

ECONOMIC ANALYSIS OF THE DROIT DE SUITE – THE ARTIST’S RESALE ROYALTY

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INTRODUCTION

The European Union has announced the harmonisation of the Droit de Suite legislation which will provide that living artists and the estates of recently dead artists will receive a percentage royalty on resales of their work. Such a scheme had been opposed by the British art trade but, from 2006, a sliding scale of resale royalty will apply to works of living artists. From 2012 the Droit de Suite will apply to works of deceased artists.¹

The Droit de Suite or the artists' resale royalty is based on the notion of the "artist starving in the garret"² under which it is held that an artist works in impoverished circumstances to produce art works, sells these for a low price but lives to see them become highly valued and for them to change hands at high prices but is unable to share in the capital gains so determined. Droit de Suite is a legal requirement giving the artist a legal right to share in the increase in the value of artworks created by the artist upon second and subsequent sale.

The "artist starving in a garret" view holds that artists work for the benefit of dealers and collectors.³ Although the work of the artist might achieve critical acclaim and fame, the artist did not benefit materially from the increased fame but continued to starve in the garret. Emotive stories of Millet's grand-daughter selling flowers on a Parisian street in the same year as one of the painter's work was re-sold for one million francs but which was originally sold by Millet for 1,200 francs were supposed to be behind the decision of the French government to create the new right for artists.⁴ Other commentators have

¹ The Art Newspaper, No 116, July-August 2001, p68.

² Filer (1986).

³ In discussing the resale of one of Lucian Freud's work for over one million pounds (originally sold for 100,000 pounds) the Daily Telegraph (March 14, 1998) commented "this case seems to confirm the ancient stereotype of an artist, distracted by the promethean struggle of making a masterpiece, being ripped off by an opportunistic businessman, who buys when the work is cheap and sells when the artist has gained a reputation." The Daily Telegraph notes however that Freud preferred to sell works to dealers rather than place them on consignment.

⁴ This story is recounted in Clark (1981); a similar, but not identical, story about Millet's granddaughter is recounted in Price (1968) while Schuler (1966-67), Hochfield (1975) and Filer (1984) repeat a story with similar details.

referred to a “deep-seated romantic view of art and the artist”⁵ which underlies the rationale for Droit de Suite. Implicit in the rationale for the Droit de Suite is a notion of an unspecified market failure but later consideration of the position where art prices falls indicates the market failure view is unsustainable.

In France, a law providing for re-sale royalties was enacted in 1920. The law provides that, during the life of an artist and for fifty years afterwards, on the public sale of a work of an artist for a price in excess of 100 francs, a royalty of three per cent is payable to the artist or the artist’s heirs. Other countries have enacted similar legislation. Italy has an act which provides for re-sale royalties of up to 10 per cent (on a sliding scale) on the increase in a work’s value between sales. The Italian law applies only to paintings and sculpture sold in public sales where the price is over 5,000 and 10,000 lira respectively; the law applies to private sales where the price has increased by a factor of four. In Germany, a resale royalty of one per cent is provided for on works sold for more than 500 marks in a public facility, that is via an auction or dealer.

In California⁶, the law provides that if a work of art is sold in California or sold by a California resident, five per cent of the sale price has to be paid to the artist. The seller of the art work is responsible for locating the artist and making the payment. The application of the Californian law is restricted to painting, sculpture and drawings and to sales during the life-time of the artist and to sales where the price is greater than \$1,000 and where a capital gain occurs. The artist cannot waive the right to receive the royalty unless under a contract which itself provides for a resale royalty greater than five per cent. The right to receive the resale royalty is not transferable.

An international committee⁷ reported in 1985 that there were another ten countries which had implemented Droit de Suite and that there were another 18 which had recognised the

⁵ Price (1968).

⁶ Filer (1984) and Clarke (1981).

⁷ Executive Committee of the International Union for the Protection of Literary and Artistic Works and Intergovernmental Committee of the Universal Copyright Convention, “Droit de Suite: Draft Guiding Principles Concerning the Operation of this Right”, Paris, 10 June 1985 B/EC/XXIV/13.

principle of Droit de Suite. It is not clear how effective such laws are as it appears the means to enforce their operation is lacking.

The general Droit de Suite proposal is analysed first and then the proposal for an Australian Droit de Suite is explicitly analysed.

THE NATURE OF DROIT DE SUITE

The European harmonisation of the Droit de Suite provides for a sliding scale of resale royalties of:

Resale price of artwork in euros (€)	Royalty Rate
1-3000	zero
3001-50,000	4%
50,001 – 200,000	3%
200,001- 350,000	1%
350,001-500,000	0.5%
500,001 and above	0.25%

Subject to a maximum amount per transaction of €12,500. A four per cent levy on a sale of €50,000 would yield €2,000 to the artists which is very similar to a levy of .25 per cent on a sale of €1,000,000 so that the return to the artist is relatively constant even if prices of the artworks rocket upwards. Under this system, a living very famous artist would be better served by painting another picture and selling it in the primary market.

The Droit de Suite does not apply to private sales but only to sales of paintings and other visual artworks through auction houses, galleries and dealers. It is envisaged by Fry (1992) that, in the UK, returns would be made to an existing collecting society, the Designers and Artists Copyright Service, which currently collects copyright payment from reproductions of artworks in the form of posters, postcards and exhibition catalogues.

Under the European legislation, Droit de Suite derives from Copyright Law which generally provides for economic rights of creative artists. The Droit de Suite will hence apply only to artworks covered by copyright. Copyright exists for the life of the artist plus a period of 70 years after death.

The application of Droit de Suite to the UK art market was a special concern to participants in that market as the UK market, centred on London, is the largest in Europe with annual turnover of over two billion pounds. The opposition in the UK to the Droit de Suite argued that it would cost £68 million a year in royalty payments and would eliminate 5,000 jobs as art sales as the art market migrated to centres without a Droit de Suite such as the USA (New York is the centre of art auctions sales in the USA) and Switzerland.

ECONOMIC ANALYSIS OF THE DROIT DE SUITE

Analysis of the Droit de Suite requires an understanding of the private art market. The primary market, the market for newly created art works, is structured on the artist-dealer or artist-gallery system, as explained by Stanford (1989) in which artists consign works to a gallery or dealer who exhibits the works and acts as agent of the artist. The remuneration of the dealer is a commission on sales. Generally speaking, artists do not sell all works in an exhibition; in fact, it is extremely uncommon for an artist to have a “sell-out” exhibition but the unsold works are held by the dealer in the “stock room” or “back room” and are available for sale after the exhibition. The dealer performs important economic services for the artist in other ways as well by attempting to attract customers and to obtain commissions for the artist. The dealer will cultivate an entourage of collectors and may even finance the purchase of art works on a deferred payment system. Having an association with a dealer allows the artist to concentrate on production of art works. The private art market is almost entirely unregulated and the entering into and maintaining a business relationship with a dealer is a voluntary action by artists who have alternative sales channels of selling from their studio or selling from artist run galleries.

The secondary art market is for the re-sale of previously created artworks and has two major facets: dealers and auction houses. The general trend is for artworks to be resold in auction houses which, in order to attract offerings, have moved to charge a buyers' premium in order to reduce the commission charged to sellers. Auction houses, especially the internationally known Christies and Sotheby's hold regular auctions supported by elaborate catalogues in an attempt to attract a fashionable audience. Prices of artworks in the primary market are set by the dealer who generally does not allow bargaining by buyers. For most artists the difficulty is not having to haggle over prices but lies in finding buyers interested in their work. Artists accumulate a stock of unsold work held either in their studios or in the back-room of a dealer. It usually takes some considerable time for an artists' work to be sold in the secondary market; artists need to have achieved some success before their work can be resold in the secondary market and premature attempts to sell works in the secondary market through distress sales or realisation of deceased estates may retard the ability of the artist to support secondary market sales.

In the primary market, both collectors and artists behave with an eye to the future. Artists continue to work even though their works are not sold and even though they have to resort to non-art market activities to support themselves. Artists have an expectation that their work will be successful in the future and that prices for their work will rise. In general, artists expectations are that:

$$P_e^{t+k} > P_t \quad (1)$$

Where P^t = current price of artist's work

And P_e^{t+k} = expected price of artist's work at time t+k

The basis of this expectation formation is the observation that the distribution of artists' incomes is highly skewed so that a small proportion of artists receive a disproportionate

share; this distribution is similar to that of sporting players' incomes or musicians incomes. In both cases, the rewards to successful people are great while the majority of people receive mediocre incomes as explained by Rosen (1981). The successful artists, those who become the super-stars, and whose ability may not be excessively greater than the average, receive quasi-rents as argued by McDonald (1988). The basis of these quasi-rents arise from both demand and supply factors: there are, for example, a limited number of venues at which super-star artists may be exhibited and collectors will hold works by a limited number of super-stars. Success in the art world is a product of both ability and good fortune; no artist will succeed without talent but talent by itself is not enough to succeed. Success requires, if not luck, achievement at certain points in a career such as winning an important prize, being shown at an important venue, being purchased by significant collectors or public collections, being praised by significant opinion makers (the "art legitimization authorities"). The actual price of an artist's work at time $t+k$, will depend on their career progress and this is not predictable so that only a relatively few artists will emerge as super-stars. Individual artists are prepared to enter the art world in the hope that they will become successful; entry to the art world is equivalent to purchasing a ticket in a lottery. Artists also persist because they are dedicated to their art and find the life style of an artist satisfactory. Other artists, realising that they will not scale the heights of success turn to alternative occupations many of which are arts related.

Purchasers of artworks in the primary market are postulated to receive two forms of rewards for ownership of art: the stream of art services arising from possession of an artwork and the expected capital gain. These returns are

$$\begin{aligned}
 R_s &= R(P_t) \\
 R_k &= P_e^{t+k} - P_t
 \end{aligned}
 \tag{2}$$

Where R_s is the services provided by ownership of artworks or the consumption value of art; it is expressed as some function of the current price. There are rental markets in art

which give some estimate of the consumption value of art. Stein (1977) set the rental value of art as 11 per cent of the appraised value; Bryan (1985) estimates an approximate service return in the contemporary art market of between six and eight per cent a year.

Rk is the expected capital gain from owning art; while each work cannot be predicted to rise in price the expectation is that some artworks will increase in value. Bryan (1985) showed that rentals costs of renting contemporary visual artworks with an option to buy included ranged from 17.8 to 19.8 per cent implying that the option has a positive value. A number of studies, reviewed in Stanford (1993), concluded that the return to art as an investment was positive. The expectation that artworks will receive a capital gain is rationally based.

ARGUMENTS AGAINST THE DROIT DE SUITE

In this paper, my argument is that the primary art market embodies expectations of future price rises on the part of both buyers and sellers which makes the basis of the Droit de Suite implausible. Droit de Suite has been described as “an expression of the belief that:

1. the sale of an artist’s work at anything like its “true” value only comes late in his life or after his death;
2. the postponement in value is attributable to the lag in popular understanding and appreciation;
3. therefore the artist is subsidising the public’s education with his poverty;
4. this is an unfair state of affairs;
5. the artist should profit when he is finally discovered by the newly sophisticated market.⁸

My argument is that the increase in value of an artist’s work will come only if the artist has been an active participant in the art market. Contrast the hypothetical position of an artist who worked away in solitude and revealed to world their work only when they were

⁸ Price and Price (1971-72) p 144.

old. There is no mechanism to evaluate this work which stand outside the standard canons of appreciation. My argument further says that the artist will profit with an increase in prices realised in the secondary market because the artist or his dealer holds stocks of unsold paintings whose prices rise in line with the prices realised in the secondary market.

Arguments presented against the Droit de Suite are that introduction of a Droit de Suite will reduce the current demand for art works; the art market will move to a jurisdiction in which the Droit de Suite is not levied.

Artists have certain rights in the relation to their work even after sale⁹; one clear example is the legal right of copyright under which the artist controls the right to re-produce the work in some other form. (In the art market, a distinction is made between a "copy" of an artwork and a "reproduction" of an art work. A copy is of the same medium so that the term "copies of a print" is common. A reproduction is a representation in another medium. Art museums and galleries usually sell reproductions of famous works of art in their shops; these reproductions are photographic representations of the art work and are not in the same medium as the original art work.)

In nineteenth century England, the sale of copyright was an important source of income to artists. Re-productions of the original art work were made by engraving and the individual re-productions sold at a price which made them accessible to a much wider market than the original. Artists such as Landseer enjoyed a considerable income from the sale of copyright for re-productions; it was claimed that Landseer's income was £7000 pounds a year. One of the most famous images created by Landseer which was re-produced in mass was "The Stag at Bay".

⁹ Recent legislation in Australia has introduced the concept of "moral rights" into Copyright legislation. The Copyright Amendment (Moral Rights) Bill 1999 provided for the creation of the non-economic rights attribution, integrity, disclosure and withdrawal. Attribution gives the artist the right to be identified as the creator of the work; integrity is the right to maintain the art work in the form created by the artist and to oppose derogatory acts on the art work; disclosure is the right to determine if an artwork is to be made public; and withdrawal is the right of the artist to withdraw right from the public.

Today, copyright is generally regarded as unimportant as a source of income for artists. Copyright grants exclusive rights to authors and other creators of new works for a limited period to reproduce, sell, rent, and display their work. The time period is usually limited to the life of the artist plus a certain period; in Europe 70 years.

The limitation on the extent of copyright is intended to promote the free circulation of ideas and an increase in creative activity which benefits society as a whole; once copyright has expired, the work enters the public domain where it can be used by all¹⁰. The intention of copyright is not to provide a private benefit but a public benefit.

The property rights inherent in ownership of an art work are separable; an artist may sell the physical object but retain copyright which would allow the artist to control reproductions of the work. The artist has no control over the copyrighted work itself after the first sale of the work.

Droit de Suite can be distinguished from Moral Rights under which an artist's right to be recognised as the creator of the art work and to protect the work from defacement or destruction is maintained.

THE AUSTRALIAN COPYRIGHT COUNCIL PROPOSAL FOR DROIT DE SUITE

The proposal for Droit de Suite from the Australian Copyright Council¹¹ with the avowed objective of “encouraging creative endeavour by rewarding visual artists with a share in the increasing value of their creative product”, was based on the unsubstantiated belief that there have been few, if any, objections¹² to the principle to Droit de Suite. The

¹⁰ Clarke (1981) p1316

¹¹ Australian Copyright Council (1989).

¹² Elsen (1977) notes that the Californian artists' royalty bill was a “midnight” bill that slipped through the legislature at the last moment and that there are private contractual arrangements available to artists to achieve the same effect as the legislation. Elsen further notes that the Californian law is being ignored by

Australian proposal makes the claim that the objections to Droit de Suite centres on the perceived difficulties of administration and the fear that the cost of collection will make the scheme ineffective for artists.

The Australian proposal has the following features:

1. It would be enacted by Commonwealth legislation by an amendment to the Copyright Act rather than by specific legislation;
2. a general definition of the works of art to be included would be provided, giving specific opportunity for detailed agreements between the relevant parties as to the specific sub-categories of art works, in particular the case of works produced in limited multiples;
3. the imposition of a royalty on sales with a public element, that is, auctions or dealers;
4. a fixed percentage royalty calculated on the full sale price above a specified threshold;
5. a right, operative over the full term of copyright, inalienable and effective in relation to sales from the time of the legislation irrespective of the date of creation of the works of art;
6. a system of collection and distribution operated through an artists' collecting society;
7. civil remedies available to the artist when the scheme is not complied with;
8. inclusion in the scheme of foreign nationals on the basis of reciprocity;
9. It would cover Australian citizens and residents in a manner consistent with the operation of copyright law.

The underlying basis of the proposal is that visual artists, who create original works which are not reproduced, are at a disadvantage under current copyright law unlike

artists, dealers and collectors, even though in some cases artists have been told they are not being paid royalties. Elsen reports that the major problem facing contemporary visual artists is making the first sale.

authors and composers who create manuscripts which are sold in multiple copy reproductions. The proposal claims that Droit de Suite has the effect of “redressing this balance by giving artists whose work is not created to be reproduced, the right to share in another’s exploitation of their work - that is, resale of the original.” As recognised by the proposal itself, Droit de Suite is not a copyright in the usual sense; instead of a temporary exclusive right of a negative character, there is a positive right to receive an amount calculated on the resale amount. In addition, the proposal for Droit de Suite involves an extension of copyright to the material object itself rather than the reproductions. By analogy, a Droit de Suite arrangement in other areas of the creative arts would give a right to authors and composers to share in the profit from the resale of manuscripts.

The proposal asserts the need for the establishment of an artists’ collecting society in Australia. Such a society would maintain a record of art works produced and would check for resales. The proposal recognises that the activities of such a society would require financial support from government as it would not be expected that the society could not meet capital costs and running expenses or that the potential beneficiaries, the artists, could meet these costs.

The rationale for the Australian scheme for an artist’s resale royalty is that it creates a mechanism for encouraging creative endeavour by rewarding visual artists with a share in the increasing value of their creative product. There are currently available mechanisms for artists to achieve the effect proposed by the Australian Copyright Council; artists may enter into contracts with the purchasers of their art works to receive a proportion of any capital gain upon resale or to obtain an option to purchase the work in the future for a specific or determinable price. It is true, that under a civil contract, artists can bind only the original purchaser and are unable to extend the contract to subsequent purchasers so that artists would be able to share in only the capital gain from the first resale. Artists would be faced with transactions costs in seeking to enforce the provisions of the contract; the costs of enforcing the contract could be substantial in relation to the amount of the capital gain. Although there have been one or two isolated reports of such contracts being written in the Australian contemporary visual arts market, it is not difficult to see

why such contracts would be rare. In the first place, it is not in the interests of the purchaser to be encumbered by such an arrangement and as the bargaining power is usually held by the purchasers in a market where there is chronic excess supply, few such contracts would be concluded. Furthermore, rational collectors would discount the potential future compliance costs by offering a lower current price so that, at best, the artist may achieve only inter-temporal substitution of returns. If the rate of time preference of artists is low then it would be rational for them to accept a higher current price and forego the future benefit.

In the second place, few artists would be willing to enter into a contract where they were required to compensate the artist for further capital losses. It is in artists' interests to sell their works early in their careers because purchase by collectors is a critical point which determines the reputation of artists and their ability to increase their prices in the future. If, as has been maintained, artists do not sell all of their current production and thus hold stocks of unsold works, an increase in the market price of an artist's works will increase the value of the inventory and ensure that the artist gains from the increase in the price of the art works.

While, for all these reasons, it is likely that few such privately negotiated contracts would be concluded, it must be considered if there are any grounds for government intervention. Such intervention could be justified on the basis of existence of transactions costs which prevent private contracts from being concluded and enforced. A further ground of intervention is the view advanced by proponents of the *Droit de Suite* that artists are exploited under the present market arrangements. The previous analysis of the art market indicates that this view is unsustainable and the assertion by the artist, Marcel Duchamp, that a work of art is created to an equal extent by the artist and the public is pertinent here¹³. On the face of it, the case for a *Droit de Suite* scheme is not plausible. A formal analysis of the Australian proposal will confirm this.

¹³ Quoted in Geraldine Keen (1971).

FORMAL ANALYSIS OF THE AUSTRALIAN DROIT DE SUITE PROPOSAL

The analysis will proceed by examining formally the following transaction: a collector sells a painting, originally purchased in year 0 for P_0 , for P_t , n years later. The collector is subject to capital gains taxation; such taxation is levied only on the real capital gain, after deduction of direct selling costs, determined by the application of an official asset price deflator.¹⁴ The artist's dealer is entitled to commission on the payment to the artist under Droit de Suite under the contractual arrangement with the artist. The collector incurs selling costs by way of commission paid to the auction house or to the dealer. The effect of the imposition of the Droit de Suite will be felt by collectors as it will change their expectations about the future gain from owning paintings and by artists as they have changed expectations about the returns from their work over a period extending beyond the time of first sale.

The costs of the transactions in the sale are calculated and the returns to all parties in the sale are identified. The return to the collector is compared with the return to that of a risk free financial security. The transactions under the Droit de Suite scheme can be expressed in formal terms as:

Let

- P_0 = the initial sale price of an art work;
- P_t = the sale price of the same art work at time, t (n years after the initial sale);
- P_k = the threshold at which the Droit de Suite applies;
- d = dealer's commission on second sale;
- c = commission paid on resale of art work;
- t = rate of capital gains taxation;
- PI = deflator for capital gains taxation purposes;

¹⁴ In the 2001 Commonwealth Government budget, the capital gains tax provisions have been changed to make only half the nominal capital gain subject to taxation; this change if incorporated into the analysis would not change the results materially.

- r = real rate of interest on a risk free security;
 k = the rate of royalty payable to the artist;

The returns available to all parties on resale are calculated as follows:

The gross selling price is:	P_t
Real selling price for capital gains taxation purposes is:	P_t/PI
The nett return to the collector from the sale is:	$(1-c)P_t$
The total nominal gain is:	P_t-P_o
The real capital gain, subject to taxation, is:	$(1-c)P_t/PI-P_o$
The amount of Droit de Suite payable by collector, only if $P_t > P_k$ (which is also the gross amount receivable under Droit de Suite by the artist) is:	$k(P_t-P_o)$
The Capital Gains Tax payable by the collector only if $P_t/PI > P_o$ is:	$t((1-c)P_t/PI)-P_o$
The return to the selling agent is:	$c(P_t)$
The return to the artist's dealer, only paid if the artist receives a payment under Droit de Suite, is:	$dk(P_t-P_o)$
The gain to the artist, if Droit de Suite is payable:	$k(P_t-P_o)$
The return to the artist's dealer:	$dk(P_t-P_o)$
Return to the owner if Droit de Suite is not payable but capital gains taxation is payable:	$(1-c)P_t-t(((1-c)P_t/PI)-P_o)$
Return to the owner if Droit de Suite is payable but if no capital gains taxation is payable:	$P_t-(k)(P_t-P_o)-cP_t$
Return to the owner if Droit de Suite and capital gains tax is payable:	$(P_t-cP_t)-(k)(P_t-P_o)-t(1-c)(P_t/PI-P_o)$

Table 1. Returns to the Various Parties under a Droit de Suite Scheme

	If painting is sold for more than the threshold; if $P_t > P_k$		If painting is sold for less than the threshold; if $P_t < P_k$	
Parties to the Sale:	If a capital gain occurs; $P_t/PI > P_o$	If a capital gain does not occur; $P_t/PI < P_o$	If a capital gain occurs; $P_t/PI > P_o$	If a capital gain does not occur; $P_t/PI < P_o$
Artist	$k(P_t - P_o)$	$k(P_t - P_o)$	0	0
Collector	$(P_t - cP_t) - (k)(P_t - P_o) - t(1 - c)(P_t/PI - P_o)$	$P_t - (k)(P_t - P_o) - cP_t$	$(1 - c)P_t - t(P_t/PI) - P_o$	$(1 - c)P_t$
Selling Agent	cP_t	cP_t	cP_t	cP_t
Artist's dealer	$d(k)(P_t - P_o)$	$d(k)(P_t - P_o)$	0	0
Government	$t((P_t/PI) - P_o)$	0	$t((P_t/PI) - P_o)$	0

Comparison of the entries in Table 1 shows that:

1. the artist is not required to make a payment under any circumstances;
2. the selling agent is unaffected by Droit de Suite;
3. the artist's dealer stands to make a gain through the introduction of Droit de Suite;
4. the government will be unaffected by Droit de Suite in that capital gains taxation payments are not affected;
5. there is a potential loss for collector may suffer a loss from the introduction of Droit de Suite which is examined further below.

Whether the collector suffers a loss from the introduction of Droit de Suite depends on whether the sale of the painting represents a real gain to the collector. The collector will enjoy a real gain only if the post taxation return from the sale of the painting is greater than the returns forgone from holding a risk free financial security instead of the painting. That is, a real gain has been made only if

$$(1 - c)P_t - t(1 - c)P_t/PI - P_o > P_o(1 + r)^n \quad (3)$$

where $P_o(1+r)^n$ is the return to an amount, P_o , held in a risk free financial security for n years.

The introduction of a Droit de Suite scheme would mean that the collector would make a real return on the sale of the painting only if

$$(1-c)P_t - t(((1-c)P_t/PI) - P_o) - k(P_t - P_o) > P_o(1+r)^n \quad (4)$$

which is to say if $k(P_t - P_o) > 0$

so that the introduction of a Droit de Suite scheme is likely to reduce the expected return to holding art by collectors and the return relative to holding financial assets the effect of the introduction of a Droit de Suite on the demand for paintings could be expected to be negative that is in P, Q space there would be a leftward shift in the demand curve. In other words, it would be expected that the introduction of a Droit de Suite scheme would reduce the demand for paintings.

This conclusion can be re-enforced by an alternative analysis. Suppose that instead of the introduction of a Droit de Suite scheme, artists were given a legal requirement to be able to purchase a call option from the original buyer of their work. The call option would give the artist the right, but not the obligation, to purchase the art work from the collector at some future time at a predetermined strike price. If the collector expected that the art work might increase in price in the future, then the collector would be willing to sell a call option only at a price greater than zero. If the artist calculated that the call option has a positive value then the current receipts to the artist from the sale would fall, a position consistent with a fall in demand as analysed above. (The question of whether an artist would sell a put option, the right, but not the obligation, to purchase the painting from the collector at a future time at a price determined now, illustrates the asymmetry of the Droit de Suite proposal. If an artist were prepared to sell a put option, the collector will increase

the expected returns for owning the art work because the downside potential has been reduced. Hence a completely symmetrical Droit de Suite scheme in which the artist paid an amount to the collector in the event of a loss on resale of the painting would increase the current demand for art.)

If the artist were unwilling to purchase a call option or to sell a put option then it can be said that a symmetrical Droit de Suite scheme would not provide a net benefit to the artist.

Other considerations suggest that the introduction of a Droit de Suite scheme would not provide benefits to artists. The proposal for a Droit de Suite scheme in Australia as outlined above incorporates the provision that the right to receive a Droit de Suite payment could not be alienated or waived by the artist. Apart from the fact that this is an unusual provision in providing that property rights may not be sold as is the case in copyright, it would be expected that an artist would be willing to sell the entitlement to Droit de Suite to the original purchaser of the art work as in the case of authors who assign their copyright to publishers.

Furthermore the introduction of a Droit de Suite scheme would increase transactions costs in the contemporary visual art market as the Australian proposal requires a register of all art works produced and sold in the primary market so that public resales could be checked against the register to enforce payment of Droit de Suite. If the widest definition of artist, as proposed by the Australia Council, were adopted, the registration of art works on a data base would entail maintaining the records of 10,000 artists each of whom may produce up to 100 art works a year. If these transactions costs were to be borne from the proceeds of the Droit de Suite scheme, the amounts provided to artists may not be very great. The extent to which the introduction of the Droit de Suite scheme would benefit artists depends on the extent to which sales in the secondary market would attract the Droit de Suite payment. An empirical study of the characteristics of resales will give information on this.

EMPIRICAL STUDY OF REALES IN THE AUCTION MARKET

An empirical examination of the resales of paintings in the auction market from 1972 to 1989 was undertaken by considering all auction sales of 68 artists whose works in 1972 were the based of a portfolio study reported in Stanford (1993a and 1993 b). The data set derived from *Australian Art Auction Records* contained 4915 records and of these 298 paintings were resold at least once during the period 1973-1989.

The real price of each painting involved in a resale was calculated by deflating with the Consumer price Index.

Of direct relevance to the proposed Droit de Suite it can be noted that of the 68 artists in the total group, only 18 (or 26 per cent) had resales. Further information on the likely gains by artists from resales can be gleaned from the data on the nominal capital gains.

Table 1. Descriptive Statistics, Nominal Capital Gains, Resales in Auction Price Study, 1973-1989

Nominal Capital Gains	Descriptive Statistics:
Mean - AUD	1074.8
Standard deviation	4418.8
Minimum - AUD	-3800
Maximum - AUD	61000

The data in Table 2 shows that the average capital gain was AUD 1,075 although the distribution was highly dispersed as measured by the standard deviation and confirmed by the range. A frequency distribution of nominal capital gains is shown in Table 2 below:

Table 3 shows that nearly 38 per cent of resales did not give rise to a nominal capital gain and nearly 83 per cent of resales resulted in a capital gain of AUD 1,000 or less. Thus, if the threshold for Droit de Suite purposes were set at AUD 1,000 relatively few artists would benefit. This is consistent with evidence from the operations of the Droit de Suite in France where it has been concluded that three-quarters of the proceeds of the Droit de Suite go to only six families, all of them wealthy¹⁵

Table 2. Frequency Distribution, Nominal Capital Gains, Resales in Auction Price Study, 1973-1989

Nominal Capital Gain: AUD	Number of Resales	Percentage of Total
-2001 to -5000	1	0.3
-1001 to -2000	4	1.3
-1 to 1000	44	14.8
0	63	21.1
1 to 1000	134	45.0
1001 to 2000	17	5.7
2001 to 5000	21	7.0
5001 to 10000	8	2.7
10001 to 15000	3	1.0
15001 to 50000	2	0.7
50001 to 100000	1	0.3
Total	298	100.0

A frequency distribution of real capital gains is shown in Table 4.

Table 4 Frequency Distribution of Real Capital Gains, Resales in Auction Price Study, 1973-1989

Real Capital Gains: AUD	Number of Capital Gains	Percentage
-5001 to -15000	1	0.3
-4001 to -5000	1	0.3

¹⁵ Colin Gledhill, "Taking on the Big Two", The Electronic Telegraph, Issue 1058, Sunday 18 April 1998.

-2001 to -4000	4	1.3
-1001 to -2000	5	1.7
-1 to -1000	7	2.3
0	126	42.3
1 to 1000	105	35.2
1001 to 2000	15	5.0
2001 to 3000	14	4.7
3001 to 4000	4	1.3
4001 to 5000	2	0.7
5001 to 10000	9	3.0
10001 to 20000	2	0.7
20001 to 50000	2	0.7
50001 to 100000	1	0.3
Total	298	100.0

Table 4 shows that over 40 per cent of resales did not result in a real capital gain while a further 35 per cent of resales resulted in real capital gains of between zero and AUD 1,000. The table further shows that some resales resulted in substantial capital gains and that, under a Droit de Suite, some artists may benefit considerably from these gains.

CONCLUSIONS

The Droit de Suite is based on an inadequate analysis of the art market and the distribution of returns to participants in the art market. The Australian proposal for a Droit de Suite draws on overseas specifications but includes two aspects one of which adds to the costs of administering the scheme and one of which places restrictions on the right of artists to dispose of their property rights in the Droit de Suite. The first proposal is the setting up a new registration procedure which would incur heavy costs in relation to the funds available for re-distribution under the Droit de Suite; the second is the prohibition on the artist selling the right to receive Droit de Suite. It would be predicted that artists would generally choose to alienate rights to Droit de Suite so that a major weakness of the Droit de Suite proposal is apparent in the Australian scheme which prohibits artists from alienating their rights to Droit de Suite.

Formal analysis of the Australian Droit de Suite proposal indicates that the artist does not experience any loss or costs but that the costs of the Droit de Suite would be borne by the collector or owner of art works.

These formal conclusions are re-enforced by the empirical study of the Australia art auction market over the period 1973-1989 which shows that only 26 per cent of artists in the study enjoyed resales of their work; that most resales result in a small nominal capital gain and that while a small number of resales generate large capital gains the benefits are enjoyed by only a few artists.

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