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Droit de Suite.

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“Artist Resale Right” that entitles artists of postwar, modern, and contemporary art (or their successors) to claim a portion of the price paid (above varying minimum levels) on the secondary art market.

Visual art typically circulates in the commercial market as originals. Compared to creators who establish reputations in other fields, visual artists whose work remains in copyright have few opportunities to commercialize turnover and the volume of sales. Upon resale within copyright at a markedly higher price, *droit de suite* entitles the artist or the estate of that artist to partake in the appreciation of value of his or her creation. This royalty is payable every time a work is resold, no matter who sells to whom. However, the royalty is capped and subject to both varying and sliding scales, and *de minimus* levels apply in the territories in play at the time of the resale of work by artists to whom the resale right applies.

1. Origin and early history of resale right.

Between 1748 and 1890 commercial galleries operated alongside the official art exhibition system known as the Paris Salon. The historical avant-garde resisted the state-sponsored Salon and set up independent commercial exhibitions. The Société des Amis des Arts was active in Paris during the height of the French Revolution. In offering living artists encouragement and support, the role of the Société bore a close resemblance to that of the *salonnières* of the time. During the social upheaval of the Revolution—characterized by radicalization and faction-forming—the membership of the Société included both members of

the royal family and of the liberal opposition. Members' subscription fees were used to acquire works of art for the collections of the Société which were disseminated through a lottery among members.

The Paris Salon collapsed in the late 19th century. The turn of the century saw new salons coming to the forefront. However, many of the most renowned artists in the modern canon gained relatively little financial reward in their lifetimes, as their works sold for low prices relative to contemporary artists today. Only in later years did the work of artists such as Millet, Gauguin, Cézanne, and Degas sell for large sums. Among the foremost critics of the Salon system was art historian <XR oao-9781884446054-e-7000084694>Théophile Thore</XR>. A keen businessman and proto-socialist, he co-founded the Alliance des Arts in 1842 with Paul Lacroix. The organization aimed to promote and sell art, representing the interests of both artists and collectors. The Alliance organized sales and produced detailed catalogs of works, breaking tradition of alphabetical listings to group paintings by school or chronology, promoting more recent works as part of a historical framework.

Albert Vaunois introduced the concept of a *droit de suite* for visual artists in an article that appeared in the *Chronique de Paris* of February 25, 1893. A campaign for its recognition started in France. It was buttressed by a firm conviction that the sale of the artist's work at its "true" value occurs late in life, if not posthumously. The delayed appreciation was ascribed to a time lag in the popular understanding of an artist's true worth. The belief took root that artists deserved to profit upon being discovered by a newly educated market. After all, artists were at a distinct disadvantage on account of having to subsidize the education of the public by their own poverty (Price and Price, p. 144). The effort on the part of financier André Level (c. 1870–1946) to set up the La Peau de l'Ours (Bearskin club) in 1904 is a well-known example of money being pooled in a fund that supported artists. With an investment of 250 francs from each member, he bought works directly from major avant-garde artists of that

time and, ten years later, sold the collection at auction. The yield was spectacular: four times the original capital outlay. The members each returned 20 percent of the profits to the artists. Nonetheless, as long as the conceptualization of the *droit de suite* rested on informal, voluntary group initiatives, the protection offered would remain indirect and unstable. Standardized treatment for artists would require a law of general application to be drafted and adopted.

Also in 1904, the Société des Amis du Luxembourg produced a draft that became the French law that was promulgated on May 20, 1920. The Société was established in Paris in 1903 with the dual purpose of setting up the Musée du Luxembourg and seeing to the enactment of the *droit de suite*. At first, the artists' resale right as established and promulgated in 1920 applied only to works sold at auction. Subsequently incorporation of the Law of 1920 into the French Copyright Law of 1957 saw an effort to extend it to dealers, but the extension never took effect.

2. Conditional and globally fragmented application.

The resale right was first given international recognition in the Berne Convention in 1948. Applicability of the right depended on whether domestic legislation was in place where the artist or creator was either habitually resident or a national. Italy and Belgium already had in place legislation on the resale right by that point, and a number of civil law countries subsequently followed the lead of French law. Efforts on the part of the European Commission to harmonize *droit de suite* across the EU culminated in an EC Directive on the resale right for the benefit of the author of an original work of art (Directive 2001/84/EC). Today, the right applies to all sales completed in the European Economic Area (EEA). *Droit de suite* was introduced into UK law, effective on February 14, 2006.

The resale right is guaranteed on the basis of reciprocity. Accordingly, only the nationals of countries which apply the resale right to EEA nationals may benefit from the rights given under EU law. Both the artist's home country and the place where their work was resold must have enacted the right in order for it to be viable. EU member states are required to ensure that the royalties are collected and distributed to artists. In practice, auction houses and dealers make the royalty payments to collecting societies which distribute them to artists. The right, however, does not have global reach. Legal gaps arise where attempts to introduce the right in certain countries floundered, or where introduction was optional. Adoption of the right at federal level in the USA is becoming increasingly unlikely. California is the only state in the USA to recognize a resale right similar to that in EU law. However, the future of the California Resale Royalty Act has been uncertain ever since American artists filed a class action law suit against Christie's, Sotheby's, and eBay for allegedly failing to pay royalties in 2011. The scope of application of the Act has now been clarified through litigation. Sales by residents of California and made in the state of California incur the levy, whereas sales made out-of-state do not. Canada rejected the resale right altogether; Switzerland and China, after some consideration, have still not precluded its adoption. Consequently, the position is that no *droit de suite* applies when works by artists from the EEA are resold in Switzerland, China, and in the USA (with the exception of California), or works produced by Swiss, Chinese, and American artists are resold in the EEA.

3. Disparities in application.

Legal diversity exists across countries and states that have opted for the resale right. For instance, French law entitles an artist to a 3 percent royalty based on the total sale price of the work at auction. Traditionally, the portion was paid by the seller. Christie's transferred the

burden to the buyer in its conditions of sale, and the Court of Justice of the European Union has confirmed the legality of this procedure. In the UK the royalty is calculated according to a sliding scale from 4 to 0.25 percent. At first, the right applied to living artists only, but in 2012 it was additionally extended to heirs or estates of artists deceased within seventy years. Other examples of disparities include California law, where the artist must receive a royalty of 5 percent of the sale price and the right is enforceable by a creator's heirs for up to twenty years after his or her death. The percentage is the same under German law, but artists are precluded by law from taking any action to claim the right. The government-appointed collecting agency VG Bild-Kunst is the only body authorized to initiate a claim and to request information from a dealer or auction house about works that were sold and the identity of the seller.

4. Controversy and debate.

In addition to ongoing questions of implementation, there is considerable debate about the merits of the resale right and the bureaucratic burden required to sustain it. The implementation of the resale right amounts to an additional tax on the art market (and only the art market) by the government, which is levied at a higher rate than other markets. While it allows the artist to keep track of sales on the secondary market, administrative costs are deducted from the money actually disbursed to artists and occasionally money is generated by the tax that cannot be disbursed simply because the creator or his/her heirs cannot be found. The bureaucratic (and thus financial) burden on dealers and auction houses raises the question whether artists merit special protection in the first place; whether the rights and financial interests of artists should rank higher than those of other participants in the market; and whether their special protections are worth the attendant difficulties of collecting and

dispensing resale tax funds. Another important debate concerns the factors that determine how global art business expands.

As of now, no final answer can be supplied on the question of whether the implementation of artists' resale rights has had any significant impact on the flow of art in global markets, nor on the question whether it gave Asian countries, Switzerland, and the USA (except California) a competitive advantage over *droit-de-suite* countries.

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