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### Item 7 of the Provisional Agenda

## **Practical aspects of the exercise of the *droit de suite*, including in the digital environment, and its effects on developments in the international art market and on the improvement of the protection of visual artists<sup>1</sup>**

### **Part I - *Droit de suite* management**

#### **1. Definition of works under *droit de suite* legislation**

##### **1.1. Original works of art**

*Droit de suite*, recognized in view of its importance and justification through cultural policy and copyright, concerns the re-sales of all original works of art created by artists which are realised by the art trade following the first sale, usually between a gallery, an auctioneer or art dealer and a collector or museum. The works in question must therefore be the “original” works of art within the meaning of this term given in the national copyright law and the international conventions, consequently one’s own and ingenious creative artistic productions.

##### **1.2. Original works of graphic art**

The works of art include not only the originals of paintings and sculptures, but also works created through reproduction techniques, both classical - letter press and intaglio printing - and modern printing techniques – silk screen print, offset print etc. - as long as it is possible to prove that these works are themselves originals in their multiplied form. This is usually indicated by the artist's numbering and his signature.

In view of the numerous cultural differences which exist in the particular national art markets, it would appear to be a good policy to leave the definition of originals, as regards the graphic arts, to the national legislation or jurisdiction.

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<sup>1</sup> This study was prepared by Mr Gerhard Pfennig, Director General of the Society of Authors of Fine And Graphic Arts- BILD-KUNST, Germany, at the request of the Secretariat. The opinions expressed in it are not necessarily those of UNESCO’s Secretariat.

### 1.3. Photographs

In the last fifteen years, photographic works, least the photographs having an artistic character, have been included in the definition of works of art in a literal sense as subjects of the art market.

In recent times, even the original prints of press photographs have been put on the resale art market, in particular through auctions, because picture archives containing analogue black and white photograph prints are being increasingly transformed into digital data banks; as a result, the original positives are being put into circulation within the art trade as an artistic merchandise, unless the artist raises any contractual return claims. For instance, in autumn 2000, German newspaper archives and the New York Times archives started marketing activities to sell their stocks.

### 1.4. Other works

Apart from the above mentioned “classical” original works of art and artistic photographs, even objects considered to be borderline cases between art and handicraft are subject of *droit de suite* in many countries.

The distinction should be made here – with regard to original works of graphic art - whether these objects have been created as works of art or whether they are part of commercial editions of commercial factories etc., without the features of an original work.

In this sense, even handicraft objects - tapestries and ceramics - can be subjects of the art market, if they have been created as original individual works for as parts of a limited and numbered edition by the artist himself or executed under his control. In these cases, there is no reason to exclude these kinds of objects from the range of works of art subject to *droit de suite*. However, as each country has different traditions, it is advisable to leave the definition of what constitutes an “original” to the respective national legislation.

### 1.5. Definition proposed by the European Unions' Directive on harmonisation of *droit de suite*

Having considered the above aspects, the European Union's Directive on the harmonisation of *droit de suite*<sup>2</sup>, which is still at the decision stage, provides for the following definition:

*"Art. 2 Works of art to which the artist's resale right relates*

*(1) For the purposes of this Directive, "original work of art" means works of graphic or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs, provided they are made by the artist himself or are copies considered to be original works of art."*

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1 Amended Proposal for a European Parliament and Council Directive on the resale right for the benefit of the author of an original work of art, File No 96/0085 (COD)

## 2. Persons entitled to *droit de suite* claims

### 2.1. Nationals of *droit de suite* countries

In accordance with Article 14ter of the Berne Convention as revised in 1971 and the existing national legislation, *droit de suite* is part of the author's rights comprised in copyright and therefore there is no doubt that not only the entitled creators - plastic artists and photographers during their lifetime - but also eventually their heirs, can claim *droit de suite* in the course of the duration of the term of protection (between 50 or 70 years).

Heirs are entitled not only to claim the remuneration for re-sales subject to *droit de suite*, but also to the rights (information right, etc.) necessary to enforce their claims (see under 4 ).

### 2.2. Inalienability of *droit de suite* claims

The art market is characterised by a marked imbalance between artists and galleries, especially with regard to first sales: there exist a great number of artists in comparison to the limited number of art galleries available; therefore any young artist seeking to interest an art dealer in his or her work and placing him on the market is faced with a challenge. Hence it is usually the art dealers who dictates the business conditions and, at least in the beginning of an artist's career, sets the price and sale conditions and, in general, holds a stronger bargaining position.

If, under such circumstances, the art dealer was able to persuade the artist to waive his or her future *droit de suite* claims, then each art dealer would make this waiver a contractual condition in any purchase of an art work. He would be acting on the assumption that at a later date he himself might buy back the work of this artist with a view to re-selling it or, in solidarity with other dealers, assuming that they might, if reselling this work at a later date, have to pay *droit de suite* remuneration on it. Thus, a potential assignment of the *droit de suite* claims would result in neutralising them, because the art market would automatically develop standard contracts forcing the first-sale artists to renounce their claims from the beginning and therefore excluding a later claim.

In view of this, national legislations recognizing *droit de suite*, as well as Article I of the EU Directive define *droit de suite* explicitly as an "inalienable" right which the author cannot waive in advance. Only such a legal construction can guarantee that the artist is able to exercise this right at a later date; however, it does not imply that the artist is obliged to exercise his right: after any resale he can still refrain from making a claim on the basis of resale right with respect to a specific gallery or sale.

### 2.3. Reciprocity in respect of *droit de suite*

Art. 14ter (2) of the Berne Convention created *droit de suite* not as minimum right, but as a right whose application in another country can be linked to the condition of reciprocity. This regulation is justified, because up to now, not all Contracting States exercise *droit de suite*; Art. 14ter (2) of the Berne Convention is an incentive for States which have not yet

recognized *droit de suite* to introduce it to obtain the benefits of its application for their artists in countries already applying *droit de suite*.

The EU was well advised to confirm this aspect in Art. 7: there is no obvious reason to abandon this condition in the present situation of recognition of *droit de suite*.

### **3. Persons obliged to pay *droit de suite* remuneration**

#### **3.1. Definition of the resale price as a basis for *droit de suite* calculation**

In its literal sense, *droit de suite* is directed at those who derive a profit from reselling a work of art which they own. Time and again, in the course of the legislative procedures in many countries, the question has been raised as to whether the entitled party's claim should concern only the real surplus value achieved by a resale or also the resales whose profits come below the initial price. An economic calculation as such may well be considered systematically; but it cannot be appropriately applied in the existing art market. An artist reselling a work of art at any given time - which may be years after the first sale – may not have the documents at his disposal to prove the original sale price; therefore a calculation of a possible surplus value cannot be compared with systems being applied by tax administrations for value added tax calculations.

Works of art are usually resold only if the vendor believes there will be a sales profit; furthermore, the development of the art market over the years suggests that works of art which are attractive to the market usually gain in value. This is why all known and working systems of *droit de suite* management – and the EU Directive - intend that each resale case be covered by *droit de suite*. The royalty rates settled for resales take account of this by defining the artist's share as an average rate; in this way it is also borne in mind that in some exceptional cases works are resold at a lower price than at the first sale.

However, the resale price to which the *droit de suite* share applies is taken as a net price: additional expenses like restoration, framing, etc. have to be deducted.

#### **3.2. Resales between private persons**

In many cases, works of art are resold directly between private persons; in general, these resales are transacted discreetly and therefore escape *droit de suite* regulations. In these cases it appears reasonable to give priority to the protection of privacy and avoid seeking information and remuneration rights which normally cannot be enforced, and which would lead to a detective-like enquiry practice and infringement of personal privacy. For this reason a resale between private persons without the intervention of a market professional should remain free of *droit de suite* obligations.

#### **3.3. Resales with the intervention of an art dealer**

Existing legislation and the EU Directive define all acts of resale as subject to *droit de suite*, if they involve vendors, buyers or intermediaries represented by art market professionals, such as salesrooms, art galleries and art dealers in general (Art. 1 (2)).

Generally speaking, a person who actually makes a resale profit and who is obliged to pay *droit de suite* remuneration, is usually the owner of a work of art. It is not rare that an art dealer will act as an intermediary or, if it is an auction sale, as a commission agent who sells in his own name according to the relevant commercial law regulations, receives the payment and hands over the property without having to reveal the depositor's, (i.e. the previous owner's), name and address. Contacts between the parties entitled to the remuneration and the vendors obliged to pay *droit de suite* become even more complicated in the case of sales carried out via Internet, whose organisers appear within different legal situations - either as traditional auctioneers, i.e. vendors on commission, or, in some cases, only as an intermediary between seller and buyer.

Therefore, *droit de suite* regulations should offer a choice to the entitled parties enabling them to enforce their remuneration right through information right claims (see below, 4.) both against the original owner/seller and the commissioned art dealer, auctioneer or agent. Nothing but the possibility to call upon the selling art dealer - whether Internet auctioneer, "classical" auctioneer or commercial agent - can really ensure that the claim is respected, especially in international art dealings which, supported by the internet, are negotiated between persons in different countries or continents.

The EU Directive's wording of Art. 1 (4) sets a standard for this rule; it provides:

"The royalty shall be payable by the seller. Member States can provide natural persons or legal entities alone to be liable or share liability with the seller for payment of the royalty."

German copyright law provides in Art. 26 (4) that the art dealer or auctioneer being held liable must provide the name and address of the initial vendor to enable the artist to turn to him. Only payment of the *droit de suite* remuneration discharges his liability. This provision may well apply to the trade within one country in the "analogue" age; in an internationally expanding integrated art trade this is not helpful to the artist. If he succeeds at all in enforcing his claim and probably only with the help of a collecting society (s. below, 4.3.), it is only by holding the art dealer liable that he can do so.

#### **4. Right to Information**

##### **4.1. The information claim's recipient**

In order to effectively enforce a *droit the suite* claim, the entitled party - the artist or the right owner - must be aware of an art sale. It is only in rare cases that the art trade is fully transparent economically - though sales at art fairs may be supervised, details such as the buyer's name, sale prices etc. are not documented in the relevant press. Regular sales documentation may only be found in the traditional auction trade, because auction houses publish the profit figures of previous auctions with a view to attracting sellers for future auctions, thus providing an insight into the practices and price developments of the art markets. In addition, many information data banks have been developed - for example [www.artnet.com](http://www.artnet.com) - which document world wide auctions results systematically, however not to facilitate the enforcement of *droit de suite* claims, but to provide possibilities for comparison of purchase prices for potential buyers. This kind of information service is usually liable to charges which persons entitled to receive *droit de suite* remuneration, in most cases, cannot afford to pay.

In this situation, it is clear that the sole and proven prerequisite to claim *droit de suite* is the entitled party's right to information in respect of any art dealer, agent or auctioneer involved in the sale.

This claim which can be enforced legally compels the respective art dealer involved in the resale to name at least the author, work title and resale price which constitutes the information necessary to determine and calculate the claim.

#### 4.2. The parties entitled to the right to information

Generally speaking, the person entitled to claim *droit de suite* remuneration is also entitled to claim information about resales.

Granting the right to information to each and every entitled artist or heir has the disadvantage that enterprises engaged in the resale market could be confronted with numerous information claims arriving intermittently, presented in different forms, worded differently, possibly from entitled persons in foreign countries, and all of which could be enforced legally. An information system which could get out of hand in that way - as it is designated in the EU Directive's Art. 9 - would become even more complicated, if the period allowed for raising such claims is longer than three years. In this case, the art trade would be exposed to an extensive obligation to keep all documentation about resales on behalf of any entitled artist or heir who does not need to possess any concrete evidence of a resale in order to raise general information enquiries. It raises the possibility that, particularly through the use of modern information and data processing technologies, an entitled heir might deluge a country's art dealers with enquiries by e-mail or chain of letters forcing them to provide information even if it is negative.

#### 4.3. Raising information right claims by a collecting society

Therefore, it may be worth considering to what extent only collecting societies should be entitled to raise information claims, similar to the German copyright law - Art. 26(5), stipulating that “the claims....may only be asserted through a collecting society”

German law allows a short period in which to raise an information claim - from the end of the year in which the sale took place and then for the duration of one year; it can only be raised by a collecting society. General practice has established that once a year - shortly before the expiry of the said period - the collecting society, in one single procedure, circulates a request letter accompanied by a membership list of all the artists it represents enquiring about re-sales in the previous period. The collecting society also evaluates the result lists of the auction houses.

Furthermore, the collecting society disposes of sufficient personal resources with which to watch the market, to pursue the development of new art business firms and to add them to its information lists, to visit art sales and fairs, to evaluate relevant publications and media and therefore succeeds in gaining an overall perspective of the market, enabling it to properly enforce the information claim system.

Experience shows that an information claim framed in favour of a collecting society in the this way will encourage the art dealer and the society to conclude special agreements at the

national level in order to regulate jointly how to provide the necessary information in a way which will reduce the bureaucratic obstacles as much as possible.

Compared with the possibility of raising the information claim individually, as described above, a practice-orientated administration, including a collecting society, is possible and it will not impede the art trade more than is necessary and desirable.

#### 4.4. Making of *droit de suite* claims by individuals

The system described above does not require that the collecting society intervene in every single case where *droit de suite* claims are to be raised by individuals. It is possible that the artist or his heir, who has personally collected the information about resales, for example by consulting himself the auction houses' sales lists, does not need the help of the collecting society to obtain the necessary information. In such cases he should be free to make his claim for remuneration without the involvement of a collecting society. Nevertheless, in most cases it will be preferable to call upon intervention of the collecting society. The reality is that in the majority of cases the collecting societies retain both the right to information and the collection of remuneration.

#### 4.5. The international enforcement of the *droit de suite* through collecting societies

This applies especially to cases where *droit de suite* claims are to be enforced beyond national borders: only the collecting societies' contractual network of mutual representation, as it exists within CISAC, enables an artist of one state, on one continent to claim information on the sales of his works in another state, on another continent. If he does not seek the help of a collecting society, he will not be able to control and make his claims outside his native country.

It is possible to make an information claim in the above manner at comparatively low costs, even if only through the means of simple data processing ; for example in the Federal Republic of Germany, administrative costs for making *droit de suite* claims in the this way - asserting information right and collecting remuneration by the collecting society - amount to about 10 % of the collected amounts.

Finally, it is only collecting societies, within the framework of their international co-operation networks, that can pursue the newly developing sales techniques by e-commerce and make *droit de suite* claims successfully, because they have at their disposal co-ordinated tracing systems with which to follow and consider Internet offers and resales and obtain the necessary information to enforce their *droit de suite* claims.

If we compare this co-ordinated organisation of rights' management with the possibilities for the individual artist who would be obliged to consult the Internet as a mean of searching for sales of his works and then claim information and remuneration, it quickly becomes obvious that the development of new technologies in particular renders collecting societies the only viable means for successful enforcements of information and remuneration claims.

## 5. Royalty rates

### 5.1. Current regulations in several states

The current provisions concerning for *droit de suite* provide for royalty rates in nearly all countries where this right is recognized. The rates vary between 5 % - in Germany or Denmark - and 3 % in France, where for the time being only auctions are covered by *droit de suite*. It is only in Italy that rates vary from 1 - 10 % depending on the sales prices, but, to our knowledge, this provision has never been applied in practice.

Nevertheless, it should be emphasised that in every country with an efficient *droit de suite* system the same royalty rate is applied for all kinds of sales. At least on a national level a clear and predictable practice is being assured which greatly facilitates the collective management and, to some extent, even creates the precondition for concluding contracts with groups of vendors; Through such contracts *droit de suite* remuneration is collected in the form of a lump sum payment.

### 5.2. EU Directive: graded rates

In contrast, the EU Directive designates graded royalty rates for *droit de suite*; Art. 4 specifies as follows (as decided by the European Parliament on the 13<sup>th</sup> December 2000)

"The royalty provided for in Article 1 shall be set at the following rates:

- (a) 4 % for the portion of the sale price to Euro 50,000;
- (b) 3 % for the portion of the sale price from Euro 50,000. 01 to Euro 200,000;
- (c) 1 % for the portion of the sale price exceeding Euro 200,000. 01 to Euro 350,000;
- (d) 0,5 % for the portion of the sale price from Euro 350,000.01 to Euro 500,000;
- (e) 0.25 % for the portion of the sale price exceeding Euro 500,000.

However, the total amount of the royalty may not exceed Euro 12,000.

The EU Directive is unsatisfactory in every respect, but it reflects the Union Members States' differing legislations and takes into consideration the fact that within the harmonisation process several Member States insisted that the implementation of *droit de suite* with high royalty rates would lead to the transfer of the art trade to third countries which do not recognize this right and, in particular, to the United States of America.

A survey of the Directive's Art. 4 (1) with regard to the royalty rates shows a calculated average rate of about 3 % taking into account all sales. The artists' organisations hold this to be a relatively low rate which may only be accepted because the harmonisation of *droit de suite* introduces it at least into some high level art sales countries, like the United Kingdom and Austria where, to date, national artists have not received any *droit de suite* remuneration. It is generally recognized that an acceptable rate is 5% which is applied in the Federal Republic of Germany and the Scandinavian countries. This rate takes into consideration the fact that in some cases resale prices are lowered and it is not thus high as 10% which is usually considered appropriate for the exercise of other author's rights, such as reproduction right or the right of public performance.

### 5.3. Emigration of the art market as a result of *droit de suite*?

In the process of elaboration of the Draft Directive the EU authorities feared the displacement of the art trade from Europe to the USA. This fear may have been justified at a time when *droit de suite* had not yet been recognized world wide. It should be said, however, that royalty rates of 3 % would not prompt any vendor to quit a market place. Experience shows that sellers trade in those markets which promise the highest sale prices; these markets vary, depending on the origin and period of the art work in question. Nevertheless certain art trade lobbyists maintain the argument that the recognition of *droit de suite* in a state leads to the transfer of the art market to other states. This point of view fails to take into account that in many cases art sales can only be negotiated in certain places and while a transfer might, on the one hand, save *droit de suite* remuneration, on the other, hand it might not sufficiently interest the buyers thus leading to a decline in prices.

The German example proves the opposite: since the introduction of *droit de suite* in 1981 and its subsequent effective application, no important art dealer has left the country, on the contrary the art market has developed very well since then.

### 5.4. Minimum and ceiling thresholds

The EU Directive is intended, like all previous legislations, to provide a minimum threshold for claiming *droit de suite* remuneration which in the harmonisation process alternated between 1,000 and 4,000 Euro. The experience of collective administration shows that rates under 1,000 Euro are very costly to manage; but *droit de suite* can be successfully administered if the resale price exceeds 1,000 Euro. However, the threshold of 4,000 Euro under discussion would exclude a large number of entitled parties - surveys in *droit de suite* countries suggest about 60 % - from claiming their *droit de suite* payments. For this reason on 13 December 2000 the European Parliament decided on a minimum threshold of 1,000 Euro.

Nevertheless, the argument put forward by the Nordic states that the minimum threshold must be lowered further should be given serious consideration. In this way, more artists whose works are sold for lower prices would be included in the *droit de suite* system. Though this argument is favourable to the artists, it should be repeated that it leads to a large-scale and more expensive collective management of this right.

On the other hand, a ceiling threshold as provided by Art. 4,(1), S. 2 of the draft EU Directive – which before the Parliaments' intervention tended to curb the artists' remuneration to a limit of 12.500 Euro - contradicts all copyright traditions and should therefore be totally abandoned. It can hardly be justified that in the case of an enormous increase in the value of an art work put on sale, the artist who created the work should receive only a limited share.

The EU Directive will, should its present Draft become final, complicate the practical application of the remuneration rates set down in Art.4 (1)(a) –(c), because the art trade will be forced to prepare exact sale price lists for *droit de suite* calculations in order to add and pay *droit de suite* remuneration at the end of each year. Accordingly, the entitled parties' collecting societies – in so far as the right has been assigned to them - will be confronted with many administrative problems in applying the different rates to the sales and to transfer the remuneration which is due to the entitled persons.

In practice, this rate scale will lead to the payment of lump sums which may end in the calculation of average rates and technically simplify the administrative procedures.

To avoid sale price manipulations and bureaucratic obstacles, the EU Directives example of the different rates should on no account be taken as a model. Only one fixed rate for all sales is practicable and it enables debtors, entitled parties, art dealers and collecting societies handling the management of *droit de suite* remuneration to develop the most simple and practical administrative procedures.

## **6. Claiming *droit de suite* remuneration**

As mentioned above, mandating a collecting society to claim *droit de suite* remuneration on behalf of the artist is the only way to administer this right if the artist or other entitled party does not have his own information on a sale. Should he possess this information, there is no obstacle to making an individual claim in his own country. The artist simply has to raise his claim against the vendor, whether auction house or an individual even, if need be, by means of legal action.

However, experience shows that the said argument for collecting information in respect of management of information claims alone suggests calling in a collecting society which can also incur remuneration claims, particularly against reluctant debtors at home or in the case of resales carried out abroad.

A single artist often is not able to avail of the necessary legal means required to enforce his remuneration claim against a reluctant art dealer or a private person reselling a work by way of authorising an auctioneer or an agent who, as experience shows, will try to avoid this claim.

In contrast, the help of a collecting society offers many advantages, because these societies are known in market circles and can usually command enough influence to enforce their claims, if need be, through legal support.

What has been said already on cooperation between collecting societies with regard to realising the information claim also applies to international exchange: solely the net of collecting societies can guarantee a world-wide and sufficient respect of resale remuneration claims.

The enforcement of remuneration claims on the collecting basis offers also a large advantage to the art trade, because the vendors only have to balance accounts once a year with a collecting society and in this way they settle all their *droit de suite* obligations for the past year. If art dealers, auctioneers and other vendors were obliged to settle each single sale individually with each entitled party, their administrative costs would rise considerably thus leading to a rise in prices and possibly to a shrinking market.

## **7. Social and cultural aspects of *droit de suite***

Those artists who are members of authors' societies, at least in states having civil law legal traditions and tradition developed thereof, have the possibility of establishing support organisations in the framework of their societies and within the national legal framework which provide a certain percentage of *droit de suite* remuneration to support young artistic

talents. Social benefit organisations can as well support needy elderly or disabled artists. Thus, the collective administration of *droit de suite* offers the possibility to establish a support system encouraging artistic creativity.

Nevertheless care should be taken that these deductions do not affect the whole management of *droit de suite* and do not totally avoid the remuneration related to the value of the creative artist's work.

## 8. Summary

- 8.1. All original works of fine art in its widest sense, including works of graphic art and photographs of a creative nature, which are resold on the art market in the world, must be subject to *droit de suite* legislation.

The persons entitled to *droit de suite* remuneration are the artists and their heirs (for the whole term of protection). In order to prevent the art dealers from forcing the artists to give up this right on the occasion of the first sale it must be recognised as inalienable and non-waivable.

- 8.2. The *droit de suite* claim must be addressed not only to the vendors themselves, but also to any art market professional involved in resale either on the vendor's or on the buyer's side.

This right should not apply to sales between private persons.

- 8.3. *Droit de suite* legal provisions should provide for uniform royalty rates; rate splitting for certain portions of sale prices only complicates its management.

- 8.4. The precondition to making *droit de suite* claims is a right to information granted to the right owners and enforceable against vendors and traders; it is more appropriate that this right be exercised by a collecting society.

- 8.5. The remuneration claim can be enforced independently of the information claim and be asserted by each individual entitled party as well as by a collecting society; practice will prove that this claim is usually made by a collecting society jointly with the information claim which makes the management of this right less costly and minimises the interference in the market proceedings.

- 8.6. Author's societies mandated to exercise *droit de suite* are in a position to maintain social institutions or institutions which support young artistic talents with a view to encouraging the growth of the artistic potential of the nation, as well as persons excluded from the art market who benefit, at least partially, if this lies in the national legislature's intentions.

- 8.7. To encourage all States to introduce this right, it should be bound to the principal of material reciprocity

## **Part II - The impact of *Droit de suite* on the art market**

### **1. Economic factors influencing the art market**

Any consideration of the effect of *droit de suite* on the art market must take into account that art markets are influenced by different factors having proportionally varied effects from country to country.

On the one hand, a country's art market depends on the quantity and creative productivity of its artists and consequently on its cultural activity and its geographic size and, on the other hand, on its domestic economic situation.

In a detailed manner, the following factors of particular importance should be mentioned:

#### **1.1. Domestic economic situation of each country:**

Economic growth and the optimism of the market forces, as well as tax legislation and a policy of encouragement of the arts fundamentally influence any art market's development.

These factors have been researched in several international studies, and recently by the society "Market Tracking International Ltd." on behalf of the "The European Art Market 2000"<sup>3</sup>, the European Fine Art Foundation. Dealing in priority with the consequences of two different kinds of import VAT and *droit de suite* regulations in the EU Member States, this study suggests that import VAT has a greater effect on the art market than *droit de suite*. Art dealers and experts confirm that even in the current EU situation, art sales are shifting to Great Britain not only because it does not recognize *droit de suite*, but also because a different category of buyers, interested for example in German expressionism, can be found there, more than in Germany itself; further motives for export can be the tax factors and an interest in conducting sales anonymously. Moreover, regarding the structure of terms and conditions, particularly in the sales of works important in the public eye, international auction houses are definitely prepared not only to adapt their conditions to the vendor's wishes, but possibly even to give sales guarantees. It is evident that not only the non recognition of *droit de suite* leads to moving important sales to certain countries.

Nevertheless, the study suggests what is also obvious: *droit de suite* represents an additional financial burden for the art dealers, at least as long as no equivalent legislation exists in competing international markets. It should be born in mind that *droit de suite* will always affect only a certain part of the market, namely the part of the resale market of works of fine art protected by copyright and which, furthermore, have been created by artists whose home countries apply *droit de suite* and who are prepared to have this right administered by a collecting society.

At the same time, this explains that the effects of *droit de suite* on the development of national art markets are only marginal: for the period 1994 - 1998 alone the German art market showed an increase of 20 % despite *droit de suite* remuneration, while in

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<sup>3</sup> "The Droit de suite", Marlies Hummel, ifo Institute, August 1994 ; "The European Art Market 2000", TEFAF, The European Fine Art Foundation, January 2000

1997, as a result of a macro-economic recession in Germany, a decrease of 21 % was observed.

A review of the German market shows that with a market size of 998 millions DM about 100 millions DM, hence about 10 %, have been collected on the basis of *droit de suite*. This hardly proves *droit de suite* to be a handicap for the market involving considerable movement out of the national market to foreign countries. The study confirms what the situation in France as well as in some other countries shows: even compared internationally, a country's art market will be more strongly influenced by the above mentioned economic factors than by actually applying *droit de suite*.

Nevertheless, during the debate on the introduction of *droit de suite* in the EU countries which do not yet recognize it, the representatives of the European art trade always maintained that a EU *droit de suite* harmonisation would lead to a shift in the art trade in the USA.

All in all, the respective EU publications substantiating the Directive on the harmonisation of *droit de suite*, as well as studies carried out by the IfO institute in Germany and by the above mentioned British institute conclude that the main problem with regard to *droit de suite* has to be seen in its non-recognition of the world-wide deal, or, at least, not having been harmonised for a special group of markets.

The fact that the important American market is not yet governed by *droit de suite* gives particular cause for concern in that, with harmonisation in Europe and not only Western Europe but also the Middle and East Europe where *droit de suite* is recognised by the laws, the world-wide art trade might become unbalanced.

This opportunity should be taken to draw attention to the Report of the Registrar of Copyrights of the USA which he made following an extensive consultation in December 1992. He emphasised in his Report in respect of the possible introduction of *droit de suite* as follows: "Should the European Community succeed in harmonizing existing *droit de suite* laws, Congress may want to take another look at the resale royalty, particularly if the Community decides to extend the royalty to all its Member States"<sup>4</sup>. Only then will the US Copyright Office propose a draft legislation. Therefore, there is a chance that the lasting EU harmonisation will set off further legislative measures in states like Switzerland and the USA.

## 1.2. Local tax situation

Experience shows that applying property tax on works of art usually brings as a result that they are shown less often; works of art, supposed to be sold are moved to other countries to avoid that the national tax authorities become aware of any fiscal fraud on the part of the owners. Besides, the success or failure for market - at least in view of works from other states being put on the market - is influenced by the application of import VAT on works of art, which might impede their importation.

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<sup>4</sup> "Droit de Suite: The Artist's Resale Royalty", A Report of the Register of copyrights, December 1992

### 1.3. Support of artists

Legal regulations to support artists may have positive and negative impact on the production of works of art and subsequently on the art market. In Germany, for example, the Federal Government sponsors the exhibition of young artists in special gallery space during the biggest German fair of contemporary art, the ART COLOGNE - a measure intended, first of all, to support the artists but also the development of the galleries; public funds for the participation of galleries in foreign art fairs have a similar effect. Social insurance contributions for artists paid by the art trade, for example, in Germany and France, also affect the market, as well as *droit de suite* which influences the resale of works of art, i.e. the secondary art market.

## 2. **The effect of *droit de suite* on the art markets**

The foregoing illustrates that *droit de suite* is one of several factors influencing the art market; the debate held with a view to European harmonisation clarified that, on one hand, the non-recognition of *droit de suite* in important art trading countries can, to a limited extent, be decisive for shifts in the art market; undoubtedly it has had psychological effects that have been used by the British art dealers to push their government to argue against *droit de suite* harmonisation and thereby – a burden of the British market even if comparatively low.

With their arguments against the introduction of *droit de suite*, the art trade tried to disguise from the fact that this right is not imposed on the art trade itself, but on those persons reselling works of art and finally profiting from the increases in value; art dealers are only included in the *droit de suite* system insofar in some cases, they transmit the remuneration from the selling private person to the artist entitled to *droit de suite*.

Under these circumstances *droit de suite* appears not as a mere bureaucratic trade impediment, but as a real burden for vendors of works of art.

Therefore a world-wide harmonisation will help, above all, to more evenly spread the markets' economic burdens and to reduce the psychological obstacle for recognition of this right. National art markets should not fear negative economic impact, though after the introduction of *droit de suite* as the additional burden for an art market, unknown up to now, is relatively low, because this right affects only that part of the market which deals with the resale of those works of art still being protected under copyright laws. Neither the galleries' first sale market nor the resale market for the public domain works of art will be affected.

Hence, the significance of *droit de suite* lies in creating equal trade conditions and in removing handicaps for those countries which dispose of progressive copyright legislation for the benefit of the artists and their heirs. Furthermore, *droit de suite* provides appropriate shares for artists in the development of the resale market for modern art.

## **Part III - Importance of *droit de suite* for the improvement of the artists' situation**

The economic situation of the plastic artists and creative photographers is influenced by many different factors partially similar to those which affect the art markets development. We should mention the following ones:

- a living art market in the economic environment providing enough free capital for art purchases;
- public and private systems of cultural support, tax relief for sponsoring and patronage;
- public commissions for artists in the context of new buildings, environmental designs or science and public education;
- the artists' social situation, their inclusion in systems of health and social security insurance;
- development of copyright legislation and the artists' participation in any use of their works by way of reproduction, TV transmissions, private reprography and exhibitions;
- support for a good professional start for young artists in the form of public funds and special aid for galleries.

Combined with these factors determining the economic situation of artists, *droit de suite* is one element among others in the context of national legislations. It goes without saying that effective support of artists through *droit de suite* is possible if exist both a national art market for first-time sales and a secondary market allowing the circulation of works through auction houses and special art galleries; the international application of this right further requires national artists to be economically successful also in foreign countries to expect a reflux of *droit de suite* remuneration.

With regard to the artists whose works are subject to *droit de suite*, there is no doubt that it mostly benefits the artists having higher public recognition, at least during a certain creative period of their life. Experience shows that this is the reason why only few of a country's artists gain significant profits from the sales turnover in the art market. In Germany, for example, in 1998 *droit de suite* remuneration was collected for altogether 480 German and 306 foreign entitled artists and estates - 786 artists in total. Measured against the number of about 12,000 German artists organised in artists' associations, it represents a low percentage and, more so, if only the German recipients of *droit de suite* remuneration are taken into consideration. However, a study of the German collecting society Bild-Kunst based on turnovers of the main European art fairs in Basel and Cologne and taken with an interval of five years shows interesting parallel figures, putting the fore-mentioned German result into an international context. Of about 2.500 living and deceased artists from many countries whose works were shown in 1990 at one or both of these art fairs, in 1994 only 30 %, roughly 750 works, were exhibited in the same art fairs. Whatever the reasons may have been, others' works were no longer objects of the art market after this period of time. Comparing these figures with the number of the artists who received *droit de suite* remuneration from the German art market in 1998 reveals nearly the same proportion.

This leads to the conclusion that the essence of art market – both in respect of first sales and resales - is concentrated on a comparably small number of artists. Of course, this core is surrounded by a large number of other artists who also profit from the art market for first-time and resales, but to a varying degree.

This analysis shows that in the economically significant dimensions *droit de suite* benefits mainly those artists who at least in a certain creative phase were economically successful;

with regard to a large number of other, less successful artists, it brings a share in resales and offers at least a certain, and apparently in the last years, growth share in resales of their works in the art market.

In view of this, there can be no doubt about that this right rewards the success of works in the art market enabling their authors to share with the buyers the economic benefit they derive from the increases in value of art works. However, *droit de suite* is not an instrument that would considerably or widely improve the economic situation of a country's artistic population.

This result is not unusual, though a similar picture of a small top team and a comparably broad basis exists in the field of music : it is sufficient to compare the list of the musical works registered with the societies of composers with the titles and performers (composers, librettists, music editors and performers) being represented in "hit parades".

Additionally, at least in Central European states with a tradition of collective representation not only in respect of the single author's individual share, but also acknowledging the copyright's cultural and social role - *droit de suite* definitely can be one of the different instruments for social or cultural support of the artists. The European authors' societies maintain social and cultural support organisations also with *droit de suite* remuneration. These organisations are mainly intended to help young talented artists entering the market for the first time and to promote exceptional talents. In this way, *droit de suite* not only has a positive impact on the next generation of artists, but also on the art trade which is enabled to discover, promote, support and include new talents in the art market.

To sum up it can be said that *droit de suite*, as one of various copyright elements, serves to help plastic artists individually, like their colleagues in the field of literature and music, to benefit from the further use of their works, namely the art market's use increasing their value. Together with further copyright elements and other means of support of the artists, it represents an important factor in strengthening the artists' legal security and economic autonomy.