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COMMENT

The Costs and Legal Impracticalities Facing Implementation of the European Union's *Droit de Suite* Directive in the United Kingdom

*Jennifer B. Pfeiffer**

I. INTRODUCTION

In 2001, the European Union passed a directive requiring member countries to implement a *droit de suite* on the resale of art.¹ A *droit de suite* is a resale royalty created to benefit visual artists.² The phrase is French and literally translated means “follow-up right.”³ It gives artists an inalienable right to hold an interest in their artwork even after they have sold their work.⁴ Every time the work is resold the artist can collect a commission or royalty (provided the transaction meets the requirements set out by the law mandating the *droit de suite*).⁵ The purpose of the *droit de*

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¹ Council Directive 2001/84 of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art, 2001 O.J. (L 272) 32 [hereinafter Council Directive]. The *droit de suite* is a mandatory royalty imposed on the sale of artwork. Some sources refer to the *droit de suite* as a tax, but this paper will refer to it as a royalty because the artists and not the government are the intended recipients of the money. See Gavin McFarlane, *E.U. and World Trade Brief: Time for the Droit de Suite?*, 149 NEW L.J. 1289, 1290 (1999).

² See Council Directive, *supra* note 1.

³ Jay B. Johnson, *Copyright: Droit de Suite: An Artist is Entitled to Royalties Even After He's Sold His Soul to the Devil*, 45 OKLA. L. REV. 493, 493 (1992).

⁴ Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1, 36 (1988); see generally Council Directive, *supra* note 1.

⁵ Johnson, *supra* note 3, at 493. Some stretch the reach of *droit de suite* beyond a royalty interest to include an interest in the work's display or destruction. *Id.* The European

suite is to allow artists to profit off of their growing reputations;⁶ for example, a starving artist who has sold a work for a pittance may profit (or his heirs may profit) when he has risen in prominence and his work has consequently increased in value.⁷

The United Kingdom actively opposed the directive;⁸ it worried about the effect of the directive on its lucrative art market⁹ and questioned the usefulness of the *droit de suite* itself.¹⁰ Even artists have protested the directive.¹¹ Nevertheless, the directive was passed¹² and the United Kingdom must implement the directive within the next eight to ten years.¹³

The United Kingdom stands to lose a lot of art business by implementing the directive.¹⁴ However, the British resistance to the directive involves more than the potential loss of business. The civil law concept of *droit de suite* conflicts with the British common law system. The United Kingdom's system of law is common law;¹⁵ conversely, the *droit de suite* originated in civil law.¹⁶ Because of the *droit de suite*'s civil

Union's directive does not extend the reach of the *droit de suite* this far, and therefore does not expect member states to include these interests in their national laws. See generally Council Directive, *supra* note 1.

⁶ Shirine Tiwari, *Artist's Resale Rights*, at http://www.axa-nordstern-art.co.uk/cw/law/law2002/resale_rights.html (last visited Mar. 30, 2004).

⁷ Tiwari, *supra* note 6; Johnson, *supra* note 3. The described scenario is the stereotype on which the *droit de suite* is based. See William A. Carleton, *Copyright Royalties for Visual Artists: A Display-Based Alternative to the Droit de Suite*, 76 CORNELL L. REV. 510, 536-8 (1991), (discussing the relationship between the *droit de suite* and the stereotype of the starving artist); see also Jon Stanford, *Economic Analysis of the Droit de Suite—The Artist's Resale Royalty*, 42 AUSTRALIAN ECON. PAPERS 386, 386-87 (2003).

⁸ See generally Kevin A. Bell, 1999 WTD 247-4 U.K. Weekly Update: U.K. Challenges Proposed E.U. Art Tax (Dec. 27, 1999): U.K. Challenges Proposed E.U. Art Tax, WORLDWIDE TAX DAILY, Dec. 27, 1999; Leyla Linton, *Art Market threatened by E.U. Tax 'on Sales*, THE INDEPENDENT, July 4, 2001 available at <http://www.independent.co.uk> (last visited Oct. 19, 2002); Clare Sellars, *Directive on Resale Rights for Artists*, 13 ENT. L.R. 24 (2002); David Heathcoat-Armory, *A Market Under Threat: How the European Union Could Destroy the British Art Market*, Centre for Policy Studies, at <http://www.cps.org.uk/dha.htm>; George Moore and Matthew Warren, *Artists win resale royalties*, MANAGING INTELL. PROP., Mar. 2002, at 18.

⁹ Bell, *supra* note 8; Tiwari, *supra* note 6; Heathcoat-Armory, *supra* note 8.

¹⁰ Tiwari, *supra* note 6; Linton, *supra* note 8.

¹¹ Tiwari, *supra* note 6; Henry Lydiate, *E.U. Directives: Copyright & Resale Right*, ART MONTHLY, Nov. 2001, at 49.

¹² See, e.g. Council Directive, *supra* note 1.

¹³ Lydiate, *supra* note 11, at 49.

¹⁴ See *Is London done for?*, ECONOMIST, July 24, 1997.

¹⁵ Peter Groves, *Moral Rights in the U.K. and Beyond*, CAN. BUS. & CURRENT AFF., Apr. 2003, at 3.

¹⁶ Jimmy A. Frazier, *On Moral Rights, Artist-Centered Legislation, and the Role of the State in Art Worlds: Notes on Building a Sociology of Copyright Law*, 70 TUL. L. REV. 313, 335 (1995).

law origins, the United Kingdom will have difficulty incorporating it into its common law system. The *droit de suite* is a *droit moral*, or a moral right;¹⁷ the common law copyright law is not grounded in moral rights and only offers moral rights limited, recent recognition.¹⁸ Moreover, the *droit de suite* conflicts with common law policies in copyright, property, and contract law. The United Kingdom will have an additional problem attempting to enforce the *droit de suite* once it becomes law. This comment will examine the problems the United Kingdom will face when it passes the *droit de suite* legislation mandated by the European Union's directive.

II. BEHIND THE *DROIT DE SUITE*

A. A Brief History of the London Art Market

In the mid-nineties, thirty percent of the world's art sales took place in London,¹⁹ making it the second largest art market in the world in terms of volume after New York²⁰ and the largest art market in Europe.²¹ London's eminence in the art world has existed for centuries,²² making it renowned not only for the number of art transactions, but also for the art expertise the city provides.²³ The British art market employs 51,000 people and has an annual turnover of more than £2.2 billion.²⁴ For the United Kingdom, a lot is a stake when considering the negative impact that a tax or royalty could create; therefore the United Kingdom is inclined to be protective of its art market.²⁵ The United Kingdom first opposed the *droit de suite* when the European Union began discussing the possibility of a directive in the early

¹⁷ Frazier, *supra* note 16, at 335. A *droit moral* gives artists or authors an interest in their work after the work as left their hands. The interest is based on the theory that a work is an extension of the author or artists' personality. The *droits morales* include rights affecting the work's display or alteration. The *droit de suite* affects only the resale right and is the only right included in the directive. Henry Hansmann and Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 98 (1997).

¹⁸ Groves, *supra* note 15, at 3.

¹⁹ *Is London done for?*, *supra* note 14.

²⁰ *Id.*

²¹ Summary, *First Authoritative Survey Commissioned by TEFAF*, The European Fine Art Foundation, 2002 at <http://www.artworlddealers.com/survey.htm> (last visited Jan. 18, 2004) [hereinafter *TEFAF*].

²² *Let the bad times roll*, *ECONOMIST*, Jan. 24, 2002.

²³ *Id.*

²⁴ Heathcoat-Armory, *supra* note 8.

²⁵ See Art Market: VAT and *Droit de Suite*, 589 PARL. DEB., H.L. (5th ser.) (1998) 154 [hereinafter *Parliamentary Debate*]; Ian Black and Dan Atkinson, *The United Kingdom gives up the fight against European art sale tax*, *GUARDIAN*, Feb. 16, 2000.

nineties.²⁶

B. The Value Added Tax

In 1994, the European Union's policies began to interfere with London's art market by forcing the United Kingdom to impose a 2.5% value-added tax ("VAT") on all art sales.²⁷ Another E.U. directive compelled the United Kingdom to raise the VAT to 5% in 1999.²⁸ The purpose of increasing the VAT was to harmonize the taxation of British art sales with the rest of the E.U. member states²⁹ and end protectionism of London's art market.³⁰ After the VAT came into effect, London's art market lost business, and many attribute this loss of business directly to the VAT.³¹ Between 1994 and 1998, art imports to the United States have grown at twice the rate of art imports into Europe.³² As early as 1996, after the imposition of the 2.5% VAT but before the 1999 increase, British art imports dropped 28% although the value of art sold at auction worldwide grew.³³ This occurrence suggests that sellers are choosing not to sell their art in London but instead are selling their art elsewhere.³⁴ By 2002, a number of auction houses and galleries displayed financial troubles by closing, being evicted, or being sold.³⁵

Despite the problems caused by the VAT, the British did not seem to fight it as intensely as it did *droit de suite* directive.³⁶ While the United Kingdom did attempt to block the VAT increase, it backed down on the VAT issue long before it did on the *droit de suite*.³⁷ Even though both were proposed around the same time, the European Union was able to pass the VAT increase almost five years before the *droit de suite*.³⁸ There is a possible explanation for this discrepancy; the VAT was already in place and acted as an ordinary tax³⁹ and so an effective philosophical argument could

²⁶ Parliamentary Debate, *supra* note 25; Black & Atkinson, *supra* note 25.

²⁷ *Is London done for?*, *supra* note 14. The VAT essentially acts like a sale tax.

²⁸ *Id.*

²⁹ Written Question No. 51/98 by Maren Gunther to the Commission, 1998 O.J. (C 223) 93, Jan. 28, 1998; *Is London done for?*, *supra* note 14.

³⁰ *Is London done for?*, *supra* note 14.

³¹ *Id.*; TEFAF, *supra* note 21.

³² TEFAF, *supra* note 21.

³³ *Is London done for?*, *supra* note 14.

³⁴ *Id.*

³⁵ *Let the bad times roll*, *supra* note 22. In addition to the long string of difficulties detailed in the article, the "top contemporary art dealer," the Anthony d'Offray Gallery, has closed. *Id.*

³⁶ See Black & Atkinson, *supra* note 25.

³⁷ *Id.*

³⁸ See *Let the bad times roll*, *supra* note 22; *Is London done for?*, *supra* note 14.

³⁹ See Parliamentary Debate, *supra* note 25.

not be made against the VAT itself.⁴⁰ However, the VAT is more far reaching than the *droit de suite*, affecting the sale of all art and antiquities.⁴¹ The *droit de suite* directive only affects the resale of modern and contemporary artwork.⁴² The United Kingdom's response to the *droit de suite* seems to show that there is some characteristic of the *droit de suite* that makes it more objectionable than the VAT. In a debate in the House of Lords, it was clear that the Lords did not consider the *droit de suite* a mere tax;⁴³ they made a clear distinction between the VAT and the *droit de suite* based on the fact one is tax and the other is not.⁴⁴

C. A Brief History of the *Droit de Suite*

After receiving opposition from British Parliament and an outcry in the London art market,⁴⁵ the European Union passed the directive mandating the *droit de suite* in September 2001.⁴⁶ There was little opposition in other E.U. member states because the royalty already existed in many of those states;⁴⁷ eleven of the E.U. member states already included some form of the *droit de suite* in their national laws.⁴⁸

1. French civil law origins

The *droit de suite* originated in French civil law;⁴⁹ it became part of French intellectual property law in 1920.⁵⁰ However, the ideas behind *droit de suite* existed long before it became codified. Before the French Revolution, French law was largely concerned only with economic rights,⁵¹ but after the Revolution, moral rights became a legal interest due to the ideologies of the Revolution and the Enlightenment.⁵² Although French law previously offered artists many legal protections, the French officially

⁴⁰ See *id.*

⁴¹ See *Let the bad times roll*, *supra* note 22.

⁴² Cf. Council Directive, *supra* note 1, art. 8; see also Tiwari, *supra* note 6.

⁴³ Parliamentary Debate, *supra* note 25.

⁴⁴ *Id.*

⁴⁵ Deborah Hargreaves, *U.K. Will Again Challenge European Union on Art Tax*, *WORLDWIDE TAX DAILY*, Dec. 20, 1999, 244-46 (excerpt reprinted from the *Financial Times*, Dec. 20, 1999).

⁴⁶ Council Directive, *supra* note 1.

⁴⁷ Tiwari, *supra* note 6.

⁴⁸ *Id.*; see also Clare McAndrew & Lorna Dallas-Conte, *Implementing Droit de Suite*, Research Report for the Arts Council of England, Mar. 2002, at 25-26, for detailed charts describing the *droit de suite* collection practices of the states.

⁴⁹ Frazier, *supra* note 16, at 335-36.

⁵⁰ LILIANE DE PIERREDON-FAWCETT, *THE DROIT DE SUITE IN LITERARY AND ARTISTIC PROPERTY* 218 (1991); Tiwari, *supra* note 6.

⁵¹ Frazier, *supra* note 16, at 335.

⁵² *Id.*

codified a scheme in 1920 to compensate visual artists by giving them a percentage of the resale value of their works of art.⁵³

The *droit de suite* originated in French civil law as a *droit moral*, or moral right.⁵⁴ It is not indigenous to common law;⁵⁵ few common law states recognize the right, and those that do incorporated the right recently.⁵⁶ Moral rights are rarely recognized in the common law,⁵⁷ especially when they interfere with economic interests.

2. The Berne Convention

The controversy created by the European Union's proposed directive is not the first clash between civil and common law countries created by the *droit de suite*. In 1886, ten countries signed the Berne Convention, created for the recognition of international copyright.⁵⁸ The conferences leading up to the convention's creation involved arguments between the civil law countries,⁵⁹ who wanted to include more rights for individual authors and artists, and countries such as the United Kingdom and the Netherlands who wanted the individual countries to control those rights.⁶⁰ France and the United Kingdom were on opposite sides of the issue.⁶¹ Despite their distinct copyright philosophies, both countries were original signatories.⁶² However, the Convention failed to create a universal copyright law, as the French had hoped;⁶³ the countries involved had rejected the French proposal that included *droits d'auteur* (rights for individual authors).⁶⁴

By 1948, the Convention had thirty-seven members.⁶⁵ That year they met in Brussels to revise the Convention.⁶⁶ The final right added to the

⁵³ *Id.* at 338.

⁵⁴ *Id.* at 335-36.

⁵⁵ Groves, *supra* note 15, at 3.

⁵⁶ *See id.*

⁵⁷ *Id.* Historically, common law deals mainly with economic rights, and moral rights, if observed at all, tend to be a recent addition superseded by economic interests.

⁵⁸ Burger, *supra* note 4, at 15. In the century since the creation of the Convention, countries have continued to sign the treaty. In 1988, the United States signed the Convention. *Id.* As of March 23, 2004, over 150 states had become parties to the convention. *See* Contracting Parties to the Berne Convention, World Intellectual Property Organization at <http://www.wipo.int/treaties/en/ip/berne/index.html> (last visited March 30, 2004).

⁵⁹ *See* Burger, *supra* note 4, at n.367.

⁶⁰ *Id.* at 13-14.

⁶¹ *Id.* at n.367.

⁶² *Id.* at n.88.

⁶³ *Id.* at n.367.

⁶⁴ *Id.* at 13-14.

⁶⁵ *Id.* at 29.

⁶⁶ *Id.*

revision was the *droit de suite*.⁶⁷ The contracting countries, however, agreed that the *droit de suite* would not be a minimum Convention requirement.⁶⁸ An author could claim the right "only if legislation in the country to which the author belongs so permits."⁶⁹ The Convention members could choose whether to enact it and, if they did, what the terms would be.⁷⁰ Yet, the revision reflected the growing acceptance of the right internationally and a desire among some nations that the right become universal.⁷¹

3. How the *droit de suite* never came to be in the United Kingdom

The United Kingdom chose not to enact *droit de suite* legislation.⁷² In 1971, the British government created the Whitford Committee to examine the possible effects of implementing the revised Berne Convention, including the *droit de suite*.⁷³ In the Committee's 1977 report, it advised against implementing the *droit de suite* in the United Kingdom, citing its inefficacy, the procedural and administrative difficulties of implementation, and the negative economic effect it would have on the art market.⁷⁴

D. The *Droit de Suite* and the European Union

The European Union takes after the majority of Europe in that its system is derived from civil law.⁷⁵ Of the six original member states, five had systems based on civil law,⁷⁶ and therefore "community law bears a strong imprint of the French legal system."⁷⁷ As a result, French civil law, from which the *droit de suite* originates, influences the European Union's substantive law.⁷⁸ Judges and the European Court of Justice ("ECJ") do contribute some common law influences to the European Union, but the system is still very much grounded in civil law, especially when it comes to its statutes and directives.⁷⁹

⁶⁷ *Id.* at 36.

⁶⁸ *Id.*

⁶⁹ Berne Convention, Sept. 9, 1886, art. 14.

⁷⁰ *Id.*

⁷¹ See Burger, *supra* note 4, at 36, n.367.

⁷² See Simon Hughes, *Equal Treatment for Artists Under Copyright Law and the E.U.'s Droit de Suite*, in INTELL. PROP. AND ETHICS 147, 166-167 (Lionel Bently & Spyros Maniatis, eds., 1998) [hereinafter Simon Hughes, *Equal Treatment*].

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ WALTER CAIRNS, INTRODUCTION TO EUROPEAN UNION LAW 11 (2002).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

The European Union proposed the *droit de suite* to accomplish a number of goals.⁸⁰ The first goal addresses the particular situation of visual artists in the European Union; the European Union wants to “redress the balance between the economic situation of authors of graphic and plastic works and that of other creative artists.”⁸¹ By giving the artists a role in the secondary art market, the European Union hopes to have artists profit from their artwork even after the original has left their possession.⁸² The primary market involves transactions between artists and buyers; artists usually earn their money from the primary market. The secondary market involves the resale of the artwork.⁸³ The *droit de suite* seeks to give visual artists an interest in this market as well.

The other goals involve harmonization within the European Union.⁸⁴ Second, because an overreaching goal of the European Union is the harmonization of its markets,⁸⁵ the European Union hopes the *droit de suite* will harmonize the art markets of the member states.⁸⁶ Third, because the European Union desires the creation of a common market, the European Union promotes measures that are designed to balance market conditions among the member states.⁸⁷ The European Union believed that the states that do not impose the royalty have an unfair competitive advantage in art over states that require the royalty.⁸⁸ As such, the European Union hopes to create a level playing field in the art market.⁸⁹ Finally, the European Union wants to “put in place a harmonized legal framework in respect to the resale right so as to ensure the proper functioning of the market in works of modern and contemporary art.”⁹⁰ The directive brings the European Union a step closer to a universal, European copyright law.

The United Kingdom protested the European Union’s *droit de suite* from its conception.⁹¹ The European Union primarily aimed the proposed

⁸⁰ The E.U. has listed a number of goals relating to the desirability of a *droit de suite* generally. These three goals are goals specifically tailored to the E.U.

⁸¹ Commission Opinion on the Resale Right for the Benefit of the Author of an Original Work of Art, COM(01)47 final at 2 [hereinafter Commission Opinion].

⁸² Mark A. Reutter, *Artists, Galleries and the Market: Historic, Economic and Legal Aspects of the Artist-Dealer Relationships*, 8 VILL. SPORTS & ENT. L.J. 99, 112 (2001).

⁸³ Commission Opinion, *supra* note 81.

⁸⁴ See Council Directive, *supra* note 1, at pmb1.

⁸⁵ See TREATY ON EUROPEAN UNION, July 7, 1992, O.J. (C 191) 1 (1997) [hereinafter E.U. TREATY].

⁸⁶ Commission Opinion, *supra* note 81.

⁸⁷ See E.U. TREATY, *supra* note 85.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See generally Bell, *supra* note 8; Linton, *supra* note 8; Sellars, *supra* note 8; Heathcoat-Armory, *supra* note 8; Moore & Warren, *supra* note 8.

directive at the United Kingdom.⁹² The European Union perceived that the United Kingdom's art market was partially so successful because of the lack of the royalty,⁹³ and the European Union wants other member states to have a share in the large volume of art work that passes through London every year.⁹⁴ Those employed in the London art market protested the directive in the media and to their government.⁹⁵ Galleries and dealers argued that the London art market ought to be protected—that instead of spreading the wealth of its market to other E.U. states, the directive will chase the business to New York, Geneva, or even Tokyo.⁹⁶ Even artists protested the directive.⁹⁷ Artists argued that sale prices would drop to account for the royalty and the directive's resulting administrative costs.⁹⁸ They also worried that more sales would become private, thereby avoiding the royalty.⁹⁹

In December 1999, Tony Blair, the British Prime Minister, wrote a letter to the European Commission and the Finnish Presidency of the European Union offering a compromise on the directive's terms.¹⁰⁰ Other correspondence followed between the British government and the E.U. Parliament. The British proposed phasing in the *droit de suite* over a period of 15 years;¹⁰¹ but the European Parliament rejected the proposal.¹⁰² The European Parliament also rejected the British proposal limiting payments to living artists.¹⁰³ By early 2000, the British government abandoned its protest because it realized that the measure would pass;¹⁰⁴ the directive was subject to majority voting, and the majority of E.U. states already had a *droit de suite* and would, therefore, not oppose, or help the United Kingdom

⁹² See generally *Is London done for?*, *supra* note 14.

⁹³ See generally *id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Black & Atkinson, *supra* note 25; Tiwari, *supra* note 6; *Is London done for?*, *supra* note 14; *Let the bad times roll*, *supra* note 22.

⁹⁷ See Linton, *supra* note 8. Artists started an organization called Artists Against Droit de Suite. Lydiate, *supra* note 11, at 49. Members include established artists such as David Hockney, Emma Sergeant, Karel Appel, Sir Anthony Caro, and Sigmar Polke. *Id.* The organization organized a poster campaign that argued that the directive "violates artists' human rights." *Id.* See also *Artists criticize royalties deal*, CNN, July 3, 2001 at <http://edition.cnn.com/2001/WORLD/europe/07/03/artists.royalties/> (last visited Nov. 23, 2003). It is, however, also important to note that not all artists opposed the directive. Lydiate, *supra* note 11, at 49.

⁹⁸ Tiwari, *supra* note 6.

⁹⁹ *Id.*

¹⁰⁰ Bell, *supra* note 8; Hargreaves, *supra* note 45.

¹⁰¹ *Droit de Suite*, 24 INTELL. PROP. NEWSLETTER 3, Aug. 2001.

¹⁰² *Id.*

¹⁰³ Hargreaves, *supra* note 45.

¹⁰⁴ See Black & Atkinson, *supra* note 25.

oppose, the directive.¹⁰⁵ The only other countries to also oppose the *droit de suite* were the Netherlands and Ireland,¹⁰⁶ and they did not have enough additional votes to successfully block the directive.¹⁰⁷ Consequently, the United Kingdom and the European Union entered into an agreement that rendered the *droit de suite* less forceful than it would otherwise have been.¹⁰⁸ The agreement gave the United Kingdom more time to implement the directive¹⁰⁹ and exempted low-value works from the *droit de suite*.¹¹⁰

The Council of the European Union adopted the directive on September 27, 2001.¹¹¹ In the new directive, the European Union listed the terms of the *droit de suite* in detail.¹¹² The directive requires that all member states incorporate the *droit de suite* into their national laws;¹¹³ generally, the *droit de suite* must provide artists with an inalienable resale right attached to original works of art.¹¹⁴ The royalty applies only to transactions that involve an art market professional¹¹⁵ and does not apply to private sales between individuals or sales involving museums, provided that the museum is non-profit and open to the public.¹¹⁶ The term of the royalty is for the artist's life and seventy years thereafter.¹¹⁷ The directive establishes a graduated series of rates dependant upon the selling price of the work with the result that the higher the selling price, the lower the royalty rate.¹¹⁸ The rates range from a quarter percent for works selling for more than EUR 500,000 to four percent for works selling for between the

¹⁰⁵ *Id.*

¹⁰⁶ Parliamentary Debate, *supra* note 25.

¹⁰⁷ *Id.* Ireland and the Netherlands had eight votes between them. The United Kingdom would have needed eight more votes to succeed in blocking the directive. *Id.*

¹⁰⁸ U.K. Patent Office, Annual Report 2002, Chapter 5: The Changing Intellectual Property System, 17 available at <http://www.patent.gov.uk/about/reports/anrep2002/chapter5.pdf> (last visited Nov. 23, 2003) [hereinafter Annual Report].

¹⁰⁹ *Id.* at 17.

¹¹⁰ *Id.*

¹¹¹ Council Directive, *supra* note 1.

¹¹² *See generally id.*

¹¹³ *See* Council Directive, *supra* note 1, at art. 12.

¹¹⁴ Council Directive, *supra* note 1, at arts. 1, 2. *See id.* at art. 2 for a description of what constitutes an original work of art. Some copies such as photographic copies and prints are also considered original works where the artists produce limited quantities. *Id.* It is important to note that the directive is not self-executing. *See also* Sellars, *supra* note 8, at 24; David Gourlay and Lisa Sutherland, 2001 *Review of the Year*, COPY WORLD, Feb. 2002; Tiwari, *supra* note 6.

¹¹⁵ Council Directive, *supra* note 1, at art. 1.

¹¹⁶ *Id.* at pmb. § 18. Another possible argument against the *droit de suite* directive is that it encourages private sales. Public sales tend to ensure the integrity of the transaction (i.e. the art is not stolen, etc.).

¹¹⁷ *See id.* at art. 8.

¹¹⁸ *Id.* at art. 4, for the list of rates. These rates do not include the VAT. *Id.* at art. 5.

minimum sale price and EUR 50,000.¹¹⁹ It is up to the member states to set a minimum sale price after which the royalty will be applied;¹²⁰ this minimum price may not exceed EUR 3,000.¹²¹ Artists who receive the royalty from a British sale will receive a minimum royalty of about 76 pounds.¹²²

The deadline for implementation of these terms is January 1, 2006.¹²³ However, the European Union decided to give an extension, with regards to benefiting the artists' heirs, to countries that did not have any *droit de suite* legislation prior to the directive,¹²⁴ the deadline for these countries, which include the United Kingdom,¹²⁵ is January 1, 2010.¹²⁶ Even then, the member state may be able to obtain a further extension of two years provided that it can offer the European Union a persuasive reason for the extension.¹²⁷ It is therefore possible for the United Kingdom to delay the implementation of the *droit de suite* for over a decade. Considering the United Kingdom's dislike for the royalty, it is likely that they will try to put implementation off for as long as possible.

As a result of the time limitation listed in the directive, the *droit de suite* will only affect modern and contemporary artwork.¹²⁸ Therefore it will not affect the antiquities trade and trade of pre-modern (e.g. medieval, renaissance) artwork. Yet the British response to the *droit de suite* was so much stronger than their response to the VAT, which affects all art trades. While their response is certainly motivated by economic concerns, their concerns reflect the differences between the common law and civil law system.¹²⁹ Historically, the common law system rarely addresses *droits morals*, at least not where they might interfere with economic concerns. The common law system has little precedent for the French concept of moral rights, and as a system based upon precedent, the common law system fails to support the *droit de suite*.¹³⁰

¹¹⁹ *Id.* at art. 4.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Tiwari, *supra* note 6.

¹²³ Council Directive, *supra* note 1, at art. 12.

¹²⁴ *Id.* at art. 8, 12.

¹²⁵ Simon Hughes, *Equal Treatment*, *supra* note 72, at 166-67.

¹²⁶ Council Directive, *supra* note 1, at art. 12. *See also* Gourlay and Sutherland, *supra* note 114, at 25.

¹²⁷ Council Directive, *supra* note 1, at art. 12.

¹²⁸ *See id.* at art. 8.

¹²⁹ *See* Burger, *supra* note 4, n.367.

¹³⁰ When this comment refers to moral rights, it is purely referring to the French concept of *droits morals*. One should not interpret this phrase to include any law with a moral rationale (e.g. laws against crimes).

III. IMPLEMENTING THE *DROIT DE SUITE* IN THE UNITED KINGDOM

The European Union has put forth three major goals for the *droit de suite* directive.¹³¹ However, it seems unlikely that the directive will accomplish these goals, at least not in the way the European Union hopes. It is debatable whether its first goal, to provide artists with what the European Union considers an important right that addresses their economic situation and gives them recognition,¹³² would have much effect. General reasons for the *droit de suite* include creating an incentive for artists to create,¹³³ giving visual artists a comparable interest in their work as authors and musicians have in their works,¹³⁴ allowing the starving artist to profit off his/her growing reputation,¹³⁵ etc.¹³⁶ Arguments against these goals include the assertion that the remote possibility of a royalty years down the road will not inspire an artists to create¹³⁷ (i.e. no one goes into visual art for the money), the probability that even if an artist's works bring in a large profit¹³⁸ (which for most artists is unlikely), the works are not likely to appreciate until after the artist's death, etc.¹³⁹ There are also more complicated economic arguments about the artist's role in the market that question whether potential appreciation is factored into the original selling price¹⁴⁰ or whether the *droit de suite* will discourage transactions and lower selling prices.¹⁴¹ Whether the *droit de suite* actually helps artists has been argued for decades with no definite conclusion. The purpose of this comment is not to rehash the arguments against the *droit de suite* in general, but to present the specific impracticalities presented by the European Union's *droit de suite* directive in the United Kingdom.

These specific impracticalities emerge in the European Union's second and third goals. The bulk of the arguments against the *droit de suite* argue the ineffectiveness of the European Union's second objective, namely to harmonize the art trade in the European Union.¹⁴² The European Union hopes that the directive will eliminate competition among the European

¹³¹ See Council Directive, *supra* note 1, at pmbl.

¹³² *Id.* at pmbl. §§ 2-4.

¹³³ See Carleton, *supra* note 7, at 534-5.

¹³⁴ McAndrew & Dallas-Conte, *supra* note 48, at 19.

¹³⁵ Tiwari, *supra* note 6; Johnson, *supra* note 3.

¹³⁶ Johnson, *supra* note 3; Stanford, *supra* note 7, at 1-2.

¹³⁷ Carleton, *supra* note 7, at 534-5; see also Johnson, *supra* note 3, at 501.

¹³⁸ Tiwari, *supra* note 6.

¹³⁹ See *id.*

¹⁴⁰ See Stanford, *supra* note 7, at 7-9 (discussing of the economic arguments against the *droit de suite*).

¹⁴¹ McAndrew & Dallas-Conte, *supra* note 48, at 19.

¹⁴² Council Directive, *supra* note 1, at pmbl. See generally *Is London done for?*, *supra* note 14; Tiwari, *supra* note 6.

Union's art markets¹⁴³ and give other cities or countries a slice of London's lucrative art business.¹⁴⁴ Opponents of the directive argue that London will lose art business, but not to E.U. member states.¹⁴⁵ They claim the business will go to New York instead of other E.U. cities.¹⁴⁶ The European Union's art market would be harmonized in the sense that there would be a harmonized lack of art business, but this result would be at the expense of the European Union as a whole.¹⁴⁷ The British solution to the issue of harmonization is that the European Union should just get rid of the *droit de suite* altogether,¹⁴⁸ an argument that never received much consideration.

A. Harmonizing the Market or Destroying the Market?

Opponents of the *droit de suite* make one major and one minor argument as to why the London art business will go to New York and not to other E.U. states. First, the *droit de suite* will raise prices, and buyers will go to New York where prices are lower because there is no added *droit de suite*.¹⁴⁹ The rise in price will not only reflect the actual royalty, but also the administrative costs, not to mention the burden of dealing with the bureaucracy resulting from the directive.¹⁵⁰ Second, while London's long history and depth of art expertise will continue to attract some buyers,¹⁵¹ the other E.U. countries lack the expertise that will attract buyers necessary to expand their markets.¹⁵² The main point of both of these arguments is that the addition of the *droit de suite* will create enough of a disincentive for art buyers to move away from the London art market,¹⁵³ but the directive will offer nothing that will make the art markets in other E.U. states more attractive.¹⁵⁴

¹⁴³ Council Directive, *supra* note 1, at pmb1.

¹⁴⁴ *Is London done for?*, *supra* note 14.

¹⁴⁵ *Id.*; see Linton, *supra* note 8.

¹⁴⁶ *Let the bad times roll*, *supra* note 22; *Is London done for?*, *supra* note 14; Linton, *supra* note 8.

¹⁴⁷ *Is London done for?*, *supra* note 14; see TEFAF, *supra* note 21.

¹⁴⁸ Cait Murphy, *How the French Killed Their Art Market*, FORTUNE, Dec. 20, 1999, at 62.

¹⁴⁹ See *Is London done for?*, *supra* note 14. Cf. Gerhard Pfennig, Study, *Practical aspects of the exercise of the droit de suite, including in the digital environment, and its effects on developments in the international art market and on the improvement of the protection of visual artists*, prepared at the requests of UNESCO's Secretariat, Mar. 27, 2001, § 11, available at <http://www.unesco.org/culture/copyright/images/IGCXII6.rtf> (last visited Nov. 13, 2003).

¹⁵⁰ Linton, *supra* note 8; Lydiate, *supra* note 11, at 49.

¹⁵¹ See *Is London done for?*, *supra* note 14.

¹⁵² *Id.*

¹⁵³ Cf. Pfennig, *supra* note 149, §12.

¹⁵⁴ Cf. Murphy, *supra* note 148, at 62.

A British study by the Department of Trade and Industry concluded that if all the works that were eligible for the *droit de suite* left the London market (a worst case scenario), the London art market would lose £68 million annually and up to 5,000 jobs.¹⁵⁵ Other sources report that the United Kingdom has forecasted the loss of 8,500 jobs in auction houses.¹⁵⁶ If London only lost trade originating in E.U. member states then the projected loss would be £17 million in fees and 1,300 jobs.¹⁵⁷

Supporters of the *droit de suite* have a response to naysayers. First, they explain that the aforementioned numbers represent a worst case scenario.¹⁵⁸ In actuality, not all of the sales affected by the *droit de suite* will leave London.¹⁵⁹ Loyalty and the draw of London's expertise will help to retain a number of sales.¹⁶⁰ However, money is a strong consideration for most people in the business of buying and selling, and while the worst case scenario may not occur, some sales will definitely be lost to New York or Switzerland.¹⁶¹ Supporters of the royalty respond that, in many cases, the cost of transporting the art will outweigh the potential royalty, thereby keeping the art in London for sale.¹⁶² Yet, much of the art traded in the London art market is imported from elsewhere.¹⁶³ In these cases, the transportation costs already exist, and it is only a matter of changing the destination.¹⁶⁴ Proponents of the directive dismiss the economic complaints with the response that the directive is necessary to achieve higher goals such as universal copyright law and support of the powerless artist.¹⁶⁵ One can respond to both arguments by speculating that perhaps the cure is disproportionate to the problem. Does the *droit de suite* redress the perceived problem to the point that it is worth losing art business? (Even if the worst-case scenario does not occur, London will surely lose some business because of the royalty). The British are not denying the plight of the artist when they protest the directive. Instead, they protest the cost of providing the *droit de suite*. When the House of Lords debated the directive, one of the main areas of contention was the European Union's failure to create a cost-benefit analysis of the directive.¹⁶⁶ The United

¹⁵⁵ Parliamentary Debate, *supra* note 25.

¹⁵⁶ Hargreaves, *supra* note 45; Bell, *supra* note 8.

¹⁵⁷ *Id.*

¹⁵⁸ *Is London done for?*, *supra* note 14.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See Simon Hughes, *Equal Treatment*, *supra* note 72, at 186-192; see also Written Question No. 51/98, *supra* note 29.

¹⁶⁶ *Id.*; Parliamentary Debate, *supra* note 25 (confirmed by Lord Haskel).

Kingdom questions the benefit of the *droit de suite* compared to the cost.¹⁶⁷ If the art market is going to suffer, it should be for a purpose, and the solution should be proportional to the problem.

B. Harmonizing the Legal Framework: Is it even possible?

The third goal of the European Union's directive is the most problematic. The European Union wants to impose the *droit de suite* in England to harmonize the law within the European Union regarding artists' resale royalties.¹⁶⁸ This goal presents a problem because England has a different system of law from the European Union and most of its member states. Moreover, England has a different system of law from the system of law in which *droit de suite* originated.

[T]he common-law countries. . . historically not only have failed to make explicit provision for such continuing rights of artists in their work but have legal regimes that effectively render unenforceable any effort by an individual artist to craft and retain such rights in his own creations after he has transferred the other elements of ownership.¹⁶⁹

1. Is Droit de Suite a Moral or Economic Right?

The *droit de suite* goes hand-in-hand with moral rights.¹⁷⁰ English copyright law is based on economic rights, not moral ones,¹⁷¹ a marked difference from the French civil copyright law from which *droit de suite* evolved.¹⁷² Most proponents of the *droit de suite* argue that it is an economic right,¹⁷³ because it protects an economic interest.¹⁷⁴ However, despite having some of the properties of economic rights, it has enough characteristics of a moral right to make it unfamiliar to common law copyright law.¹⁷⁵

The purpose of the *droit de suite* is to give visual artists rights and

¹⁶⁷ See Tiwari, *supra* note 6.

¹⁶⁸ Council Directive, *supra* note 1, at pmb1.

¹⁶⁹ Hansmann & Santilli, *supra* note 17, at 96.

¹⁷⁰ Marina Santilli, *United States' Moral Rights Development in European Perspective*, 1 MARQ. INTELL. PROP. L. REV. 89, 107 (1997); see also cf. Geri J. Yonover, *Artistic Parody: The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79, at n. 34 (1996).

¹⁷¹ Cf. David R. Toraya, *Federal Jurisdiction over Foreign Copyright Infringement Actions - An Unsolicited Reply to Professor Nimmer*, 70 CORNELL L. REV. 1165, n.155 (1985).

¹⁷² Frazier, *supra* note 16, at 335-36.

¹⁷³ Carleton, *supra* note 7, at 533; Santilli, *supra* note 170, at 107.

¹⁷⁴ Carleton, *supra* note 7, at 533; Santilli, *supra* note 170, at 107.

¹⁷⁵ Cf. Toraya, *supra* note 171, at n.155.

economic incentives similar to those the law gives to authors and musicians.¹⁷⁶ Unlike artists, authors make their money from copies of the original, not the original work itself.¹⁷⁷ The situation is similar for musicians who can also realize profit in recordings of their works;¹⁷⁸ the original sheet music and lyrics are not a source of profit for most musicians.¹⁷⁹ Although copies of artwork can make the artist some money,¹⁸⁰ it is usually not until the original amasses significant value that copies attract any value. Often, by the time the work accumulates value it is no longer in the artist's hands.¹⁸¹ The profit goes to the owner of the work, not the artist who created the work.¹⁸² The *droit de suite* seeks to redress this injustice by allowing artists to profit off their growing reputations.¹⁸³

What makes the *droit de suite* not an economic right, but a moral right, is its inalienability.¹⁸⁴ The right is inalienable and "presumes to know what is best for the artist, and insists that the artist accept its remedy in the form it prescribes."¹⁸⁵ The idea behind the *droit de suite* is that an artist's work is an extension of his/her personality and just as one cannot separate oneself from one's personality, one cannot entirely separate oneself from one's works of art.¹⁸⁶ Unlike the writer or musician who may sell his/her copyright, the artist cannot give away or sell the *droit de suite*.¹⁸⁷ It is inalienable;¹⁸⁸ while artists may choose not to enforce the *droit de suite* with regards to the sale of one of their works, they cannot legally disown or disassociate themselves from the work.¹⁸⁹ The reason for the right's inalienability is to address what the right's creator considered the artist's lack of bargaining power.¹⁹⁰ The *droit de suite*'s goal is to protect starving artists who might sell off their copyright interest simply because they are

¹⁷⁶ Council Directive, *supra* note 1; Written Question No. 51/98, *supra* note 29; McAndrew & Dallas-Conte, *supra* note 48, at 19.

¹⁷⁷ *See id.*

¹⁷⁸ *See id.*

¹⁷⁹ One could stretch the argument by taking the position that a live performance is comparable to an original work of art. However, unlike an original work of visual art, a musical performance is non-transferable.

¹⁸⁰ Johnson, *supra* note 3, at 502-03.

¹⁸¹ *See* Council Directive, *supra* note 1; Written Question No. 51/98, *supra* note 29; McAndrew & Dallas-Conte, *supra* note 48, at 19.

¹⁸² *See id.*

¹⁸³ Council Directive, *supra* note 1, at pmb1.; Written Question No. 51/98, *supra* note 29; McAndrew & Dallas-Conte, *supra* note 48, at 19.

¹⁸⁴ *See* Carleton, *supra* note 7, at 536-37.

¹⁸⁵ *Id.* at 534.

¹⁸⁶ Frazier, *supra* note 16, at 336.

¹⁸⁷ Tiwari, *supra* note 6.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Carleton, *supra* note 7, at 536-37; Johnson, *supra* note 3, at 503.

unable to make a sale without relinquishing their future right to royalties;¹⁹¹ the *droit de suite* would supposedly redress a perceived lack of bargaining power.¹⁹²

The inalienability of the right puts the artist in a special class. Legal scholars have argued the necessity of singling out the artist in such a way.¹⁹³

In large measure, however, the proposition that visual artists are in poor bargaining positions and that therefore a waivable proceeds right would not be useful, follows from the *droit de suite*'s romantic stereotype of the impoverished artist . . . [I]t remains unclear whether artists in general are more or less financially secure than the population as a whole.¹⁹⁴

Why should visual artists be afforded a legal protection that musicians, authors, and inventors, who may be similarly disadvantaged, are not afforded?

The United Kingdom's response to the moral argument that artists require this inalienable right to address their unique situation argues that there are a number of organizations and grants that exist to help (impoverished) artists.¹⁹⁵ These organizations and grants do not require commercial success before helping the artist; the *droit de suite* is only successful if the artist achieves some success because the work must sell for considerable amount before the royalty rate applies and the artist profits.¹⁹⁶

Another argument against the intentions of the *droit de suite* is that the right does not redress the wrong it presupposes exists. Few artists ever become commercially successful.¹⁹⁷ Those who do are probably not starving, and the small profit (maximum about £7,820)¹⁹⁸ that might come from the royalty is not going to make the difference to them that it would make to a starving artist.¹⁹⁹ Furthermore, even fewer artists achieve commercial success during their lifetimes;²⁰⁰ in those cases the royalty go to his/her heirs,²⁰¹ who arguably put no more work into the artwork than the person who is selling the work.

Another argument against the efficacy of the *droit de suite* takes the side of the investor. It questions whether art should be treated differently

¹⁹¹ Carleton, *supra* note 7, at 536-37.

¹⁹² *Id.*

¹⁹³ See generally *id.*

¹⁹⁴ *Id.* at 537-38.

¹⁹⁵ Parliamentary Debate, *supra* note 25.

¹⁹⁶ See Tiwari, *supra* note 6.

¹⁹⁷ See generally McFarlane, *supra* note 1, at 1291.

¹⁹⁸ Tiwari, *supra* note 6.

¹⁹⁹ See Black & Atkinson, *supra* note 25.

²⁰⁰ See generally McFarlane, *supra* note 1; Tiwari, *supra* note 6.

²⁰¹ Council Directive, *supra* note 1, at art. 6.

from any other investment, e.g. stocks.²⁰² When an artist becomes successful, the investor collects the reward for making a good investment.²⁰³ However valid the argument may be, it is rarely successful because it seems so cold. An artist is a person, not a business in which one buys stock. Moreover, art tends to involve emotion, which tends to conflict with business practice. Ideally, one buys art because of an emotional or aesthetic response, not because of a calculated investment. However, this argument is naïve; numerous goods exchange hands because of an emotional response—clothing, cars, and furniture are only a few examples. Despite art's non-economic qualities, it is still a commodity that is exchanged for money.

The legal argument against the success of the *droit de suite* in the United Kingdom begins with it being a moral right. "Much hostility results from the natural-law, not economic, roots of moral rights."²⁰⁴ Some sources claim that the *droit de suite* is not, in fact, a moral right, but simply related to moral rights.²⁰⁵ Yet it was created in a copyright system based on moral rights.²⁰⁶ Regardless of whether it is simply a moral right or related to them, *droit de suite* traditionally does not exist in systems that are not based in moral rights.²⁰⁷ The *droit de suite* is considered a *droit moral* in French civil law.²⁰⁸ "French law ultimately evolved to see moral rights as perpetual rights of personality, completely separate from any economic rights of the artist."²⁰⁹ The right's inalienability also adds to its identity as a moral right; the inalienability of the right creates a legal link between artists and their works that is more than economic.²¹⁰ The work becomes inextricable from the artist's personality; death is the only way the artist ever severs his/her relationship with his/her art.²¹¹

2. *The Droit de Suite in a Common Law System*

As mentioned *infra*, moral rights are a product of civil law.²¹² Common law does not give much consideration to moral rights,²¹³

²⁰² See Johnson, *supra* note 3, at 502.

²⁰³ See Stanford, *supra* note 7, for an argument based in economic theory as to how the future possibility of appreciation is factored into the original selling price.

²⁰⁴ Frazier, *supra* note 16, at 337.

²⁰⁵ Carleton, *supra* note 7, at 530.

²⁰⁶ See Frazier, *supra* note 16, at 335-36, 338.

²⁰⁷ See Toraya, *supra* note 171, at 1191 n.155.

²⁰⁸ Frazier, *supra* note 16, at 335.

²⁰⁹ *Id.* at 336.

²¹⁰ See *id.*

²¹¹ See *id.* at 336 n.176. One could simplify the difference between moral rights and economic rights as one of right versus privilege. See Toraya, *supra* note 171, at 1191 n.155.

²¹² Frazier, *supra* note 16, at 335.

²¹³ Cf. Toraya, *supra* note 171, at 1191 n.155.

especially if they interfere with economic undertakings. In the nineteenth century, while France was undergoing a series of revolutions seeking to improve the rights of man, the United Kingdom was experiencing an industrial revolution. As France was developing its civil law at this time, it is not surprising that its law encompasses moral rights and that English laws seek to preserve economic efficiency.²¹⁴ Those in the common law system have difficulty accepting the *droit de suite* because it is a moral right.²¹⁵ It has not been until recently that common law systems have begrudgingly begun to accept some form of moral rights in the realm of contract and copyright law.²¹⁶

The *droit de suite* goes against British copyright law which is based on economic rights.²¹⁷ Moreover, although *droit de suite* is primarily a tool of copyright law, it lies at the nexus between copyright, property, and contract law. The common law supports the freedom to contract and the alienability of property.²¹⁸ The *droit de suite* infringes on both of these principles due to its inalienability.

British copyright law is based upon the Statute of Anne, which dates back to 1709.²¹⁹ The 1774 decision in *Donaldson v. Beckett* determined that the Statute of Anne replaced the old common copyright law.²²⁰ The Statute of Anne provided economic incentives to create works.²²¹ It did not include moral rights for authors.²²² Even though the statute was mostly concerned with copyrights for written works, it created the basis for British copyright law—that economics would drive copyrights.²²³ The specific

²¹⁴ This statement is an over-generalized summary of French and British legal history. However, this statement could present an interesting paper topic. Another interesting topic could be a comparison of the French and British legal attitudes toward profits versus non-economic goals.

²¹⁵ Cf. Toraya, *supra* note 171, at 1191 n.155.

²¹⁶ See Hansmann & Santilli, *supra* note 17, at 97, 100, 129. Moral rights include more than just the *droit de suite*. Some common law states have adopted laws giving the artist the moral rights of attribution and integrity. The right of attribution gives artists the right to have their name associated with their work even after the work has left their ownership. The right of integrity gives artists the right to object if their work is altered after it has left the artists' ownership. *Id.* at 99, 130. The success of the *droit de suite* in other common law states is discussed *infra* III.B.3.

²¹⁷ Cf. Yonover, *supra* note 170, at 86 n.34.

²¹⁸ Benjamin S. Hayes, *Integrating Moral Rights into U.S. Law and the Problem of the Works for Hire Doctrine*, 61 OHIO ST. L.J. 1013, 1021-22 (2000); see also David S. Cowan, *The Future for Land Law*, 142 NEW L.J. 1016, 1017 (1992).

²¹⁹ David S. Cowan, *The Future for Land Law*, 142 NEW L.J. 1016, 1017 (1992).

²²⁰ Burger, *supra* note 4, at 6 n.25.

²²¹ See Statute of Anne, 8 Ann. c. 19 (1709) (Eng.) (cited in Yonover, *supra* note 170, at 86 n.34).

²²² Groves, *supra* note 15, at 3.

²²³ Burger, *supra* note 4, at 6 n.25.

copyright laws have changed, but the economic basis remains. As the Whitford Committee Report testified, inalienable rights are not part of the “normal practice” of U.K. copyright law.²²⁴

However, in 1988, the United Kingdom “reluctantly” recognized moral rights in the Copyright, Designs and Patents Act of 1988.²²⁵ The government included these rights in order to ratify the 1971 Paris Text of the Berne Convention, a requirement for E.U. Member States.²²⁶ The moral rights received only limited recognition²²⁷ and the *droit de suite* was not included in the act. However, the moral rights created in Britain are weaker than their counterparts in civil law countries.²²⁸ The rights were “narrowly defined,” and they had to be asserted in writing;²²⁹ in France, the right is automatic.²³⁰ Also, while the moral rights do retain some of their inalienability, in that an artist cannot pass them on to another person, they lose a lot of their strength because they can be waived in writing.²³¹ It is apparent that the United Kingdom desired to appease the requirements of an international treaty while making sure the rights have as little effect as possible.²³² In the fifteen years since the United Kingdom allowed for moral rights, there has been only one case involving them,²³³ and the case “falls well short of providing a ringing endorsement of this novelty in [U.K.] copyrights law.”²³⁴

Although the British do not acknowledge a royalty right when an artist sells a work, they do recognize a reproduction right separate from the work itself. In 1910, an Act of Parliament recognized the artist’s right to control and profit from reproductions even after the artist sells the work.²³⁵ While this act may seem like a concession to those supporting moral rights for artists, it is strictly economic in nature. The artist may transfer this right to anyone the artist chooses.²³⁶ It lacks the inalienability that characterizes *droits morales*. This act therefore does not interfere with alienability of

²²⁴ Simon Hughes, *Equal Treatment*, *supra* note 72, at 167.

²²⁵ Groves, *supra* note 15, at 3.

²²⁶ *Id.* at 3, 4.

²²⁷ *See id.* at 3. These rights included the right to paternity (right to be acknowledged at the work’s author/creator) and a limited right to integrity (right to object to unjustified modification of the work that would harm the author’s/creator’s reputation). *Id.* These rights apply to authors of written works as well as visual artists. *See id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Cf. id.*

²³³ *Id.*

²³⁴ *Id.* *See also* Tidy v. Natural History Museum, IPR 501 (1995).

²³⁵ Johnson, *supra* note 3, at 502-03.

²³⁶ *Id.*

property or the freedom to contract; it merely acknowledges that ownership of the artwork and the right to reproduce it are separate.²³⁷

Civil copyright law is not purely based on economic incentives. Instead it focuses on an artist or author's bond with his/her work.²³⁸ The right is automatic. "There are no provisions for such formalities as copyright notice, registration of ownership, deposit of copies, etc.," all of which are characteristics of common copyright law.²³⁹

Common property law presents another problem for the *droit de suite*. One of the policies underlying common property law is the alienability of property.²⁴⁰ "The free alienability of property has arguably been one of the central government policies over the past 15-20 years."²⁴¹ Under the *droit de suite* an artist can never truly sever ties to his or her art. Even if the artist wishes to disassociate him/herself from the work, the best the artist can do is to avoid collecting the royalty. It follows then that the owner of the physical work cannot claim full ownership. The moral rights enacted in 1988 did not infringe upon the alienability of property because they could be waived,²⁴² thereby disassociating the creator from the work.

There is a broader argument against the directive asserting itself in British law. Article 222 of the European Community explains that the Treaty shall not interfere with the "national laws governing the system of property ownership."²⁴³ For the above reasons, the directive interferes with property ownership in the United Kingdom, both in actuality and policy. Beyond interfering with the ability to buy and sell property, the directive interferes with another British policy. The Whitford Committee disagreed with the fact that the *droit de suite* does not end with the artist but passes to the artist's heirs.²⁴⁴ The Report claimed that the "present climate of opinion is against inherited wealth."²⁴⁵ (One need only look at the United Kingdom's high inheritance taxes to note that the government promotes this policy.).²⁴⁶

²³⁷ See *id.*

²³⁸ Toraya, *supra* note 171, at 1191 n.155; Frazier, *supra* note 16, at 336.

²³⁹ Toraya, *supra* note 171, at 1191 n.155 (quoting Henn, *The Quest for International Copyright Protection*, 39 CORNELL L.Q. 43, 58 (1953) (footnotes omitted)).

²⁴⁰ Hayes, *supra* note 218, at 1021-22; Cowan, *supra* note 218.

²⁴¹ Cowan, *supra* note 218.

²⁴² Groves, *supra* note 15, at 3.

²⁴³ MARTIN VRANKEN, FUNDAMENTALS OF EUROPEAN CIVIL LAW AND THE IMPACT OF THE EUROPEAN COMMUNITY 217 (1997).

²⁴⁴ Simon Hughes, *Equal Treatment*, *supra* note 72, at 167.

²⁴⁵ *Id.*

²⁴⁶ See The Association for Certified and Chartered Accountants, Consultation Response on Entrepreneurship in Europe, June 2003, at <http://smallbusinesseurope.org/Issues/Entrepreneurship%20in%20Europe%20Consultation%20and%20Action%Plan/1057231495/acca>. While estates under £242,000 do not have to pay a tax, inheritors of larger estates must

Common practice has rendered the argument one could make using Article 222 moot. The European Union frequently interferes in property law, and directives are a way to get around the article. Instead of being seen as the European Union interfering with national law, directives merely require the member state to “adjust” their national laws themselves.²⁴⁷

The directive also conflicts with common contract law, which reflects the policy of freedom to contract.²⁴⁸ Freedom to contract signifies that parties can enter into a contract with as little government interference as possible. The doctrine developed through nineteenth century court cases, but the early and mid-twentieth century saw a decline in support for this policy.²⁴⁹ However, classical law was not completely expunged from the books; around 1980, courts began to revert back to classical doctrines and once again stressed the importance of freedom to contract.²⁵⁰

The *droit de suite* interferes with the freedom to contract by creating an encumbrance on a work of art.²⁵¹ When attempting an art transactions, buyers and sellers must consider both the royalty and fact that the artist (or his/her heirs) will continue to have an interest in the work. The parties cannot contract for these rights, due to the right’s inalienability.²⁵² The 1988 enactment of limited moral rights did not necessarily interfere with the freedom to contract; many contracts included waivers of the limited moral rights that the United Kingdom created in 1988.²⁵³ Furthermore, the royalty is based on the presumption that the artwork will appreciate.²⁵⁴ The *droit de suite* directive fails to consider the possibility that a work may not increase in value and may even decrease, thereby forcing the seller to lose money in a sale should the work fail to appreciate, or the work depreciates.²⁵⁵ The seller cannot even contract to protect him/herself from this possibility.

Proponents of the right might argue that the *droit de suite* is a valid infringement on the freedom to contract because it addresses a perceived

pay a tax rate of 40%. Inland Revenue, Inheritance Tax: An Introduction, available at <http://www.inlandrevenue.gov.uk/pdfs/iht3.htm>.

²⁴⁷ VRANKEN, *supra* note 243, at 217.

²⁴⁸ Hayes, *supra* note 218, at 1021-22.

²⁴⁹ P.S. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 15 (1995).

²⁵⁰ *Id.* at 27.

²⁵¹ Toraya, *supra* note 171, at n.155.

²⁵² Tiwari, *supra* note 6.

²⁵³ Groves, *supra* note 15, at 4. Contracts usually included these waivers because one of the contractors did not want to “risk infringing an extraneous legal right of doubtful event.” *Id.*

²⁵⁴ See Edward J. Damich, *Moral Rights Protection and Resale Royalties for Visual Art in the United States: Development and Current Status*, 12 CARDOZO ARTS & ENT L.J. 387, 405 (1994).

²⁵⁵ See *id.*

imbalance in bargaining power. The argument is based on two assumptions. The first is that the artist is impoverished—a “starving artist”—and therefore unable to walk away from a deal, however bad it is. There has been little research (none offered by the European Union) to support this stereotype. The second is that the artwork will appreciate, excluding the artist from the major source of profits.²⁵⁶ Few artists find commercial success within their lifetimes.²⁵⁷ While the *droit de suite* may protect a few artists, one might question whether the measure used to address the situation is proportionate to the weight of the problem.

A further problem arises with the common law use of precedent. While the directive does not conflict with *stare decisis*, the interaction between the two could create a predicament. In civil law countries, the civil code is considered the definitive source of law and is written with the intent that it will provide a rule for any case coming before the court.²⁵⁸ “Europeans are more comfortable legislating broad principles whose ultimate effect is less known.”²⁵⁹ Precedent is not binding in civil law.²⁶⁰ On the other hand, English common law relies on precedent as a source of law; judges’ interpretation of the law can be binding on other courts.²⁶¹ While judges in civil law countries, such as France, do have to interpret the statutes, their interpretations are not binding on other courts.²⁶² Moreover, civil law and common law methods of interpretation differ.²⁶³ Civil law judges are more likely to look at the intent of what they are interpreting,²⁶⁴ while English common law judges will first look at the terms or language to assemble the meaning.²⁶⁵ The differing methods of interpretation and the English rule of precedent could lead the *droit de suite* to have implications never intended by the directive or even the civil law from which it came.

The directive only intends for the member states to pass the *droit de suite* as a resale royalty. In a civil law country, the right is not likely to go beyond the resale right unless the government adds new rules to the civil code. However, there is a remote possibility in a common law system that a court case could extend the law beyond its original intention. For example, hypothetically, a court could determine that the artist, having a pecuniary

²⁵⁶ See Damich, *supra* note 254, at 405.

²⁵⁷ McFarlane, *supra* note 1; Tiwari, *supra* note 6.

²⁵⁸ RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 10 (1991).

²⁵⁹ Justin Hughes, *Art and the Law: Suppression and Liberty the Line Between Work and Framework, Text and Context*, 19 CARDOZO ARTS & ENT. L.J. 19, 21 (2001).

²⁶⁰ CROSS & HARRIS, *supra* note 258, at 10-11, 14.

²⁶¹ *Id.*

²⁶² *Id.* at 13-14.

²⁶³ See P.D.V. MARSH, COMPARATIVE CONTRACT LAW: ENGLAND, FRANCE, GERMANY 35-38 (1994).

²⁶⁴ *Id.*

²⁶⁵ *Id.*

interest in the art which he/she has sold, has a right to protect the interest by having a say in the work's display or destruction. The *droit de suite* does not currently include these rights, and while such a case is unlikely, it is not impossible.

Today, though, British methods of interpretation are changing, partly because of the European Union.²⁶⁶ In one court decision, Lord Denning explained,

Seeing these differences [between British and E.U. interpretation], what are the British Courts to do when they are faced with the problem of interpretation? They must follow the European pattern. No longer must they examine the words in meticulous detail. No longer must they argue about the precise grammatical sense. They must look to purpose or intent.²⁶⁷

However, Denning was considering a case involving a European Union regulation; regulations do not require a corresponding national law, as directives require. Yet if the British court looks to the intent of the law instead of the wording, it is unlikely that it will stray far from the European Union's intention of limiting the directive to resale rights.

3. Enforcement

Two enforcement issues face the directive. The first one confronting the European Union is compelling the United Kingdom to comply with the directive. Not only does the European Union have to ensure that the United Kingdom creates a *droit de suite* as part of its national law, but the European Union must also determine whether the United Kingdom enforces that new law. Enforcement will also create a problem for the United Kingdom; the United Kingdom faces the issue of determining how to enforce the *droit de suite* and how to resolve the burden of enforcement.

The United Kingdom has until 2006 to implement the *droit de suite* directive for the works of living artists²⁶⁸ and until 2010 to implement the directive for the works of dead artists.²⁶⁹ If the U.K. applies for and receives an extension, it will have until 2012.²⁷⁰ Member states are supposed to report to the Commission when they adopt the law, and they should also keep the Commission informed of the content of their *droit de suite* laws.²⁷¹ There is no specific penalty listed for failure to implement the

²⁶⁶ See *H.P. Bulmer Ltd v. J. Bollinger, S.A.* 1 Ch. 401 at 425 (C.A. 1974).

²⁶⁷ *Id.* at 426.

²⁶⁸ Council Directive, *supra* note 1, at art. 12.

²⁶⁹ *Id.* at pmb1.

²⁷⁰ Sellars, *supra* note 8, at 24.

²⁷¹ Council directive, *supra* note 1, at art. 12.

directive, but if the United Kingdom fails to comply or if its measures on enforcement are not strict enough, the European Commission will likely bring an action in the ECJ.²⁷² The ECJ is the judicial branch of the European Union; the court is “the unifying force in the application and interpretation of Community Law.”²⁷³ The United Kingdom would have to deal with the ECJ if it did not comply with the directive or if its national laws did not produce the result the directive requires.²⁷⁴ The ECJ can command compliance and impose a periodic fine if the United Kingdom fails to comply by a certain date.²⁷⁵ It is highly unlikely that the United Kingdom would resist the European Union to this level because it seems that there would be little point to it.

It is easier to determine how the European Union will enforce its directive than to figure out how the United Kingdom will enforce the *droit de suite* as part of national law. For the former there are established methods of enforcement, but for the latter the United Kingdom must discover a way to enforce the *droit de suite*. While the directive does make some provisions that will aid in enforcement, it does not specifically explain what method the member states should employ in creating the *droit de suite*.²⁷⁶ It requires art market professionals to report sale information if the artist requests it in respect to royalty collection.²⁷⁷ The directive, however, also mentions that the artists are responsible for managing the royalty sums and “may arrange for collective management.”²⁷⁸ Despite these provisions, a number of questions remain. How will the artists manage the royalty? Who will oversee the process of collection management? While the European Union has placed the burden on the artist to alleviate any burden the directive might place on the state,²⁷⁹ the directive fails to consider how exactly the royalty is enforced. What happens if the seller refuses the royalty? Who resolves disputes? The state cannot ignore these questions without ignoring the *droit de suite*. With the European Union checking on the member state’s enforcement of the *droit de suite*, it is important for the United Kingdom to devise an effective method of enforcement.

In France, artists’ societies track the sale of art and enforce the

²⁷² See, e.g. Gourlay & Sutherland, *supra* note 114, at 26.

²⁷³ CAIRNS, *supra* note 75, at 40.

²⁷⁴ See, e.g. Gourlay & Sutherland, *supra* note 114, at 26.

²⁷⁵ See, e.g. Case 387/97, Commission of the European Union v. Hellenic Republic, 2000 E.C.R. I-365047.

²⁷⁶ See Council Directive, *supra* note 1. Broad suggestions, however, are made in the preamble. *Id.*

²⁷⁷ Tiwari, *supra* note 6; Council Directive, *supra* note 1, at pmb1.

²⁷⁸ Simon Hughes, *Droit de Suite: A Critical Analysis of the Approved Directive*, EUR. INTELLECTUAL PROP. R. 694, 698 (1997) [hereinafter Simon Hughes, *Droit de Suite*].

²⁷⁹ *Id.*

collection of the *droit de suite*. This is essentially what the directive has in mind when it suggests artists use collective management.²⁸⁰ The United Kingdom points out that these societies are inefficient.²⁸¹ It takes money to run these societies, and with the exception of a few famous artists, most of the royalties will be small especially in comparison to costs of collection.²⁸² SPADEM, one of the main collecting societies in France, filed for bankruptcy because the amount it collected was not enough to cover the running costs of the society, despite collecting for the heirs of Matisse and Picasso.²⁸³ Proponents of the directive claim that collecting societies can efficiently distribute royalties.²⁸⁴ They cite computers as decreasing the costs of running a society, pointing to Denmark's system as an example.²⁸⁵ Then again, Denmark is small country with a small art market.

The Whitford Committee suggested in 1977 that, if implemented, the right should be treated like any other copyright, with the burden on the artists to administer the right.²⁸⁶ Ordinarily, when one person fails to pay another person money owed, a person can sue. However, with the exception of the occasional major art sale, the royalty will not be enough to warrant the cost of a court case.²⁸⁷ Also, artists would have the difficult burden of tracking the sales for their works of art. While the artists could assign an agent the task of administering their *droit de suite* right, again the costs of enforcing the resale right may be more than the royalty received from the sale.²⁸⁸ Additionally, this method of enforcement may not satisfy the European Commission as rigorous enough. While the directive purports to place the administrative burden on the artists,²⁸⁹ the artists will require state support to collect the royalty from unwilling sellers. Another option for enforcement is to institute a criminal penalty for noncompliance. There are no examples of any system having done this with the *droit de suite*. However, once again the costs may outweigh the benefits; the exception being that the state, instead of the artist, takes on the enforcement costs.

Of the twenty-nine jurisdictions worldwide that impose some form of the resale right in their laws, twenty-four apply the right rarely or not at all.²⁹⁰ The United States operates under common law as well, and one of its

²⁸⁰ *Id.*

²⁸¹ Simon Hughes, *Equal Treatment*, *supra* note 72, at 187.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 189.

²⁸⁶ *Id.* at 166-67.

²⁸⁷ See Tiwari, *supra* note 6, for a chart listing the royalty rates and maximum and minimum royalties.

²⁸⁸ *Id.*

²⁸⁹ Simon Hughes, *Droit de Suite*, *supra* note 278 at 698.

²⁹⁰ PIERREDON-FAWCETT, *supra* note 50, at 106.

states has passed a statute creating a *droit de suite*.²⁹¹ In 1977, California passed the Resale Royalties Act, which required the seller of work of fine art to pay the artists five percent of the sale, provided that the seller lives in California or the sale takes place in California.²⁹² The resale right, like the one in the European Union's directive, is inalienable.²⁹³ Scholars have noted the problem California has enforcing its statute.²⁹⁴ In California, the burden is on the seller to locate the artist and pay the royalty,²⁹⁵ however, it is still up to the artist to enforce their right to the royalty,²⁹⁶ which is often prohibitively expensive.²⁹⁷ While the Supreme Court has upheld the statute, litigation is costly and the costs would most often outweigh the benefit of the royalty.²⁹⁸ Again, there is the problem of even discovering that such a sale had been made. "The little evidence available indicates that the Act is ineffective and practically unenforceable. . .the law has generally been ignored."²⁹⁹

Does the California statute predict the fate of the British *droit de suite*? Part of California's problems with enforcing its Resale Statute may come from possible conflicts with federal law.³⁰⁰ The United Kingdom does not have that problem because the *droit de suite* will be national law. However, the controversy surrounding the *droit de suite* will not likely allow the laissez faire approach like Californians have towards to the resale right. The European Union and supporters of the right will demand more rigorous enforcement.

IV. CONCLUSION

The European Union's *droit de suite* directive presents a series of problems for the United Kingdom. London's lucrative art business stands to lose profit and sales; those in the art business are consequently worried about their jobs.³⁰¹ The directive seeks to implement a construct of civil law in a common law system. *Droit de suite*'s inalienability classifies it as moral right, and the common law rarely recognizes moral rights in the

²⁹¹ See Carleton, *supra* note 7, at 531.

²⁹² *Id.* at 531.

²⁹³ *Id.*

²⁹⁴ See Carleton, *supra* note 7, at 532; Johnson, *supra* note 3; Frazier, *supra* note 16, at 339.

²⁹⁵ Stanford, *supra* note 7, at 2.

²⁹⁶ Frazier, *supra* note 16, at 339. Presumably, the artist would have to litigate to get the royalty. *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ Carleton, *supra* note 7, at 532.

³⁰⁰ See PIERREDON-FAWCETT, *supra* note 50, at 106.

³⁰¹ See Hargreaves, *supra* note 45.

realm of contract and copyright law. Furthermore, the *droit de suite*'s inalienability conflicts with common law policy in the areas of copyright, property, and contract law. Finally, the *droit de suite* presents a problem with enforcement. Established methods to compel the United Kingdom's compliance with the directive are already in place in the European Union. Yet, the United Kingdom still must worry about setting up a national system of enforcement that compels sellers to pay the *droit de suite*. If the United Kingdom fails to make an effort to enforce the *droit de suite*, the European Union may take action in the ECJ.

These problems create questions regarding the success of the *droit de suite* in the United Kingdom and consequently the success of the directive as a whole. The European Union hopes the directive will give artists greater rights, harmonize the art markets of the E.U. states, and harmonize the legal framework regarding the *droit de suite* in the European Union. In actuality, the European Union is likely to lose art business to New York with no benefit to European Union member states, and it is nearly impossible to harmonize the legal framework with the conflicts presented by two differing legal systems.

By observing the success or failure of the *droit de suite*, one can perhaps foretell the fate of a similar royalty in the United States. There has been some support in the United States for greater artists' rights, including the *droit de suite*, but those attempting to forecast the possible future of the royalty in the United States predict different outcomes. Some predict that the *droit de suite* in the European Union will put pressure on the United States to enact the *droit de suite*³⁰² and that the United States is already heading in that direction.³⁰³ Others claim that the United States and the European Union are heading in opposite directions on the *droit de suite*;³⁰⁴ a 1992 Congressionally-ordered study came to a negative, but controversial, conclusion about implementing the resale royalty in the United States.³⁰⁵

The United States also has a system of common law, and it would face many of the problems the United Kingdom is now facing with regard to the resale right. (The lack of its success in California is indicative of the problems one faces trying to institute a *droit de suite* in a common law system.) While the effects of the *droit de suite* may not be apparent in the United Kingdom for another decade, the United Kingdom's handling of those problems may determine whether the United States would consider

³⁰² Damich, *supra* note 254, at 406. The European Commission has said that it plans "to take the necessary actions to extend the application of the resale right at international level." Written Question E-1151/02 by Eric Meijer (GUE/NGL) to the Commission, 2002 O.J. (C 052) 40, Apr. 22, 2002. [hereinafter Written Question 2].

³⁰³ See Carleton, *supra* note 7, at 531.

³⁰⁴ Santilli, *supra* note 170, at 107; Hayes, *supra* note 218, at 1022.

³⁰⁵ Hayes, *supra* note 218, at 1022.

instituting the *droit de suite*. The next likely development to anticipate is the European Commission's economic study on the competitiveness of the market in modern and contemporary art in the European Community.³⁰⁶ The Commission plans to have the study completed by January 1, 2009³⁰⁷ and hopes that the results of the study will quiet the arguments against the *droit de suite* and even convince countries outside the European Union, such as the United States, to consider implementing a *droit de suite*.³⁰⁸

³⁰⁶ Written Question 2, *supra* note 302, at 41.

³⁰⁷ *Id.*

³⁰⁸ *See id.*

