapestry, a ceramic, an item of glassware or a photograph.

(2) However, a copy of a work is not to be regarded as a work unless the copy is one of a limited number which have been made by the author or under his authority.

#### **Joint authorship**

**5.** —(1) In the case of a work of joint authorship, the resale right shall belong to the authors as owners in common.

(2) The right shall be held in equal shares or in such other shares as may be agreed.

(3) Such an agreement must be in writing signed by or on behalf of each party to the agreement.

(4) "Work of joint authorship" means a work created by two or more authors.

#### **Proof of authorship**

**6.** —(1) Where a name purporting to be that of the author appeared on the work when it was made, the person whose name appeared shall, unless the contrary is proved, be presumed to be the author of the work.

(2) In the case of a work alleged to be a work of joint authorship, paragraph (1) applies in relation to each person alleged to be one of the authors.

#### **Assignment etc.**

**7.** —(1) Resale right is not assignable.

(2) Any charge on a resale right is void.

(3) Paragraph (1) does not prevent the transfer of a resale right which was transmitted to a qualifying body under regulation 9 (or is deemed to have been so transmitted under regulation 16), provided that the transfer is to another qualifying body.

(4) A qualifying body is a body which—

(a) is a charity within the meaning of section 96(1) of the Charities Act 1993<sup>[6]</sup> or section 35 of the Charities Act (Northern Ireland) 1964<sup>[7]</sup>;

(b) is a Scottish charity; or

(c) is a foreign charity, and has its central administration in an EEA state or a country listed in Schedule 2.

(5) In paragraph (4)—

(a) "Scottish charity" means—

(i) a body entered in the Scottish Charity Register under section 3 of the Charities and Trustee Investment (Scotland) Act 2005<sup>[8]</sup>; or

(ii) a "recognised body" within the meaning of section 1(7) of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990<sup>[9]</sup>; and

(b) "foreign charity" means a body which is established outside the United Kingdom for purposes similar to those for which a body within paragraph (4)(a) or (b) may be established, and which is subject to similar rules regarding the distribution and application of its assets.

#### **Waiver etc.**

8. —(1) A waiver of a resale right shall have no effect.

(2) An agreement to share or repay resale royalties shall be void.

(3) Paragraph (2) does not affect any agreement made for the purposes of the management of resale right in accordance with regulation 14.

#### **Persons entitled on succession**

9. —(1) Subject to regulation 10(2), resale right in respect of a work is transmissible as personal or moveable property by testamentary disposition or in accordance with the rules of intestate succession; and it may be further so transmitted by any person into whose hands it passes.

(2) Resale right may be so transmitted only to—

(a) a natural person; or

(b) a qualifying body.

(3) Notwithstanding paragraph (2), a resale right may be transmitted as bona vacantia.

(4) Where a resale right is transmitted to more than one person, it shall belong to them as owners in common.

#### **Requirements as to nationality etc.**

10. —(1) Resale right may be exercised in respect of a sale only by a person who, at the contract date, is—

(a) a qualifying individual; or

(b) a qualifying body.

(2) Resale right may be transmitted under regulation 9 only by a person who, at the time of his death, is a qualifying individual.

(3) A qualifying individual is a natural person who is—

- (a) a national of an EEA state; or
- (b) a national of a country listed in Schedule 2.

(4) Nothing in this regulation prevents a resale right from being exercised after it has been transmitted as bona vacantia.

(5) Resale right may vest by operation of law in—

- (a) a personal representative of a deceased person; or
- (b) an official receiver (or, in Northern Ireland, the Official Receiver for Northern Ireland) or a trustee in bankruptcy,

and nothing in this regulation prevents a resale right from being exercised by any person acting in that capacity.

#### **Trusts**

11. Nothing in regulations 7, 9 or 10 prevents a resale right from being—

- (a) held, and exercised in respect of a sale, by any person acting as trustee for the person who would otherwise be entitled to exercise the right ("the beneficiary"); or
- (b) transferred to such a trustee, or from the trustee to the beneficiary.

#### **"Resale"**

12. —(1) The sale of a work may be regarded as a resale notwithstanding that the first transfer of ownership was not made for a money (or any) consideration.

(2) The sale of a work may be regarded as a resale only if the conditions mentioned in paragraph (3) are satisfied in respect of that sale.

(3) The conditions are that—

- (a) the buyer or the seller, or (where the sale takes place through an agent) the agent of the buyer or the seller, is acting in the course of a business of dealing in works of art; and
- (b) the sale price is not less than 1,000 euro.

(4) The sale of a work is not to be regarded as a resale if—

- (a) the seller previously acquired the work directly from the author less than three years before the sale; and
- (b) the sale price does not exceed 10,000 euro.

#### **Liability to pay resale royalty**

13. —(1) The following shall be jointly and severally liable to pay the resale royalty due in respect of a sale—

- (a) the seller; and
- (b) the relevant person (within the meaning of paragraph (2)).

(2) The relevant person is a person who satisfies the condition mentioned in regulation 12(3)(a) and who is—

- (a) the agent of the seller; or
- (b) where there is no such agent, the agent of the buyer; or
- (c) where there are no such agents, the buyer.

(3) Liability shall arise on the completion of the sale; however, a person who is liable may withhold payment until evidence of entitlement to be paid the royalty is produced.

(4) Any liability to pay resale royalty in respect of a resale right which belongs to two or more persons as owners in common is discharged by a payment of the total amount of royalty to one of those persons.

#### **Collective management**

**14.** —(1) Resale right may be exercised only through a collecting society.

(2) Where the holder of the resale right has not transferred the management of his right to a collecting society, the collecting society which manages copyright on behalf of artists shall be deemed to be mandated to manage his right.

(3) Where there is more than one such collecting society, the holder may choose which of them is so mandated.

(4) A holder to whom paragraph (2) applies has the same rights and obligations, in respect of the management of his right, as have holders who have transferred the management of their right to the collecting society concerned.

(5) For those purposes—

(a) "collecting society" means a society or other organisation which has as its main object, or one of its main objects, the administration of rights on behalf of more than one artist; and

(b) the management of resale right is the collection of resale royalty on behalf of the holder of the right in return for a fixed fee or a percentage of the royalty.

#### **Right to information**

**15.** —(1) A holder of resale right in respect of a sale, or a person acting on his behalf, shall have the right to obtain information by making a request under this regulation.

(2) Such a request—

(a) may be made to any person who (in relation to that sale) satisfies the condition mentioned in regulation 12(3)(a); but

(b) must be made within three years of the sale to which it relates.

(3) The information that may be so requested is any that may be necessary in order to secure payment of the resale royalty, and in particular to ascertain—

(a) the amount of royalty that is due; and

(b) where the royalty is not paid by the person to whom the request is made, the name and address of any person who is liable.

(4) The person to whom the request is made shall do everything within his power to supply the information requested within 90 days of the receipt of the request.

(5) If that information is not supplied within the period mentioned in paragraph (4), the person making the request may, in accordance with rules of court, apply to the county court for an order requiring the person to whom the request is made to supply the information.

(6) In Scotland, such an application shall be by way of summary application to the sheriff, and the procedure for breach of an order shall proceed in like manner as for a contempt of court.

(7) Information obtained under this regulation shall be treated as confidential.

#### **Transitional provisions**

**16.** —(1) These Regulations—

(a) do not apply to sales where the contract date preceded the commencement of the Regulations; but

(b) apply notwithstanding that the work sold was made before that commencement.

(2) Where the author of a work (or a person to whom the resale right in that work is deemed to have been transmitted under this regulation) died before the commencement of these Regulations, and was at the time of his death a qualifying individual—

(a) if he was the owner of the copyright in the work immediately before his death, and on his death a qualifying person became beneficially entitled to that copyright (or to part of it), the resale right in the work shall be deemed to have been transmitted to that person;

(b) if he was the owner of the work (but not the copyright in it) immediately before his death, and on his death a qualifying person became beneficially entitled to the work, the resale right shall be deemed to have been transmitted to that person;

(c) otherwise, the resale right shall be deemed to have been transmitted to the qualifying persons who were beneficially entitled to the residue of his personal estate.

(3) Where the author of the work was one of a number of joint authors, the right deemed to have been transmitted by the author under this regulation is one of that number of equal shares in the resale right.

(4) Where a resale right is deemed to have been transmitted to more than one person under paragraph (2)(a), (b) or (c), the resale right shall be deemed to have been transmitted to them in equal shares as owners in common.

(5) In this regulation, "qualifying person" means a person to whom a resale right may be transmitted under regulation 9(2) and (3).

#### **Sales before 1st January 2010**

**17.** Where a resale right is transmitted under regulation 9, or deemed to have been transmitted under regulation 16, it may not be exercised in respect of any sale where the contract date precedes 1st January 2010.

*Sainsbury of Turville*

Parliamentary Under-Secretary of State for Science and Innovation  
Department of Trade and Industry

13th February 2006

## SCHEDULE 1

Regulation 3(3)

## CALCULATION OF RESALE ROYALTY

1. The resale royalty payable on the sale of a work shall be the sum of the following amounts, being percentage amounts of consecutive portions of the sale price—

<i>Portion of the sale price</i>	<i>Percentage amount</i>
From 0 to 50,000 euro	4%
From 50,000.01 to 200,000 euro	3%
From 200,000.01 to 350,000 euro	1%
From 350,000.01 to 500,000 euro	0.5%
Exceeding 500,000 euro	0.25%

2. However, the total amount of royalty payable on the sale shall not in any event exceed 12,500 euro.

## SCHEDULE 2

Regulations 7(4) and 10(3)

## COUNTRIES OUTSIDE THE EEA WHOSE NATIONALS MAY ENJOY RESALE RIGHT

Algeria

Brazil

Bulgaria

Burkina Faso

Chile

Congo

Costa Rica

Croatia

Ecuador

Guinea

Iraq  
Ivory Coast  
Laos  
Madagascar  
Mali  
Monaco  
Morocco  
Peru  
Philippines  
Romania  
Russian Federation  
Senegal  
Serbia and Montenegro  
Tunisia  
Turkey  
Uruguay

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#### EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations implement Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art (OJ No L 272, 13.10.2001, p.32) ("the Directive"). The Regulations also amount to the implementation, by the United Kingdom, of the option given by Article 14ter of the Berne Copyright Convention (Cmnd. 5002).

*Regulation 3* creates a new intellectual property right ("resale right") to be enjoyed by the creator of a work of art (and that artist's successors in title) for as long as copyright continues to subsist in the work. The right consists in the entitlement to claim a royalty on the resale of the work following its first transfer by the artist. The amount of the royalty is based on the sale price (denominated in euro), and *Schedule 1* sets out how that amount is to be calculated.

*Regulation 4(1)* defines the works of art which are covered by the Regulations. *Regulation 4(2)* lays down the conditions under which a copy of a work is to be regarded as a work covered.

*Regulation 5* makes provision for works which are the joint product of two or more artists, and *regulation 6* lays down a rebuttable presumption that a signatory of the work is its creator.

*Regulation 7* ensures that resale right may not be assigned or charged, but does not prevent the transfer of a resale right where it has been transmitted to a qualifying charitable body, provided that the transfer is to another such body. (See also *regulation 11* on trustees.) The relevant bodies are defined in *regulation 7(4) and (5)*.

*Regulation 8* prevents resale right from being waived, and precludes any agreement to share or repay resale royalties; however, this does not prevent a collecting society from collecting resale right on the holder's behalf in return for a percentage of the royalty (see *regulation 14*).

*Regulation 9* enables a resale right to be transmitted, on the death of its holder, to a natural person or to a qualifying charitable body, and makes it clear that in the absence of any heirs it may pass to the Crown as "bona vacantia" ("ownerless property").

*Regulation 10* lays down certain nationality requirements. Resale right may be exercised only by an individual who is an EEA national (or national of a country listed in *Schedule 2*), or by a qualifying charitable body. Similarly, only such an individual may transmit resale right under *regulation 9*. It follows from the combined provisions of *regulations 9 and 10* that an individual who does not satisfy those requirements may none the less inherit resale right, but such an individual may not exercise it or further pass it on while the requirements continue not to be satisfied.

*Regulation 11* enables any person to hold and to exercise resale right in the capacity of a trustee for a person entitled to the right, and enables legal title to the right to be transferred to such a trustee or to the beneficiary. Thus in particular the nationality and other requirements of *regulations 9 and 10* are to be satisfied by the beneficial owner of a resale right rather than by the trustee.

*Regulation 12* defines when a sale is to be regarded as a "resale" for the purposes of the Regulations (thereby attracting the obligation to pay resale royalty). *Regulation 12(1)* makes it clear that a sale may be a resale, even though the initial transfer of ownership in the work was not itself a sale. Thus for example a "resale" following a gift by the artist would also qualify (and see also *regulation 3(5)*). *Regulation 12(3)* provides that an art-market professional must be involved in the sale, either as principal or agent, and imposes a minimum price threshold of 1,000 euro. *Regulation 12(4)* exempts certain sales where the work was recently acquired from the artist.

*Regulation 13* makes a specified art-market professional involved in the sale jointly and severally liable with the seller. The art-market professional who is so liable is the agent of the seller, if any, or failing that the agent of the buyer, or (again if there is no such agent) the buyer. Thus where the agent of the seller is a professional, that agent will be liable; and a buyer who is a professional will be liable only if no professional is involved either as an agent of the seller or the buyer.

*Regulation 14* imposes the requirement of compulsory collective management (an option permitted by Article 6(2) of the Directive). Thus resale right may be exercised only through an artists' collecting society (although the holder may select for those purposes any such society which manages rights on behalf of artists).

*Regulation 15* enables holders of a resale right to obtain the information necessary to

enforce their rights. Information regarding a sale may be requested from any art-market professional involved in the sale; if the necessary information is not provided within 90 days of the request, an application may be made to the court. Such requests must, however, be made within three years of the sale in question.

*Regulation 16* contains transitional provisions. By *regulation 16(1)*, the Regulations do not apply where the relevant contract of sale was made before the date that the Regulations come into force. But as regards contracts made subsequently, the Regulations apply notwithstanding that the work sold was made before that date. (However, by *regulation 3(1) and (2)*, resale right will exist only if the work is still in copyright.)

*Regulation 16(2) to (5)* provides for the case where the artist died before the Regulations come into force. In such circumstances, resale right cannot at that time have been transmitted to the artist's successors under *regulation 9*. Accordingly, *regulation 16(2)* provides a rule for determining who should then be regarded as the artist's successors for the purpose of holding resale right. Resale right is deemed to have passed with copyright in the work, if the copyright formed part of the artist's estate; or, failing that, to have passed with the work itself. If the artist owned neither the work nor the copyright in it, or if neither passed to a specific beneficiary, resale right in the work is deemed to have formed part of his residuary estate. The same rule applies where the deemed successor in turn died before the commencement of the Regulations.

*Regulation 17* exercises the option under Article 8(2) of the Directive, which is available to member States such as the United Kingdom which did not have resale right at the date of entry into force of the Directive (13th October 2001). In accordance with that option, those to whom a resale right is transmitted (or deemed to be transmitted) after the death of the artist may not exercise the right until 1st January 2010.

A Regulatory Impact Assessment, and a Transposition Note setting out how these Regulations implement the Directive, have been placed in the libraries of both Houses of Parliament.

The Regulatory Impact Assessment and the Transposition Note are also available from the Patent Office, Intellectual Property and Innovation Directorate, Concept House, Newport, South Wales, NP10 8QQ, and are available electronically at:

[www.patent.gov.uk/about/consultations/responses/resale](http://www.patent.gov.uk/about/consultations/responses/resale).

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Notes:

[1] 1972 c. 68.[back](#)

[2] SI 2004/1984.[back](#)

[3] 1979 c. 54.[back](#)

[4] 1988 c. 48. There is an amendment to section 1 that is not relevant to these Regulations.[back](#)

[5] 1985 c. 66.[back](#)

[6] 1993 c. 10.[back](#)

[7] 1964 c. 33.[back](#)

[8] 2005 asp10; section 3 comes into force on such day as the Scottish Ministers may by order appoint.[back](#)

[9] 1990 c. 40; section 1 is amended by paragraph 7(a) of Schedule 4 to the Charities and Trustee Investment (Scotland) Act 2005, which comes into force on such day as the Scottish Ministers may by order appoint.[back](#)

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**ATTACHMENT 2****CALIFORNIA CIVIL CODE 986 (RESALE ROYALTY ACT CODE)**

- a. **Whenever a work of fine art is sold and the seller resides in California or the sale takes place in California, the seller or the seller's agent shall pay to the artist of such work of fine art or to such artist's agent 5 percent of the amount of such sale. The right of the artist to receive an amount equal to 5 percent of the amount of such sale may be waived only by a contract in writing providing for an amount in excess of 5 percent of the amount of such sale. An artist may assign the right to collect the royalty payment provided by this section to another individual or entity. However, the assignment shall not have the effect of creating a waiver prohibited by this subdivision.**
1. When a work of fine art is sold at an auction or by a gallery, dealer, broker, museum, or other person acting as the agent for the seller, the agent shall withhold 5 percent of the amount of the sale, locate the artist and pay the artist.
  2. If the seller or agent is unable to locate and pay the artist within 90 days, an amount equal to 5 percent of the amount of the sale shall be transferred to the Arts Council.
  3. If a seller or the seller's agent fails to pay an artist the amount equal to 5 percent of the sale of a work of fine art by the artist or fails to transfer such amount to the Arts Council, the artist may bring an action for damages within three years after the date of sale or one year after the discovery of the sale, whichever is longer. The prevailing party in any action brought under this paragraph shall be entitled to reasonable attorney fees, in an amount as determined by the court.
  4. Moneys received by the Council pursuant to this section shall be deposited in an account in the Special Deposit Fund in the State Treasury.
  5. The Arts Council shall attempt to locate any artist for whom money is received pursuant to this section. If the Council is unable to locate the artist and the artist does not file a written claim for the money received by the Council within seven years of the date of sale of the work of fine art, the right of the artist terminates and such money shall be transferred to the Council for use in acquiring fine art pursuant to the Art in Public Buildings program set forth in Chapter 2.1 (commencing with Section 15813) of Part 10b of Division 3 of Title 2, of the Government Code.
  6. Any amounts of money held by any seller or agent for the payment of artists pursuant to this section shall be exempt from enforcement of a money judgment by the creditors of the seller or agent.
  7. Upon the death of an artist, the rights and duties created under this section shall inure to his or her heirs, legatees, or personal representative, until the 20th anniversary of the death of the artist. The provisions of this paragraph shall be applicable only with respect to an artist who dies after January 1, 1983.
- b. **Subdivision (a) shall not apply to any of the following:**
1. To the initial sale of a work of fine art where legal title to such work at the time of such initial sale is vested in the artist thereof.
  2. To the resale of a work of fine art for a gross sales price of less than one thousand dollars (\$1,000).

3. Except as provided in paragraph (7) of subdivision (a), to a resale after the death of such artist.
  4. To the resale of the work of fine art for a gross sales price less than the purchase price paid by the seller.
  5. To a transfer of a work of fine art which is exchanged for one or more works of fine art or for a combination of cash, other property, and one or more works of fine art where the fair market value of the property exchanged is less than one thousand dollars (\$1,000).
  6. To the resale of a work of fine art by an art dealer to a purchaser within 10 years of the initial sale of the work of fine art by the artist to an art dealer, provided all intervening resales are between art dealers.
  7. To a sale of a work of stained glass artistry where the work has been permanently attached to real property and is sold as part of the sale of the real property to which it is attached.
- c. **For purposes of this section, the following terms have the following meanings:**
1. **"Artist"** means the person who creates a work of fine art and who, at the time of resale, is a citizen of the United States, or a resident of the state who has resided in the state for a minimum of two years.
  2. **"Fine art"** means an original painting, sculpture, or drawing, or an original work of art in glass.
  3. **"Art dealer"** means a person who is actively and principally engaged in or conducting the business of selling works of fine art for which business such person validly holds a sales tax permit.
- d. **This section shall become operative on January 1, 1977, and shall apply to works of fine art created before and after its operative date.**
- e. **If any provision of this section or the application thereof to any person or circumstance is held invalid for any reason, such invalidity shall not affect any other provisions or applications of this section which can be effected, without the invalid provision or application, and to this end the provisions of this section are severable.**
- f. **The amendments to this section enacted during the 1981-82 Regular Session of the Legislature shall apply to transfers of works of fine art, when created before or after January 1, 1983, that occur on or after that date.**