Le Droit de Suite: An Unartistic Approach to American Law

Jonathan D Tepper, American University, Washington College of Law

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By
Jonathan D. Tepper
B.A., May 1990, Duke University
J.D., May 2007, American University, Washington College of Law

Copyright: Jonathan D. Tepper
1831 North Uhle Street
Arlington, VA  22201
H: (703)528-4208  Cell: (703)801-5360
Email: jonathan_tepper@hotmail.com
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Introduction

Ethel and Robert Scull were in the midst of a messy divorce in October of 1973 when they staged an auction of contemporary art in New York. One of the highlights of the auction proved to be the sale of American artist Robert Rauschenberg’s painting entitled “Thaw.” The painting sold for eighty-five thousand dollars garnering an immense profit for the Sculls who purchased it for nine hundred dollars. Originally purchased in 1958 from a noted art dealer acting on behalf of the artist, the immense disparity between the original sale price and the price

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1 See Baruch D. Kirschenbaum, The Scull Auction and the Scull Film, ART JOURNAL XXXIX/1, 50-54 (1979) (providing a detailed description of the Sotheby Park Bernet Auction as captured in a now famous documentary film entitled AMERICA’S POP COLLECTOR: ROBERT C. SCULL—CONTEMPORARY ART AT AUCTION (E.J. Vaughn and John Schott 1974). The film is often used by advocates as evidence of the need to protect the rights of artists from exploitation from collectors. Id. John Henry Merryman, The Wrath of Robert Rauschenberg, 41 AM. J. COMP. L. 103, 109-110 (1993) (detailing the circumstances surrounding the auction in which the Sculls sold a collection of American abstract expressionism and Pop art for over two million dollars including Rauschenberg’s work, “Thaw.”) See also Nora Sayre, Movie Documents Auction of Scull’s Art, N.Y. TIMES, Oct. 17, 1974, at 55 (reviewing a documentary film about the October 1973 auction of Robert Scull’s collection of contemporary art which brought in over two million dollars for sales of noted works by Willem de Kooning, Frank Stella, Robert Rauschenberg, and Andy Warhol). In reviewing the film, Sayre noted that many credit Robert Scull for taking risks and buying works that were not popular at the time of purchase. Id. Robert Scull claimed that his sale of Rauschenberg’s works helped raise prices of the artist’s works. Kirschenbaum, supra at 51. Scull explained the mutual relationship between artists and benefactors directly to Rauschenberg in the film and said, “I’ve been working for you too. We work for each other.” Id.

2 Id.

3 See Merryman, supra note 1, at 110-11 (observing that the Sculls purchased the painting from noted art dealer Leo Castelli, who acting on behalf of the artist established the original market value). Castelli was well-respected within the art world for both his fair treatment of artists and his success in promoting unknown artists. Id. Merryman also questions the factors that influenced the increase in the value of paintings, and while giving credit to the continuing efforts of the artist, he also questions whether some of the increase in value is due to the efforts of the art dealer, critics, museum curators, and collectors. Id. Castelli promoted many well-known contemporary artists who saw their works skyrocket in value including Andy Warhol, Andy Warhol, Jasper Johns, and Claes Oldenberg. CastelliGallery.com, About Our Gallery, http://www.castelligallery.com/history/index.html (last visited Aug. 28, 2007).
at resale led to another highlight of the auction, the now famous confrontation between the artist and the seller, where Rauschenberg vociferously complained, “I’ve been working my ass off for you to make all the profit!”4 Irate over his failure to receive a single penny of the significant windfall, the perturbed artist shoved Robert Scull and stormed off swearing to include royalty rights in all future sales of his art which would guarantee him a percentage of the profits gained on the fruits of his artistic endeavors.5

While Rauschenberg’s rights were unprotected in the United States, had Rauschenberg been a French artist reselling his work in a Parisian gallery, his reaction would have been considerably different as French law provides visual artists with the droit de suite. The droit de suite, also known as a resale royalty, allows artists to claim a small percentage of the resale price of their works. This protection would have allowed Robert Rauschenberg to reap a percentage of the windfall from the resale of his work “Thaw.”

The provision and treatment of royalty rights on the resale of art marks a major distinction in the treatment of art between civil law countries such as France and common law


5 See U.S. COPYRIGHT OFF. REG. OF COPYRIGHTS, DROIT DE SUITE: THE ARTIST’S RESALE ROYALTY 64-65 (Dec. 1992) [hereinafter Copyright Report] (detailing the circumstances surrounding the auction and quoting Rauschenberg’s vow to demand resale royalties in the future); Merryman, supra note 1, at 110 (acknowledging Rauschenberg’s ongoing efforts in support of artists’ rights and establishment of the droit de suite in the United States). See also MARY LYNN KOTZ, RAUSCHENBERG, ART AND LIFE, 173 (1990) (detailing Rauschenberg’s efforts including testifying before Congress for legislation to provide artists with resale royalty rights).
countries such as the United States.\(^6\) The rift between these opposing views has become wider as the European Union ("EU") has moved to harmonize copyright laws amongst its member nations.\(^7\) In an effort to meet this goal and create a level playing field, the EU issued a directive in September of 2001 calling for member states to commence the implementation of royalty rights in January 1, 2006.\(^8\)

While the droit de suite is recognized by the European Union as an important right attached to the fine arts, the United States is reluctant to recognize resale royalty rights, holding instead to a more traditional view of fine art as property – a view generally hostile to restraints

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\(^8\) See Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art, 2001 O.J. (L 272) 32-36, [hereinafter EU Directive], *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_272/l_27220011013en00320036.pdf, (last visited Aug. 29, 2007) (directing member states to provide a resale right to benefit the author of an original work of art with a royalty on subsequent sales of their works). The directive specifies that the right is both inalienable and cannot be waived, even in advance. *Id.* art. 1. Implementation of the resale right for living artists will start on January 1, 2006 and January 1, 2010 for heirs of dead artists. *Id.* art. 8, 12. The implementation of the droit de suite has met considerable resistance within the British art world as some view the royalty as nothing more than an added tax on art. Susan Adams, *Picked Pockets*, FORBES, June 20, 2005 at 167.
on alienability. However, over the last forty years the United States has taken steps to join the international efforts to harmonize the protection of intellectual property by joining the Berne Convention and enacting the Visual Artists Rights Act of 1990 (“VARA”). VARA’s enactment introduced the protection of certain moral rights for artists but significantly omitted resale royalty rights.

This comment argues that the United States should not adopt the droit de suite because a resale royalty: (1) opposes the free alienability of property; (2) conflicts with the freedom to contract; (3) conflicts with copyright’s “first sale” and “work for hire” doctrines; (4) does not serve the constitutional purposes of copyright law; (5) falsely tries to equate the original works of artists with those of authors of reproducible creations; and (6) is an emotional response to the romantic myth of the starving artist.

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9 See Colleen P. Battle, Righting the ‘Tilted Scale’: Expansion of Artists’ Rights in the United States, 34 CLEV. ST. L. REV. 441, 463 (1986) (recognizing the two principles of free alienability and transferability of property as being cherished legal traditions in the United States); Elliott C. Alderman, Resale Royalties in the United States for Fine Visual Artists: An Alien Concept, 40 J. COPYRIGHT SOC’Y U.S.A. 265, 267 (1992) (maintaining that restraints on the alienability of art are antithetical to the Anglo-American tradition of alienability of property). The free alienability of intellectual property is fundamental to the Copyright Act as new owners are free to resell or dispose of the property without any input from the original creator. Id. at 267 n.5. The common law rule against restraints on alienation traces back to thirteenth century England and is the roots of the modern view that the free alienation of property is vital to the welfare of society. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS I, II IN NT (1983).


11 See VARA, supra note 10 (granting authors of works of visual art the rights of attribution and integrity). VARA allows an artist to: claim authorship of his art, prevent the use of his name with respect to any work they did not create, prevent the use of the artist’s name in the event of any alteration of his art which may be detrimental to his honor, and prevent the destruction of any work of recognized stature. Id. Artists retain these rights regardless of whether they hold the copyrights to the art but may waive the rights via writing. Id.
Part I of this article defines the droit de suite tracing its roots back to the French droit morale and also summarizes the reception of moral rights particularly under copyright law in the United States. Part II of this article presents arguments against the droit de suite highlighting the conflict a moral right presents to a common law system. Part III of this article recommends alternatives to the droit de suite. This article concludes that the United States should not implement the droit de suite.

I. Background

A. Droit de Suite: Definition and History

Literally translated to mean “follow-up right,” the droit de suite creates an unbreakable bond between an artist and his art by granting the artist proceeds for the subsequent sales of his works. The European Parliament and Council of the European Union agreed to the implementation of the droit de suite in 2001 granting artists an inalienable and unwaivable right

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12 See infra Parts I.A, I.B, I.C, I.D, I.E and accompanying text (tracing the French civil law origins and the moral rights movement which gave birth to the droite de suite and the reception of moral rights within common law systems such as the United States).

13 See infra Parts II.A, II.B, II.C, II.D and accompanying text (presenting a number of conflicts between the droit de suite and American property, contract, and copyright law as well as present some flaws in the foundations of the droit de suite).

14 See infra Parts III.A, III.B, III.C, III.D and accompanying text (presenting a number of alternatives to the implementation of the droit de suite including a contractual approach, a display based royalty, subsidies for the arts, and a watered down version of the droit de suite).

15 See Diane B. 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, 22 (1966) (providing a literal translation of droit de suite in her seminal work but proposing that a more accurate title would be “art proceeds right”).

16 See EU Directive, supra note 8, art. 1 (creating a resale right which cannot be alienated, waived or transferred). See generally Liliane de Pierredon-Fawcett, The Droit De Suite in Literary and Artistic Property: A Comparative Law Study, 3 (John M. Kernochan ed. & Louise Martin-Valiquette trans., 1991) (recognizing that the droit de suite was a claim of continuing rights by artists in their works regardless of any changes in ownership).
to receive a royalty based on the resale of an artist’s work.\textsuperscript{17} The droit de suite applies to any resale by an art market professional, but not to sales by private parties.\textsuperscript{18} With an overall objective of ensuring artists share in the appreciation of their works, the European Directive hopes to achieve two major goals.\textsuperscript{19} 

The first objective of the European Directive is the harmonization of rights between artists and the creators of other copyright works such as authors and composers.\textsuperscript{20} Implementing the droit de suite across the European Union will allow artists to receive the same economic

\textsuperscript{17} See EU Directive, supra note 8, art. 1, 4 (directing EU members to implement a resale royalty for any original works of art or limited, numbered copies of works, with a minimum sale price not to exceed three thousand euros). Original works of art includes graphic and plastic arts such as paintings, prints, lithographs, sculptures, tapestries, ceramics, photographs, etc. \textit{Id.} art. 2. Limited to twelve thousand, five hundred euros per work, the royalty is based on a graduated scale which starts at four percent of the sale price up to fifty thousand euros and gradually decreases until it reaches the top bracket of one-quarter of a percent of the portion of the sale price that exceeds five hundred thousand euros. \textit{Id.} art. 4. Member states have some discretion with respect to lowering the minimum threshold of three thousand euros, increasing the minimum royalty on the sale of lower priced art, and may exempt works acquired from the artist less than three years before resale. \textit{Id.} art. 1-4.

\textsuperscript{18} See EU Directive, supra note 8, pmbl. ¶ 18, art. 1 (applying the resale royalty to all acts of resale with the exception of sales by private persons acting in their own capacity as well as acting in a private capacity for museums). The EU Directive refers to sellers, buyers, or intermediaries, acting on behalf of salesrooms, art galleries, auction houses or art dealers in general. \textit{Id.}

\textsuperscript{19} See EU Directive, supra note 8, pmbl. ¶ 3 (declaring the intention of the droit de suite is to improve the economic situation of artists in comparison to those of other authors who benefit from “successive exploitation” or copies of their works). See also Pfeffer, supra note 6, at 544-45, 547-48 (explaining the goals of the Directive and adding a number of general goals including the incentive to create new art and allowing starving artists to benefit from the increased value of the works they created).

\textsuperscript{20} See EU Directive, supra note 8, pmbl. ¶ 3 (stating the goal of eliminating disparities between the rights and economic benefits received by artists with those received by other creators who receive ongoing royalties from sales of their creations).
benefits and standard protections as those of other creative authors who benefit from the successive exploitation of their works and the protection of copyright law.\textsuperscript{21}

The European Directive’s second objective addresses another major goal of the European Community, the standardization of laws and markets across member countries.\textsuperscript{22} The standardization of laws and markets will assist the European Union in their efforts to both create a common market and eliminate any unfair competitive advantage or treatment of artists that may exist in the market of a member country lacking a resale royalty.\textsuperscript{23}

B. The Droit Moral – Foundation for the Droit de Suite

Arising from a concern for the condition of artists, the droit de suite finds its origins in the droit morale or moral rights movement born of the French Revolution.\textsuperscript{24} While some scholars

\textsuperscript{21} See EU Directive, supra note 8, pmbl. ¶ 3, 17 (stating the directive’s intentions of redressing the balance between artists and other authors by granting economic benefits to artists for successive exploitation of their works and setting the term of the right to match those of other copyright holders, life of the author plus seventy years). See also Clare McAndrew and Lorna Dallas-Conte, Implementing Droit de Suite (artists’ resale right) in England, THE ARTS COUNCIL OF ENGLAND RESEARCH REPORT 23, (Mar. 2002), at 19, http://www.artscouncil.org.uk/documents/publications/325.pdf (explaining the Directives’ goal of allowing artists to participate in both the economic gains of their works as well as remove any inequities that may exist between artists and other creators who realize the success of their works through performances or successive sales of copies of their works).

\textsuperscript{22} See EU Directive, supra note 8, pmbl. ¶ 11-13 (referring to the objective of the European Community as detailed in the Treaty to ensure the economic and social progress of member states by eliminating barriers which divide Europe) (citing Sixth Council Directive 77/388/EEC, 1977 O.J. (L 145)). Another major European Union goal served by the droit de suite is the elimination of differences between laws and markets which may have an effect of distorting competition or displacing sales amongst or within member states and thus lead to any unfair market advantages. \textit{Id.}

\textsuperscript{23} See EU Directive, supra note 8, pmbl. ¶ 11-13 (specifying the establishment of a standard value added tax across member states) (citing Sixth Council Directive 77/388/EEC, 1977 O.J. (L 145)). The EU Directive also specifies other Community goals of eliminating any differences between laws and markets which may have an effect of distorting competition or displacing sales amongst or within member states and thus lead to any unfair market advantages. \textit{Id.}

\textsuperscript{24} See Pierredon-Fawcett, supra note 16, at 1-5 (detailing the growth of artists status and moral rights from before the Renaissance through the twentieth century). Pierredon-Fawcett highlights
view the droit de suite as being strictly an economic right distinct from moral rights, other scholars highlight the similarities in function and characteristics as indicative of their common roots. Despite differing views, there is agreement that the roots of the droit de suite emerged from the soil of French civil law and share a common ancestry with the moral rights movement which flowered after the French Revolution.

Prior to the French Revolution, artists served at the mercy of their patrons, their art reflections and property of the nobles and clergy they served. The status of artists is reflected in the plight of the starving artist and illustrates their exclusion from the great gains in value of their art on resale with numerous examples from the late 1800s of the works of great artists such as Degas, Millet, and l’Epinay selling for astronomical prices in comparison to their original sale price. Id. The French courts developed the doctrine of moral rights to protect artists’ rights including the right of paternity, the right of integrity, the right to release, and the right to withdraw. Schulder, supra note 15, at 21.

See Schulder, supra note 15, at 21-23 (explaining that though the droit de suite is similar to a moral right because of its inalienable and unwaivable nature, it is also closely aligned with an economic right because of its pecuniary nature). See also Henry Hansmann & Maria Santilli, Authors’ and Artists’ Moral Rights and the Droit De Suite: A Comparative Legal and Economic Analysis, 68-80 (November 21, 1995) (unpublished preliminary draft presented at the University of Chicago Law School Workshop in Law and Economics, on file with author). (mentioning a strong distinction is often drawn regarding the economic nature of the droit de suite, but arguing that the functions of the droit de suite are analogous to those served by the droit morale). Hansmann and Santilli’s work details the interests protected by the moral rights and explains substitute protections offered under other forms of law such as copyright and trademark law. Id.


See Pierredon-Fawcett, supra note 16, at 1-4 (detailing the treatment of art and artists during the Middle Ages where artists were treated as suppliers in the service of the Church and Nobles and retained few rights in their works); DaSilva, supra note 25, at 7-9 (explaining that during the
the works of the period as the origin of many works remains a mystery as many were unsigned because the artists were craftsman providing a mere service to their benefactor.\textsuperscript{28} This status began to change during the Renaissance as attention shifted away from patrons in favor of the artists who started gaining recognition for their works.\textsuperscript{29} One noted scholar explained, “The Renaissance restored the importance of Man as an individual and thus completely transformed the artist’s status.”\textsuperscript{30}

The restoration of an individual’s rights took on a greater importance in French philosophy during the tumultuous years following the French Revolution and during the Enlightenment as new philosophies embraced the vision of art as the reflection of an individual’s personality.\textsuperscript{31} The refinement of this doctrine reflects input from philosophical schools of thought which gained popularity in other parts of Europe, specifically the philosophies of \textit{Ancien Régime} the authors rights stemmed from the crown, while after the French Revolution authors rights came from the artist’s act of creation).

\textsuperscript{28} \textit{Id. See also} Jonathan Harr, \textit{The Lost Painting}, 25-26 (2005) (explaining that artists were “regarded merely as skilled tradesman, practitionaers of a manual craft, like shoemakers or potters.”) While a work of historical fiction, Harr’s story correctly depicts the status of artists in explaining why many artists did not sign their works.

\textsuperscript{29} \textit{See} Pierredon-Fawcett, \textit{supra}, note 16, at 1 (attributing the transformation of artists’ rights as part of an overall movement commencing during the late 17th century which recognized the intellectual elite and the valuable contributions they made to the public interest). Pierredon-Fawcett points to artists signing their works as a first step toward gaining recognition for both their creations and rights. \textit{Id.}

\textsuperscript{30} \textit{Id.}

\textsuperscript{31} \textit{See} Christine L. Chinni, \textit{Droit D'Auteur Versus the Economics of Copyright: Implications for American Law of Accession to the Berne Convention}, 14 \textit{W. New Eng. L. Rev.} 145, 149-50 (1992) (discussing testimony of legislators in the post-revolution Constituent Assembly who favored the implementation of artists’ rights and endorsed the idea that artistic creations were more than mere property, but a valuable asset of the artist’s personality); DaSilva, \textit{supra} note 26, at 7-11 (summarizing the status of authors’ rights during the Middle Ages and the debate which took place after the French Revolution). In tracing the growth of moral rights, DaSilva points to the period after the French Revolution as art became characterized less as property and more as a creation of the artists’ personality. \textit{Id.}
Immanuel Kant and Georg Wilhelm Freiderich Hegel. 32 The revolutionary laws of 1791 and 1793 were the first legislation to reflect this philosophy by granting authors an exclusive right of performance and reproduction. 33 These rights grew in the fertile soil of French jurisprudence as the court recognized the rights of disclosure, attribution, integrity, and retraction. 34 Viewed as both moral and pecuniary rights, these rights served as the foundation for French copyright law and as the groundwork introducing the droit de suite. 35

32 See Dane S. Ciolino, Moral Rights and Real Obligations: A Property-Law Framework for the Protection of Authors’ Moral Rights, 69 TUL. L. REV. 935, 939 (1995) (summarizing the refinement of the droit moral during the eighteenth and nineteenth centuries as addressed by the philosophies of Immanuel Kant and Georg Wilhelm Freiderich Hegel who addressed the legal nature of artists’ rights). Id. Ciolino compares Kant’s theory of dualism and Hegel’s theory of monism and the existence of distinct interests in an author’s works. Id. Ciolino explains that Kant identified artist’s rights as being fundamentally personal rights because they are a continuing expression of an artist’s inner self, while Hegel added economic rights on top of artists’ personal rights. Id.

33 See Jane C. Ginsburg, A Tale of Two Copyrights: Literary Property in Revolutionary France and America, 64 TUL. L. REV. 991, 1005-09 (1990) (detailing the legislative history and impetus behind the decrees of 1791 and 1793 as well as highlighting scholars who justified the exclusive right based upon art being an artist’s intellectual personality) (citing C. Colombet, Propriete Litteraire et Artistique 8 (4th. ed. 1988) (translated by Jane C. Ginsburg)).


35 See DaSilva, supra note 26, at 4 (emphasizing that French jurists view moral rights as more than just mere additions to copyrights, but important rights unto themselves) (citing Loi du 11 mars 1957 Sur La Propriete Littéraire et Artistique, [1957] J.O., translated in UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD, (1976)). The Law of July 3, 1985 primarily addresses moral rights associated with computer software and establishes rules for audiovisual works, rather than fundamentally altering the substance or philosophy of the 1957 Laws which they amended. Id. The 1957 laws codified the protection of artists’ rights already recognized by the French courts which noted the fundamental differences between the intellectual creations of individuals which the court saw as manifestations of the creator’s personality versus other forms of property such as “a suit or refrigerator.” Rita E. Hauser, The French Droit de Suite: The Problem of Protection for the Underprivileged Artist Under Copyright Law, 11 COPYRIGHT L. SYMP. 1, 13-14 (1962).
C. Introduction of the Droit de Suite

First proposed in 1893, the droit de suite was created in response to the decrease in the importance of the salon, the passing of the private patron in France and the cause of the day – the starving artist working in his garret to produce his next masterpiece. The myth of the starving artist proved to be a major source of momentum behind the introduction of the droit de suite in the early 1920s, as newspapers painted images of widows of famous artists such as Jean Francois-Millet selling flowers on the streets of Paris as their dead husband’s paintings spiraled to new heights in the galleries of Paris. The image of the starving artist is so strongly ingrained...
in society that it has become a work of art itself being portrayed in Puccini’s *La Bohème* and surviving in the modern day musical *Rent*.\(^{39}\) This myth serves as one the major factors motivating the implementation of the droit de suite in the European Union.\(^{40}\)

In the early 1900s the droit de suite gained further momentum with the emergence of advocates such as Abel Ferry and the formation of a number of artists’ associations.\(^{41}\) Joined by these associations, Abel Ferry led the charge to implement the droit de suite in France’s Chambre


\(^{39}\) See generally Jane C. Lee, *Upstaging the Playwright: The Joint Authorship Entanglement Between Dramaturgs and Playwrights*, 9 LOY. L.A. ENT. L.J. 75 (1998) (providing a description of the struggle of bohemians in *La Bohème* and the development of *Rent*, a play based upon the same storyline of struggling artists). See also Copyright Report, supra note 5, at ii (comparing the beginning of Puccini’s *La Bohème* to the plight of the starving artist and mentioning that the image helps drive awareness of the droit de suite).

\(^{40}\) See Godfrey Barker, *Let Their Tiny Hands Freeze*, TIMES (LONDON), Jan. 6, 2006, at 20, available at http://www.timesonline.co.uk/article/0,,3284-1972268,00.html (retelling the story of Rodolfo, the artist in *La Bohème*, throwing one of his paintings on the fire for warmth as a comment on influence of the emotional pleas of artists influencing Prime Minister Tony Blair into agreeing to implement the droit de suite despite widespread protest in the British art community).

\(^{41}\) See Pierredon-Fawcett, supra note 16, at 3-4, (mentioning Abel Ferry as one of the leading advocates of the droit de suite and detailing the development of Société des Amis du Luxembourg and Le Droit d’Auteur aux Artistes, two associations formed at the turn of the century to further the rights of artists); see also Hauser, supra note 35, at 3-4 & n.8 (detailing the development of the Société des Amis du Luxembourg in 1903 and their aims of establishing the Museum of Luxembourg as well as enacting the droit de suite). The popular support of the droit de suite is evident based upon a number of articles which appeared in the 1904 edition of *L’Eclair* and *l’Humanité*, and a Series of articles by Jacques Duhr in *Le Journal* of 1908 and in *Le Siècle* of 1909 which called for the droit de suite and helped create support with the general public. *Id.*
des Deputes in 1914, only to have the debate on the bill cut short by the onslaught of World War
I, an event which resulted in Ferry’s death.42

The plight of the starving artist continued to be a driving force behind the droit de suite as
the French Parliament passed legislation in large part to support artists returning from World
War I.43 Passed with little fanfare, the French legislation granted artists an inalienable and
unwaivable right to a resale royalty for any subsequent sale of their creations at public auction.44
This right expanded in the 1957 Copyright Law which granted a flat three percent royalty on the
resale price on all works for the life of the author plus fifty years for any sales through art dealers
and auctions.45

A number of civil law countries followed France’s lead and implemented the droit de
suite within their copyright laws.46 The Berne Convention for the Protection of Literary &
Artistic Works reflects the European movement to grant artists moral rights in Article 6bis which protects the rights of attribution and integrity.

D. Moral Rights and Copyright Law in the United States

In contrast to civil law countries such as France, common law countries including the United States are reluctant to recognize moral rights for artists. A number of court decisions reflect this lack of acceptance including Vargas v. Esquire, Inc., where the Seventh Circuit rejected an artist’s claim to protect the moral rights associated with his art. The court reasoned

Kusin & Comp., European Fine Arts Foundation, *The Modern and Contemporary Art Market*, 16-30 (2005) (studying the state of the contemporary art market and identifying countries that have implemented the droit de suite); see generally *Copyright Report* supra note 5, at 5-60 (providing a broad view of the foreign experience with the droit de suite including its application in countries such as France, Belgium, Uruguay, and Italy). The Copyright Report summarizes efforts to implement the droit de suite in other countries and efforts to implement it on an international scale through the Berne Convention. *Id.*


48 See Robert J. Sherman, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373, 384-85 (detailing the history and incorporation of the moral rights of attribution and integrity in the Berne Convention, as well as explaining that individual countries were free to determine under what conditions those rights may be protected).

49 See Ciolino, *supra* note 32, at 948 (citing numerous cases in support of the notion that moral rights have received a less than hospitable reception in the United States); Hansmann & Santilli, *supra* note 25, at 96 (contrasting the lack of explicit provisions as well as the unenforceability of provisions for the continuing rights of artists in common-law countries versus the mandatory provisions protecting an artist’s continuing rights in many civil law countries). The authors posit that common law regimes may forbid certain mandatory provisions protecting artists’ rights provided under civil law regimes. *Id.*

50 See Vargas v. Esquire, Inc., 164 F.2d 522, 526 (7th. Cir. 1947) (granting an injunction for an artist who sought to enjoin Esquire from using his drawings after termination of the artist’s contract). The Seventh Circuit held that plaintiff by plain and unambiguous language in the contract had completely divested the title and ownership of the pictures and the right to their possession, control and use. *Id.* The court also rejected the artist’s argument that he had moral rights finding that United States law does not recognize these rights. *Id.* The Second Circuit also declined recognition of the existence moral rights in the United States and allowed a record
that, while fully developed in civil law regimes, neither the legislation nor the courts extend protection to moral rights in the United States. 51

The difference in the recognition of moral rights between the common law system in the United States and the civil law regime of countries such as France is nowhere more evident than in Shostakovich v. Twentieth Century-Fox Film Corp. 52 In Shostakovich, Soviet composers claimed that a motion picture company infringed upon their moral rights by using their names and music in an anti-Soviet motion picture as well as the movie’s advertising and publicity materials. 53 The New York Supreme Court denied the plaintiff an injunction and held that the law did not recognize moral rights and thus did not protect the rights of composition and company to reissue phonograph records in a different format than the original record. Granz v. Harris, 198 F.2d 585, 590 (2d Cir. 1952). Moral rights met the same reception in state court as the New York court also concluded that the law does not recognize moral rights and held that an artist had no recourse to halt the alteration of a mural he painted on a church wall. Crimi v. Rutgers Presbyterian Church, 89 N.Y.S. 2d 813 (Sup. Ct. 1949).

51 E.g. Vargas v. Esquire, supra note 50, at 526 (holding that moral rights are a foreign concept and would require new legislation to implement them in the Unites States).

52 See Shostakovich v. Twentieth Century-Fox Film Corp., 80 N.Y.S. 2d 575 (Sup. Ct. 1948), aff’d, 87 N.Y.S.2d 430 (App. Div. 1949). (seeking an injunction to prevent the movie’s producers from using their music and names in the movie, credits, and advertisements). See also DaSilva, supra note 26, at 1 (noting that the New York court was at a loss to identify a standard by which they could test a claim of moral rights.) (citing Shostakovich, 80 N.Y.S. at 579).

53 See Shostakovich, 80 N.Y.S. at 576-79 (explaining that the “The Iron Curtain” depicted espionage activities performed by the Soviet Union in Canada and an anti-Soviet theme which reflects negatively on the composers).
Demonstrating the differing view of moral rights in civil law countries, the four composers met with the opposite result and successfully brought suit in France.

While not recognizing the existence of moral rights, American courts provide artists with moral rights through a number of other legal doctrines including the protection offered by copyright law. The foundation of copyright law is the Copyright Clause of the U.S. Constitution, which elucidates the aim of promoting the progress of the arts. The Supreme

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54 See Shostakovich, 80 N.Y.S.2d at 579 (ruling the plaintiffs compositions were not protected under any copyright or common law, that there is no evidence of damages, and no legal recourse for infringing on the composers’ moral rights). See also Sherman, supra note 48, at 380 & n.44 (referring to the court’s decision in Shostakovich and noting that courts find the discussion of moral rights outside the statutory mandate of copyright law).


56 See generally Ciolino, supra note 32, at 948-59 (1995) (providing an overview of alternative methods used to recognize moral rights in the United States both indirectly through the Copyright Act and the Lanham Act, indirect methods such as state laws enacted in California and New York, and various laws including: defamation, the rights of privacy and publicity, and the doctrine of misappropriation); Ciolino also elaborates on the protections offered by contract and tort theories by citing a number of cases where courts have recognized contract provisions protecting artists’ moral rights. Id. The protection of moral rights offered by tort theories includes protection from defamation to prevent false attribution and injuries to an author’s reputation as well as the right to privacy for misuse of an author’s name. Id. The Lanham Act addresses both trademarks and unfair competition and protects from false designation and description of products and services. Lanham Act, 15 U.S.C.A. § 1125 (West 1999). For example, the court ruled that ABC’s broadcast of edited versions of “Monty Python,” impaired the integrity of the original work and thus violated § 43(a) of the Lanham Act 15 U.S.C. § 1125(a)). Gilliam v. American Broadcasting Co., 538 F.2d 14 (2d Cir. 1976). Rather than recognize the moral right of integrity, the court indirectly recognized the right by finding a violation § 43(a) of the Lanham Act which prohibits any false designation of the origin of goods and services. Id. The New York Court looked to contract law in protecting an author’s rights and held that the purchaser of the book needed an express contract to use the book without crediting the author. Clemens v. Press Pub. Co., 122 N.Y.S. 206 (1910). The court declared that rights of a literary production were much different than other forms of property such as pork. Id.

57 See U.S. Const. art. I, § 8 (“To 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”); see also Schulder, supra note 15, at 28-29 (distinguishing the treatment of art in
Court has long recognized the twin purposes of encouraging new works and adding to the public domain. Copyright law furthered these aims by expanding to protect artists’ moral rights by protecting the property interest and rights attached to an author’s creation. Congress further protected these purposes by providing limited protection to artists’ moral rights in the Copyright Act of 1976.

E. Visual Artists Rights Act of 1990

In response to the United States joining the Berne Convention, Congress took the first step to recognizing moral rights by enacting the Visual Artists Rights Act of 1990 (“VARA”) which granted artists protection of a number of moral rights including the right of authorship as well as the right to protect their works from modification, distortion, or mutilation. Though
discussion of implementing a resale right took place, Congress chose to omit the right, opting to order a study on the feasibility of implementing a resale royalty rather than including the right in VARA.62 The resulting report discouraged the implementation of a resale royalty until comprehensive data on the resale market could be collected.63

While the federal Government chose not to implement the droit de suite through national legislation, one state chose to take action on its own. California independently opted to take action and implemented a form of the droit de suite in 1976, mandating a five percent royalty on the resale price of art resold in California or resold anywhere by a California resident.64 Soon after its enactment, an art dealer challenged the Act, claiming: (1) the California legislature lacked the constitutional authority to grant artists a right that is not available under federal copyright law; and, (2) the act violated both the Due Process and Contracts Clauses of the U.S. Constitution.65 While the Ninth Circuit Court of Appeals rejected both claims, they did raise a number of concerns regarding the deleterious affects of the legislation.66

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63 E.g., Copyright Report, supra note 5, at xv-xvi (concluding that the droit de suite should not be implemented until any clear data on the resale market and the effect a resale royalty on the production of new works is gathered).

64 E.g. and passed the California Resale Royalties Act of 1976, Cal. Civ. Code § 986 (West 1982 & Supp. 2005) (establishing a resale royalty right for artists for any work of fine art sold by a gallery, dealer, broker, museum or other person acting as an agent for the seller). California established the Arts Council to collect the royalties on behalf of the artists. Id.

65 See Morseburg v. Balyon, 621 F.2d 972 (1980)(ruling that the California Resale Royalties Act did not preempt the Copyright Act of 1909 because there were no federal laws that addressed the issue and the resale royalty did not impermissibly restrict transfer of the art). The court also held
II. Analysis: Arguments Against the Droit de Suite

A. The Droit de Suite Conflicts with the Common Law System of Copyright

The foundation of the droit de suite evinces the conflict between the core foundations of copyright law in civil law regimes versus common law regimes. As opposed to common law copyright law where statutes grants an author rights to his creations, copyright law under civil law stems from the moral rights automatically granted to an artist when works are created. As a result common law copyright protects art as an object or piece of property, while civil law

that since the Act did not affect fundamental rights, was not arbitrary or capricious, and any contract impairment caused by the act was insignificant, the court rejected the constitutional challenges and affirmed the judgment of the lower court. Id. The Ninth Circuit Court of Appeals affirmed the lower courts decision and the United States Supreme Court denied to hear the case. High Court Upholds Artists’ Royalties, N.Y. TIMES, Nov. 11, 1980, at C14.

66 See Morseburg, 621 F.2d at 977-78. (detailing the possible effects of the resale royalty as including: increasing the duration of a purchaser’s holding of fine art, decreasing the volume of business transactions in California, resulting in double-taxation, and making the transfer of art a practical impossibility); see also Jennifer L. Clarke, The California Resale Royalties Act as a Test Case for Preemption Under the 1976 Copyright Law, 81 Colum. L. Rev. 1315 (1981) (concluding that Congress intended the same type of preemption analysis previously used by courts, and that this analysis finds the implementation of a resale royalty in state law does not preempt any federal laws); see generally Joshua H. Brown, Creators Caught in the Middle: Visual Artists Rights Act Preemption of State Moral Rights Laws, 15 HASTING COMM. & ENT. L.J. 1003 (1993) (analyzing state moral rights laws, their conflicts with VARA and issues regarding preemption).

67 See supra notes 24-35 and accompanying text (detailing the foundations and history of moral rights in France).

68 See supra notes 24-35 and accompanying text (explaining that civil law regimes view art as an extension of the creators personality); supra notes 16-18 (explaining that as an extension of the artist’s personality, the droit de suite creates an unbreakable bond between the artist and his creation which cannot be transferred). See also Tom G. Palmer, Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects, 13 HARV. J.L. & PUB. POL’Y 817 (1990) (concluding copyrights and patents are deliberate statutory creations that create an artificial scarcity that creates the possibility of revenue for authors); Pfeffer, supra note 6, at 553 (highlighting the automatic grant of copyrights upon creation in civil copyright law, versus the requirements such as copyright notice, registration, and deposit required to file a copyright in common law systems).
copyright protection focuses on authors’ moral rights and protecting the continuous bond between the author and his work. 69 This difference represents a major obstacle to the implementation of the droit de suite in a common law regime because as a piece of property, a copyright is a bundle of rights that are divisible and transferable and placing an encumbrance on these property rights limits the freedom of alienability as well as the freedom to contract.70

1. The Droit de Suite Opposes the Free Alienability of Property

In creating a right that is inalienable and unwaivable, the droit de suite conflicts with the long held common law tradition of free alienability of property.71 Congress confirmed this

69 See Comment, Toward Artistic Integrity: Implementing Moral Right Through Extension of Existing American Legal Doctrines, 60 GEO. L.J. 1539, 1542 (1972) (clarifying that many view American copyright law as an owner’s statute rather than an author’s statute as in civil law). See generally Rudolf Monta, The Concept of “Copyright” Versus the “Droit D’Auteur”, 32 S. CAL. L. REV. 177, 177-78, 185 (1959) (contrasting the differences between copyright law in France versus the United States, Monta concludes that the Anglo-Saxon concept of copyright leans toward being more rational and logical, while the French concept leans toward a more idealistic and emotional view of author’s rights). As part of the French view, copyright law protects artists against exploitation by those with greater market advantages such as wealth. Id. at 185.

70 See 17 U.S.C.A. § 106 (West 2002) (listing the bundle of rights associated with copyrights including the rights of: reproduction, preparation of derivative works, distribution of copies, display, and performance); 17 U.S.C.A. § 201 (West 2002) (allowing copyright holders to divide and transfer the rights in any manner the holder chooses). See also Peter Jaszi, A Garland of Reflections on Three International Copyright Topics, 8 CARDOZO ARTS & ENT. L.J. 47, 59-61 (1989) (contrasting the differences between Continental or civil recognition of authors being protected by author’s rights while common law choose to recognize copyrights rather than give reference to author’s rights). Prof. Jaszi also notes that Continental law blurs the line between the physical work and the author, while the line between the two is crucial in Anglo-American copyright law. Id.

71 See supra note 9 and accompanying text (detailing the long held loathing within the common law system of restraints on alienation and encumbrances on property); Pfeffer, supra note 6, at 553, (arguing that the free alienability of property is an important policy to common law governments and that an artist can never fully eliminate ties with his works). See also Victor Ginsburgh, Droit de Suite: An Economic Viewpoint, in Kusin & Comp., European Fine Arts Foundation, The Modern and Contemporary Art Market 50 (2005) (assessing the reaction of artists, Ginsburgh notes that a number of noted artists who stand to benefit from the droit de suite oppose its implementation, including Karen Appel, Georg Baselitz, Anthony Caro, Gotthard Graubner, David Hockney and Sigmar Polke). They primarily oppose the droit de suite because
convention in enacting the Copyright Act of 1976, adhering to the long-held principle of
unlimited alienability of copyright.\textsuperscript{72} Under common law regimes such as American and British
copyright law, an artist or author may waive any rights associated with their works and alienate
their property without encumbrances.\textsuperscript{73} This includes waiver of moral rights such as integrity and
attribution.\textsuperscript{74} Implementation of the resale royalty under the European Union Directive bars this
option by prohibiting artists from waiving their right thus leaving purchasers with an economic
encumbrance that affects future sales.\textsuperscript{75}

they claim the inalienable nature of their right undermines their free choice and violates their
human rights. \textit{Id.}

\textsuperscript{72} \textit{See} H.R. Rep. No. 94-1476, at 21, 123 (1976) (stating Congresses intent that the bundle of
rights granted by the Copyright Act of 1976 are divisible and transferable). \textit{See also} Neil
Netanel, \textit{Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A
treats authors’ creations as any other object with the property rights such as a “shoe”). Congress’
intended to grant copyright holders the same bundle of property rights as encompassed by any
other piece of property which is assignable, transferable, waivable, and free of encumbrances. \textit{Id.}
Netanel contrasts the inalienable protection offered by the Continental European copyright
docline of moral rights versus the Copyright Act’s principle of inalienability. \textit{Id.} at 3-21.

\textsuperscript{73} \textit{See} Cal. Civ. Code § 986, \textit{supra} note 64 (legislating that the right to a resale royalty may be
waived via written instrument or transferred for purpose of collection); \textit{VARA, supra} note 10, §
106A(e) (detailing that the rights granted by \textit{VARA} may be waived via written instrument). \textit{See also}
Zechariah Chafee, Jr., \textit{The Music Goes Round and Round, Equitable Servitudes and Chattel},
69 \textit{Harv. L. Rev.} 1250, 1261-62 (1956) (explaining that encumbrances that run with land do not
attach to mere chattel). The author describes the right of alienation as essential, while dismissing
restraints as “obnoxious” to public policy. \textit{Id.}

\textsuperscript{74} \textit{See} Henry Hansmann & Maria Santilli, \textit{Authors’ and Artists’ Moral Rights: A Comparative
Legal and Economic Study}, 26 \textit{J. Legal Stud.} 95, 124-26 (1997) (confirming that the both the
United States and Great Britain grant artists the moral rights of integrity and attribution and that
while non-assignable, the artist may waive his moral rights by written agreement).

\textsuperscript{75} \textit{See} Copyright Report, \textit{supra} note 5, at 129-30 (declaring the restraints on free alienability as
the most substantial restriction of the owner’s rights); Pfeffer, \textit{supra} note 6, at 551 (explaining
that the droit de suite is antithetical to copyright law in the United Kingdom because the common
law supports the free alienability of property as well as the freedom to contract, both of which
are infringed by an encumbrance such as the droit de suite). \textit{See also} Schuldern, \textit{supra} note 15, at
28 (mentioning that critics question why art should be treated differently than other commodities
such as stocks where the owner assumes the risk of gains and losses).
2. The Droit de Suite Opposes the Freedom to Contract

The inalienable nature of the droit de suite also restricts the freedom to contract provided by common law by fixing the resale royalty as a term of any resale.\textsuperscript{76} Advocates of the droit de suite claim that the mandatory term is a valid infringement on the freedom to contract because artists may be forced to negotiate from a weakened position where they are pressured by circumstances to waive the royalty.\textsuperscript{77} However, this argument proves hastily contrived. While artists may be forced by dire circumstances to waive their resale rights to make a sale, the existence of resale rights does not guarantee that the reseller of an artist’s creation is reaping the spoils of an unfair bargain, as the reseller must pay a royalty whether the artist’s work reaps a profit or a loss.\textsuperscript{78} In essence, a reseller is forced to pay the artist a royalty even if he sells a piece of art for less than he originally paid for the piece. By fixing the term of sale and placing the risk

\textsuperscript{76} See EU Directive, supra note 8, art. 4-5 (fixing the rates charged on the resale price of the art); Pfeffer, supra note 6, at 554-55 (explaining that the droit de suite infringes on the freedom of contract by failing to consider whether the works suffer a loss upon resale). Advocates of the droit de suite claim the inalienability of the droit de suite is necessary to redress artist’s lack of bargaining power. \textit{Id.}

\textsuperscript{77} See Price, supra note 37, at 1335 (illustrating the alleged unequal position of the desperate starving artist selling his work to a shrewd investor so that the artist can purchase supplies for his sick wife); Schulder, supra note 15, at 39 (assuming that if an artist is in a poor bargaining position when initially selling their art, the same unequal bargaining position upon resale will necessitate waiver of resale rights); Pfeffer, supra note 6, at 551 (explaining the implementation of the droit de suite will redress artist’s perceived lack of bargaining power versus buyers, especially for starving artists who would abandon their rights in favor of making a sale).

\textsuperscript{78} See EU Directive, supra note 8, art. 4-5 (fixing the rates charged on the resale price of the art rather than any profits realized). See also Stephen E. Weil, Resale Royalties: Nobody Benefits, ARTNews, Mar. 1978, at 58 (describing the contemporary art market as a huge risk where ninety to ninety-nine out of one hundred works never increase substantially or have any resale market at all). \textit{Accord} Telephone Interview with David Kusin, President, Kusin & Comp. (Feb. 17, 2006) (elaborating that according to the latest tax figures, less than one percent of all artists have a market for the auction of their works).
of an even greater loss on the purchaser, the droit de suite impinges on the purchaser’s freedom to contract under common law.\(^{79}\)

3. **The Droit de Suite Conflicts with Copyright’s First Sale and Work for Hire Doctrines**

Implementation of the droit de suite is also problematic because it conflicts with two well settled aspects of American copyright law, the “first sale doctrine” and the “works for hire” doctrine.\(^{80}\)

Tracing its origins to the concept of free alienation of property, the first sale doctrine severs an artist’s distribution rights once the artist receives compensation for a copy of their work, allowing the new owner to rent, sell, trade, or otherwise transfer his ownership rights without any restrictions including royalties.\(^{81}\) The rights to further compensation are severed

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\(^{79}\) See Hayes, *supra* note 10, at 1021-22 (explaining that the droit de suite fixes a term of the contract by dictating a resale royalty which further constrains the free transfer of property). See also Solomon & Gill, *supra* note 4, at 341-43 (illustrating by example that the application of the California Resale Royalty on the gross sales of art fails to account for the low profit percentage on most sales, the dealer commission, other costs of doing business, as well as the fact that the majority of art work depreciates in value).

\(^{80}\) See 17 U.S.C.A. § 109(a) (West 1997) (confirming the principle that where the copyright owner transfers ownership of a particular copy of a work, the person to whom the copy is transferred is entitled to dispose of it by sale, rental, or any other means without consent of the copyright owner); 17 U.S.C.A § 201(b) (West 1976) (legislating that in the case of works made for hire, the employer or other person for whom the work was created is considered the author and owns all of the rights associated with the copyright of the work unless waived by written instrument).

because the one-time compensation is considered sufficient incentive for the creation of new works.\(^ {82} \) The economic encumbrance of the droit de suite directly conflicts with the first sale doctrine by limiting an owner’s right to sell, trade, or dispose of their property (art) as provided by copyright law.\(^ {83} \)

The inalienable and unwaivable nature of the droit de suite also conflict with copyright’s work for hire doctrine which grants an employer rights to any work created by an employee within the scope of their employment.\(^ {84} \) While well established in common law countries such as the United States, the work for hire doctrine receives no recognition in civil law countries such as France.\(^ {85} \) This lack of recognition is reflected in the European Union’s Directive implementing the droit de suite on all original works of art regardless of whether created under

\(^{82}\text{See Kenneth R. Corsello, The Computer Software Rental Amendments Act of 1990: Another Bend in the First Sale Doctrine, 41 CATH. U. L. REV. 177, 188-89 (explaining that the first sale doctrine eliminates further compensation because the first sale compensation provides a sufficient reward to encourage the creation of new works). In examining the used CD market which is considering implementing a resale royalty for resale of used CDs, Corsello posits that there are two bundles of rights granted by copyright law, those granted in the work of authorship and the distinct bundle of rights in the material object on which the work is recorded. Id. at 185.}\n
\(^{83}\text{See Alderman, supra note 9, at 267 n.5 (questioning whether Congress wants to abandon the principle of free alienability of property). But see Hayes, supra note 10, at (reaching the conclusion that despite its conflict with the first sale doctrine, the droit de suite provides artists with a potential bargaining chip).}\n
\(^{84}\text{See 17 U.S.C.A. § 101 (West 1999) (defining a work for hire as any work prepared by an employee within the scope of his employment as well as any work falling within nine enumerated categories including work made by signed written agreement); 17 U.S.C.A § 201(b) (West 1976) (explaining that absent a written agreement the employer is considered the author of works for hire and retains all copyrights associated with the work).}\n
\(^{85}\text{See Hansmann & Santilli, supra note 74, at 134-36 (positing that though civil law jurisdictions do not recognize the work for hire doctrine, they can reach the same results by recognizing that work for hire is done under the control of an employer and thus retains less of a connection to the artists personality).}\n
contract or in the employ of another. Any artist would still be entitled to a royalty even though the work they created was part of their employment and furthermore this royalty right would be both unwaivable and inalienable so it could not be purchased by or transferred to the employer. The inalienable and unwaivable nature of the resale royalty directly conflicts with the work for hire doctrine which waives all rights associated with any works created while employed for another or under contract to another.

B. The Droit de Suite Fails to Create Incentives for the Creation of New Works

In addition to requiring major alterations to the copyright doctrines of first sale and works for hire, the droit de suite fails to satisfy the underlying twin goals of the Constitution by encouraging the creation of new works and dissemination of the works to the public domain. In effect, the implementation of the droit de suite will have the opposite effect as it benefits only a few select artists and their heirs.

It is argued by some that the promise of a resale royalty satisfies one of the goals of the copyright law by creating an incentive for the creation of new works because artists will see a

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86 See EU Directive, supra note 8, art. 2 (defining the scope of the resale right as any original work of art, provided they are created by the artist himself or are copies in limited numbers made by the artist himself or under his authority).

87 See Hansman & Santilli, supra note 74, at 132 (asserting that the while VARA recognizes the moral rights of attribution and integrity, as part it specifically exempts works created under the work for hire doctrine).

88 See supra notes 57-60 and accompanying text (detailing the recognition of the dual purposes of the U.S. Constitution’s Copyright Clause within American common law, jurisprudence and copyright laws). See also Copyright Office Report Executive Summary, Droit de Suite: The Artist’s Resale Royalty, 16 COLUM.-VLA J.L. & ARTS 381, 389 (1992) (applying the copyright clause to the world of art to find encouraging creativity and the broad public dissemination of art works a goal of public policy).

89 See Ginsburgh, supra note 71, at 51-53 (contending that the droit de suite’s economic benefits for artists are highly questionable, and the introduction of the droit de suite across the European Union will drive sales to other countries without resale royalties).
long-term return from their works. However, a resale royalty fails on this account because it only benefits a few established artists. In the United States, the most recent data concluded that the limited market for the resale of contemporary art is highly skewed towards a few already established and noted artists such as Willem de Koonig, Jasper Johns, Roy Lichtenstein, and ironically Robert Rauschenberg. In fact, the top twenty percent of all eligible artists would have collected over ninety-five percent of all royalties, with the top five artists collecting over fifty-five percent of all possible resale royalties.

The artists themselves are also aware of the limited effect of the resale royalty on developing artists. In opposing the implementation of the European directive, a group of

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90 See Eden, supra note 6, at 144-145 (supporting the droit de suite as an incentive for creation, Eden uses testimony from supporters of the right including the California Lawyers for the Art, artists, and the National Artist Equity Association to argue that the droit de suite will encourage the creation of new works). See also Daniel Mayer, sculptor and Vice President of Nat’l Artists Equity Ass’n Comments Before the Reg. of Copyrights (Jan. 23, 1992), in U.S. COPYRIGHT OFF. REG. OF COPYRIGHTS, DROIT DE SUITE: THE ARTIST’S RESALE ROYALTY, Dec. 1992, at 277 (recounting Robert Rauschenberg’s comments given the financial backing of a resale royalty earlier in his career Rauschenberg would have pursued a conceptual line of art that combined science and art).

91 See generally Jeffrey C. Wu, Art Resale Rights and the Art Resale Market: A Follow-Up Study, 46 J. COPYRIGHT SOC’Y U.S.A. 531, 543 (1999) (updating a study of the secondary art market, Wu found a handful of artists accounted for a disproportionate share of the resale market by both number of sales and total value of the sales).

92 See Id. at 543-45 (noting the huge discrepancy between the top twenty percent of the artists who would have received a median royalty of over one-thousand dollars a month versus the next twenty percent who would have received just over one-hundred dollars a month). See also Dalya Alberge, Art Tax Ineffective and Damaging, Says Hockney, TIMES (LONDON), January 21, 2006. (Available at http://www.timesonline.co.uk/tol/news/uk/article716584.ece) (detailing comments by critics who said that the only artists standing to gain from the royalty are those who are “already successful and wealthy, along with their families.”) Alberge further refers to a French art dealer’s comment that ninety percent of the resale royalties in France benefited a “handful of families.” Id.

93 See David Hockney, Michael Craig-Martin, Sir Howard Hodgkin, Anthony Green, Ian Davenport, Gillian Ayres, Letter to the Editor, Resale Right is Wrong for Art, TIMES (LONDON), January 21, 2006. (Available at
illustrious British artists led by renowned pop artist David Hockney commented on the implementation of the resale royalty in the United Kingdom and its deleterious effect on the creation of works by new and emerging artists:

The arrival of this levy will do little or nothing for the vast majority of British artists. It will undoubtedly envelop the market, on which we as artists depend, in red tape and it will discourage art dealers from buying particularly the work of emerging artists but also of most artists who have not achieved “celebrity” status.  

The concentration of resale royalties in the hands of a few select artists fails to create incentives for the large majority of artists to create new works and thus does little to further the goals of the Copyright Clause.

In benefiting only a handful of artists, the droit de suite also fails to create incentives for the creation of new works by these artists because the majority of the proceeds of the royalty benefit the heirs of artists rather than the artists themselves. Of the top fifty artists whose works sold for the highest sums, over ninety-five percent of the potentially royalties payable on their sales benefited the heirs of the artists rather than the creators themselves. These are not the starving artists the droit de suite is intended to protect, but the heirs of celebrated artists such as Picasso and Matisse. The concentration of resale royalties in the hands of a few celebrated

http://www.timesonline.co.uk/tol/comment/debate/letters/article716371.ece (protesting the implementation of a resale royalty on art sold in the United Kingdom).

94 Id.
95 See Kusin & McAndrew, supra note 46, at 24 (concluding that in the European Union over eighty-one percent of the potential proceeds of the droit de suite would benefit the heirs of artists, instead of the artists themselves).
96 See Ginsburgh, supra note 71, at 49 (calculating that heirs of the artists would have collected over ten times more than living artists).
97 See Tony Thorncroft, Brussels Policy Paints a Bleak Picture for the London Art Market, FINANCIAL TIMES (LONDON), Mar. 12, 2005, at 4 (estimating that the estates of six artists will gather most of the proceeds of the droit de suite in France with the estates of Picasso, Matisse, and Braque collecting seventy percent of the proceeds).
artists and their heirs fails to create incentives for artists to create new works and does little to further the goals of the Copyright Clause.

Limiting incentives to artists is not the only consequence of the droit de suite. The royalty also negatively affects the incentives for the creation of new works by increasing the risk of sellers facing diminished profits upon resale. As the primary actors in the resale or secondary market, auction houses are reluctant to risk taking a chance on reselling art which is unlikely to cover the expense of sale. This increased risk based upon the possibility of a decreased return magnifies the effect on the resale of less established artists in effect shutting new artists out of the resale market. This opposes the desired effect as less established artists face a diminished number of actors willing to take a chance on selling their works and creating a secondary market where the value of their works will increase.


99 See Kusin & McAndrew, supra note 46, at 11 (dividing the market into two-tiers, the primary market where artists first sell new works directly to collectors and dealers, and the secondary market where dealers and auction houses resell an artist’s work). The secondary market is limited to a few living artists who are relatively well known. Id. Kusin explains that the secondary market entails considerable risks and expenses such as insurance, shipping, and conservation costs which are not present in the primary market, and that this drives the secondary market to minimize risks. Telephone Interview with David Kusin, President, Kusin & Comp. (Feb. 17, 2006). Kusin also notes that less than one percent of all artists’ creations ever reach the auction block and typically those pieces that reach the auction block do so after being resold three or four times. Id.

100 See id. See also Merryman, supra note 1, at 105-07 (emphasizing that very few artists participate in the secondary market and the great majority of the artists are shut out of the market by dealers looking to recover the expense of sale).
The droit de suite also fails to serve the second of the dual purposes of copyright law by enhancing the public domain.\textsuperscript{101} As an added cost of resale, the droit de suite will result in a decrease of the number of works placed on the auction block as collectors will be less inclined to sell their art if there is a diminished expectation of returns, while purchasers will also face the same expectation of diminished returns.\textsuperscript{102} The disadvantage may have a further deleterious effect as the sale of works of art are driven away from the United States in search of greener pastures which do not impose a royalty on the resale of art.\textsuperscript{103} In essence, implementation of the droit de suite will decrease the circulation of art as owners reluctant to face market risks remove their works from the public domain and hold onto them for longer periods of time in hopes of recovering their investments.\textsuperscript{104}

C. Art is Different from Other Copyrightable Works

Implementation of the droit de suite also fails to meet the European Union’s goal of eliminating the disparate treatment of artists under copyright law because art is significantly different than other works protected by copyright law.\textsuperscript{105} Advocates of the droit de suite

\textsuperscript{101} See supra note 57-60 and accompanying text (outlining the goals of the U.S. Constitution’s Copyright Clause).

\textsuperscript{102} See Weil, supra note 78, at 60-61 (stressing that the droit de suite would function as a tax on the resale of art and as in other commodities would have a negative impact as buyers and sellers sought other commodities with smaller burdens). Weil further posits that as a commodity, contemporary art is a luxury item that is more sensitive to an added tax. Id.

\textsuperscript{103} See Alberge, supra note 92 (highlighting critics arguments that a resale royalty on works sold in the United Kingdom places sellers at a disadvantage and will drive sales to alternative markets).

\textsuperscript{104} See Merryman, supra note 1, at 105-07 (1993) (emphasizing that very few artists participate in the secondary market because the majority of the artists are shut out of the market by dealers and collectors looking to recover the expense of sale).

\textsuperscript{105} See EU Directive, supra note 8, at pmbl. ¶¶ 2-4 (elucidating the EU Directive’s goals of redressing and standardizing the economic situations of artists with those of other copyright
highlight the deferential treatment of artists and their failure to receive the same protections as justification for the payment of a royalty on the resale of their creations. Copyright law’s principal benefit is the protection from the unauthorized exploitation granted to authors who reproduce or perform their works multiple times. While a book is reproducible and exploitable for the author’s benefit, the same cannot be said for an artist’s creations. In stark contrast to the ongoing proceeds collected by an author or musician upon reproduction or performance of their works, an artist is limited by the canvas he paints or the marble he chisels to the initial proceeds gained on the sale of his creation. While art may be reproduced in a limited manner through lithographs or prints, the original can hang on only one wall or sit in one place. Thus arguing that works of art should be entitled to the same copyright royalties as books or music is a weak justification at best. Perceived as a weakness in comparison to other copyright creations, art’s uniqueness is its biggest strength. Unlike authors or musicians, artists benefit from the holders such as authors and composers). See also McAndrew and Dallas-Conte, supra note 21, at 19 (explaining that the droit de suite’s goal is the removal of an inequities that exists between authors and composers who profit from successive exploitation of their works).

See Pfeffer, supra note 6, at 547-48 (elucidating on the purposes of the droit de suite and its creation of economic incentives similar to those granted to other creators such as authors and musicians).

See Hauser, supra note 35, at 2 (explaining that copyright protects authors against any unauthorized reproduction or performance of their work and reserves the author some economic benefits when he sells his exclusive rights).

See id. (analogizing the sale of art to the sale of any object such as a “suit of clothes” where the author retains no property interest).

See Schulder, supra note 15, at 24 (characterizing an artist’s options as limited by the medium in which he creates to the first sale of his creation). Schulder advocates that the implementation of the droit de suite enables artists to exploit their works on resale). Id.

See Copyright Report, supra note 5, at xv (identifying the distinct nature of art and its unique form as differing from those of other copyright works).

See Copyright Report, supra note 5, at 130-31 (arguing that the copyright scheme favors artists because the value of art is largely a function of scarcity, which benefits artists as they sell
initial sale where the artist receives all of his compensation in one fell swoop rather than spread over time as is the case with royalties.\footnote{112}{See Price, supra note 37, 1346-47 (explaining that artist receives a one time payment for his works, while authors and composers amass royalties over an extended period of time); Eden, supra note 6, at 148 (positing that the sale of a first edition book may be a better analogy to the sale of art).}

D. Artists Are Not Starving

Implementation of the droit de suite is forever entwined with the image of the starving artist slaving away in his garret as a shrewd investor profits from his misfortune.\footnote{113}{See supra notes 36-40 and accompanying text (detailing the origins of the droit de suite).} One can envision the modern day equivalent a starving artist slaving away in her SoHo loft, her paintings auctioned off to cappuccino sipping patrons at a trendy West Village gallery. Despite the poignant image, the vision of the starving artist faces increasing scrutiny today and is questionable at best.\footnote{114}{See Alderman, supra note 9, at 280-81 (questioning whether the starving artist is a myth, Alderman asserts that understanding society’s perception of artists is crucial to the acceptance of any resale royalty scheme). See also John Henry Merryman, The Proposed Generalization of the Droit de Suite in the European Communities, 1 INTELL. PROP. Q. 16, 21 (1997) (arguing that the concept of the starving artist is misplaced as many artists achieve widespread success). Merryman describes the art world’s appetite for finding fresh talent to promote and the competition that exists to land the next great artist. Id. Merryman theorizes that the widespread success of artists such as Marc Chagall, Andy Warhol, and Pablo Picasso is evidence that artists are not victims of exploitation. Id.} A fair comparison must be conducted in order to come to the conclusion that artist are treated inequitably.\footnote{115}{See Weil, supra note 78, at 59 (concluding that in any fair comparison between artists and other creative authors such as poets will prove that artists consistently earn more than their peers who receive royalties); see also Price, supra note 37, at 1336 (explaining that part of the discrepancy between an artist’s income and others is attributable to the unavoidable lag in the market’s acceptance of new works which occurs because contemporary art is often ahead of its time).} In studying this issue, a more accurate picture emerges that shows that while not at top of the market, artists earn just slightly less than other workers, but
also work fewer hours.\textsuperscript{116} It must also be argued that since artists choose their profession they are not exploited when they enter into transaction with buyers.\textsuperscript{117} While still a vivid image, the myth of the starving artist is no a strong argument for the implementation of the droit de suite.\textsuperscript{118}

\textsuperscript{116} See Randall K. Filer, \textit{The “Starving Artist” – Myth or Reality? Earnings of Artists in the United States}, 94 J. POL. ECON. 1, 56-75 (1986) (analyzing the 1980 Census and comparing the earnings of artists to other authors and performers as well as the general work force, Filer found that on average artists earn approximately seven hundred and fifty dollars less per year than the average worker).

\textsuperscript{117} See Ben W. Bolch, William W. Damon, & C. Elton Hinshaw, An Economic Analysis of the California Art Royalty Statute, 10 CONN. L. REV. 689, 693 (1978) (concluding that there is no exploitation of the artist in normal transactions, just a differing view of the price as the artist takes value in present consumption versus the collector’s future consumption).

\textsuperscript{118} See Filer, \textit{supra} note 116, at 73 (concluding that the art world is not a economic disaster area and artists are younger, earn slightly less, and work slightly less than other workers).
III. Recommendations – Alternatives to the Droit de Suite

As the foundation upon which American copyright law rests, the dual purposes enumerated by the Copyright Clause of the United States Constitution serve as an excellent framework for designing and evaluating alternatives to the droit de suite. Four alternatives which better serve the dual goals of motivating the creation of new works and promoting the dissemination of works to the public include: contractual alternatives, display based royalties, alternative incentives such as increased funding for the arts through associations, and an alternative that eliminates the elements of the droit de suite that conflict with American laws.

A. The Contractual Approach

One alternative to the droit de suite is the implementation of a resale royalty through contract provisions. Private bargaining for additional future compensation removes the restraints posed by the droit de suite, allowing individuals to retain or waive rights in their creations. Standard language developed by artist’s associations would provide artists with the necessary provisions which they could add to their personal contracts of sale. The use of these standard stipulations and the involvement of artists associations to educate artists and art market professionals on the implementation of rights through contract will help overcome any obstacles

119 See supra notes 56-60 and accompanying text (elucidating on the goals of the U.S. Constitution’s Copyright Clause and the foundations of American copyright law). See also Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (explaining the purpose of the Copyright Clause and the balance between a creator’s rights and the benefits reaped from new creations).

120 See generally Damich, supra note 60, at 65-66 (contending that an author is free to protect his rights including moral rights through contract provisions attached to art sales) While affirming the protection offered by contract law and the precedent set in American courts, the author questions the bargaining power of artists and their ability to request special contract terms from auction houses and dealers. Id.

121 See Price, supra note 37, 1356-58 (proposing private bargaining through contracts as the easiest method for an artist retaining a residual interest in their creations). Price compares artists to movie producers who retain residuals in their movies. Id.
to implementing an artist’s economic rights. The repeated use of these contractual provisions
would also serve a further purpose as, over a period of time, the provisions would become the
standard within the art world and accepted by the courts as normally used within the
profession. The use of contractual provisions provides artists with an alternative method for
protecting their future rights while serving the dual purposes provided by the Copyright Clause.

B. Display Based Royalty

Another possible alternative to the droit de suite is a royalty based on the display of art
rather than its resale. Similar to the rights of performance, implementation of a display based
royalty would remove artists’ dependence on the resale of their work, yet reward their efforts
every time their works are exploited or viewed. As an extension of current copyright law
which already protects artists’ public display rights, the display based royalty allows artists to
stand on equal ground to those of other authors.

A display based royalty entails a major drawback hostile to the U.S. Constitution’s goal
of promoting the dissemination of works to the public. Specifically, the royalty increases the

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122 See Id. at 1356 (positing that Government legislation protecting the contract negotiations may
assist artist by insuring that fair and voluntary bargaining takes place). Despite their vital interest
in protecting their creations and rights, artists are reluctant get involved in the business end of
their profession. Id.

123 See generally Damich, supra note 60, at 66-72 (discussing the interpretation of contracts and
limited recognition of moral rights).

124 See William A. Carleton, Copyright Royalties for Visual Artists: A Display-Based Alternative
to the Droit de Suite, 76 CORNELL L. REV. 510, 537-48 (1991) (detailing the operation of a
display based royalty as well as the advantages it brings which include its precedence in the
rights of performance).

125 See Copyright Report, supra note 5, at 149-50 (mentioning a broader public display right as
an alternative method of providing artists with a continuing interest in their works).

126 See 17 U.S.C.A § 106(5) (West 2005) (granting pictorial, graphic, or sculptural works the
right to display the works publicly). This right is extinguished by the first sale doctrine, but either
a slight alteration of copyright law or an express contract would enable artists to collect a display
royalty.
cost of display for museums or other institutions exhibiting art to which the royalty applies.

However, this stumbling block could be overcome by providing museums, educational institutions, and non-profit organizations an exemption under the doctrine of fair use. Allowing fair use by museums, educational institutions, and non-profit organizations not only enhances the public dispersal of art to the broadest possible audience, but motivates artists as a broader public recognition enhances the value of their works.\(^{127}\)

A display based royalty not only harmonizes the rights of artists with other authors such as musicians or playwrights who receive royalties when their works are performed, but also enables the inclusion of other attributes of copyright law including the doctrine of fair use.\(^{128}\) The display based royalty provides incentives for the artist to create and display new works because every time an artist’s work is displayed it enhances the artist’s reputation and the value of his subsequent creations.\(^{129}\) In serving the dual constitutional purposes of copyright law and allowing for an exertion for fair use by museums and other institutions, the display based royalty provides an attractive alternative to a sweeping royalty such as the droit de suite.

\(^{127}\) But see Carleton, supra note 124 at 543-46 (disclaiming the notion that museums, educational institutions, or non-profits should be exempt from a display based royalty). Carleton claims that though supported by grants and public funds, museums are commercial operations which attract viewers and waiving a display based royalty would be “unfair use” by forcing artists to subsidize museums. Id.

\(^{128}\) See id. at 539-40, (equating artists with movie producers and other artists who receive recurring payments for the display, performance, or reading of their creations); 17 U.S.C.A. § 107 (West 2005) (allowing the fair use of copyrighted works without compensation for purposes of criticism, comment, news reporting, teaching, scholarship, or research).

\(^{129}\) See Alexander Weatherall, Harmonising the Droit de Suite; a Legal and Economic Analysis of the EC Directive and an Overview of the Recent Literature 33 (German Working Papers in Law and Econ., Working Paper No. 22, 2003), available at http://www.bepress.com/gwp/default/vol2003/iss1/art22/ (proposing an approach closer to that of performances of dramatic works where the author receives royalties based upon the display of his art). Weatherall concludes that the implementation of a resale royalty has many pitfalls and it cannot be determined whether the resale royalty will help intended beneficiaries. Id. at 34.
C. Government and Private Subsidies to Encourage the Creation of Art

Perhaps the largest flaw in any resale royalty scheme such as the droit de suite is that it fails to address the fundamental problem confronting artists, the lack of an initial market for their work. Any resale royalty is a moot point if the “first sale” of an artist’s work never takes place. This is the ultimate failure of the droit de suite to meet the constitutional goal of promoting the creation of works for the public benefit. However, this failure can, in part, be overcome by both government and private subsidies created to encourage less established artists and promote the creation of new works.

One method for encouraging the promotion of contemporary arts is through federal assistance programs such as the National Endowment for the Arts (NEA) or other organizations which provide artists with funds for the creation of new works. The subsidies provided by organizations such as the NEA offset an artist’s costs of creation and display thus allowing an artist’s works to gain value while increasing public access to new works by less established artists. A similar method for subsidizing art is through local government action such as the

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130 See Weil, supra note 78, at 62 (concluding that the droit de suite fails to broaden the initial markets of contemporary artists and merely redistributes income from less-established artists to more established artists). Weil proposes any alternative solutions focus on increasing the available funds for new artists rather than redistributing the same pool of funds. Id.

131 See NEA at a Glance, http://www.nea.gov/about/Facts/AtAGlance.html (celebrating its fortieth anniversary, the NEA is the country’s largest provider of funds for the arts in the United States); Price, supra note 37, at 1353-56 (detailing the economics behind the costs of public exhibitions and distribution of art in museums and proposing that these costs shift from the artist to the government which could subsidize the exhibits and promote new artists). See also James Rosenquist, Artist, Comments Before the Reg. of Copyrights (Jan. 23, 1992), in U.S. COPYRIGHT OFF. REG. OF COPYRIGHTS, DROIT DE SUITE: THE ARTIST’S RESALE ROYALTY, Dec. 1992, at 441 (recounting his experience on the Council for the National Endowment for the Arts and his responsibility to inform and encourage the furtherance of the arts).

132 See Id. at 1353-54 (explaining that the major share of the costs of museums and gallery exhibition is absorbed by the artist themselves including the cost of creation, publicity, hanging, and opening night parties). Price vividly illustrated the principle by describing the results of a Los Angeles show where many of the fifty artists created works for the exhibition, only to see
“Percent for Art” legislation implemented in localities including Miami, San Francisco and Colorado.\textsuperscript{133} Programs such as the “Percent for Art Program” mandate the purchase of art in connection with government construction projects.\textsuperscript{134} Programs such as the NEA present paths for directing funds to less established artists and promote the creation of new works for the public benefit.

In addition to government subsidies, private subsidies such as grants from associations, museums and galleries also serve the same purpose of encouraging new artists and further the goals of the Copyright Clause.\textsuperscript{135} The aggrieved artist Robert Rauschenberg proved to be an ardent activist supporting artists associations, helping to found the Artists Rights Today (A.R.T.), an organization that campaigned for the resale royalty, and Change, Inc., an organization that donated emergency funds to artists in need of medical care, rent, food, or art supplies.\textsuperscript{136}

Improving the plight of new artists seeking an initial market for their works through government or private subsidies encourages the creation of new works as well as benefit the public through increased viewing opportunities. By serving these dual constitutional purposes,

\begin{footnotes}
\footnote{133}{\textit{See} Weil, \textit{supra} note 78, at 62 (explaining the details of the “percent for art” legislation including the proposal by Congresswoman Gladys Spellman that the General Services Administration implement the program on all new federal building projects).}

\footnote{134}{\textit{Id.}}

\footnote{135}{\textit{See} Rosenquist, \textit{supra} note 131, at 443 (mentioning a number of artists’ funds to help struggling artists in America including the Krasner-Pollock Foundation, the Gottlieb Foundation, and the Andy Warhol Foundation).}

\footnote{136}{\textit{See} Kotz, \textit{supra} note 5, at 173 (labeling Robert Rauschenberg’s activism a natural outgrowth of the sixties, Kotz explains that he was heavily involved with the environmental and anti-war movement).}
\end{footnotes}
subsidies provide an alternative to a broad resale royalty which serves a few select artists while actually harming the initial market for new artists.

D. Eliminate the Offensive Parts of the Droit de Suite

Another perhaps simplistic alternative is to implement the droit de suite without the elements that conflict with U.S. law. Making the droit de suite both alienable and waivable harmonizes the rights of artists with those of other copyright holders, while still allowing them to benefit from the future use of their works if they so choose.137 Allowing waiver and transferability would also eliminate any conflicts with the works for hire doctrine and allow for free alienation of property, two large stumbling blocks to the implementation of a resale royalty in the United States.138

IV. Conclusion

The implementation of the droit de suite across the European Union increases pressure on the United States to level the playing field as the EU seeks to prevent the sale of fine art from migrating across the Atlantic to the United States.139 The United States should not surrender to

137 See Carleton, supra note 124, at 536 n.123 (explaining that the Copyright Act of 1976 (17 U.S.C. § 204 (1988)) allows for the assignment of rights if the transfer is written and explicit).
138 See supra, notes 67-86 and accompanying text (detailing the conflicts between the droit de suite and common law doctrines including the freedom to alienate property and the work for hire doctrine).
139 See Will Bennett, EU Art Levy Helps New York Land “Sale of the Century”, DAILY TELEGRAPH (LONDON), July 25, 2001, at 10 (chronicling the movement of an art collection expected to fetch close to fifty million dollars at auction from Paris to New York). Scheduled to go on the auction block in Paris, the auction was moved to New York because it has a lower tax rate and does not have any resale royalty). Id. As the largest contemporary art market in the world, the European Union is placing pressure on the United States to implement the droit de suite and even the playing field with Europe. Kusin & McAndrew, supra note 46, at 16-17. See also Alberge, supra note 92 (noting critics’ argument that art sales “will go to the free markets in Switzerland and America.”).
this pressure for the reasons behind the implementation of the droit de suite are weak at best.\textsuperscript{140} The droit de suite stands in opposition to a number of doctrines firmly rooted in the American legal system including basic tenets of copyright and property law.\textsuperscript{141} The effort to harmonize protection between artists and other copyright holders also wilts under considerable scrutiny, as the very nature of an artists’ unique creation sets it apart from the works of other authors.\textsuperscript{142}

The vision of the struggling artist saved by a resale royalty is a myth – artists are not starving and the royalty benefits those who need its proceeds the least.\textsuperscript{143} Most importantly the droit de suite neither promotes the creation of art, nor adds to the public domain, and thus fails to meet the dual purposes prescribed by the Constitution.\textsuperscript{144} For these reasons the United States should not implement the droit de suite.

\textsuperscript{140} See discussion supra Part II (detailing the weaknesses in the droit de suite and its failure to reward artists for new creations).

\textsuperscript{141} See supra notes 67-75 and accompanying text (detailing the conflicts between the droit de suite and the common law system of property and copyright in the United States).

\textsuperscript{142} See supra notes 105-112 and accompanying text (detailing the difference between artists and authors of other copyrightable works and concluding that the deferential treatment is due to the nature of the creations).

\textsuperscript{143} See supra notes 90-92, 113-118 and accompanying text (concluding that the droit de suite mainly benefits artists who already have a market for the resale of their works and that artist are not necessarily worse off than other authors of creative works).

\textsuperscript{144} See supra notes 88-104 and accompanying text (highlighting the failure of the droit de suite to either encourage the creation of new works or benefits society).