Boston College International and Comparative Law Review

Volume 3 | Issue 2 Article 5

8-1-1980

The Applicability of the Droit de Suite In the United States

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I. INTRODUCTION

Art has long been recognized as a unique form of property.[1] Although at one time art was only the concern of wealthy patrons, connoisseurs and royal families, today art affects and involves a much vaster audience. This audience ranges from inner city minorities who seek to comprehend their ancient culture and heritage through an understanding of its art, to middle class Americans who strive to broaden and enrich their lives through a knowledge and appreciation of art.[2]

Accompanying this increased interest in art has been a growing awareness of the inadequacies in the body of law surrounding art.[3] In particular, there has been a greater sensitivity to the rights of artists.[4] Aside from the copyright

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1. *See generally* R. BROWN, THE LAW OF PERSONAL PROPERTY (3d ed. 1975); M. NIMMER, NIMMER ON COPYRIGHT, § 2.08(B) (rev. ed. 1978) [hereinafter cited as NIMMER]; U.S. CONST. art. I, § 8, cl. 8; Protection of World Cultural and Natural Heritage, Dec. 17, 1975, 27 U.S.T. 37, T.I.A.S. No. 8226 (1976).

2. L. DUBOFF, THE DESKBOOK OF ART LAW 3 (1977) [hereinafter cited as DUBOFF]. There are even those who would go so far as to say that 'art worship' is a new twentieth century phenomenon with the Sunday outing to the local museum replacing the visit to Church. Bethell, *The Cultural Tithe,* HARPER'S, Aug. 1977, at 18.

3. DUBOFF, *supra* note 2, at 3.

4. *Id.* It is inherent in the nature of most artists not to think of themselves as engaged in a business enterprise. In fact, in their efforts to avoid commercialism, many artists have neglected even the minimal protection which most national legal systems have granted them under their copyright laws. *See* Sheehan, *Why Don't Fine Artists Use Statutory Copyright? — An Empirical and Legal Survey,* 22 BULL. COPYRIGHT SOC'Y 242 (1975); *see also* Schulder, *Art Proceeds Act: A Study of the Droit de Suite and a Proposed Enactment for the United States,* 61 NW. U. L. REV. 19, 20 (1966) [hereinafter cited as Schulder]. Schulder notes that "[i]n France, the artist retains reproduction rights unless there is an express stipulation granting the rights to another. In the United States, on the other hand, it seems that reproduction rights pass with the work of art unless they are expressly reserved." *Id.* However, the Copyright Act of 1976, 17 U.S.C. § 202 (Supp. II 1978),

(or the right of reproduction), artists' rights encompass two other important groups of rights — the *droit morale* or the moral right[5] and the *droit de suite* or the

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provides that "[t]ransfer of ownership of any material object . . . does not of itself convey any rights in the copyrighted work embodied in the object." *Id.* Thus, the longstanding doctrine established in Pushman v. New York Graphic Society, Inc., 287 N.Y. 302, 308, 39 N.E.2d 249, 251 (1942), that an "unconditional sale carried with it the transfer of the common law copyright and the right to reproduce" has been overturned by the Copyright Act of 1976.

The Copyright Act of 1976, which became effective January 1, 1978, revised the Copyright Act of 1909 in its entirety. Although there were some aspects of the Copyright Act of 1909 that were conclusively terminated, many of its provisions continue to have practical significance in their application to works which entered the public domain before 1978. Under the Copyright Act of 1909, 17 U.S.C. § 24 (1976), a copyright could be secured for 28 years, with an additional 28 years renewal and extension. However, the Copyright Act of 1976, 17 U.S.C. § 302 (Supp. II 1978) protects works created after January 1, 1978 for the life of the author and 50 years after his death. Works which are in their first term as of January 1, 1978 are entitled to a 47 year renewal and extension under the Copyright Act of 1976, 17 U.S.C. § 304(a) (Supp. II 1978). This Comment will refer generally to the Copyright Act of 1976, but the reader should be aware of the continued application of the Copyright Act of 1909.

Essentially, the copyright provides the right to control reproduction of a work. Writers and composers have customarily benefited from the collection of royalties, since the economic exploitation of a manuscript or a musical composition is realized through reproduction. Artists, too, of course, may benefit from the right to control reproductions of a work. Copyright Act of 1976, 17 U.S.C. §§ 102(a)(5), 106(1) (Supp. II 1978).

It is not uncommon for artwork to be reproduced sometimes in another medium, such as making a silkscreen or lithograph from a painting. The artist also may retain a copyright in these reproduced, or 'derivative,' works. *Id.* §§ 103, 106(2) (Supp. II 1978). This poses a dilemma since copyright protection is often not relevant to the visual artist. This is because the value of such work may result to a large extent from its originality. Copyright laws protect economic exploitation of the reproduction of the artistic product. As such they are inadequate for the visual artist who must depend entirely on the proceeds from the first sale of a painting or sculpture for his income from that particular work. Hauser, *The French Droit de Suite: The Problem of Protection for the Underprivileged Artist under the Copyright Law,* 6 BULL. COPYRIGHT SOC'Y 94, 105 (1962) [hereinafter cited as Hauser]. For a description of the copyright laws in various countries, *see* UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION (UNESCO), COPYRIGHT LAWS AND TREATIES OF THE WORLD (1964) [hereinafter cited as CLTW].

5. Over 63 countries throughout the world have recognized the special relationship that exists between an artist and his artwork and have developed laws which protect that bond. *See* CLTW, *supra* note 4. When the artists' rights are of a personal nature they are generally referred to as 'moral rights,' or as they are known in Europe, *les droits moraux,* or generically — *le droit moral.* Essentially the moral rights of an artist include:

1) The right of the artist to insist that his name be connected with his work and only his work.
2) The right of the artist to insist that the integrity of his work be respected. [For example, that the work not be altered or destroyed].
3) The rights of the artist to have his work published only with his consent. [This would give the artist the right, for example, to enjoin another from publishing that which the artist has discarded].
4) The right of the artist to withdraw his work from sale.
5) The right of the artist to protection from excessive criticism. [This is usually defined

proceeds right.[6] Typically, it has been the older countries of Western Europe which have been in the vanguard of recognition of a broad range of artists' rights,[7] while under U.S. law only the copyright is fully available to the artist.[8] The moral right, which can be defined as "the artists' legitimate interest in the continuing physical integrity of a work that he or she has created,"[9] has long been afforded the artist by the signatories to the Berne Convention on the Protection of Literary and Artistic Property [The Berne Convention].[10] However,

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as criticism in the nature of defamation, in which the artist must prove falsity, malice and damages].

Devlin, *Moral Right in the United States,* 35 CONN. BAR J. 509, 510 (1961) [bracketed material supplied by the author of this Comment for explanatory purposes]. For a discussion of efforts to enact the moral right in the United States, *see* note 11 *infra.*

6. That is, the right of the artist to receive a percentage of the resale price each time a work of art is resold. This right is referred to as the 'proceeds right' or 'resale royalty' or by its original French name, '*droit de suite.*' The author will use the names interchangeably within this Comment to signify the same concept.

7. Schulder, *supra* note 4, at 20.

It is evident that it would be desirable for the *droit de suite* to be accepted in other countries, even internationalized. The legislation on copyright in the great industrial nations . . . like the United States, for example, is so much behind that in Europe it shall be a long while before arriving at this unification.

Id., *quoting* J. DUCHEMIN, LE DROIT DE SUITE DES ARTISTES 149 (1948).

8. Copyright Act of 1976, 17 U.S.C. § 102 (a)(5) (Supp. II 1978). If a work of art is original, that is, "independently created" and fixed within a tangible form, it is eligible for U.S. Copyright protection. NIMMER, *supra* note 1, at § 10.1. Essentially the Copyright Act prohibits the unauthorized sale of copies of copyrighted work. Note that this right is of no benefit to the painter or sculptor who does not plan to sell copies, or 'reproductions,' of his artwork, but instead relies on the *uniqueness* of his product for its value.

9. Weil, *The 'Moral Right' Comes to California,* ART NEWS, Dec. 1979, at 88 [hereinafter cited as Weil]. *See generally* Katz, *The Doctrine of Moral Right and American Copyright Law — A Proposal,* 24 S. CALIF. L. REV. 375 (1951); Merryman, *The Refrigerator of Bernard Buffet,* 27 HASTINGS L. J. 1023 (1976); Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators,* 53 HARV. L. REV. 554 (1940) [hereinafter cited as Roeder]; Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law,* 16 AM. J. COMP. L. 465 (1968); Strauss, *The Moral Right of the Author,* 4 AM. J. COMP. L. 506 (1955); Treece, *American Law Analogues of the Author's "Moral Right,"* 16 AM. J. COMP. L. 487 (1968) [hereinafter cited as Treece]; Comment, *Toward Artistic Integrity: Implementing Moral Right Through Extension of Existing American Legal Doctrines,* 60 GEO. L. J. 1539 (1972). *See also* note 5 *supra.* For a comparison of the French *droit moral* with similar British artists' rights, *see* Marvin, *The Author's Status in the United Kingdom and France: Common Law and the Moral Right Doctrine,* 20 INT'L & COMP. L. Q. 675 (1971).

10. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised,* June 26, 1948, art. 6 *bis,* 331 U.N.T.S. 217, 227 (1948) [hereinafter cited as the Berne Convention], *reprinted in* 4 NIMMER, *supra* note 1, App. 27. The Berne Convention is a multilateral treaty defining minimum mandatory copyright protection in member countries. *Id.* art. 6, 331 U.N.T.S. 217, 225, *reprinted in* 4 NIMMER, *supra* note 1, at App. 27. As of January 1, 1979, the Berne Convention had 71 signatories. *Organisation Mondiale de la Propriété Intellectuelle (OMPI),* 92

only one aspect of the right — the right of divulgation — has been incorporated into U.S. law on a national basis.[11] This was accomplished through the Copyright Act of 1976.[12]

This Comment is concerned primarily with the proceeds right or *droit de suite*. A study of the origins and comparative differences of the proceeds right as it appears in various Western European countries will be followed by a review of *droit de suite* legislation in the United States, particularly under the laws of California. After a discussion of the efforts to internationalize the *droit de suite* under the Berne Convention and the Universal Copyright Convention, this Comment will explore the advantages and disadvantages of this right in a comparative context and as the possible basis of reform or modification of the regime applicable to the artists in the United States. The author concludes that the proceeds right is not particularly applicable in the United States and offers possible alternatives to the right which may more effectively implement its basic objective: to provide an economic benefit to artists.

LE DROIT D'AUTEUR 6 (1979). However, the United States is not a member of the Berne Convention. *Id.*

Although the 1976 Copyright Act may open the door to future Berne Convention membership by the United States, the Convention is still believed to contain "provisions at variance with our basic law of copyright," and "in conflict" with the principles of American Copyright Law. DUBOFF, *supra* note 2, at 808. The issue of U.S. entry into the Berne Convention is outside the scope of this Comment. However, for an early article advocating U.S. entry, *see* Bodenhausen, *United States Copyright Protection and the Berne Convention,* 13 BULL. COPYRIGHT SOC'Y 215 (1966).

11. J. MERRYMAN & A. ELSEN, LAW, ETHICS AND THE VISUAL ARTS, 4—1 (1979) [hereinafter cited as MERRYMAN & ELSEN]. The right of divulgation has been defined as the right of the artist to disclose a piece of work when he believes it is completed and, conversely, the right to withhold the work. Treece, *supra* note 9, at 487. *See* note 5 *supra*.

However, the moral right has been enacted into law in California. The California Art Preservation Act, 1979 CAL. CIV. CODE § 987 (West Supp. 1980), took effect on January 1, 1980. *Id.* § 987(1)(j). It provides that, "[n]o person . . . shall intentionally commit, or authorize the intentional commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art." *Id.* § 987(1)(c)(1). For a discussion of the California Art Preservation Act, *see* Weil, *supra* note 9, at 89.

National legislation has been proposed in the United States by Representative Drinan of Massachusetts. The Visual Artists' Moral Rights Amendments of 1979, H.R. 288, 96th Cong., 1st Sess., 124 CONG. REC. E6,270 (daily ed. Oct. 13, 1977). The proposed legislation was sent to the Judiciary Committee on Feb. 15, 1979, which then referred it to the Subcommittee on Courts, Civil Liberties and Administration of Justice. Telephone Interview with Mark Kmetz, Legislative Assistant to Representative Drinan, Washington, D.C. (Mar. 7, 1980). That Subcommittee has not reported on the bill as of this date. *Id.*

France enacted moral rights legislation in 1957. Loi de 11 mars 1957, [1957] Journal Officiel de la République Française (J.O.) 2723, [1957] Bulletin législatif Dalloz (B.L.D.) 197.

12. Copyright Act of 1976, 17 U.S.C. §§ 101-118, 201-205, 301-305, 401-412, 501-510, 601-603, 701-710, 801-810 (Supp. II 1978).

II. THE DROIT DE SUITE IN WESTERN EUROPE[13]

A. *France*

The *droit de suite,*[14] or artists' proceeds right, concerns the right of artists to a certain percentage of the resale price each time their works are subsequently

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13. A form of *droit de suite* also has been enacted by the Eastern European governments of Czechoslovakia and Poland. On March 25, 1965, Czechoslovakia enacted an artists' proceeds right. Law of March 25, 1965, No. 35, art. 31, *Sbírka Zákonů,* Apr. 8, 1965, *reprinted in* CLTW (Supp. 1967), *supra* note 4, at 365. The law operates only upon the increase in value of the latest sales price over the preceding sales price. For a description of the operation of the Czechoslovakian law, *see* J. DUCHEMIN, LE DROIT DE SUITE DES ARTISTES 188 (1948) [hereinafter cited as DUCHEMIN]. Originally, the amount of the proceeds was to be determined by the courts, up to a maximum of 20 percent of the profit. Schulder, *supra* note 4, at 31; *see* MERRYMAN & ELSEN, *supra* note 11, at 4—136. Factors which enter into this determination include the relative financial status of the artist and the seller, MERRYMAN & ELSEN, *supra* note 11, at 4—136, and the seller's costs for transportation, conservation and installation of the work. Schulder, *supra* note 4, at 31. Apparently this arrangement proved so complicated, not to mention being conceptually unclear, that its actual application was quite rare. *Id.* The law has since been modified to apply only in cases in which a "socially unjustified" profit has been realized. Law of March 25, 1965, No. 35, art. 31, *Sbírka Zákonů,* Apr. 8, 1965, *reprinted in* CLTW (Supp. 1967), *supra* note 4, at 365; *see* MERRYMAN & ELSEN, *supra* note 11, at 4—136. Compare the Italian *droit de suite* law discussed in text accompanying notes 53-66 *infra.*

Poland enacted a proceeds right in 1935, which imposed an assessment upon the increase in value of subsequent resales of an artist's work. Law of Mar. 22, 1935, art. 27 *bis, discussed in* DUCHEMIN, *supra,* at 298. The seller was obliged to pay the artist 20 percent of the increase in value, but only if the increase amounted to at least 50 percent of the purchase price. Schulder, *supra* note 4, at 31. It is not clear in the statute whether "purchase price" referred to the last purchase price if there were successive resales, or to the first purchase price when the work was originally sold by the artist or his agent. *Id.* Moreover, although it is the seller who must pay the artist, it is the artist who must provide proof of both the present purchase price and the prior purchase price. Evidently, the regulations governing the law were so manifestly inadequate that it was almost never carried out and the law was omitted from the 1952 recodification of Polish Copyright Law. [1952] Dziennik Ustaw 373, *reprinted in* CLTW, *supra* note 4, at 1467. One writer has suggested that the socialist philosophy precludes effective operation of the proceeds right in both Poland and Czechoslovakia. DUBOFF, *supra* note 2, at 857. *See generally* Ionasco, *La Protection du Droit d'Auteur dans les Pays Socialistes,* 75 REVUE INTERNATIONALE DU DROIT D'AUTEUR 85 (1973).

14. The term *droit de suite* comes from the French real property law. Under article 2279 of the Civil Code a taker of *personality* [sic] cuts off all rights of the true owner, for "in matter of personality [sic], possession equals title." The only exception is in the instance where the holder is a thief or finder and the owner vindicates his rights in three years. Rights to realty are, however, more sacred, and an owner or a creditor may pursue the reality [sic] in the hands of a taker, even a *bona fide* one. Creditors may not do the same to personality [sic], for the chattel mortgage, as such, does not exist in French law. This right to pursue or follow the property (realty) is called, literally enough, the "follow-up right" (*droit de suite*).

Hauser, *supra* note 4, at 97.

The concept of the *droit de suite* originated in an article in the *Chronique de Paris* of February 25, 1893. In 1903 the *Société des Amis du Luxembourg* was created with the double purpose of establishing the Museum of Luxembourg and the enactment of the *droit de suite.* A draft was produced in 1904, which became the basis of the law of 1920 enacting the *droit de suite. Id.* at 96.

resold.[15] A form of *droit de suite* was enacted into law in France for the first time on May 20, 1920.[16] The law was perceived as an extension of the general copyright law which was believed to provide inadequate protection for artists at that time.[17] It was intended to put artists on an equal economic footing with writers and composers by granting artists similar royalty rights in the exploitation of their work,[18] since "the copyright itself was not a useful tool for artists."[19]

Under the law of 1920, artists were entitled to a percentage of the gross sales price received each time their works were resold at a public auction, provided that the work was "original."[20] The rate set under the 1920 Act was a progressive tariff dependent on the sales price.[21] Apparently, the law functioned smoothly from its beginning in 1920,[22] but in 1957 a new law was passed which repealed the progressive tariff and established a uniform rate of three

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15. For a general discussion of the *droit de suite, see id.*; Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite,* 77 YALE L. J. 1333 (1968) [hereinafter cited as Price]; Schulder, *supra* note 4. The leading foreign source is DUCHEMIN, *supra* note 13; *see* H. DESBOIS, LE DROIT D'AUTEUR EN FRANCE (rev. ed. 1973); Duchemin, *La Propriété Artistique selon la Loi Française du 11 Mars 1957,* 19 REVUE INTERNATIONALE DU DROIT D'AUTEUR 323 (1958) [hereinafter *La Propriété Artistique*]; LEGAL RIGHTS OF THE ARTIST (M. Nimmer ed. 1971).

16. Loi de 20 mai 1920, [1921] Recueil Dalloz Périodique et critique (D.P. IV) 335, [1920] Duvergier & Bocquet (Duv. & Boc.) 539, *as amended by* Loi de 11 mars 1957 (Copyright Act of 1957), art. 42, [1957] J.O. 2723, 2726-27 [1957] B.L.D. 197, 202.

Sentiment in favor of the legislation was stimulated by a lithograph by Jean-Louis Forain showing two ragged urchins standing in front of an auction house in which a picture is displayed which is to be sold at a high price. *"Un tableau de Papa,"* says one pathetic tot to the other. Hochfield, *Artists Rights: Pros and Cons,* ART NEWS, May 1975, at 23 [hereinafter cited as Hochfield].

17. DUCHEMIN, *supra* note 13, at 271.

18. The bundle of rights granted to artists, writers and composers is called *droit d'auteur* in France, which is the equivalent to the American term "copyright." *See generally* CLTW, *supra* note 4, at 773.

19. Comment, *Artists' Resale Royalties Legislation: Ohio House Bill 808 and a Proposed Alternative,* 9 TOL. L. REV. 366, 369 (1978) [hereinafter cited as *Artists' Resale Royalties*]. For the manner in which copyright laws operate to deprive painters and sculptors of effective protection from the economic exploitation of their work, *see* note 4 *supra.*

20. Loi de 20 mai 1920, art. 1, [1921] D.P. IV at 335, [1920] Duv. & Boc. at 539. The term "original" was never defined in the French law, but apears to be used in opposition to the word 'reproduction': *"telles que peintures, sculptures, dessins, soient originales et représentent une création personnelle de l'auteur." Id.* The difficulty arises in the case of lithographs, engravings, woodcuts and other artworks generally reproduced in quantity for sale. However, these prints rarely sell at prices high enough to bring them within the coverage of the law and as a result there are no decisions on the question. Hauser, *supra* note 4, at 98.

21. Loi de 20 mai 1920, art. 2, [1921] D.P. IV at 335, [1920] Duv. & Boc. at 539, *amended by* Loi de 27 octobre 1922, [1922] B.L.D. 653, [1922] Duv. & Boc. 443. If the sale price was from 50 to 10,000 francs, the artist received one percent of the gross sales price; from 10,000 to 20,000 francs, he received one and a half percent; from 20,000 to 50,000 francs, he received two percent; and in excess of 50,000 francs, he received three percent. *Id.*

22. Hauser, *supra* note 4, at 102. [1957] B.L.D. at 202.

percent.[23] The 1957 Act was also expanded to include private sales by art dealers,[24] but this aspect of the law has not been implemented.[25] The Act has never been extended to private non-commercial sales and considering the enormous practical difficulties in enforcing a proceeds right over such sales, there is little likelihood that it will be.[26]

Presently a minimum sales price of 100 francs is required before the Act comes into effect and the amount due is paid by the seller.[27] In addition, the Act provides that the *droit de suite* exists as a matter of law and cannot be alienated by the artist.[28] The French were concerned about the unprotected artist negotiating away his rights to the commercially sophisticated art dealer. Finally, the benefits of the French Act inure to the artist for his life plus fifty years,[29] and under Article 24 of the 1957 Act only the surviving spouse and heirs can claim any benefits under the Act; legatees and assignees are barred.[30]

The functioning of the French Act depends upon an association of artists which will protect the interests of its members in much the same way that the American Society of Authors, Composers and Publishers (ASCAP)[31] operates in the United States.[32] The Union of Artistic Property,[33] a private organization, is presently the sole organ collecting the royalties from dealers and dis-

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23. Loi de 11 mars 1957 (Copyright Act of 1957), art. 42, [1957] J.O. at 2726-27. This was done to "simplify collection." *La Propriété Artistique, supra* note 15, at 341.

24. Loi de 11 mars 1957 (Copyright Act of 1957), art. 42, [1957] J.O. at 2726, [1957] B.L.D. at 202. That is, artists were to receive three percent of the gross sales price of all resales by an art dealer (*par l'intermédiaire d'un commerçant*). *Id.*

25. Schulder, *supra* note 4, at 33. The expansion was voted by Parliament in 1957 before the de Gaulle government came to power. The "*reglement d'administration publique*" (administrative regulation) required to implement the law was never signed by the de Gaulle government. Apparently, the art dealers are quite powerful and thus, the expanded coverage is not effective. *Id.* at 33-34.

26. *See* text accompanying notes 203-209 *infra.*

27. Loi de 11 mars 1957, art. 42, [1957] J.O. at 2727, [1957] B.L.D. at 202.

28. *Id.*, [1957] J.O. at 2726, [1957] B.L.D. at 202.

29. *Id.*, [1957] J.O. at 2727, [1957] B.L.D. at 202.

30. *Id.* art. 24, [1957] J.O. at 2725, [1957] B.L.D. at 200.

31. The American Society of Composers, Authors and Publishers (ASCAP) is a voluntary non-profit organization which collects royalties and distributes them to composers, authors and publishers of musical compositions, who hold copyrights in their work. ASCAP acts as a clearing house through which users of music may obtain for a fee a license to perform any and all of the compositions written and published by ASCAP members. THE ASCAP BIOGRAPHICAL DICTIONARY OF COMPOSERS, AUTHORS AND PUBLISHERS (ASCAP 3d ed. 1966); *see* Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 5 (1979).

32. Hauser, *supra* note 4, at 100.

33. The Union of Artistic Property is a rough translation of *Société de la propriété artistique et des dessins et modèles* (SPADEM). This organization controls all public sales of artwork by public auctioneers (*commissaires-priseurs*). It collects dues from members and keeps 15 percent of the 3 percent resale proceeds payments made to artists. Hochfield, *supra* note 16, at 23.

tributing them to the artists.[34] Almost all French artists are members of the Union.[35] If an artist is found who does not belong to the Union, his membership is solicited immediately.[36]

For the most part the *droit de suite* has been successful in France.[37] This is partly due to the fact that the law is limited in scope,[38] and partly because the art market in France is centered almost exclusively in Paris. This geographical concentration makes administration and enforcement problems manageable. While auctioneers had argued against the *droit de suite,* claiming that it would result in decreased sales in France to the advantage of foreign countries where the *droit de suite* was not acknowledged, these expectations have not been realized as there has been no diminution of auction sales.[39]

B. *Germany*

In Germany, a *droit de suite* law was enacted on September 16, 1965.[40] Like the French Act, the German Law establishes an inalienable right to the artist

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34. Hauser, *supra* note 4, at 100-01.

35. *Id.*

36. *Id.*

37. *Id.* The following are some examples of funds received by artists through the *droit de suite* in France:

	Sale of June 14, 1957 (in francs)	*Droit de Suite* (in francs)
Gaugin	104,000,000	3,120,000
	35,500,000	1,065,000
Renoir	22,000,000	660,000
	9,800,000	294,000
Monet	17,500,000	525,000
Boudin	13,800,000	414,000
	Sale of March 15, 1958	*Droit de Suite*
Utrillo	7,500,000	225,000

Id. at 101 (these figures were supplied by the Secretary General of the Union of Artistic Property).

38. That is, to sales which are known to the public and for which records are accessible.

39. None of the inconveniences foreseen by the auctioneers was noted. The sales by public auction of works of art have never been so big in France as since 1920. The rate for the *droit de suite* is low and represents very little in the deductions made at auction sales. The very lucrative situation of the auctioneers has become more and more important.

La Propriété Artistique, supra note 15, at 345 (remarks of J.L. Duchemin, Secretary-General of the Union of Artistic Property (SPADEM)). Professor Robert Rie of the State University of New York at Fredonia has stated that since 1969, there has not been a year in which less than 1,000,000 francs (about $250,000) have been returned to artists by the auctioneers in France. Hochfield, *supra* note 16, at 23. For a contrasting view, *see* notes 135, 200 *infra.*

40. Law of 16 September 1965, Urheberrechtsgesetz [URG] (Copyright Law), no. 51, art. 26, [1965] BGB1 II 1276, *reprinted in* 48 REVUE INTERNATIONALE DU DROIT D'AUTEUR 160 (1966). In 1972, an amendment served to decrease the minimum sale price from 500 to 100 German

in his property, and applies to sales occurring through a public facility, *i.e.*, an auction house or art dealer.[41] Another similarity to the French Act is that it also sets a uniform rate — in this case five percent — to be applied to the gross sales price and paid by the seller.[42] The effective period is the artist's life plus 70 years.[43]

The German Law does not require an art dealer or an auctioneer to publicly disclose the identity of the seller of a work of art. The problem for the artist is further complicated by the fact that Section 5 of the German Law provides that only a collecting society can assert a claim against an art dealer or an auctioneer for his failure to reveal to the artist, 1) which originals of an artist were sold and 2) the name and address of the seller.[44] According to the law, the claim for a payment of the proceeds remains in the artist, but before the artist can assert such a claim for the proceeds he must ascertain the identity of the seller.[45] The collecting society for German artists is the Society *VG Bild-Kunst* (*Bild-Kunst*) in Frankfurt.[46] In order to enforce the request for information the *Bild-Kunst* must initiate legal action against the violating auctioneer or art dealer. The *Bild-Kunst* has been beset by financial problems which have prevented it from obtaining the identity of the seller, as well as the additional information. Without this information the artist cannot bring a claim. This has precluded any effective enforcement of the German *droit de suite* law.[47] As a result, the *droit de suite* has not been successful in Germany.[48]

Although similar to the French proceeds right, the German right differs fundamentally in its underlying conceptual justification.[49] The German Law is

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marks and to increase the artist's share of the gross resale price from one to five percent. *Id.* Law of 10 November 1972, URG, [1972] BGB1 I 2081, *reprinted in* 78 REVUE INTERNATIONALE DU DROIT D'AUTEUR 262 (1973), CLTW (Supp. 1973), *supra* note 4, at 70.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. Nordemann, *Dix ans de droit de suite en Allemagne Federale,* 91 REVUE INTERNATIONALE DU DROIT D'AUTEUR 77, 84 (1977) [hereinafter cited as Nordemann].

47. *Id.*

48. I was not aware of a single case in the almost seven years (1965-1972) during which the original version of the law was in force, of a single art dealer or auctioneer who paid even a penny to a graphic or plastic artist according to the *droit de suite.*

Id. at 78. Moreover, the same writer noted that art dealers have threatened to boycott (*i.e.*, no longer represent, deal with or exhibit the work of) any artist who joins the *Bild-Kunst* and raises a claim under the *droit de suite. Id.* at 86. *Cf.* notes 89, 90 *infra* and accompanying text. The *droit de suite* may yet succeed in Germany due to two recent events. Nordemann, *supra* note 46, at 88. First, the *Bild-Kunst* has received additional funds from the operation of a completely different group of laws. *Id.* Second, the *Bild-Kunst* has been authorized to collect French artists' claims for the *droit de suite* in Germany. *See* Law of 8 November 1975, [1975] BGB1 III 2775. This has increased the membership in the *Bild-Kunst* as of 1977, from 1,000 to approximately 4,000 members. Nordemann, *supra* note 46, at 88-90.

49. Schulder, *supra* note 4, at 30.

based on the 'theory of intrinsic value'[50] which is premised on the notion that the greater value which is later recognized in the work has always existed in latent form and any increase in the value is due solely to the artist's earlier labors.[51] Therefore, it is equitable that the artist share in the gain accruing to his original labor. This theory is buttressed by the argument that it is unjust for speculators to benefit from the increased value of the artistic work to the exclusion of the creator. One writer has described the premises which underlie this rationale as follows:

> The *droit de suite* is *La bohême* and *Lust for Life* reduced to statutory form. It is an expression of the belief that (1) the sale of the 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 subsidizing 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.[52]

It is submitted that the German Law is conceptually unclear. Although it is based on the right of the artist to share in the *increased value* of his artwork, *i.e.*, the difference between the seller's purchase price and the seller's sales price, the law requires the seller to pay five percent of the *gross sales price* to the artist.

C. *Italy*

The Italian Law recognizing an artist's proceeds right was passed on April 22, 1942.[53] Italy adopted the German "theory of intrinsic value" and under its system the artist is entitled to share only in the increased value, *i.e.*, the difference between the present and the prior selling price.[54] The Law is complicated and provides a sliding scale of percentages for the artist:[55] the greater the "plus-value"[56] or increase in price, the greater the artist's share, with a

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50. Hauser, *supra* note 4, at 106. *See* Opet, *Der Wertzuwachsanspruch des bildenden Kunstlers,* 46 ANNALEN DES DEUTSCHEN REICHES 368 (1913), *cited in* Price, *supra* note 15, at 1338 n.14.

51. Hauser, *supra* note 4, at 106.

52. Price, *supra* note 15, at 1335.

53. Law of 22 April 1941, no. 633, arts. 144-155, [1941] Raccolta Ufficiale delle Leggi et Decreti della Repubblica Italiana (Rac. Uff.) 2253-2255, [1941] Gazetta Ufficiale della Repubblica Italiana (Gaz. Uff.) 2809, *reprinted in* MERRYMAN & ELSEN, *supra* note 11, at 132-35.

54. *Id.* art. 144, [1941] Rac. Uff. at 2253, [1941] Gaz. Uff. at 2809, *reprinted in* MERRYMAN & ELSEN, *supra* note 11, at 4—132. For a work which discusses the Italian justification for the Act, *see* De Sanctis & Fabiani, *The Right on the Increase in Value of the Works of Fine Arts in the Italian Copyright Law,* in LEGAL RIGHTS OF THE ARTIST V—1 (M. Nimmer ed. 1971) [hereinafter cited as De Sanctis & Fabiani].

55. Law of 22 April 1941, no. 633, art. 152, [1941] Rac. Uff. at 2254, [1941] Gaz. Uff. at 2809, *reprinted in* MERRYMAN & ELSEN, *supra* note 11, at 4—134.

56. *Id.* art. 145, [1941] Rac. Uff. at 2253, [1941] Gaz. Uff. at 2809, *reprinted in* MERRYMAN &

maximum share of ten percent on an increase in excess of 175,000 lire.[57] The Law takes effect in the case of a public sale only when the selling price exceeds 1,000 lire in the case of drawings, 5,000 lire in the case of paintings and 10,000 lire in the case of sculptures.[58] The Law also applies to private sales, but only when the selling price exceeds 4,000 lire, 30,000 lire, and 40,000 lire respectively for drawings, paintings and sculptures, with the additional requirement that the original price of the first sale have quintupled.[59] With these conditions met, the increase in value is then subject to a flat ten percent rate.[60]

The collecting society for the *droit de suite* in Italy is the Society of Authors and Publishers (*Societa Italiana degli Autori ed Editori*) (SIAE).[61] The SIAE is granted a monopoly as an artists' society under Italian copyright law, but it is not compulsory for artists to belong to the group. They may negotiate individually for their own rights with the sellers of their artwork.[62] Like the *Bild-Kunst* in Germany, the SIAE has encountered financial difficulties which have deterred effective enforcement of the law.[63]

The complexity of the Italian *droit de suite* has posed serious administrative problems. It is "unduly burdensome and almost unworkable."[64] Not surprisingly the Italian Law has not proved successful.[65] "[T]he major problems

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ELSEN, *supra* note 11, at 4—132. "Plus-value" means increase in value De Sanctis & Fabiani, *supra* note 54, at V—9. Aside from Italy, this form of assessment has been adopted in Czechoslovakia, Poland and Uruguay. *See* notes 13, 66 *supra*. The assessment on the gross sales price has been adopted in France, Belgium and California. *See* notes 20, 66, 76 *supra* and accompanying text.

57. Law of 22 April 1941, no. 633, art. 152, [1941] Rac. Uff. at 2254, [1941] Gaz. Uff. at 2809, *reprinted in* MERRYMAN & ELSEN, *supra* note 11, at 4—134.

58. *Id.* art. 146, [1941] Rac. Uff. at 2254, [1941] Gaz. Uff. at 2809, *reprinted in* MERRYMAN & ELSEN, *supra* note 11, at 4—133. A "public" sale presumably means a sale by an auction house or an art dealer, but the law is not clear on this point.

59. Law of 22 April 1941, art. 147, [1941] Rac. Uff. at 2254, [1941] Gaz. Uff. at 2809, *reprinted in* MERRYMAN & ELSEN, *supra* note 11, at 4—133. Clearly, in the case of private sales, it would be very difficult to establish the actual original price. Article 147 provides that "[p]roof of the price paid for a work and of the conditions specified in this Article shall be the responsibility of the authors." *Id.* This problem for artists would be practically insurmountable in the case of works of art purchased outside of Italy and then resold within that country.

60. *Id.* In countries which base the assessment of proceeds on the increase in value, the most common rate is 20 percent. The rates for all such countries are as follows:

Italy	1-10%
Czechoslovakia	20%
Poland	20%
Uruguay	25%

Schulder, *supra* note 4, at 31.

61. DeSanctis & Fabiani, *supra* note 54, at V—29-31.

62. *Id.* at V—31.

63. *Id.* For the critical role of the collecting societies in France and Germany, *see* text accompanying notes 31-36 *supra* (France); 44-48 *supra* (Germany).

64. DUBOFF, *supra* note 2, at 857.

65. DeSanctis, *Lettre d'Italie,* 74 LE DROIT D'AUTEUR 221, 221-22 (1961).

[with the law] involve the noncooperation, frequently amounting to fraud, of auctioneers [and] the indifference of artists and their successors in interest."[66]

III. THE DROIT DE SUITE IN THE UNITED STATES

There is currently no form of *droit de suite* that has been enacted in the United States on a national level. However, efforts to implement artists' rights in the United States, both in the form of private contracts and national legislation, have been undertaken. Following an analysis of a *droit de suite* law that has been enacted in California, these recent national efforts will be examined.

A. *The California Resale Royalties Act*

On September 22, 1976, California Governor Edmund G. Brown signed the Resale Royalties Bill into law, thus enacting the first form of *droit de suite* legislation in the United States.[67] The statute, codified as Section 986 of the California Civil Code,[68] provides that when a work of art created by a living

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66. Sherman, *Incorporation of Droit de Suite into United States Copyright Law,* 18 ASCAP COPYRIGHT L. SYMP. 50, 55 (1970) [hereinafter cited as Sherman].

Several other countries in Western Europe, as well as a few countries in Northern Africa and South America, have enacted a form of *droit de suite.* For example, Belgium enacted a *droit de suite* law in 1921 shortly after France enacted its law. Law of 25 June 1921, Moniteur Belge (20 Aug. 1921), [1921] Pasinomie 343, *reprinted in* CLTW, *supra* note 4, at 213. Although the Belgian Law is modeled after the French statute, its underlying rationale is premised on the restitution theory of 'unjust enrichment.' The Belgian statute draws an analogy between the *droit de suite* and the principle called *imprevision,* or 'changed circumstances.' Hauser, *supra* note 4, at 110. In the latter situation, where the continuation of a contract would result in a hardship to one of the parties, the civil law would permit a revision of its terms. *Id.* However, this doctrine has very little application in French law, except to rescind contracts. Thus, it is unlikely that the French ever would use this theory as a basis for the *droit de suite. Id.* Tunisia has enacted a *droit de suite* law which is incorporated into the copyright system just as it is in France. Act of 14 February 1966, art. 17, 109 Journal Officiel de la République Tunisienne 227 (Feb. 15, 1966), *reprinted in* CLTW (Supp. 1967), *supra* note 4, at 377.

Uruguay has a proceeds right for artists which combines both the French and the Italian systems. Act of 17 December 1937, art. 9, [1935] Diario Official 482A, *reprinted in* CLTW (Supp. 1964), *supra* note 4, at 1932. Like the French Law it is incorporated into the copyright law of Uruguay, but in a manner similar to the Italian Law, it only gives the artist a percentage of the "plus-value" — in this case 25 percent. *Id.* Unfortunately, Uruguay has never enacted enabling legislation that would allow recovery of the proceeds due. Hauser, *supra* note 4, at 107. Thus, for practical purposes the *droit de suite* in Uruguay is inoperative. For a discussion of the failure of the Uruguayan statute, *see* C. MOUCHET & S. RADAELLI, LOS DERECHOS DEL ESCRITOR Y DEL ARTISTA 156 (1953).

The *droit de suite* has been enacted in Norway in 1961, Algeria in 1973, Chile in 1970, Luxembourg in 1972, and Morocco in 1970. *See* Duchemin, *Le Droit de Suite,* 80 REVUE INTERNATIONALE DE DROIT D'AUTEUR 5, 9 (1974). It has been considered, but not enacted, in Austria, Great Britain, the Netherlands, Spain and Switzerland. Schulder, *supra* note 4, at 22.

67. Hochfield, *Legislating Royalties for Artists,* ART NEWS, Dec. 1976, at 52 [hereinafter cited as *Legislating Royalties*].

68. CAL. CIV. CODE § 986 (West Supp. 1978). The statute became effective on January 1, 1977. *Id.* § 986(1)(d) (West Supp. 1978).

artist[69] is sold for $1,000 or more,[70] and the seller is a California resident or the sale takes place in California,[71] the seller must pay the artist five percent of the sales price.[72] The right of the artist is not transferable and may be waived only by a contract in writing providing for a royalty in excess of five percent.[73] The Act does not apply to the initial sale of a work of art where legal title at the time of the sale is vested in the artist[74] or when the gross sales price (or the fair market value of property exchanged for the artwork) is less than the purchase price paid by the seller.[75]

The California Resale Royalties Act (California Act) is similar to the French *droit de suite* in that it bases its assessment on the gross sales price of the work of art.[76]

On the one hand, the California Act is broader than the French Act because it applies to sales at auctions and by art dealers.[77] On the other hand, it is more limited than the French Act because it is not effective after the artist's death, nor when there has been a loss on resale,[78] *i.e.*, the resale price is lower than the price originally paid by the seller.

The operation of the California Act puts the burden on the seller to locate the artist to pay the five percent royalty.[79] If, after ninety days, the seller is unable to locate the artist, the seller pays this amount to the California Arts Council.[80] If the Council is also unable to locate the artist and the artist does not file a written claim for the money received by the work within seven years, then the artist's right terminates and the money is transferred to the operating fund of the Council.[81] Absent voluntary payment of the royalty by the seller, the artist has the burden of bringing an action for damages within three years of the sale or one year after discovery of the sale, whichever is longer.[82]

Unfortunately, even with the passage of the California Act, there is no incentive to discourage a dealer from concealing the fact of resale from an artist for several reasons.[83] First, unlike his French counterpart, the American artist

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69. *Id.* § 986(1)(b)(3).
70. *Id.* § 986(1)(b)(2).
71. *Id.* § 986(1)(a).
72. *Id.*
73. *Id.*
74. *Id.* § 986(1)(b)(1).
75. *Id.* §§ 986(1)(b)(4), (5).
76. Rather than on the "plus-value" or increase in price alone, found in the Italian, Czechoslovakian, Polish and Uruguayan systems. *See* note 56 *supra.*
77. CAL. CIV. CODE § 986 (1)(a)(1) (West Supp. 1978).
78. *Id.* §§ 986(1)(b)(3), (4).
79. *Id.* § 986(1)(a)(1).
80. *Id.* § 986(1)(a)(2).
81. *Id.* § 986(1)(a)(5).
82. *Id.* § 986(1)(a)(3).
83. Ashley, *A Critical Comment on California's Droit de Suite, Civil Code Section 986,* 29 HASTINGS L. J. 249, 258 (1977) [hereinafter cited as Ashley]. For example:

> [A] California artist may discover that a subsequent California purchaser of his art has

does not have the support of an artists' union,[84] and second, the California Act has no requirement that art sales be publicly disclosed. Furthermore, the artist may be hesitant to bring a suit to collect royalties due:

> Where the seller is a stranger, the artist may be willing to sue for the royalty; but where, as is often the case, the seller is the artist's friend, relative, dealer, or a supportive collector, the fear that a lawsuit would jeopardize a continuing relationship in the future may cause the artist to hesitate before filing suit.[85]

Several enforcement problems suggest that the impact of the statute will be minimal. Since the proceeds right terminates upon the artist's death,[86] it is feasible that sellers may dispose of their art through long term leases with purchase options.[87] Moreover, since the Act does not come into effect when the sale price is less than the purchase price paid by the seller,[88] a clever art dealer attempting to evade the law might sell several works of both living and deceased artists to a buyer for one sum, listing the prices of works by deceased artists at high values, while undervaluing the works by living artists.

To date there is no evidence that any significant amount of royalties have been collected.[89] As one frustrated California art dealer concluded: "Nobody's paid, nobody's sued, everybody's avoiding it. . . . A bill that's not acceptable to anybody is just not going to work."[90]

Aside from enforcement difficulties, the California Act presents possible

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> resold the art at the previous purchase price, $1,000, to a dummy Delaware corporation, which has resold the work in New York for $100,000 to another dummy Delaware corporation owned by a California art collector, who has brought the art back to California. In order to recover his share of the proceeds, only $5,000, the artist has to persuade an attorney to bring a lawsuit, the success of which would depend on the lawyer's persuading a court to pierce the veils of the Delaware corporations in order to reveal the sham transaction. . . .

Id.

84. *See* notes 31-36, 44-48, 61-63 *supra*.

85. Solomon & Gill, *Federal and State Resale Royalty Legislation: "What Hath Art Wrought,"* 26 U.C.L.A. L. REV. 322, 336 (1978) [hereinafter cited as Solomon & Gill].

86. CAL. CIV. CODE § 986(1)(b)(3) (West Supp. 1978).

87. Ashley, *supra* note 83, at 257.

88. CAL. CIV. CODE § 986(1)(b)(4) (West Supp. 1978).

89. According to Howard E. Morseburg, art dealer and President of Howard E. Morseburg Galleries in Los Angeles, California, everyone — including dealers, collectors and artists — is ignoring the law. He estimates that perhaps two or three galleries have sent in token amounts, but that no collectors, to his knowledge have paid, with the exception of Alan Sieroty, the State Senator in California who sponsored the bill. Telephone interview with Howard E. Morseburg, President of Howard E. Morseburg Galleries of California, Los Angeles, California (Jan. 25, 1980) [hereinafter cited as Interview with Howard Morseburg]. The California Arts Council reports that it has collected approximately $400 over the past three years that the California Act has been in effect. Telephone interview with a staff member of the California Arts Council, Sacramento, California (March 14, 1980).

90. Bates, *Royalties for Artists: California Becomes the Testing Ground,* N.Y. Times, Aug. 14, 1977, § 2, at 18, col. 1 (remarks of art dealer Ben Horowitz).

constitutional problems. The first problem is whether the California Act is subject to preemption[91] under Section 301 of the Copyright Act of 1976 (Copyright Act).[92] Section 301 provides that as of January 1, 1978:

> [A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 . . . are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.[93]

The California Act has never been challenged on preemption grounds under the Copyright Act,[94] but arguably it conflicts with Section 109(a) of the Copyright Act which modifies the distribution right.[95] Under that section the copyright owner can control the disposition of a particular copy only until the time of the first authorized sale.[96] He then loses control of any subsequent distribution. However, under the California Act the owner of a work of art does not have an unrestricted right to sell the work because a royalty must be paid beforehand.[97] The inconsistency between the two statutes is apparent, and if the courts accept the preemption argument, a federal statute would be necessary to provide artists with a proceeds right.[98]

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91. Preemption is a violation of the supremacy clause of the U.S. CONST., art. VI, § 2. Obviously, any state law in direct conflict with a federal statute is 'preempted' by the federal law. But a state law can also be preempted because of the pervasiveness of the federal regulation, the dominancy of the federal interest or the inconsistency of the state policy with the federal objective. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). *See* Comment, *The Resale Royalty Act: Paintings, Preemption and Profit,* 8 GOLDEN GATE U. L. REV. 239 (1978). *Contra,* Comment, *The Case of Droit de Suite,* 47 GEO. WASH. L. REV. 200 (1978) [hereinafter cited as *The Case of Droit de Suite*], in which the author believes that the California Resale Royalties Act is preempted by the Copyright Act of 1976. The author states that "[t]o decide otherwise would permit the States the freedom of distorting the carefully drawn system of incentives that Congress has fashioned to promote literary and artistic achievement." *The Case of Droit de Suite, supra,* at 222.

92. 17 U.S.C. § 301(a) (Supp. II 1978).

93. *Id.*

94. A constitutional challenge against the California Resale Royalties Act has been made. Morseburg v. Balyon, No. 77-2410 (C. D. Cal. Mar. 23, 1978) (declaratory judgment action), *appeal docketed,* No. 78-2129 (2d Cir. Apr. 19, 1978). Solomon & Gill, *supra* note 85, at 339. Four constitutional violations were alleged: first, that the California Act was preempted by the Copyright Act of 1909; second, the California Act violated the commerce clause; third, the Act constituted an unlawful taking under the fourteenth amendment; and fourth, it violated the impairment of contracts clause. *Id.* The court upheld the constitutionality of the California Act, granting summary judgment to the state's motion on preemption grounds. The court also rejected the plaintiff's other arguments, stating that the state legislature is free to enact regulatory statutes which impair contracts as long as the statute is "reasonable and of a character appropriate to the public purpose justifying its adoption." *Id., citing* Morseburg v. Balyon, No. 77-2410, slip op., at 5 (C. D. Cal. Mar. 23, 1978).

95. 17 U.S.C. § 109(a) (Supp. II 1978).

96. *Id.*

97. CAL. CIV. CODE § 986(1)(a)(1) (West Supp. 1978).

98. It can be argued, however, that the right to *distribute* and the right to a *royalty* are not "equivalent" within the meaning of the Copyright Act of 1976, 17 U.S.C. § 301 (Supp. II 1978). This is supported by section 202 of the Copyright Act, which emphasizes the difference between

B. *Private Contracts*

There have been numerous efforts to implement artists' rights through private contracts.[99] Certainly the most widely publicized among the various contracts proposed was the Artists' Reserved Rights Transfer and Sale Agreement (Projansky Agreement).[100] The contract provides that when artwork is resold, the artist receives 15 percent of the gross proceeds[101] when the purchaser resells. In addition, the covenant runs with the work of art. This covenant is effected by the inclusion of two requirements. First, a notice of the existence of the contract is required to be permanently affixed to the work. Second, the purchaser must agree not to alienate the work without procuring the new buyer's agreement to be bound by the terms of the original contract.[102]

Other rights reserved to the artist are the right of restoration if the work is damaged,[103] the sole rights to reproduction,[104] the right, upon 120 days notice to the buyer, to possess the work for exhibition purposes,[105] and the right of notification of the details of any exhibition.[106] Furthermore, the buyer covenants that he will not intentionally destroy, damage, alter, modify or change the work in any way[107] and that he will pay to the artist one-half of any monies to which the buyer becomes entitled for rental or use of the work at a public exhibition.[108] In return, the artist covenants to maintain a record of each transfer. At the request of the buyer, the artist must furnish a written provenance[109] and history of the work, and certify the authenticity of the work and its provenance to critics and scholars.[110]

As desirable as the Projansky Agreement may be to the artist in creating en-

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ownership of the copyright and ownership of the material object. Copyright Act of 1976, 17 U.S.C. § 202 (Supp. II 1978).

99. *See generally* MERRYMAN & ELSEN, *supra* note 11, at 4—141-66; Solomon & Gill, *supra* note 85, at 326-32.

100. The Artists' Reserved Rights Transfer and Sale Agreement [hereinafter cited as the Projansky Agreement], *reprinted in* DUBOFF, *supra* note 2, at 1131-33, was drafted and published in 1971 by New York lawyer Robert Projansky and art dealer Seth Siegelaub.

101. *Id.* art. 2(b), *reprinted in* DUBOFF, *supra* note 2, at 1131.

102. *Id.* arts. 5, 14, 15, *reprinted in* DUBOFF, *supra* note 2, at 1131-32.

103. *Id.* art. 10, *reprinted in* DUBOFF, *supra* note 2, at 1132.

104. *Id.* art. 12, *reprinted in* DUBOFF, *supra* note 2, at 1132. However, the "[a]rtist shall not unreasonably refuse permission to reproduce the Work in catalogues and the like incidental to public exhibition of the Work." *Id.*

105. *Id.* art. 8, *reprinted in* DUBOFF, *supra* note 2, at 1132. This right is limited to 60 days out of every five years. *Id.*

106. *Id.* arts. 7(a), (b), *reprinted in* DUBOFF, *supra* note 2, at 1132.

107. *Id.* art. 9, *reprinted in* DUBOFF, *supra* note 2, at 1132.

108. *Id.* art. 11, *reprinted in* DUBOFF, *supra* note 2, at 1132.

109. A provenance is a pedigree of ownership of a work of art. It consists of documentation which shows a chain of title originating from the artist. It is often accompanied by a certificate of authenticity given by a competent and recognized scholar in a particular area of art. ENCYCLOPEDIA OF THE ARTS 357 (D. Runes & H. Schrickel eds. 1946).

110. Projansky Agreement, *supra* note 100, art. 6, *reprinted in* DUBOFF, *supra* note 2, at 1132.

forceable rights otherwise unavailable to him by statute or common law, the Agreement clearly has some drawbacks. The primary one is that most artists simply do not have sufficient bargaining power to persuade potential purchasers to sign the Agreement. Artists using the Projansky Agreement may suffer a decline in sales due to the reluctance of buyers to bind themselves to any or all of the Agreement's covenants. The economic detriment to a purchaser involved in signing the Agreement would not be merely the 15 percent share of appreciation paid to the artist, but the possibly far greater loss of a better resale price.[111] A second area of difficulty is enforcement of the contract over its life. Given that the artist has found a buyer willing to sign the Agreement, the artist then has the burden of making sure that it is adhered to. This may require more in the way of record keeping and surveillance than the individual artist had originally expected or is capable of maintaining.[112] The likelihood of breach is heightened when one considers three additional problems. First, there is no expedient way in which the original purchaser can sell the painting at auction without breaching the Agreement. It is problematical whether any auction gallery would accept a work of art for sale knowing that no bid could be honored without first ascertaining the bidder's willingness to adopt the Agreement as his own.[113]

Second, the problems of inheritance are significant. For example, if the work of art formed part of a residuary estate left to the original purchaser's issue, some of whom might be minors or some of whom might not be willing to adopt the Agreement, it would be difficult to enforce the covenant. To confront a potential buyer with such drastic testamentary restrictions as the Agreement purports to do, as well as to impose what is tantamount to an additional estate tax,[114] must necessarily be both an impediment to sales and an inducement for the buyer to breach the Agreement. Third, another problem exists in the artist's absolute right to veto any public exhibition of the painting.[115] This would be an unacceptable condition to any museum pur-

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111. F. FELDMAN & S. WEIL, ART WORKS: LAW, POLICY AND PRACTICE 96 (1974) [hereinafter cited as FELDMAN & WEIL].

112. For example, Carl Andre sold about 80 works subject to the Projansky Agreement at a show of his works in 1971. He and his dealer later discovered unreported resales and were able to track a few of them down with satisfactory results. However, apparently the job was so time consuming that Andre has decided not to use the Projansky Agreement in the future except for major pieces. Hochfield, *supra* note 16, at 23.

113. FELDMAN & WEIL, *supra* note 111, at 96.

114. *Id.* Article 2 of the Projansky Agreement provides that if the work of art passes by inheritance, the collector's personal representative shall pay 15 percent of the appreciated value to the artist. Projansky Agreement, *supra* note 100, art. 2, *reprinted in* DUBOFF, *supra* note 2, at 1131.

An estate tax in the United States similarly requires the decedent's estate to pay a tax on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States. I.R.C. § 2001(a).

115. FELDMAN & WEIL, *supra* note 111, at 97.

chaser.[116] Thus, the Agreement creates more problems than it solves. "Covenants run no more gracefully with works of art than with most chattels."[117]

C. *National Legislation*

The United States currently does not have an artist's proceeds right statute. In 1978 Representative Henry A. Waxman of California introduced into Congress the Visual Artists' Residual Rights Act of 1978, a bill that would establish a national system of royalties.[118]

The bill was an outgrowth of years of debate and lobbying by artists' groups within the United States.[119] In retrospect, probably one of the most significant events for the artists' rights movement was the widely publicized *Sale of Post-War and Contemporary Paintings and Sculpture from the Collection of Robert C. Scull* on October 18, 1973.[120] During the sale, artist Robert Rauschenberg witnessed his painting *Thaw* sell for a price of $85,000 — the same painting he had sold to Scull in 1958 for $960 — thus resulting in a profit of 9,333 percent.[121] This event served to bring the secondary position of the artist in the art market to the attention of the public, state legislatures and Congress. The response on a national level was the proposed Visual Rights Act of 1978.[122] According to the bill's sponsor, Representative Waxman, "[t]he bill was drafted solely so that implementation of resale royalties might be presented in its purest form."[123] The proposed Act was modeled on the California Resale Royalties Act: sellers would be required to pay a five percent royalty on the gross sales price when-

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116. Duffy, *Royalties for Visual Artists,* PERFORMING ARTS REV. 560, 582 (1977).

117. *Id.*

> If there are problems when the first sale takes place not too long after the initial sale, they are considerably intensified when resales take place 20 or 100 years later. People move and are never heard from again, or they die; dealers go out of business; records are lost or accidentally destroyed.

Hochfield, *supra* note 16, at 23.

118. H.R. 11403, 95th Cong., 2d Sess. (1978). *See* 124 CONG. REC. H1846 (daily ed. Mar. 8, 1978).

119. *See, e.g., Artists Decide They Should Share Profits on Resale of Paintings,* Wall St. J., Feb. 11, 1974, at 1, col. 4; Baldwin, *Art and Money: The Artist's Royalty Problem,* ART AM., Mar.-Apr. 1974, at 20; Clack, *Artists' Rights,* THE CULTURAL POST, Mar.-Apr. 1977, at 10; Gorewitz, *Commentary,* MUSEUM NEWS, May-June 1977, at 7; Gorewitz, *Royalties for Artists: A Practical Proposal,* AM. ARTIST, Jan. 1975, at 28; Hochfield, *supra* note 16; Hughes, *A Modest Proposal: Royalties for Artists,* TIME, Mar. 11, 1974, at 65; Weil, *Resale Royalties: Nobody Benefits,* ART NEWS, Mar. 1958, at 58 [hereinafter cited as *Resale Royalties*].

120. *Scull's Art Brings Record $2 Million,* N.Y. Times, Oct. 19, 1973, at 57, col. 1.

121. *Id.* Rauschenberg later announced that "[f]rom now on, I want a royalty on the resales and I am going to get it." *Artists Decide They Should Share Profits on Resale of Paintings,* Wall St. J., Feb. 11, 1974, at 1, col. 4.

122. H.R. 11403, 95th Cong., 2d Sess., 124 CONG. REC. H1846 (daily ed. Mar. 8, 1978). For a discussion of the proposed Act, *see* Solomon & Gill, *supra* note 85.

123. 124 CONG. REC. E1146 (daily ed. Mar. 8, 1978) (remarks of Rep. Waxman).

ever a work is sold in interstate commerce for $1,000 or more.[124] However, the bill died in an informal hearing on June 21, 1978, before even reaching committee.[125] The major difficulty was the absence of sufficient information as to how the proceeds right would affect the art market in the United States.[126] More importantly, the limited information that was available to Congress suggested that more harm would inure to those who would pay the royalties than benefit to those who would receive such royalties.[127] Until further research is conducted on the condition and needs of the visual arts in the United States, it is unlikely that any federal bill proposing artists' resale royalties will be successful.[128]

IV. EFFORTS TO INTERNATIONALIZE THE DROIT DE SUITE[129]

The first *droit de suite* law in France in 1920[130] provided that the right would be granted only to those foreigners whose countries gave the reciprocal right to French citizens.[131] By a subsequent decree on September 15, 1956, the *droit de suite* was extended to include foreign artists when there is no reciprocity,[132] but the artists must "have participated in the life of French art and have been domiciled in France for at least five years not even consecutive."[133] However, in practice the foreign artists can collect the *droit de suite* if they make the claim through the Union of Artistic Property despite not having met these requirements.[134]

For competitive reasons, the French auctioneers and art dealers would like

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124. H.R. 11403, § 4(a)(1), 95th Cong., 2d Sess. (1978). *See* 124 CONG. REC. E1146 (daily ed. Mar. 8, 1978).

125. This would have been the House Interstate and Foreign Commerce Committee. Telephone interview with Bruce Wolpe, Legislative Assistant to Representative Waxman, Washington, D.C. (Jan. 18, 1980).

126. *Id.* Describing the bill as basically an "income redistribution" device, Wolpe stated that although artists favored the proposed legislation, "it alienated everyone else." *Id.*

127. *Id.*

128. *See* Solomon & Gill, *supra* note 85, at 357-59.

129. A full discussion of the Berne Convention, note 10 *supra*, the Universal Copyright Convention (UCC), note 137, *infra*, and other international copyright conventions and agreements is beyond the scope of this Comment. This section will consider only the Berne Convention and the UCC within the context of possible incorporation of a *droit de suite* provision. For a more thorough analysis and comparison of these two conventions, *see* Dawid, *Basic Principles of International Copyright*, 21 BULL. COPYRIGHT SOC'Y 1 (1973); Hadl, *Toward International Copyright Revision*, 18 BULL. COPYRIGHT SOC'Y 183 (1970); McConnell, *The Effect of the Universal Copyright Convention on other International Conventions and Arrangements*, 9 ASCAP COPYRIGHT L. SYMP. 32 (1958); Mott, *The Relationship Between the Berne Convention and the Universal Copyright Convention*, 11 IDEA: PAT., T.M. & COPYRIGHT J. RESEARCH & EDUC. 306 (1967). For additional information, *see* authorities cited at note 137 *infra*.

130. *See* note 16 *supra*.

131. Hauser, *supra* note 4, at 108.

132. *Décret du 15 septembre 1956*, no. 56-932, [1956] J.O. 8886, [1956] B.L.D. 761-62.

133. *La Propriété Artistique*, *supra* note 15, at 351-53.

134. DUCHEMIN, *supra* note 13, at 84.

to see the proceeds right granted in the other major art centers of the world.[135] For the same reasons, they would like to have the proceeds right incorporated into the two major international copyright agreements: the Berne Convention[136] and the Universal Copyright Convention (UCC).[137] This is due to the fact that the French view the *droit de suite* as part of the group of rights granted under *le droit d'auteur* (copyright law). However, there are other writers who, while they may accept the necessity of granting artists a percentage in future sales of their artwork, do not regard the *droit de suite* as part of copyright law.[138] Instead, it is often seen as a special relief which is more in the nature of a private tax on a sale than a subject of copyright law.[139]

There have been numerous attempts since 1920 to include the *droit de suite* as a substantive right under the Berne Convention.[140] It was finally adopted as the new Article 14 *bis* in the Brussels Revision Conference of the Berne Copyright Convention in 1948:

> (1) The author, or after his death the persons, or institutions authorized by national legislation, shall, in respect of original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first disposal of the work by the author.
> (2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the degree permitted by the country where this protection is claimed.

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135. In 1963 the Minister of Cultural Affairs held a Conference at which it was acknowledged by some that the *droit de suite* had become a burden in the international market. Suggestions were made to lower the tax from three percent to one percent on those sales in excess of 20,000 francs, and to prohibit collection of the royalty from 'collateral heirs' (as opposed to a spouse and direct descendants). Price, *supra* note 15, at 1334.

136. The Berne Convention, *supra* note 10, *reprinted in* 4 NIMMER, *supra* note 1, App. 27. *See* note 10 *supra*.

137. The Universal Copyright Convention (UCC), Sept. 6, 1952, 6 U.S.T. 2731, T.I.A.S. No. 3324, 150 U.N.T.S. 67 (effective Sept. 15, 1955), *revised*, July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868. It was conceived and drafted by the United States as a compromise for failure to join the Berne Convention. DUBOFF, *supra* note 2, at 808.

The UCC requires a state to protect works of aliens in the same way a resident's works would be protected and it grants protection only on the basis of a national copyright law. UCC, arts. I, II, 25 U.S.T. 1341, 1344-45, T.I.A.S. No. 7868. For a thorough analysis of the UCC, *see* A. BOGSCH, THE UNIVERSAL COPYRIGHT CONVENTION (3d rev. ed. 1968) [hereinafter cited as BOGSCH]. *See also* Sargoy, *U.C.C. Protection in the United States: The Coming into Effect of the Universal Copyright Convention*, 33 N.Y.U. L. REV. 811 (1958).

138. Hauser, *supra* note 4, at 107. *See* Recht, *Has the Droit de Suite a Place in Copyright?*, 3 UNESCO COPYRIGHT BULL. 61 (1950) [hereinafter cited as Recht]; Sherman, *supra* note 66.

139. Hauser, *supra* note 4, at 107.

140. For a good analysis of these attempts, *see id.* at 108-10.

(3) The procedure for collection and the amounts shall be matters for determination by national legislation.[141]

Thus a compromise was reached by requiring material reciprocity to prevail as an interim solution until the proceeds right was made a substantive right in a large number of member countries.[142]

The *droit de suite* is not expressly provided for under any of the articles of the UCC. Presently Article I of the UCC provides only that each contracting State is obliged to provide for "adequate and effective protection of the rights of authors,"[143] and Article II requires that each State grant to the work of a foreigner who is a national of a country party to the UCC the same protection that it accords to the works of its own nationals.[144] Therefore, it can be argued that any national of a contracting State can claim national treatment for the purposes of the *droit de suite.* Nevertheless, many writers express the belief that this claim does not exist for the *droit de suite.*[145] It is pointed out that in view of the controversy surrounding the incorporation of the *droit de suite* at the Brussels Conference for the Berne Convention in 1948, greater consideration of that right would have resulted in Geneva in 1952 when the UCC was adopted — at least to the extent of demanding substantive reciprocity.[146] Furthermore, suggestions to include a provision in the UCC recommending national extension of the *droit de suite* were defeated by the resistance of no fewer than 12 countries.[147] Therefore, the argument concludes that the provisions of the UCC were intended to be limited to "classical copyright matters."[148]

On the other hand, it is contended that "[t]he fact that the Universal Copy-

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141. The Berne Convention, *supra* note 10, art. 14 *ter,* 331 U.N.T.S. 217, 235, *reprinted in* 4 NIMMER, *supra* note 1, App. 27.

142. Hauser, supra note 4, at 109.

143. UCC, art. I, 25 U.S.T. 1341, 1344, T.I.A.S. No. 7868. The issue is then what is 'adequate and effective protection.' According to the Chairman of the Geneva Conference, the rights given protection under the UCC "should include those given to authors by civilized countries." BOGSCH, *supra* note 137, at 5. Although this may not appear very helpful in determining whether a right such as the *droit de suite* is included under the UCC, the lack of enumeration of the rights has the distinct advantage that as the views of civilized countries change with respect to what is adequate, so will the obligations of the countries under Article I. The Convention will be automatically updated. *Id.*

144. UCC, art. II, 25 U.S.T. 1341, 1345, T.I.A.S. No. 7868.

145. Hauser, *supra* note 4, at 110; Katzenberger, *Das Folgerecht in rechtsvergleichender Sicht,* GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT (GRUR), INTERNATIONALER TEIL 660, 667 (1973) [hereinafter cited as Katzenberger]; Recht, *supra* note 138, at 70; Schulder, *supra* note 4, at 42; Sherman, *supra* note 66, at 86; Ulmer, *Das Folgerecht im internationalen Urheberrecht,* 76 GRUR 593, 599 (1974) [hereinafter cited as Ulmer].

146. Ulmer, *supra* note 145, at 599.

147. *Latest Developments Towards Establishment of a Universal Copyright Convention,* 4 UNESCO COPYRIGHT BULL. 3, 48 (1951).

148. Nordemann, *The "Droit de Suite" in Article 14 ter of the Berne Convention and in the Copyright Law of the Federal Republic of Germany,* 13 COPYRIGHT 337, 341 (1977) [hereinafter cited as Nordemann, *The "Droit de Suite"*]. Moreover, one writer believes that it is anomalous that

right Convention affects unfavorably countries with better developed copyright could not conceivably have been overlooked by its creators."[149] Moreover, it is argued that when these creators established the principle of national treatment under Article II, they did not want to dilute its priority, and at the same time create a dangerous precedent, by requiring reciprocity for the *droit de suite,* which in relation to the whole field of copyright law was of relatively minor importance.[150]

Thus, the authorities are divided on the issue of whether the *droit de suite* exists under the UCC. In view of its obligations under that Convention, the United States should consider carefully this problem before enacting *droit de suite* legislation on a national level.

V. THE DESIRABILITY OF DROIT DE SUITE

The primary purpose of the artists' proceeds right is to secure economic benefits for artists. If the *droit de suite* achieves this objective, then society benefits as well by the stimulation of the arts resulting from the incentive for artists to produce.[151]

A second possible advantage to the proceeds right would be the establishment of a system of authentication. The French legislation attempted to merge these goals. Specifically, the regulations promulgated pursuant to the French *droit de suite* law provide that artists shall enter their claim of *droit de suite* in the *Journal Officiel.*[152] It was hoped that this official register could be used for purposes of authentication.[153] However, since the actual operation of the *droit de*

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citizens of countries without the *droit de suite* could claim the *droit de suite* in, for example, France or Germany, while citizens of Berne signatory countries could claim only on the basis of reciprocity. Katzenberger, *supra* note 145, at 667.

149. Nordemann, *The "Droit de Suite," supra* note 148, at 341. Indeed, those who adhere to this position believe that adherence to the UCC was for Berne Convention signatories, "a form of cultural development aid in favor of countries with a weaker copyright." *Id.*

150. *Id.* at 342.

151. The importance of this effect is manifested by the embodiment of copyright in the U.S. Constitution. The copyright clause gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. . . ," U.S. CONST., art. 1, § 8, cl. 8.

For the *droit de suite* to attain this objective, two implicit assumptions must be made. First, it must be assumed that the right will not affect adversely the market for the primary sale of works of art, since it is to this market that artists ultimately look for their livelihood. Asimow, *Economic Aspects of the Droit de Suite, in* MERRYMAN & ELSEN, *supra* note 11, at 4—124 [hereinafter cited as Asimow]. Second, it must be assumed that the right will not place a significant financial burden on resales of artwork. *Id.* For the validity of these assumptions, *see* text accompanying notes 181-202 *infra.*

152. Décret du 17 decembre 1920, [1920] B.L.D. 694, [1920] Duv. & Boc. 997.

153. "[The artist] indicates his name, address, *artistic* signature, and legal signature, indicating that the procedure was as much conceived of as a means of authenticating works of art as a requisite step in manifesting the artist's intent to benefit from the *droit de suite.*" Hauser, *supra* note 4, at 100 (emphasis in original).

suite is determined by the Union of Artistic Property,[154] certain deviations from the letter of the law have occurred and the French goal of authentication was not achieved.[155] However, this does not mean that a system of authentication is necessarily unattainable. It has been suggested that such a system might be more easily instituted in the United States than in France, because citizens of the United States are accustomed to registering officially for copyrights.[156] There is no doubt that due to the increase in art fraud and art thefts there is a need to establish a system of authentication in the United States and elsewhere.[157]

VI. THE PROBLEMS WITH THE DROIT DE SUITE

A. *Conceptual Problems*

The major theoretical difficulty underlying the concept of the *droit de suite* has been the difficulty of classifying it within a traditional legal framework. Efforts have been made to fit the right into property, contract, copyright or tax law — or any combination of these substantive areas of law.[158] It is submitted that until a conceptual justification is agreed upon by all interested parties, including artists, dealers and collectors, the artists' proceeds right will not succeed beyond mere tokenism.

Attempts to classify the *droit de suite* within the context of property law present problems. First, such a classification acts in derogation of traditional rules of ownership, namely *jus utendi et abutendi*.[159] Of course, works of art may, and

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154. *See* note 33 *supra* and accompanying text.

155. Schulder, *supra* note 4, at 25.

156. Whereas in France, copyright exists without registration. *Id.* at 26.

157. It is arguable that since art has become an international commodity, the problem of authentication should be solved on that level. *See generally Symposium: Legal Aspects of the International Traffic in Stolen Art,* 4 SYRACUSE J. INT'L L. & COM. 51 (1976); Rogers, *The Legal Response to the Illicit Movement of Cultural Property,* 5 L. & POL'Y INT'L BUS. 932 (1973); MERRYMAN & ELSEN, *supra* note 11, at 6—85. Fraudulent art has increased tremendously. *See, e.g.,* Gupte, *Artful Thieves,* N.Y. Times, July 22, 1979, § 6 (Magazine), at 42. A system providing artists' proceeds rights could very possibly work in tandem with a central bureau for authenticating art. Schulder, *supra* note 4, at 26-28. *But see* Price, *supra* note 15, at 1337:

> If the painter is asked whether the painting is authentic, the *droit de suite* may provide an inducement for the artist to "authenticate" faked works. Of course, if acknowledging the painting as his would depreciate the artist's reputation, the painter would not authenticate. But most fakes presented to the artist for authentication would probably be quite good. If the work is an unauthorized cast from the artist's mold, or even an expert cast from an unauthorized mold, or if it is a good painting in the artist's style and worthy of his name, why should he not collect the *droit de suite* proceeds?

Id.

158. *See, e.g.,* Comment, *The Droit de Suite Has Arrived: Can It Thrive in California as It Has in Calais?,* 11 CREIGHTON L. REV. 529, 542-45 (1977); Hauser, *supra* note 4, at 103-07; Schulder, *supra* note 4, at 28-33; Sherman, *supra* note 66, at 58.

159. Hauser, *supra* note 4, at 106. Translated literally *jus utendi et abutendi* means the right to use and to abuse, or the right to do exactly as one pleases with property, to have full dominion over it. BLACK'S LAW DICTIONARY 770, 779 (5th rev. ed. 1979).

perhaps should, be considered distinct from other property, because of the contribution they make to our cultural heritage.[160] For example, in those countries which have adopted artists' moral rights legislation,[161] it is illegal to destroy, mutilate or alter a work of art. The moral rights, then, become the *personal* rights of the artist in the sense that they protect the integrity, reputation and spirit of the artist as these concepts are embodied in a work of art. It is easy to see how these rights directly benefit society which has an interest in preserving art. On the other hand, the *droit de suite* is an *economic* right, which gives the artist the right to participate in future sales of the artwork.[162] If this right, which also derogates from traditional property values, is to be accepted, then it also must be shown that the right benefits society or, at the very least, the artist. If the artist profits then one can assume that society will also benefit indirectly from the artists' incentive to produce more art. However, if a proceeds right results in an overall rise in prices in the art market, it surely does not benefit the general public.[163] If it results as well in galleries dropping the younger and lesser known artists that they support at a risk,[164] then it clearly benefits neither the general public nor the artists.[165] Before a legislature will or should deviate from traditional property views, it must be convinced that such a deviation will serve the interest of a group that it wishes to protect.

A second rationale for the artists' proceeds right is the restitution theory of unjust enrichment.[166] Under this theory, the increased fame and popularity of the artist is the justification for the *droit de suite.* By continuing to create works of high quality and stimulating public demand, in a sense the artist continues to add to the value of the works which were sold before.[167] However, this rationale is not entirely persuasive since it ignores the contribution by prior purchasers to the value of later works. If an important museum or a prominent collector buys the work of an unknown artist, this may also affect the market for the artist's future work. In fact, publicity about artists, including catalogs of exhibitions, normally includes lists of collections in which their works are represented.[168] Furthermore, when considering the question of unjust enrichment, one is confronted with the initial problem of determining exactly what is meant by profit. The increase in value could be nothing more than the increase in monetary value resulting from the current rate of inflation, or the ex-

160. *See* note 1 *supra* and accompanying text. *See also* Schulder, *supra* note 4, at 28.

161. *See* note 5 *supra.*

162. Hauser, *supra* note 4, at 105.

163. *Artists' Resale Royalties, supra* note 19, at 381.

164. *Id.* Dealers typically support unprofitable "front room" displays of lesser known artists' work through the profit made from "back room" sales of successful artists' work. *Id.*

165. *Resale Royalties, supra* note 119.

166. RESTATEMENT OF RESTITUTION § 1 (1937). This theory is the basis for the Belgian legislation. *See* note 66 *supra.*

167. Sherman, *supra* note 66, at 58-59.

168. MERRYMAN & ELSEN, *supra* note 11, at 4—112.

penses incurred for insurance, conservation, shipping and dealer's commission. In addition, another problem arises in those situations where one buys two works of art by the same artist and one work increases in value while the other decreases by the same amount.[169] Finally, artists with a resale market may not need a proceeds right to provide them with support since they are able to sell their most recently produced works for ever-increasing prices.[170]

The third justification suggested for the *droit de suite* is the same as that of copyright law: "to stimulate and encourage production of artistic works by assuring that an adequate financial reward will accrue to the creator of the work."[171] However, it has long been recognized, at least in the United States, that the central purpose of copyright is to secure "the general benefits derived by the public from the labors of authors."[172] As with the property right rationale, basing the artists' proceeds right in copyright demands some proof that the general public will be benefited. Under current U.S. copyright doctrine this really requires no more than a showing that artists as a group will be

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169. *Resale Royalties, supra* note 119, at 60.

170. The theory of unjust enrichment is to be distinguished from the theory of "intrinsic value" which Germany originally used to justify its *droit de suite* legislation. This latter concept insists that any increased value in a work of art is due to a latent quality that had always existed within the work. "At [the *droit de suite's*] core is a vision of the starving artist, with his genius unappreciated, using his last pennies to purchase canvas and pigments which he turns into a misunderstood masterpiece." Price, *supra* note 15, at 1335. Therefore, "society must do some penance for its thickheadedness; the artist should not support the entire maturing process." *Id.* at 1336.

However, art does not have a monopoly on innovation, and one may well ask whether there should be a proceeds right for architects or designers when an avant-garde house or piece of furniture increases in value. Instead of compensating the artist for society's lack of vision at the time of the first sale of artwork, it would make more sense to spend money to improve society's insight. Indeed, Congress budgeted $149,585,000 for the National Endowment of the Arts (NEA) in 1979. *See* NATIONAL ENDOWMENT OF THE ARTS, 1979 NATIONAL ENDOWMENT OF THE ARTS ANNUAL REPORT 268 (1979). This amount was allocated for the most part to States' Arts Councils, to art fellowships, to museums in a matching-grant program and to programs designed to strengthen existing cultural institutions. Certainly, all of this funding can be viewed as increasing society's aesthetic and cultural awareness. As Congress stated in its Declaration of Purpose in the NEA-creating legislation: "[t]he Congress hereby finds and declares . . . (3) that democracy demands wisdom and vision in its citizens and that it must therefore foster and support a form of education designed to make men masters of their technology and not its unthinking servant." The National Foundation of Arts and Humanities Act, 20 U.S.C. § 951(3) (1976).

171. Sherman, *supra* note 66, at 57. As previously indicated, France, Czechoslovakia, Belgium and Germany have included the *droit de suite* in their copyright legislation, the rationale being that since former copyright laws were not a useful tool for artists, a proceeds right was necessary to put artists on par with writers and composers. Hauser, *supra* note 4, at 105. It is submitted, however, that the need for a proceeds right does not thereby make it susceptible to the principles of copyright law.

172. 1 NIMMER, *supra* note 1, § 1.03(A), *quoting* Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932). *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975), in which the Supreme Court stated that "[c]reative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. . . . [T]he ultimate aim is . . . to stimulate artistic creativity for the general public good." *Id.* at 156.

aided.[173] It is assumed that "encouragement of individual effort by personal gain is the best way to advance public welfare."[174] However, there is no personal gain for the vast majority of artists when less than one percent of living artists have a resale market.[175] Furthermore, if it is revealed that the proceeds right actually *discourages* the flow of money into the primary art market, then it is difficult to accept the right under the copyright rationale.[176]

Another difficulty with the adoption of copyright law as a vehicle for *droit de suite* is that it makes the simple assumption that the present copyright scheme discriminates between artists and authors.[177] A look at the different methods of compensation may reduce the apparent discrimination:

> An author who sells 50,000 copies of a novel and who receives a royalty of thirty cents per copy obtains $15,000 as the copyright reward for his work over the period during which the books are sold. An artist of the same class . . . may not sell a major canvas for more than $5,000, but the money is usually immediately available. Even though he does not have the right to a portion of the proceeds . . ., he can obtain interest on the price paid for the painting. Thus a painter who sells a painting for $5,000 today is as well rewarded as an author who must take ten years to obtain twice the sum through royalties.[178]

A conceptual problem with using copyright law to justify the *droit de suite* is that the copyright applies to the reproduction of works, whereas the *droit de suite* applies only to original works.[179] Authors and composers exploit their creative works through reproduction, thereby causing a royalty to be paid, *e.g.*, an author writes a manuscript whose value is based upon its reproduction. The author's words — his expression or his 'idea' — can be separated from the tangible physical object (the manuscript) from which he derives his income. On the other hand, a painter or a sculptor creates an object whose value is completely dependent on its originality or uniqueness, *i.e.*, the opposite of reproduction. The creative expression is embodied in the original work. The two cannot be separated. Therefore, the artist has nothing to reserve for himself when he sells a painting or a piece of sculpture.

The final justification for the *droit de suite* — the tax law rationale — presents

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173. *Id.*

174. Mazer v. Stein, 347 U.S. 201, 219 (1954).

175. Hochfield, *supra* note 16, at 22 (remarks of Ralph Colin, former Administrative Vice President and Counsel of the Art Dealers Association of America).

176. *See, e.g.*, Asimow, *supra* note 151, at 136; Bolch, Damon & Hinshaw, *An Economic Analysis of the California Art Royalty Statute,* 10 CONN. L. REV. 689 (1978); *Resale Royalties, supra* note 119, at 60-62.

177. Price, *supra* note 15, at 1346.

178. *Id.* Furthermore, although the author is able to collect royalties on future sales, the royalty rate is set by the original transaction and may not be at a rate as high as that the author could obtain years later when his reputation is established. *Id.* at 1347.

179. Hauser, *supra* note 4, at 95.

the most serious difficulty. Clearly, the proceeds are intended to benefit individual artists directly, and are not meant to be used for governmental or public purposes.[180] However, the most important feature that distinguishes the *droit de suite* from a tax is the fact that, quite simply, the government does not act as a conduit in the collection and distribution of the proceeds. Under all *droit de suite* legislation, the proceeds are intended to pass directly to the artist, his agent, or his heirs.

B. *Marketplace Problems*

Advocates of *droit de suite* make certain assumptions about the art market. A fundamental belief is that the *droit de suite* will not adversely affect the primary market, *i.e.*, the market for the first sale of art works from an artist or a dealer to a first collector. Unfortunately, it is not easy to test the validity of this assumption: the California Resale Royalties Act is still too new,[181] the French system is restricted to sales at auction,[182] and the Italian system has been defunct since 1950.[183] The problem is compounded by a lack of empirical data on the art market, *e.g.*, the yearly dollar volume, and the number and price level of primary sales of art work by living artists.[184] Without this information it is difficult to assess the impact that the *droit de suite* might have on these first sales upon which artists depend for their steady income.

However, in spite of this lack of statistical data, it is possible to make a tentative analysis based on existing knowledge that, as between the buyer and seller, the *droit de suite* functions as an excise tax.[185] The basic issue then becomes the determination of the elasticity of the demand curve for works of

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180. *Cf.* United States v. Butler, 297 U.S. 1, 61 (1935).

181. However, one art dealer has stated that "not one dealer has suffered in any way, shape or form," because everyone is virtually ignoring the Act. Interview with Howard Morseburg, *supra* note 89. Mr. Morseburg also maintains that many artists are against the California Act because it would require them to keep minute records of all sales and subsequent resales. *Id.*

182. There is some speculation that the system in France is responsible for that country's losing its position in the international art market. *See* note 135 *supra*. *See also Artists' Resale Royalties, supra* note 19, at 392, *citing* a letter from John Merryman to Representative Henry Waxman of California in which the *droit de suite* was blamed for the movement of the world art center from Paris to New York.

183. *See* text accompanying note 65 *supra*.

184. *Resale Royalties, supra* note 119, at 60. In addition, information is not available concerning the ratio of primary sales of living artists to the overall market for artworks, or, of the total number of works sold in the secondary market, what number are sold at a profit and what number are sold at a loss. *Id.*

185. Asimow, *supra* note 151, at 4—125. An excise tax is:

> a fixed, absolute and direct charge laid on merchandise, products, or commodities without any regard to amount of property belonging to those on whom it may fall, or to any supposed relation between money expended for a public object and a special benefit occasioned to those by whom the charge is to be paid.

Oliver v. Washington Mills, 93 Mass. (11 Allen) 268, 274-75 (1865).

art covered by the proceeds right.[186] If the demand curve is found to be elastic, there will be a decrease in the total amount of money flowing into the resale market.[187] It is then presumed that a decrease in dollars flowing into the resale market would have a 'depressive effect' on the primary market as well.[188]

Some of the various factors considered in determining elasticity include: 1) availability of substitutes; 2) the relative position of the price on the particular demand curve; 3) the percentage of consumer income that the product represents; and 4) the number of uses for the product.[189] Thus, if there are suitable substitutes in the art market not covered by the *droit de suite*, if the price of an original painting or sculpture is relatively high, if the amount spent by the investor is a significant amount of his income and if there are many uses for the product, then the demand curve is elastic. It appears that the demand curve for art resales is elastic.[190] Thus, the *droit de suite* would be likely to harm both the resale and the first sale market of art works. Since the *droit de suite* is, in application, a discriminatory tax on contemporary art, it results in art being a poor investment.[191]

Before a collector can make a profit on the resale of a work of art, he must take into account the costs of insurance, conservation and shipping, in addition to a dealer's commission of between 15 and 25 percent.[192] If one assumes an average expense of 20 percent, even before any resale royalty, a collector must resell his painting or sculpture for 125 percent to recoup his expenses. If a five percent resale royalty is imposed, then the resale price must equal 133 percent of the original purchase price in order to recoup the expenses. In the case of a painting originally bought for $10,000 and resold for $15,000 (or at a 50 percent profit), after 20 percent is deducted for expenses, the remaining profit would be $2,000 and the resale royalty $750. This is the equivalent of a

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186. Asimow, *supra* note 151, at 4—125.

> A "demand curve" represents the quantities of a product which will be demanded at various prices. The higher the price, the fewer products will be sold. If the demand curve is "elastic" an increase in price of, say, 5% leads to a greater percentage decline in the quantity of the goods taken — say 10%. On the other hand, if the demand curve is "inelastic" the 5% price increase leads to a percentage decrease in the quantity sold of less than 5%. In other words, if demand is "elastic" the quantity sold will be relatively responsive to price changes; if it is "inelastic," it will be relatively unresponsive.

Id. See generally P. SAMUELSON, ECONOMICS 380 (9th ed. 1973) [hereinafter cited as SAMUELSON].

187. SAMUELSON, *supra* note 186, at 379-80.

188. Asimow, *supra* note 151, at 4—125.

189. *Id.*

190. *Id.* at 4—126-27. Only the fourth factor indicates *inelasticity*. When a product has a single use or few uses, it is thought to have an inelastic demand. *Id.* at 4—127. The force of this factor, however, seems outweighed by the other three.

191. *Resale Royalties, supra* note 119, at 60-61. Contemporary art is already a poor investment. The majority of artwork by living artists decreases in value from the moment of its initial sale. *Id.*

192. *Id.* at 61.

tax on the profit of over thirty-seven percent. In addition, the collector would still be obligated to pay state and federal taxes on whatever profit remained.[193]

Advocates of the proceeds right who accept this depression in the art market argue that resale royalties earned in later years will neutralize the effects of a lower price structure in the primary market. While this may be true of well-established artists with a regular resale market, for the vast majority of artists who have no resale market — estimated to be about 90 to 99 percent of all living artists — there are no subsequent royalties to make up for the initial deficiency.[194] The artists in the latter group, who should be the natural beneficiaries of any legislation intended to help artists would, in effect, subsidize the artists in the former group.

For the fortunate group of artists to whom the *droit de suite* would bring resale royalties, the right also acts as a forced investment to the extent that the work had to be discounted in the primary market. The issue is whether the artist would rather have the money immediately, invest it in a savings account, or invest it in a more "highly speculative venture," namely a five percent interest in one of the artist's own paintings?[195] Obviously, the artist's decision would depend upon his present financial condition. "Only if [the artist's] wealth belies his popular image would he take a chance on such a risky investment as a painting by a living artist."[196]

Another marketplace phenomenon that must be considered is the economics

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193. *See id.* Any amounts paid by a seller to an artist or his heirs pursuant to a *droit de suite* law probably would not be included in the seller's taxable income. This result can be arrived at through three theories. First, a royalty payment could be viewed as a 'cost of sale' of a capital asset, and as such would serve to reduce the "amount realized" on the sale of the artwork. *See* I.R.C. § 1001. This alternative would be available to all taxpayers, whether they purchased art for investment purposes or purely for the pleasure of collecting art, as long as the artwork was considered to be a capital asset. *See* I.R.C. § 1221; Hollis v. United States, 121 F. Supp. 191 (N.D. Ohio 1954).

Second, the proceeds payment might be deductible from gross income as an expense incurred in the production of income. I.R.C. § 212. This alternative would be available only to those taxpayers who bought and sold art primarily for investment purposes. *See* Wrightsman v. United States, 428 F.2d 1316 (Ct. Cl. 1970).

Third, an art dealer or auctioneer in the business of buying and selling art would be entitled to a deduction for royalties paid to an artist, if the royalties were an "ordinary and necessary" business expense. I.R.C. § 162.

Of course, the artist himself would be required to include the royalty payment in gross income. I.R.C. § 61(a)(6). For a general discussion of the tax problems of collectors and art dealers, *see* DUBOFF, *supra* note 2, at 573-622.

194. *Resale Royalties, supra* note 119, at 62. It has been estimated that in the United States, the only beneficiaries of the *droit de suite* would be the approximately 50 successful artists for whose work a flourishing resale market already exists. Duffy, *Royalties for Visual Arts,* 11 J. BEVERLY HILLS B. A. 26, 29 (1977).

195. Ashley, *supra* note 83, at 252.

196. *Id.* "If [the artist] had wanted to acquire a five percent interest in his own future reputation, he could simply have put every twentieth painting he produced in his closet." *Id.* at 253.

Another weakness with the *droit de suite* is the limited time span within which it operates. The

of the art gallery itself. As has been noted, the *droit de suite* could act to jeopardize the system by which young artists have traditionally been supported.[197] If a gallery is going to lose a percentage of the profits on the resale of the art work of its better established artists, the younger artists that the gallery takes in at a risk are going to suffer.[198]

A final question exists as to the impact of a national *droit de suite* on the international art market. Since art is traded internationally, the *droit de suite* would have to be recognized by most countries or it would result in undue competitive harm to any one country.[199] The French art dealers and auctioneers have admitted concern about this problem and a report of the *Commissaires-Priseurs* has raised concern about the future position of Paris as a major locus of art sales.[200] The report reveals that the cost of selling a painting in Paris is 20 percent, while in London the same cost is only 15 percent.[201] The conclusion by the *Commissaires-Priseurs* is that the *droit de suite* charge has been especially damaging in diverting the sale of important paintings from France.[202]

C. *Administrative and Enforcement Problems*

For a *droit de suite* law to function it must be both inexpensive to administer and enforceable. If the administration of a national *droit de suite* involved a central registry responsible for keeping record of all art sales and subsequent resales, the procedure could end up being more expensive than all of the proceeds collected. Prior to the enactment of the *droit de suite* in France in 1920, Abel Ferry, then Chairman of the Fine Arts Commission, and his successor, Leon Berard, made it clear "that the virtual functioning of the *droit de suite* presupposes an association of artists which will protect the interests of its members, much as ASCAP operates in the United States."[203] However, ASCAP monitors public recordings, or publications of copyrighted

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right to royalties is unnecessary if the artist is recognized during his productive period, because recognition brings higher prices and when an artist can command a high price for his work, the reason for the *droit de suite* is obviated. The right to royalties is ineffective if the artist is recognized after his death or 50 years after his death under the French law. Thus, the *droit de suite* aids only those artists who achieve recognition after their productive period, but before their death or the end of the statutory term.

197. *See* note 164 *supra*.

198. *Legislating Royalties, supra* note 67, at 72.

199. Price, *supra* note 15, at 1334 n.7.

200. COMMISSAIRES-PRISEURS, DOSSIER DE LA CHAMBRE NATIONALE DES COMMISSAIRES-PRISEURS SUR LE DROIT DE SUITE AUX ARTISTES (1964), *discussed in* Price, *supra* note 15, at 1349. The report discloses that a substantial portion of the *droit de suite* goes to those few artists whose art sells for more than 20,000 francs per work. On average, during the period of 1961-1963, 25% of the *droit de suite* proceeds went to 10 artists while the other 75% went to 306 artists. *Id.*

201. *Id.* at 1350.

202. *Id.*

203. Hauser, *supra* note 4, at 100.

literature.[204] These are usually public occurrences which are susceptible to detection and monitoring. However, the detection of a resale of artwork is not accomplished as easily. For this reason the *droit de suite* in France is applicable to resale only at public auctions and not private sales.[205] Similar legislation in the United States, where auctions play an insignificant role in the art resale market, would make the law almost meaningless. Enforcement of the proceeds right depends on the artist's ability to verify when a work has been resold and verification outside public auctions would be difficult.

In 1957 the Parliament in France expanded the *droit de suite* to include proceeds from sales by dealers.[206] The reaction by the dealers was marked by vehement opposition. To date, the dealers have been successful in preventing the promulgation of the necessary regulations to implement the amendment.[207] Similarly the vast majority of dealers and collectors in California are simply ignoring the California Resale Royalty Act.[208] "[O]pposition [by the art world] cannot be ignored in appraising the feasibility of adopting the *droit,* since its adoption and administration would be accompanied by . . . wasteful resistance."[209]

VII. ALTERNATIVES

While the *droit de suite* may have been a solution in France in 1920, it is submitted that it is not a solution in the United States in 1980. If nothing else, the art market has changed dramatically during the intervening period, creating a rise in the popularity and acceptance of art reproductions — or art 'prints' which include lithographs, silkscreens, aquatints, etchings, intaglios, seriographs, etc. It is not only the 'mass market' that has responded to this less expensive form of art, but serious collectors, investors and museums have participated in its increased growth as well. The artist today is in a position to take advantage of this medium as a source of income.[210] In addition, artists in the large metropolitan centers of the United States have begun to form cooperatives where they can now sell their work and effectively eliminate the

204. *See* note 31 *supra.* ASCAP collects approximately 30 percent of the royalties it receives as a commission to cover its expenses. A similar agency might be too expensive for artists. Price, *supra* note 15, at 1364 n.73.

205. *See* note 20 *supra.*

206. *See* note 24 *supra.*

207. Asimow, *supra* note 151, at 4—130.

208. *See* notes 89, 181 *supra.*

209. Asimow, *supra* note 151, at 4—130.

210. Aside from prints, another source of income for the contemporary artist is the sale of preliminary drawings and sketches. These have become increasingly popular and enable the artist to capitalize on the market for works in this lower price range, as well as to take advantage of the increase in value of early major works. Price, *supra* note 15, at 1340.

art dealer as a 'middleman.'[211] Cooperatives could result in the traditional art gallery no longer dealing in the primary sales of living artists.

Artists are still in need of greater support and assistance: the *droit de suite* does not seem to be an effective solution to this problem. It has not succeeded in significantly helping artists. Resistance to the *droit de suite* has limited its effectiveness in France, and in the rest of Western Europe. Further, is the object of great opposition in California.

An alternate approach may be more effective in the United States. Three alternatives are available. All of them assume that what is needed is increased funds at the primary level of the art market to purchase works of living artists.

The first proposal is a national art bank. This concept has been used successfully in Canada.[212] Money that would be used to administer and enforce a proceeds right could be used more effectively by purchases of art works that would be circulated around the country, continuously exhibited and especially displayed in those rural areas of a country that do not have the benefits of a museum. The artist would not only benefit directly from the purchase of his art, but he would also benefit from an increased awareness and appreciation of contemporary art. If a fraction of the funds budgeted for the National Endowment of the Arts[213] in the United States were set aside each year for this program, an excellent collection could be developed in a relatively short time.

A second proposal is the passage of 'Percent for Art' legislation. Such legislation requires that a certain percentage of the budget for new public buildings, or for significant renovation of existing public buildings, be reserved for the acquisition of fine art for those buildings.[214] One significant advantage of 'Percent for Art' legislation is that it can coexist at the federal, state, county and municipal levels.[215] Currently, there are at least eight U.S. state legislatures which have enacted such legislation: Alaska,[216] California,[217] Col-

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211. For the use of cooperatives in the United States and other countries, *see* Chamberlain, *How to Set Up a Cooperative Gallery,* AM. ARTIST, Feb. 1972, at 24; Chamberlain, *Up the Organization,* AM. ARTIST, June 1973, at 68; Davis & Rourke, *Barn Raising,* NEWSWEEK, July 21, 1975, at 71; *cf.* Goodman, *Are You a Professional Artist,* AM. ARTIST, Jan. 1974, at 19.

212. CAN. REV. STAT. c.43 (1972). In 1972 the Canadian government appropriated five million dollars to the Art Bank program to be spent over a five year period. Moore, ART. AM., Nov. 1973, at 43. The Art Bank purchases either directly from Canadian artists or through commercial galleries. *Id.* The art is then leased to federal buildings in Canada or other countries at a rate of 12 percent per year. *Id.* The art that is to be purchased is selected with the assistance and advice of Regional Advisory Selection Committees comprised of museum curators, gallery owners, artists, critics, scholars and private collectors. *Id.*

213. *See* note 172 *supra.*

214. *Percent for Art Legislation,* ART & THE LAW, Mar.-Apr. 1977, at 6 [hereinafter cited as *Percent for Art*]. *See generally* DUBOFF, *supra* note 2, at 339; D. GREEN, % FOR ART (1976) [hereinafter cited as GREEN]; Berkowitz, *The One Percent Solution: A Legislative Response to Public Support for the Arts,* 10 TOL. L. REV. 124 (1978) [hereinafter cited as Berkowitz].

215. *Resale Royalties, supra* note 119, at 62.

216. ALASKA STAT. §§ 35.27.010-.030 (1976).

217. CAL. GOV'T CODE §§ 15813-15813.7 (West Supp. 1978).

orado,[218] Hawaii,[219] Illinois,[220] Oregon,[221] Texas,[222] and Washington,[223] as well as several cities and counties.[224] The advantage to the artist from this kind of legislation is twofold: it can result in greater income and the added benefit of having his work displayed in a public place, rather than in the private living room of a wealthy collector.

Perhaps the most innovative and effective measure that could be introduced to increase funds available to purchase works of art — and thereby broaden the artists' primary market — would be a tax provision that would give art a favored status as an investment.[225] One way of achieving this objective is a tax deferral provision that would allow the capital gain tax on the resale of a work of art to be deferred if the entire proceeds, including any profits realized, were reinvested into the work of a living artist.[226] This method of tax deferral is parallel to the "Rollover on Gain of Sale of Principal Residence" of Section 1034 of the U.S. Internal Revenue Code.[227] This approach could be refined

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218. COL. REV. STAT. § 24-80.5-101 (Supp. 1978).

219. HAWAII REV. STAT. §§ 103-8, 103-9 (1976).

220. ILL. ANN. STAT. ch. 127, § 783.01 (Smith-Hurd 1976).

221. OR. REV. STAT. §§ 276.075, 276.080, 276.090 (1976).

222. TEX. REV. CIV. STAT. ANN. art. 601(b) §§ 5.18-5.19 (Vernon 1976).

223. WASH. REV. CODE ANN. §§ 43.17.200, 43.19.455, 43.46.090 (Supp. 1978).

224. For example, San Francisco has a two percent rate. SAN FRANCISCO, CAL., ORDINANCE 209-65 (1965). Dade County, Florida has a rate of 1½ percent. DADE COUNTY, FLA., ORDINANCE 73-77 (Sept. 18, 1973), *reprinted in* GREEN, *supra* note 214, at 52. For additional city ordinances, *see* Berkowitz, *supra* note 214, at 127 n.21.

225. The proposed alternative of a tax provision was originally suggested by Stephen E. Weil, an attorney and a Deputy Director of the Hirshhorn Museum and Sculpture Garden, Smithsonian Institute, Washington, D.C., at an informal hearing held by Representative Waxman on June 21, 1977 on the subject of the Visual Artists' Residual Rights Act proposed by U.S. Congressman Waxman. *See* notes 122-126 *supra* and accompanying text.

226. *Resale Royalties, supra* note 119, at 61. This type of tax proposal should be analyzed in terms of the 'tax expenditure' concept. The term 'tax expenditure' connotes some form of preferential tax treatment, whether it be an exclusion, deduction, credit, exemption or preferential rate, designed "to promote a desired activity or conduct or to relieve personal hardship." S. SURREY, W. WARREN, P. MCDANIEL & H. AULT, FEDERAL INCOME TAXATION CASES AND MATERIALS 240 (1972).

The main thrust of tax expenditure analysis is the determination of whether a program of financial assistance is best accomplished through the tax system or through a direct expenditure program. Therefore, the first step in tax expenditure analysis is to restate the tax program as a direct expenditure program and then to question whether such a program achieves the desired results. For example, the proposed tax provision would clearly give a greater incentive to purchase the work of living artists to those sellers in the highest tax brackets. It is also clear that nontaxpayers, such as galleries operating at a loss or merely breaking even, would be provided no incentive at all. It would be unlikely that these results would obtain under a direct expenditure program.

Thus, by restating the tax expenditure proposal, it is necessary to make a direct comparison between the proposal and other possible direct expenditure programs as alternatives to achieve the same overall objective of financial assistance to artists. *Id.* at 251. *See generally* Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures,* 83 HARV. L. REV. 705 (1970).

227. I.R.C. § 1034.

by the following additional provisions: 1) a requirement that all qualifying new purchases be the work of a living artist; 2) a requirement that all such purchases be made directly from the artists or their agents; and 3) a restriction that no single purchase of an artwork could exceed $2,000.[228] This last requirement would ensure that the Rauschenbergs, Wyeths, and Johns of the art world would not be the sole beneficiaries of the provision. Thus, proceeds gained from all types of art, from old masters to Mayan artifacts, would be diverted into purchases of artwork by less-established living artists.

VIII. CONCLUSION

This Comment has sought to expose the deficiencies and inequities inherent in *droit de suite* legislation. The superficial assumption that artists will benefit from such a law is not sound. When fewer than ten percent of all living artists have a resale market for their work, a *droit de suite* law functions to depress the price of artwork in the primary market, and provides an inadequate opportunity for the artist to recoup this deficiency in the secondary art market.

While the *droit de suite* has operated successfully in France within the context of its limited application to sales at public auctions, this method of resale of fine art does not play an important role in the United States. The *droit de suite* experiment has not succeeded outside of France. This is due partly to extreme resistance to such legislation by art dealers and museums and partly due to the absence of adequate enforcement mechanisms.

The principal drawback of *droit de suite* legislation is that it induces society to believe that some significant benefit has been achieved for artists. In turn, this diverts society's attention from the development of more effective alternatives designed to give economic assistance to artists. The alternatives may be direct expenditure programs, *e.g.*, a national art bank or percent for art legislation, or they may take the form of indirect incentives, *e.g.*, a tax deferral provision. However, the important factor is that legislatures focus on methods that realistically assist and encourage artists. The artistic accomplishments that result from the implementation of such alternatives will be reflected in society's "wisdom and vision"[229] as well as in its cultural esteem.

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228. *Resale Royalties, supra* note 119, at 61.

229. 20 U.S.C. § 951(3) (Congressional Declaration of Purpose to the statute creating the National Foundation of the Arts).