



**SCOPING STUDY:  
ARTIST'S RESALE RIGHT**

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# **A study into the likely impact of the implementation of the Resale Right for the Benefit of the Author of an Original Work of Art**

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## **Introduction**

Directive 2001/84/EC of the European Parliament and of the Council on the resale right for the benefit of the author of an original work of art (droit de suite) was adopted on 27 September 2001.<sup>2</sup> Droit de suite will come into force in the UK on January 1<sup>st</sup> 2006. The Directive provides an artist with a right to receive a royalty based on the price obtained for any resale of an original work of art, subsequent to the first transfer by the artist. The Directive defines an original work of art as “works of graphic or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs”. It therefore excludes what is sometimes termed the “decorative arts”, such as furniture and jewelry. The right does not apply to resales between individuals acting in their private capacity, without the participation of an art market professional; or to resales by persons acting in their private capacity to museums which are not for profit and are open to the public.

The threshold or minimum sale price above which the right must apply is €3,000. The royalties are set at the following rates:

- a) 4% for the portion of the sale price up to €50,000;
- b) 3% for the portion of the sale price from €50,000,01 to 200,000;
- c) 1% for the portion of the sale price from €200,000,01 to 350,000
- d) 0.5% for the portion of the sale price from exceeding €350,000 to 500,000
- e) 0.25% for the portion of the sale price exceeding €500,000

The maximum royalty payable is limited to €12,500. All sale prices are net of tax. While the right will come into force for living artists on 1 January 2006, for those entitled to the royalty following artist’s death, the right will come into force not later than 1 January 2012. Artists will have a right to information, to enable them to collect the royalty, for up to three years following the resale.

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<sup>2</sup> published in the Official Journal of the European Communities on 13 October 2001: L272, Volume 44 (page 32). The journal can be accessed on the Europa website at [http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l\\_272/l\\_27220011013en00320036.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_272/l_27220011013en00320036.pdf)

This study was commissioned by the Patent Office and managed by the Intellectual Property Institute. The scope of this study, set out in the terms of reference, covers the following five headings:

1. Using the most up to date independent art sales figures available for the last season and the proposed royalty rates, calculate the amount of resale right which would have been payable on these sales
2. Where possible, these calculations should include a breakdown of the likely beneficiaries from the resale right, and include an assessment of the proportion of artists or their heirs whose works are likely to fall within the scope of the new right
3. Pay particular attention to the likely impact on auction houses at the lower end of the market
4. In evaluating the potential impact on the UK art market, include an analysis of the % of works of art which enter the UK from outside the EU for sale within the UK
5. Include an assessment of the likely administration cost

The study is organized as follows. We proceed to address each of the five points above in the next five sections. We conclude the study with a brief economic analysis of droit de suite. In our conclusions we make some recommendations for further research.

### **1. The size of the UK art auction market and droit de suite eligible works sold at auction in the UK**

The art market in the UK can be divided into two segments, art sold by public auction and art sold by dealers. Public art auctions are controlled by a small number of auction houses and the public nature of the transactions make it easy to analyse this segment in some detail. Sales by dealers are much less clearly recorded, and there is therefore some element of guesswork involved in extrapolating from the auction market to the market as a whole. We shall comment on this inference below, but first we discuss the size of the art auction market in the UK.

The Hislop Art Sales Index is a widely used and respected source of data on fine art sales. Specifically, it covers sales of paintings, prints, works on paper, sculptures, miniatures, and photographs worth more than 250 pounds. It covers all of the major auction houses and by their estimate, over 80% of all auction houses in the UK. It was used in the Leeuwenburgh report on the potential impact of droit de suite on the UK art market, published in 2003. Part of the purpose of this study is to update his research using more recent data.<sup>3</sup> The Art Sales Index was also used by the European Fine Art Foundation (TEFAF) in a recent study that focused on the potential impact of droit de suite harmonization across Europe.<sup>4</sup>

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<sup>3</sup> At the time of the study, data was available only through February 2004. Due to a change of ownership of the Art Sales Index and work on their database, the Art Sales Index indicated that further data will not become available until the end of 2005.

<sup>4</sup> Kusin, McAndrew and Ginsburgh, (2005) "The Modern and Contemporary Art Market". TEFAF

We address the likely impact of droit de suite on auction sales in three ways. First, we do our own systematic analysis of Hislop's Art Sales Index for the period March 2003 through February of 2004. Secondly, we do a second analysis of the Art Sales Index for the period that Leeuwenburgh analysed, August 2001 through July 2002 and compare our results for this period with his results for the same period. Finally, we compare our results with the results of the TEFAF study.

Although droit de suite will only be payable on works of art valued over €3000 in the UK, there is a sizable lobby to reduce the threshold to €1000,<sup>5</sup> and hence, where relevant, art works falling in the €1000 to €3000 sales value range are included.

### **1.1 A Systematic Analysis of the Art Sales Index**

The following information is based on our analysis of art sales by auction in the UK of sales data published in the 2003/2004 Hislop Art Sales Index (details of the data collection are contained in the footnotes, key tables in £Sterling are given in the appendix.)

**Table 1:** Total sales by British auction houses recorded in the Hislop Art Sales Index in the year March 2003 – Feb 2004<sup>6</sup>

		No Sales	No Artists	Total Value (£)	Total Value (€)
Sale Price in GBP	Sale Price in Euro				
690 - 2068.99	1000 – 2999.99	8199	4081	10145670	14711221.5
2069 – 34483	3000 – 50000	11762	4905	96232210	139536704.5
34483.01 - 137931	50000.01 – 200000	1334	724	85745400	124330830
137931.01 - 241379	200000.01 – 350000	232	162	41796000	60604200
241379.01 - 344828	350000.01 - 500000	88	67	25075000	36358750
344828.01 - 1379310	500000.01 - 2000000	152	107	92485000	134103250
1379310.01+	2000000+	39	28	109050000	158122500
Total		21806		460529280	667767456

Table 1 summarises the size of the UK auction market for the year March 2003-2004. In this period total sales of 21,806 works were valued in aggregate at €668 million (£461 million), giving an average value of just under €31,000 (about £21,000) per work sold (items valued at less than €1000 (£690) are not included). However, the average is skewed by the presence of a small number of works of art that sold at very high prices. Fewer than 200 items (about 1% of works sold) accounted for 44% of sales by value (€92 million or £202 million). Once these are excluded, the average value of works sold is only €7,000 (£12,000).

<sup>5</sup> In some other countries the threshold is even lower. For example, in France the threshold is €15.

<sup>6</sup> Data gives sale value in £. Exchange rate of £1 = €1.45 was used throughout for the period 1<sup>st</sup> March 2003 until 29<sup>th</sup> February 2004 based on the average Inter-bank rate for that period of 1.448.

The European Directive on droit de suite applies only to works by living artists or artists who died within the last 70 years and are EEA nationals or permanently resident in the EEA. Table 2 shows the quantity and value of art works by EEA nationals sold in the UK for the year 2003/04 that would have been eligible for droit de suite payments. Note that in these tables we have included payments both to artists and their heirs. The directive will only apply to living artists beginning in 2006. Not until 2010 at the earliest (or 2012 at the latest) will payments be made in the UK to artists' heirs. These categories are separated out in section 2 below.

**Table 2:** Number of Droit de Suite eligible sales by British auction houses in the year March 2003 – Feb 2004<sup>7</sup>

Sale Price in GBP	Sale Price in Euro	No Sales	No Artists	Total Value (£)	Total Value (€)
2069 – 34483	3000 – 50000	3963	1251	33770200	48966791
34483.01 – 137931	50000.01 - 200000	541	212	35510500	51490225
137931.01 – 241379	200000.01 - 350000	92	57	16457000	23862650
241379.01 – 344828	350000.01 - 500000	40	22	11755000	17044750
344828.01 - 1379310	500000.01 - 2000000	67	34	40815000	59181750
1379310.01+	2000000+	14	8	26900000	39005000
Total		4717		165207700	239551165

Comparison of table 1 and table 2 shows that droit de suite eligible works accounts for just over one fifth of the total art sales by UK auction houses by volume (22%) and just over one third by value (36%), as documented by Hislop's Art Sales Index. This discrepancy is accounted for by the fact that sales of items for between €1000 and €3000 are not droit de suite eligible, a fact has little impact by value but a large impact on volumes, since there were just under 3000 such items sold in 2003-04, accounting for nearly 15% of all auction house sales. Table 2a gives the volume and value of these sales.

<sup>7</sup> Data taken over the period 1<sup>st</sup> March 2003 until 29<sup>th</sup> February 2004. Throughout this study, cut-off dates for Droit de Suite rights for those deceased 70 years was taken as the day of sale. Several artists (e.g. George Bulleid) died in the period 1<sup>st</sup> March 1933 – 29<sup>th</sup> February 1934. Their dates of death as listed by Art Sales Index were used to identify which sales would be eligible. If the date of death could not be established and the artist was not living, the artist was excluded. The data classified a number of artists as being of mixed origin e.g. Sir Jacob Epstein – British/German. Where possible, nationality was established, otherwise artists were assigned to the first country under which they were listed. We considered an artist to be eligible if the first country under which they were listed was a member of the EEA.

**Table 2a:** Sales by British auction houses in the year March 2003 – Feb 2004 in the 1000 - €3000 band that would otherwise be eligible for droit de suite

		No Sales	No Artists	Total Value (£)	Total Value (€)
Sale Price in GBP	Sale Price in Euro				
690 - 2068.99	1000 - 2999.99	2979	1148	3667030	5317194

According to Table 2, nearly 60% of droit de suite eligible sales by value were accounted for by just over 200 works of art, which account for less than 5% of eligible sales by volume.

The estimated droit de suite payment on this amount of auction sales is given in Table 3 below. We will discuss the breakdown of this payment in section 2 below.

**Table 3:** Estimated Droit de Suite that would have been payable to artists and their heirs in the year March 2003-February 2004.

		No Sales	No Artists	Droit de suite (£)	Droit de suite (€)
Sale Price in GBP	Sale Price in Euro				
2069 – 34483	3000 – 50000	3963	1251	1350808	1958672
34483.01 – 137931	50000.01 - 200000	541	212	1251867	1815207
137931.01 - 241379	200000.01 - 350000	92	57	450087	652627
241379.01 - 344828	350000.01 - 500000	40	22	231189	335224
344828.01 - 1379310	500000.01 - 2000000	67	34	448589	650454
1379310.01+	2000000+	14	8	120690	175000
Total		4717		3853230	5587183

In conclusion, our analysis of the Art Sales Index reveals that the total value of auction sales eligible for droit de suite is £ 165,207,700 (€239,551,165) and the total droit de suite payment from auction sales is £3,853,230 (€5,587,183). This is literally only half the story. A 2002 TEFAF study prepared by Kusin and Company estimated that the art market in the UK is evenly split between auctions and dealers<sup>8</sup>. Thus, we estimate that the total value of droit de suite payments to artists and their heir is about €1 million.

## **1.2 Comparison to other Studies**

In 2005, Kusin and Company did an analysis of the impact on the global resale market of droit de suite.<sup>9</sup> While the study of the UK was not done in the same detail as either our study or Leeuwenburgh’s study, the study provides overall numbers for the UK on the amount of auction sales eligible for droit de suite, and does this for several years. For 2003, they estimate that the total amount of eligible droit de suite sales in the UK is €276,954,942. This is within 20% of our analysis of €239,551,165. Kusin and Company has documented the methodology used to calculate these numbers, and the differences

<sup>8</sup> Kusin and Company, “The European Art Market in 2002: A Survey,” TEFAF.

<sup>9</sup> Kusin, McAndrew, and Ginsburgh (2005).

likely result for two reasons. The probable major reason for the difference is that Kusin and Company did not attempt to exclude artists outside the EU but that were sold in England, which would result in an overestimate on their part.<sup>10</sup> Furthermore, one would expect slight differences as the periods do not coincide exactly.

In order to determine how the numbers produced from our methodology compared with the previous study published by Leeuwenburgh, we analysed the same period of auction sales analysed by Leeuwenburgh with the Art Sales Index. Overall, our estimates of the total amount of droit de suite eligible work is quite similar, though our numbers by category differ in some cases. Using the same methodology as Leeuwenburgh, which includes some non-EU artists and their heirs,<sup>11</sup> For August 2001 through July 2002, we find that the total value of droit de suite eligible sales is £228,754,130 (€366,006,608) and the total payment of droit de suite payable from these sales amounts to £4,784,660 (€7,655,456) whereas Leeuwenburgh finds that the total amount of eligible sales is £220,933,438 (€353,493,500) and the amount of droit de suite payable for auction sales is £4,994,219 (€7,990,750). Thus, the total difference amounts to less than 5%. Both numbers are higher than our more recent estimates. This is consistent with the price drop as noted by Kusin and Company (2005): the average price of contemporary art works sold by auction in 2003 dropped by about 27%. A more detailed comparison with Leeuwenburgh's study is presented in the appendix.

According to our figures over one third of the fine art market in the UK by value and one fifth by volume will be affected by droit de suite. However, the fine art market is not the largest segment of the art auction or dealer business in the UK. Sales of decorative arts (e.g. furniture and jewelry), mostly unaffected by droit de suite, are much greater by value. According to the Kusin survey of the European art market mentioned above, total art sales by UK auction houses in the UK in 2001 were valued at €3.4 billion (with an equal amount of business transacted by dealers). Hence, the market affected by droit de suite is a small portion of the entire market for art.

## **2. The distribution of droit de suite eligible works**

The distribution of droit de suite eligible works is important, as only living artists will receive payments beginning in 2006, and heirs of artists whose death occurred within the past 70 years are not due to receive payments not later than 2012. Furthermore, it is important to note the amount of the payments that will go to UK artists and the amounts to other EEA artists. The distribution of the payments within artists is also a concern which is addressed below.

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<sup>10</sup> Kusin, et. al. make the comment "It is worth noting that many of the artists contained in the final sample would not be eligible for droit de suite since they are from countries, such as the US, which do not apply the levy or reciprocate the EU legislation." P. 10, Kusin, McAndrew, and Ginsburgh (2005).

<sup>11</sup> How non-EU nationals will be treated has not yet been finally decided. Some may be eligible, but for time being most probably will not. Therefore we chose to omit them from our analysis.

## **2.1 The distribution of droit de suite eligible works between UK and other EU artists**

**Table 4:** Number of Droit de Suite eligible sales by British auction houses in the year March 2003 – Feb 2004 (*the table also includes sales in the €1000 - €3000 band although this has now been excluded from the directive*)

Sale Price €	Living British	Deceased British	Living EU	Deceased EU	Total
1000 – 3000	684	1750	86	459	2979
3000 – 50000	534	1595	315	1519	3963
50000 – 200000	29	104	74	334	541
200000 – 350000	8	9	17	58	92
350000 – 500000	2	2	1	35	40
500000 - 2000000	1	4	6	56	67
2000000+	1	0	0	13	14
Total eligible (>3000)	575	1714	413	2015	4717
Total (incl. < 3000)	1259	3464	499	2474	7696

Table 4 shows the distribution of droit de suite eligible works by value and by nationality. Out of a total of 4717 eligible works by EEA nationals, just under half (49%) are works of UK citizens. An even greater proportion of eligible sales in the lower value categories are by British artists, and the proportion in the non-eligible €1000-€3000 category rises to 85%. Thus excluding sales in this value range has primarily excluded British artists and their heirs from receiving droit de suite payments. However, had these works been eligible the value of droit de suite would have been negligible, as is shown in Table 5.

**Table 5:** Estimated Droit Payment (€) for works €1000 - €3000<sup>12</sup>

Sale Price €	Living British	Deceased British	Living EU	Deceased EU	Total
1000 – 3000	48378	121677	6340	36292	212687

Dividing total payments by the total number of works sold in this value category gives an average payment of just €71 per work (£49).<sup>13</sup> By contrast, other EEA nationals dominate the eligible sales in the higher value categories, with only 13% of works valued at €200,000 and above by British artists (27 out of 213).

Table 4 shows that the major beneficiaries of droit de suite payments will be the heirs rather than the artists themselves. Thus only 21% of eligible works are by living artists, and this proportion also tends to decline in the higher value categories.

Table 6 shows the distribution by value and by nationality for the total number of artists whose works are droit de suite eligible. Similar patterns emerge to those described for the

<sup>12</sup> Estimated on the assumption that Droit payment would have been levied at 4% on works in the category €1000 - €3000 prior to the raising of the minimum qualifying resale value.

<sup>13</sup> The average value of works in this category is €750.

number of works sold: British artists tend to dominate the lower value categories and scarcely appear in the higher value categories, the deceased tend to outnumber the living by three to one or more.

**Table 6:** Number of Artists whose works were Droit de Suite eligible in each price category at resale in the year March 2003 – Feb 2004<sup>14</sup>.

Sale Price €	Living British	Deceased British	Living EU	Deceased EU	Total
3000 – 50000	148	571	132	400	1251
50000 – 200000	17	46	38	111	212
200000 – 350000	4	8	10	35	57
350000 – 500000	2	1	1	18	22
500000 – 2000000	1	3	4	26	34
2000000+	1	0	0	7	8

**Table 7:** Total Value (€) of Sales of all Droit de Suite Eligible Art in UK Auction Houses, March 2003 – February 2004

	Living British	Deceased British	Living EU	Deceased EU	Total	% Overall Total
3000 – 50000	5068910	18547023	4963205	20387653	48966791	21%
50000 – 200000	3050800	9825200	6591700	32022525	51490225	22%
200000 – 350000	2378000	1986500	4277500	15220650	23862650	10%
350000 – 500000	841000	819250	391500	14993000	17044750	7%
500000 – 2000000	507500	3929500	4002000	50742750	59181750	25%
2000000+	2682500	0	0	36322500	39005000	16%
Total	14528710	35107473	20225905	169689078	239551165	
% overall total	6%	15%	8%	71%		

Table 7 gives the estimated value of droit de suite eligible artwork by nationality and price bracket. The table shows that droit de suite payments are likely to accrue primarily to the heirs of deceased artists (86% of total eligible sales) and to non-British EEA citizens (79%). Living British artists benefit least, since they supply only 6% of eligible sales by value.

Table 7 shows that, in contrast to the numbers of sales and artists which are concentrated in the lower price categories, the total of value of sales is weighted towards the higher end of the market. Sales of works over the top price band of €500000 account for 41% of the total value of sales.

<sup>14</sup> Any artist whose works have resaled in more than one price category is counted in each category e.g. under “Deceased EU” Pablo Picasso is counted in each price category.

Table 8 shows the value of droit de suite payments that would have been due had the law applied to UK auction sales in the period March 2003 – February 2004. On sales of €39 million there would a droit de suite liability of €5.6 million (2.3%). Just under one third of these payments would have arisen on the lowest price band (€3000-50,000), just under one third on the second highest price band (€50,000-€200,000) while the remaining third, on items valued above €200,000. Only a small fraction of these payments would have accrued to living British artists (7%), while the majority of payments would have been to non-British EEA citizens and their heirs (71%).

**Table 8:** Estimated Total Droit Payment (€) to all Artists in each Category

Sale Price €	Living British	Deceased British	Living EU	Deceased EU	Total	% Total payment made per price category
3000 – 50000	202756	741881	198528	815506	1958671	35%
50000 – 200000	106024	346756	234751	1127676	1815207	32%
200000 – 350000	59780	60365	119275	413207	652627	12%
350000 – 500000	16705	16596.3	8207.5	293715	335224	6%
500000 – 2000000	8768.75	39823.8	55005	546857	650454	12%
2000000+	12500	0	0	162500	175000	3%
Total	406534	1205422	615767	3359460	5587183	
% Total payment made to each artist category	7%	22%	11%	60%		

It is perhaps not surprising to see that most of the droit de suite payments are likely to accrue to a small number of artists whose works sell at the highest prices, nor perhaps that British artists represent a relatively small fraction of the total payments made. However, it is important to note that British artists are very strongly represented in the low value categories. One interpretation of these observations is that while UK auction houses are strongly represented in the sale of high value art works within the EEA, at the low value end of the market they are focused primarily on selling the work of British artists. In most countries, one might expect that the low value art works are sold in essentially local markets (i.e. low value French art is sold mainly in France, low value British art is sold mainly in the UK, and so on).

Table 9 shows the *average* value of droit de suite payments that would have accrued on works of art in each value and nationality category. The average payment of just over €1,184 (that is €5.6 million total payments (Table 8) divided by 4,717 eligible works (Table 4)) conceals a huge range. The average payment the work of living British artists whose works sold at prices in the €3,000-50,000 range would have been €380, compared to €12,500 (the maximum payable) for works in the €2m plus range. It may also be worth noting that while the average payment which would have been made to British artists in each price range is close to that which would have been paid to artists from other EEA countries, this is not true in lowest price bracket, where the average payment on British works of art were 30-40% lower. This suggests that in this price bracket, which accounts

for about 80% of total sales, British works are noticeably cheaper, suggesting that the auction market in the UK for low value British works of art is much larger than the UK auction market for low value non-British works of art.

**Table 9:** Average droit de suite payment per work of art (€) that would have accrued, March 2003 – February 2004

Sale Price €	Living British	Deceased British	Living EU	Deceased EU
3000 - 50000	380	465	630	537
50000 - 200000	3656	3334	3172	3376
200000 – 350000	7473	6707	7016	7124
350000 – 500000	8353	8298	8208	8392
500000 - 2000000	8769	9956	9168	9765
2000000+	12500	12500	12500	12500

Table 10 provides an illustration of the average payments to artists, but this table needs to be read carefully. It provides an average of payments to an artist for works in a given price band- hence it is not average payment to an artist overall, since the same artist may sell works in more than one price band. However, since the overwhelming majority of artists are located in the lowest price band, this latter is an indication of the average income that most artists might expect from droit de suite.

**Table 10:** Average Droit Payment (€) that would have been payable each Artist per Category (based on total sales and number of artists in each price category)<sup>15</sup>, March 2003 – February 2004

Sale Price €	Living British	Deceased British	Living EU	Deceased EU
3000 – 50000	1370	1299	1504	2039
50000 – 200000	6237	7538	6178	10159
200000 – 350000	14945	7546	11928	11806
350000 – 500000	8353	16596	8208	16318
500000 – 2000000	8769	13275	13751	21033
2000000+	12500	0	0	23214
Average	8695	9251	8314	14095

Taken on its own, this table is misleading, as the payments to artists are highly skewed towards a few artists. In order to demonstrate the concentration of droit de suite payments to high value artists, a separate calculation was made of the exact payments to

<sup>15</sup> Due to the double count of artists in different price categories, this number does *not* represent the average payment to any given artist, only the average payment to any artist who had one or more works resale in that price category.

certain individuals. Table 11 shows that the estate of Pablo Picasso would have received a total droit de suite payment of €447470 based on the sale of 261 works of art. This amounts to 8.0% of the total droit de suite liability that would have arisen in 2003/04. Table 12 shows that the estate of Joan Miro would have generated droit de suite income of €16,477 from sales at UK auction houses, equivalent to 2.2% of the total liability of UK auction houses in 2003/04.

**Table 11:** Droit de Suite Payment liability March 2003 – February 2004: Picasso, Pablo (€)

Sale Price €	Number of Sales	Total Value of Sale	Total Droit Payment
3000 – 50000	206	1910375	76415.00
50000 – 200000	35	4277500	145825.00
200000 – 350000	1	311750	7617.50
350000 – 500000	4	1711000	33555.00
500000 +	15	28623000	184057.50
Total	261	36833625	447470.00

**Table 12:** Droit de Suite Payment liability March 2003 – February 2004: Miro, Joan (€)

Sale Price €	Number of Sales	Total Value of Sale	Total Droit Payment
3000 – 50000	43	273300	10932
50000 – 200000	8	458000	17740
200000 – 350000	2	337000	12370
350000 – 500000	3	865000	23075
500000 +	6	5920000	59800
Total	62	7853300	123917

In his study, Leeuwenburgh also presented a breakdown of droit de suite payments. In the appendix, we compare our breakdown with his breakdown for the period August 2001 through July 2002 and carefully discuss possible reasons for differences.

To conclude this section, living artists only make up approximately 14% of total potential droit de suite eligible sales. Thus, when the Directive is first implemented in 2006, its impact will be much less than the potential impact in 2010/2012.

## **2.2 Droit de suite payments to non- EEA artists**

The figures in the previous section take no account of droit de suite payments due to artists who are not EEA citizens. According to the draft statutory instrument published in 2005, non EEA citizens may be eligible either because they are “habitually resident in the UK” or are a citizen of a non-EEA country whose nationals are granted resale rights.<sup>16</sup> There is a substantial quantity of works of art by non-EEA nationals sold at auction in the UK. There were 1,115 works of art sold at auction in the year 2003/04 with a total value of €52 million in the categories that would be eligible for droit de suite payments.

<sup>16</sup> The draft statutory instrument states that these countries are “to be specified”.

However, it seems unlikely that most of these works of art will in fact be eligible, and since we are unable to be sure whether any particular non-EEA artist will or will not be eligible, we decided to omit them entirely from our analysis.

### **3. The impact on auction houses at the lower end of the market**

Our analysis suggests that while the bulk of droit de suite payments will relate to high value items, there would be a large number of transactions involving relatively small payments. While the transactions in our data relates to sales by auction houses, there is a much larger number of transactions undertaken by relatively small dealers. We were asked to consider the impact of droit de suite on these businesses.

Analysing this market is made difficult because it is by its nature highly fragmented and there are few statistics available. It would be difficult to be sure of obtaining a representative sample of dealer opinion if a survey were attempted, and probably limited utility given the well-known moral hazard issues involved in asking people how they will respond to what is, from their point of view, essentially a tax.

According to TEFAF's survey of the European art market in 2002, there are around 9,500 dealers in the UK out of a European total of around 26,500- about 36% of all dealers in Europe. The UK figure is larger than the number given for the US and the largest in Europe outside France, which is said to have 13,700. In other words, over 85% of European art dealers are located in France and the UK. By value TEFAF estimates UK dealer sales at €3.4 billion, compared to €5.6 billion in the US and €1.3 billion in France.

In order to assess properly the impact of droit de suite one would like to see figures showing the historical trends, to evaluate the impact of past legislation (e.g. the introduction of droit de suite in France and Germany). However, these are not available. Opponents of droit de suite such as the British Art Market Federation (BAMF) argue that small dealers will (a) be excessively burdened with administrative costs and (b) will lose trade, not because works will migrate to be sold elsewhere (their market is essentially regional and hence not likely to move) but because the migration of works at the high value end will mean fewer buyers coming to London and browsing the small dealers. Proponents of droit de suite such as the Design and Artists Copyright Society (DACS) argue there will be no impact because (a) administrative costs will be low and dealers will pass on droit de suite costs to the buyer and (b) there will be little trade diversion and therefore the market will not be affected.

In the context of this polarized debate, evidence such as the large number of French dealers by number is taken to show that a tax such as droit de suite does not undermine the market, while the fact that UK sales value is more than double the French figure is taken as evidence that sales are driven out.<sup>17</sup>

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<sup>17</sup> Note that in France droit de suite does not apply to dealers, but that dealers pay a tax into an insurance fund for the benefit of destitute artists, and hence the application of the directive in France is thought to be broadly neutral for dealers.

Perhaps a more fruitful approach is to consider how dealers at the low end might react to imposition of droit de suite. We might consider the following possibilities

(i) Passing on to the buyer

Dealers might simply pass the cost on to the buyers. Demand for art is generally thought to be inelastic, and if dealers possess some market power then they are likely to pass on the costs to the buyer. Dealers in this case might be specialists in particular artists or types of work and hence insulated from competition. In any case, there seems a consensus that selling these works overseas is not a likely option. In such a world the likely impact on the dealers is small. However, if prices increase, then demand will fall, even if it is inelastic, and hence the dealers will lose some business.

(ii) Absorption

The dealer might absorb the costs if there is significant competition to attract buyers. This could eat into the profit margins of the dealers. DACS argued that dealers operate sufficiently profitable businesses that it is no problem for them to absorb the cost. However, there must be some dealers in such a large market whose margins would be sensitive to these charges and hence would be driven out of business by droit de suite.

(iii) Avoidance

Avoidance entails using legal means to avoid paying droit de suite. It has been suggested that dealers might be able to act as a kind of agent for artists, holding their work for them, and subsequently introducing them to a buyer in exchange for a commission, thus avoiding resale, and so avoiding droit de suite. If this form of avoidance were feasible, one might expect to see it practiced.

(iv) Evasion

Evasion involves using illegal means to evade liability. It has been suggested that dealers might simply refuse to register deals and so evade droit de suite. However, this would clearly introduce significant risk of prosecution. It might be feasible for very small dealers, but is probably not an option for even modest businesses. Moreover, it is plausible that artists themselves will to a degree police the system, so long as they have some idea about which dealers are selling their works.

It is worth noting that BAMF suggested that the cost would most likely be passed on rather than be absorbed. Hence the debate revolves largely around the consequences of higher prices on demand and any spillover effects from diversion at the top end of the

market. Because demand is inelastic, we think the first effect is likely to be small; the largest potential effect is likely to arise if high value items migrate to New York and elsewhere, and therefore the “passing trade” for the smaller dealers is significantly diminished. BAMF are adamant that this effect will be significant, and many of their supporters argue passionately that this is true, while DACS are just as adamant that there will be no such diversionary effect, and claim that there is no evidence that droit de suite causes diversion. Evidence and examples are hard to come by, since by definition the issue at hand is counterfactual- what would have happened had droit de suite not existed? Opponents such as BAMF point to anecdotal evidence on the relative decline of Paris or the loss of art trade in California; proponents cite the lack of any specific claims by dealers that works have been diverted because of droit de suite. One of the most interesting examples is the sale in 2001 of Rene Gaffe's collection of impressionist and contemporary works of art, sold on behalf of UNICEF, which took place in New York. Several accounts of this state that UNICEF identified droit de suite as a contributory factor in their choice of New York over Paris.

We conclude that some diversion at the top end of the market is likely, although it seems unlikely that the entire market will move overnight. Thus we also anticipate some negative impact on dealers at the lower end of the market, although the size of such an effect is impossible to determine.

It is worth commenting that droit de suite may significantly affect the relationship between artists and dealers. It is commonly argued that the relationship between artists and dealers is unequal, with dealers holding most of the bargaining power. Artists seldom have a contractual relationship with their dealer, and typically the dealer sells on behalf of the artist and the proceeds are divided 50:50. It was pointed out in the House of Commons Select Committee on the Market for Art (2005) that artists usually do not even see the sales invoice, leaving a great deal to trust.<sup>18</sup> Since droit de suite will give the artist the right to information on the sale price, the regulation will place a check on unscrupulous dealers. If such dealers were to disappear from the market altogether, it seems reasonable to say that their loss should not be considered adverse for social welfare.

There seems no doubt that droit de suite will place an additional administrative burden on the smaller dealers, but that this in itself is unlikely to drive dealers out of business in its own right (see section 5 for some discussion of the administrative costs).

#### **4. An analysis of the works of art which enter the UK from outside the EU for sale within the UK**

An important question is the extent to which droit de suite is likely to discourage imports into the UK from outside the EU and the approximate value of those imports in relation to all items that can be subject to droit de suite. Currently the UK is second only to the US as an international marketplace for art. Thus, it is important to get an idea as the

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<sup>18</sup> Sixth Report, Ev 24.

percentage of the paintings that are likely to be subject to droit de suite and that currently come from outside the EU, as droit de suite might discourage these imports. Anthony Browne of BAMF told us that roughly 30% of works sold in the UK came from vendors outside the EU, but did not provide a detailed breakdown.

Using a dataset put together by Kathryn Graddy we can obtain an independent estimate. In the UK, paintings that are subject to import VAT on the buyers' premium and the sellers' commission are daggered in the auction catalogues. These paintings are subject to import VAT because they have been imported from outside the EU. Thus, an analysis of daggered lots provides an analysis of the works of art which enter the UK from outside the EU for sale within the EU.

We analysed the daggered lots among all works sold in Contemporary and Modern Art auctions at Christie's King Street between the period 1982 and 1994. The advantage of using this dataset is that it provides an idea of the percentage of works of art that enter the UK from outside the UK in the category in which we are interested: that of Contemporary and Modern Art. In addition, the sample is fairly large. The disadvantage of using this dataset is that it is dated: VAT on imports increased from 0 to 2.5% in 1995, and then again from 2.5% to 5% in 1999.<sup>19</sup> Furthermore, the data only consists of sales from one auction house, Christie's, that is a larger importer than smaller regional auction houses in the UK. Nonetheless, by analyzing this data, we can come up with an independent estimate of the amount of imports that are present in fine art that is likely to be subject to droit de suite.

Overall for this period, we find that 29% of the works of art in this dataset entered the UK from outside the EU. The percentage tended to increase from about 17% in the early 80's to about 40% in the early 90's. However, as the most expensive paintings sold at auction did not come from outside the EU, by value, the percentage is somewhat smaller. During this period, approximately 24% of the paintings sold by Christie's by value came from outside the EU.<sup>20</sup> Thus, our numbers are roughly consistent with Anthony Browne's estimates.

We can use these numbers as a rough maximum of the likely value of contemporary art that comes to auction in the UK from outside the EU. If we extrapolate these numbers and apply them to the size of the total auction market in 2003 (both auction and dealers), the approximate value of paintings at auction that came from outside the EU is approximately £40,000,000. We have argued that this is the part of the art market trade which is most vulnerable to diversion.

Other studies that have looked at imports and exports of art have used OECD statistics on international trade by country. The OECD records trade statistics by industrial code on all goods which add to or subtract from the stock of resources of a country by entering or

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<sup>19</sup> Note, however, that according to Kusin and Company (2002) using data from Eurostat, total imports of all art into the UK have increased by 21% between 1994 and 1999 and vary significantly year by year.

<sup>20</sup> These calculations implicitly assume that the same percentage of artists are from outside the EU in non-imported paintings as in imported paintings.

leaving that country. However, imports are often underreported in countries that act as transit countries (such as the UK in art). Furthermore, the industrial codes are very broad and include information on many items not relevant to droit de suite. These studies have not provided an analysis of the percentage of works of art which enter the UK from outside the EU for sale within the UK, but have simply given total export and import amounts of all art in the relevant industrial code.<sup>21</sup>

## **5. Administration Costs**

The legislation will require dealers and auction houses to keep records of transactions in a way which enables droit de suite payments to be calculated and paid out. There appears to be a general consensus that compulsory collection through a collecting society is desirable from the point of view of keeping costs down. Collection appears to be a natural monopoly,<sup>22</sup> and the example of California is often cited as a case where collection is the responsibility of the artist, which leads to great uncertainty and frequent legal wrangles that are costly for both dealers and artists. It is necessary therefore to examine the costs of the collecting society and the costs to the dealer and auction houses.

### **(i) DACS**

Since DACS is the only artists' collecting society operating in the UK it will initially hold a monopoly. It is possible that competition could emerge in future, but since DACS already represents 52,000 artists world wide, it seems unlikely that an entrant could attract a significant fraction of artists within a reasonable time period. Thus DACS is likely to remain a monopoly for the foreseeable future.

DACS has undertaken not to charge more than their current commission rates which are 25% in relation to revenue collected in the UK and 10% in relation to revenue collected from abroad. They have said that their costs in relation to the resale right may be less, and the charges in France, Germany, Sweden and Denmark are all lower, ranging between 10% and 20%. There are substantial set-up costs involved in establishing the system so that it may be reasonable to expect costs to fall. The difficulty associated with a not-for-profit natural monopoly such as DACS is uncovering quantifiable ways to identify benefits and costs. In competitive industries inefficiencies are punished by losses and bankruptcy, while profit oriented firms tend to make investments based on clear financial gains. In the case of DACS, it will always be difficult to decide if charges reflect necessary costs. While DACS would argue that they are answerable to their members, they also argue that artists in general are not commercially motivated, and hence this constraint may be relatively weak. In a compulsory scheme they also represent artists who are not registered, and who therefore have no voice in the administration of the

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<sup>21</sup> See Kusin, McAndrew, and Ginsburgh (2005) for a discussion of the problems of using OECD data. Note that in their study, imports into the UK in 2003 are nearly 10 times the amount of eligible auction sales in the UK, as reported in their study, for that year.

<sup>22</sup> Meaning that unit costs are significantly lower under monopoly than under any competitive market structure.

society. In order to ensure that prices are brought down in line with necessary costs it might be desirable to adopt a price regulation scheme along the lines employed in public utilities such as gas and water specifying that fees must decline at some real rate over time (commonly known as RPI-X, where X is the rate of real cost reduction).

Based on our calculation of the number of works and the value droit de suite payable by auction houses in Tables 4 and 8, we estimate that the annual income of DACS would have been around £225,000 in 2003/04 assuming only works of living artists were eligible and that auction house sales are 50% of total sales (25% of €407,000 and 10% €16,000 multiplied by two and converted at £1 = €1.45) and £1,104,000 assuming that works of artists deceased within the last 70 years were also eligible (25% of €1.6 million and 10% of €4 million<sup>23</sup>). This illustrates how big an effect the extension of the right in 2010/12 will be. Note also that DACS would have been required to process only 988 payments for living artist, rising to 4,717 for the extended right. However, if DACS is a natural monopoly, it might be argued that unit costs should fall. DACS told us that administering payments to the estates of deceased artists will probably be more expensive<sup>24</sup>, but that “it is not possible (or appropriate) to speculate on the impact this might have on costs since by then we will have had 4 years experience of managing this right which could change a number of things, including our cost base”.

Another aspect of the proposed charging regime is the fact that the fixed percentage charge does not reflect cost, since collection costs are likely to be unrelated to the value of the work of art. DACS told us that a fixed percentage charge is the “fairest method of administering royalties of this kind since to charge a fixed fee would undoubtedly discriminate against recipients of smaller royalties”. Capping the charge on individual works at something close to cost would also cause charges to rise dramatically on lower value works.

Based on tables 4 and 8, the average charge per work once droit de suite is extended in 2010/2012 would have been £121 for works by British artists and £113 for works by non-EU artists, based on the data for 2003/04.<sup>25</sup> Note that the two averages are almost equal despite the fact that UK artists are charged 25% and non-UK are only charged 10%. This reflects the fact that non-British art works have a significantly higher average sales value. The DACS fee for processing a non-British work attracting the maximum droit de suite payment of €12,500 will be €1,250- about ten times the average payment. For a British work this rises to €3125- this is about 25 times the average cost of processing a payment.<sup>26</sup> If the maximum payment were capped at a level close to the cost of the transaction, the potential income for DACS would fall dramatically. Suppose, for example, that charges were capped at €200. All works over €20,000 would attract the maximum charge. Based on the 2003/04 data annual income for DACS would be in the

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<sup>23</sup> Again, this figure is double the estimated income from auction houses to approximate the value of income from the dealer market.

<sup>24</sup> Even though some prominent estates, such as Picasso and Miro are already affiliated.

<sup>25</sup> Assuming that DACS charges the maximum they have announced and that all British artists are based in the UK and other EU artists are based outside the UK.

<sup>26</sup> This assumes that the total charges implied by the 2003/04 data would equal total costs, as should be the case since DACS is a not-for-profit organisation.

region of £155,000 from living artists and £755,000 from living and deceased combined.<sup>27</sup> This is about one third less than the income that DACS would expect to raise on its announced charging scheme. Put differently, a flat rate charge that generated the same income as the announced percentage rates would have to be around £117 (for works by both living and deceased artists, UK and non-UK), equal to the droit de suite payment of an art work sold for €1243 (£2926), effectively making it pointless to collect the payment sold for less than this value.

There is strong support in much of the art community, including DACS, to extend droit de suite to works valued between €1000 and €3000. This would clearly bring a huge additional volume of works into the scheme, most of which would contribute little to covering the administration costs of DACS (a work valued at €1000 by a British artist would generate an administration charge of €10 (£6.90) and a work by a non-British artist €4 (£2.75)). While economies of scale might reduce costs, percentage rates would have to rise substantially (to obtain an even larger contribution from high value works of art) if the current average cost is close to £117.

On the face of it, the charging scheme that DACS intends to apply represents a significant cross subsidy from the authors of high value works to those of lower value works. This may be deemed consistent with the intention of the EU Directive, which is primarily to be to benefit artists on relatively low incomes.<sup>28</sup> Opponents of droit de suite may be said to inadvertently support the redistribution implicit in the charging scheme when they point out that droit de suite largely benefits the heirs of deceased artists who have large incomes and not the poor living artists who are taken to be the primary target of the moral right.<sup>29</sup> However, if a compulsory scheme is to be applied, such issues deserve a full airing. DACS told us that they are currently preparing a detailed analysis of their cost structure for Lord Sainsbury, and we think these issues should form part of that dialogue.

#### (ii) Dealer and auction house costs

It has been claimed by dealers and auction houses that the administrative costs of droit de suite will be very large, in the region of £30-£40 per transaction.<sup>30</sup> These figures appear to be taken from surveys of dealers. Leeuwenburgh quoted a figure of £6 per item under compulsory collection and £11 under voluntary schemes. These figures seem quite high given that the bulk of the administration will fall on DACS under a compulsory scheme. DACS have conducted an activity based costing exercise on the system they propose to operate and from this generated an estimate of the cost to dealers per transaction.

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<sup>27</sup> This assumes, using the data in Tables 4 and 8, that the average payment for works in €3,000-€50,000 category is €100. Note again that these figures are double the estimated income from the auction houses to take account of income from dealers.

<sup>28</sup> Paragraph 22 of the preamble says that member states should seek to apply lower thresholds than those specified in the directive “so as to promote the interests of new artists”, whose works, presumably have a lower market value. EU Directive 2001/84/EC.

<sup>29</sup> See e.g. the comments of Victor Ginsburgh p48-52 in Kusin and McAndrew (2005).

<sup>30</sup> Sixth Report of Culture, Media and Sports Select Committee, 2005, Ev39, 42

The process by which resale right liabilities will be assessed and royalties will be collected from art market professionals involves the following stages:

Stage 1: (optional) an art market professional may submit a list of works to be sold (this can be done online or with hard copy) in order to check eligibility for the resale right

Stage 2: (optional) DACS produce a report explaining which works are droit de suite eligible

Stage 3: the art market professional reports to DACS the sale price of the eligible works

Stage 4: DACS report the droit de suite liability based on the sale price

Stage 5: the art market professional sends payment to DACS

Stage 6: DACS forward payment to the artist/beneficiary.

This process can be done on a work-by-work basis or for all works sold in a given period.

The dealer or auction house is therefore involved at stages 1, 3 and 5. Stages 1 and 3 involve little more than filling out the artist names and title of work (stage 1) and the price (stage 3), all of which is data that should be readily at hand and can be filled in online or on pre-printed hardcopy forms. Stage 5 is, arguably, little more than writing a cheque or forwarding an electronic payment. DACS estimate that these three elements will take a total of about 20 minutes if the dealer elects to make a quarterly submission in total per work of art, which they estimate to be equivalent to a cost of between 43p and 56p per lot.

These figures seem plausible, assuming that the routines put in place by DACS are straightforward and user-friendly. Were there to be a significant number of disputes then costs might rise, but the benefit of a compulsory scheme is that there should be little basis for dispute. We have already noted the benefit to artists that currently do not get to see invoice prices and the scheme should lead to greater transparency in the dealer market, as long as evasion can be effectively policed. We therefore think that administrative costs for the dealers will be perceived mainly in terms of a general increase in “red tape” and a perception that there is too much paperwork, rather than any large increases in specific administration costs.

## **6. A discussion of the general economic impact of droit de suite**

Droit de suite creates the right of an artist and her heirs to share in the gains from the resale of her art works, and the previous section discussed the value of this right. However, conferring this right does not in itself affect the demand or the willingness to pay of customers for works of art, it merely redistributes the income associated with

customer demand.<sup>31</sup> The way in which it does so affects artists and dealers. We divide our analysis into direct effects and indirect effects. Direct effects concern the immediate redistributive and risk bearing implications of droit de suite. Indirect effects concern the impacts on incentives, either on artists or on dealer.

(i) Direct effects

There are two direct effects discussed in the literature- income shifting and risk. Droit de suite shifts income because the initial sale price of a work of art may factor in the liability that arises on resale. A buyer will obtain a smaller return on resale because of droit de suite, and if the buyer views a work of art as an investment, will be willing to pay less at the initial sale. In effect, the artist's income is reduced at the time of initial sale and then compensated on resale, and so one may view it as a kind of forced saving (and indeed, if resale takes place after the artist is deceased, it is a form of compulsory bequest). The fact that the right is inalienable also means that there is no way for the artist to escape from this forced saving by waiving the resale right. This form of income shifting seem particularly unfortunate for artists as a whole, since the nature of their profession is one which involves typically meager returns in early life to be compensated, hopefully, by larger returns in later life. Droit de suite skews an already skewed income profile.

It is worthwhile considering the actual size of the income shifting effect in practice. Consider a work of art sold today that the buyer expects to resell in 30 years for €25,000, which will therefore generate a droit de suite payment of €1000. Art is a risky investment, and therefore future earnings are likely to be discounted at a much higher rate than the current risk free rate of around 4%. Let us say the value is discounted at 10%, so that the present value of the work is €433. the present value of the €1000 droit de suite payment is €7, and this is the amount by which the buyer should be expected to reduce the price paid to the artist under droit de suite. On the face of it, this is a relatively small amount of money. Moreover, it may be questioned whether buyers will truly be able to make such fine calculations. Thus the effect on current prices may be negligible.

A further direct effect of the rule involves risk shifting. Dealers in art tend to buy up large quantities of works by younger artists in the expectation that a fraction of this artists will realize high resale values in the future. In effect this is a form of insurance scheme for young artists, and effectively redistributes income from those artists whose works turn out in the end to have high resale value to artists whose works turn out to be less valuable. Droit de suite tends to reduce the effectiveness of this redistribution, because the discount required to compensate for future droit de suite payments must take account of the fact that any artist could have a high resale value. This is unfortunate, since dealers are usually better able to absorb risk than young artists.

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<sup>31</sup> This may not be true in all cases. Some buyers may prefer to pay more if they perceive that the artist will benefit from the sale, just as some people will pay more for some goods if they believe the proceeds will be devoted to god causes.

(ii) Indirect effects

Direct effects may be considered to be those that will apply on the assumption that behaviour patterns are unchanged (e.g. artists produce art, dealers deal). However, indirect effects concern changes in behaviour created by the implementation of droit de suite. Probably the most important of these are associated with the dealers, but Solow (1998) raises an important point in relation to artists. Work by young artists can acquire value based on the reputation of the artist created by subsequent works. Young artists could realize more income if they could credibly promise to invest in their future reputation, but such commitments lack credibility once the money has been paid over. Droit de suite, by essentially withholding payment until works are resold, give the artist a stake in her reputation in the future and therefore credibly raises the value of art work produced today.

The main concern that has been raised in relation to droit de suite is that it will cause art the art trade to be diverted from the UK market, notably to New York, which is seen as the major competitor to London as a centre for the art trade. As we have seen, the fine art auction market in the UK was worth about £670 million in 2003/04, with droit de suite eligible sales accounting for about 22% of these sales by volume and 36% by value. However, a large proportion of art sold by dealer in the UK is not auctioned, and data on the size of this market is scarce. According to TEFAF, the total market is about twice the size of the auction market. However, in all probability, the non-auction market is concentrated on the lower value items and probably more focused on British artists. While it seems likely that diversion will be an issue for high value art which is internationally mobile (for example, the seller of any work likely to attract the maximum eligible payment of €12,500 is likely to at least consider an alternative location where no liability arises), it seems less obviously true for low value end of the market (for example, a dealer selling the work of British artist for €3000 and who has a loyal following in, say, Manchester, is unlikely to relocate the sale to New York merely for the saving of €120). Nonetheless, it may also be the case that the sale of high value items helps to stimulate the art market at the lower value levels, and hence in order to maintain their business dealers would have to absorb droit de suite payments on large items in order to keep business in the UK. The impact of droit de suite may therefore depend quite crucially on a dealer's business structure.

As with artists, there are a small number of dealers who account for a large proportion of transactions by value and also by volume, and a large number of dealers who deal with a modest volume of transactions of a relatively low value. The large dealers such are already internationally diversified and are likely to move transactions to whichever location is cost effective. It is also important that in most cases buyers of high value works of art are internationally mobile and hence cost factors will determine the location of sale. At the lower value end of the market buyers are probably more localized and the cost factor associated with droit de suite is less significant, so it seems less likely that the majority of dealers located at this end of the market will be significantly affected.

We can further conjecture upon the impact of droit de suite by considering the impact that the introduction that VAT has had on the sale of art work in the UK. Import VAT on art sold in the UK was introduced in 1995, first at a preferential rate of 2.5%, and this has been raised to 5% since 1999. In a recent study TEFAF (2003, p10), cite an example where a Japanese seller relocated a transaction to New York, rather than bear the costs associated with selling in London. This is despite the fact that a seller from outside the EU would not be liable to pay VAT in the EU. The main issue, therefore, seemed to be administrative burdens rather than direct costs. It has also been suggested that New York's increasing share of the art market in recent years is attributable with the increased burden of doing business in London. However, there is little hard evidence to back up this assertion and alternative explanations are possible (e.g. faster growth of demand for art in the US). Certainly, there is little evidence that the introduction of VAT has *dramatically* affected the position of London in the international art market, and it might be argued that since droit de suite payments are on a much smaller scale than VAT, especially for high value, internationally mobile items, that the likely impact of droit de suite will be small. Nonetheless, there is a risk that the *combined* effect of increased administration associated with the introduction of import VAT and droit de suite may adversely affect the UK market, especially if the UK market starts to develop a reputation as being expensive to deal in –whether or not this reputation is actually correct. Estimating the costs associated with such a burden is problematic, given that dealers themselves are unlikely to be able to establish how much work is required until the system is in place. Yet clearly there is a risk involved.

## **7. Conclusions**

We have estimated that the total size of the art market that is likely to be affected by droit de suite, including auction houses and dealers, is approximately £330 million (€480 million) resulting in approximately £7.7 million (€1 million euros) of droit de suite collected. Approximately half this amount can be attributed to the auction market and half to the dealer market.

The exact effect that droit de suite will have on the market when it is payable to artists in 2006 and to both artists and their heirs in 2012 remains to be seen. On the one side is the argument that droit de suite will cause a diversion of trade out of the UK and a decrease in demand for fine art in the UK. On the other side is the argument that the demand for art is fairly inelastic and that any effects will be minimal. We have argued that there is likely to be some diversion at the top end of the market, and this is likely to have some impact on the number of buyers in the UK market at the lower end. However, given the data available and the amount that is unknown as droit de suite has not yet been implemented, we have not produced a precise quantitative estimate.

After the implementation of droit de suite for living artists, monitoring of the art market is essential. We suggest three areas for research:

- 1) A continual monitoring of the Art Sales Index in the coming years to determine any changes in the UK market. The monitoring should not be limited to the UK. Ideally, the size of the markets in both important EEA and non-EEA countries should also be monitored, in order to attempt to separate out the effects of droit de suite from general movements in the art market.
- 2) A full analysis of daggered lots using up-to-date auction catalogues, in order to monitor the number of works that are imported into the UK from non-EU countries. Ideally, this monitoring would determine if trade diversion is taking place and whether imports into the UK of art for resale are suffering.
- 3) A survey of dealers to ascertain what they say about the effects of droit de suite on their business.

With this monitoring and research after the partial implementation of droit de suite in 2006, it should be possible to get a very good idea of the effect that droit de suite is having on the market, before the application of droit de suite to artists' heirs in 2010/2012.

## Appendix 1 – Key tables given in £Sterling

Table A1: Total Value (£) of Sales of all Art in UK Auction Houses, March 2003 – February 2004

Sale Price £	Living British	Deceased British	Living EU	Deceased EU	Living Rest	Deceased Rest	Total	% Overall total
2069 – 34483	3495800	12791050	3422900	14060450	2861150	6023550	42654900	21.2
34483 - 137931	2104000	6776000	4546000	22084500	2873000	6519900	44903400	22.35
137931 - 241379	1640000	1370000	2950000	10497000	800000	3720000	20977000	10.4
241379 - 344828	580000	565000	270000	10340000	260000	880000	12895000	6.42
344828 - 1379310	350000	2710000	2760000	34995000	0	6920000	47735000	23.76
1379310.01+	1350000	0	0	25050000	1400000	3900000	31700000	15.78
Total	9519800	24212050	13948900	117026950	8194150	27963450	200865300	100
% Overall total	4.74	12.05	6.94	58.26	4.08	13.92	100	

Table A2: Estimated Total Droit Payment (£) to all Artists in relevant Categories

Sale Price £	Living British	Deceased British	Living EU	Deceased EU	Living Rest	Deceased Rest	Total	% Total payment made per price category
2069 - 34483	139832	511642	136916	562418	0	0	1350808	35%
34483 - 137931	73120	239142	161897	777707	0	0	1251867	32%
137931 - 241379	41228	41631	82259	284970	0	0	450087	12%
241379 - 344828	11521	11446	5660	202562	0	0	231189	6%
344828 - 1379310	6047	27465	37934	377143	0	0	448589	12%
1379310.01+	8621	0	0	112069	0	0	120690	3%
Total	280368	831325	424667	2316869	0	0	3853230	
% Total payment made to each artist category	7	22	11	60				
% Total payment made to sales €50000+	50%	38%	68%	76%				

## Appendix 2: Evaluating the data in the Leeuwenburgh

We have used sales data published in the 2003/2004 Hislop Art Sales Index to compare the numbers retrieved using our methodology with the data reported in Tables 1 to 3 the Leeuwenburgh study. We conjecture below as to why differences occur.

**Table 1 comparisons:** Number of Droit de Suite eligible sales by British auction houses in the year August 2001 – July 2002 (the table also includes sales in the €1000 - €3000 band although this has now been excluded from the directive)

### A. Leeuwenburgh

Sale Price €	Living British	Deceased British	Living EU	Deceased EU	Living Rest	Deceased Rest	Total
1000 – 3000	671	2228	95	854	22	29	3899
3000 – 50000	699	2356	345	1866	28	61	5355
50000 – 200000	25	123	67	356	3	9	583
200000 – 350000	3	13	9	70	0	3	98
350000 – 500000	2	6	6	39	1	1	55
500000 - 2000000	2	12	8	69	0	2	93
2000000+	0	3	2	11	0	1	16
<b>Total</b>	1402	4741	532	3264	54	106	10099

### B. Recalculated

Sale Price € <sup>32</sup>	Living British <sup>33</sup>	Deceased British	Living EU	Deceased EU	Living Rest	Deceased Rest	Total
1000 – 3000	673	1755	66	441	163	115	3213
3000 – 50000	646	1895	288	1400	285	457	4971
50000 – 200000	26	112	78	363	31	87	697
200000 – 350000	3	10	8	85	1	25	132
350000 – 500000	2	6	4	46	1	11	70
500000 - 2000000	2	7	7	74	1	17	108
2000000+	0	3	2	11	0	4	20
<b>Total</b>	1352	3788	453	2420	482	716	9211

The tables are significantly different in a number of ways. The figures for “living British” match almost perfectly, but we found significantly fewer works (around 1000) attributable to “deceased British” artists and “deceased EU” (around 800). Our estimate for works by “living EU” artists was also around 20% smaller than Leeuwenburgh’s. However, about half of this discrepancy can be accounted for by the difference in Leeuwenburgh of works by non-British/EU artists (“Living Rest” and “Deceased Rest”), of which we found around 1200 in total, compared to only 160 identified by Leeuwenburgh. Nonetheless, we identified about 1000 fewer droit de suite eligible sales (about 10% of the total) than Leeuwenburgh. As this discrepancy is almost equally divided between works in the two lowest value categories, €1,000-3,000 and €3,000-

<sup>32</sup> Data gives sale value in £. Exchange rate of £1 = €1.6 was used throughout, based on the rate used by the original author.

<sup>33</sup> The data classified a number of artists as being of mixed origin e.g. Sir Jacob Epstein – British/German. Where possible, nationality was established, otherwise artists were assigned to the first country under which they were listed.

50,000, we do not end up with a vastly different estimate of the total amount of auction sales.

It is difficult to say exactly why our estimates in the two categories differ. With further investigation we found the following relevant facts:

- The CD allows us to quickly extract a figure for the total number of sales in a particular price band across all artists from the 20<sup>th</sup> century. We would expect this figure to be higher than the total in the right hand column of table 1, since some artists will have died before 1931 and hence their work would not be eligible. However, we find that the total that Leeuwenburgh gives for these two price bands is significantly higher than the total from the CD. In contrast, our data tends to meet this check. Within these price bands the author has especially high figures under deceased British and European.
- Under the columns “Living rest” and “Deceased rest” the author has much lower figures than our data suggests. Under “Deceased rest” we can cite an example of one artist, Andy Warhol, who alone accounts for more sales than the author records in his data. On this point, however, Leeuwenburgh may have been very careful with his analysis. Andy Warhol would not qualify for droit de suite under any definition of residency or nationality. It could be that Leeuwenburgh, under deceased and living rest, attempted to identify which artists might be eligible under a residency clause. However, as his paper does not cite the methodology used, this is only a conjecture.

**Table 2 Comparisons:** Total value of sales in auction liable to Droit de Suite and totals of Droit de Suite payable

**A. Leeuwenburgh**

	Total Value of Droit de Suite Eligible Sales (€)	Total Value of Droit de Suite (€)
A. Living Artists	51,836,000 (£32,397,500)	1,334,815 (£834,259)
B. Living British Artists (included in A)	16,631,500 (£10,394,688)	539,260 (£337,038)
C. Living and Deceased Artists	353,493,500 (£220,933,438)	7,990,750 (£4,994,219)
D. Living and Deceased British Artists (included in C)	91,290,000 (£57,056,250)	2,633,850 (£1,646,156)

**B. Recalculated**

	Total Value of Droit de Suite Eligible Sales (€)	Total Value of Droit de Suite (€)
A. Living Artists	47,874,320 (£29,921,450)	1,327,919

		(£829,949.4)
B. Living British Artists (included in A)	11,831,920 (£7,394,950)	398,173 (£248,858.1)
C. Living and Deceased Artists	366,006,608 (£228,754,130)	7,655,456  (£4,784,660)
D. Living and Deceased British Artists (included in C)	58,593,408 (£36,620,880)	1,742,284 (£1,088,928)

In the tables above, we use all artists in the our calculation of droit de suite eligible sales in order to be consistent with Leeuwenburgh's work. Note that in our analysis of the 2003/2004 sales, we excluded living and deceased artists outside the EEA.

Given the results of Table 1, it is not surprising that we find lower values of droit de suite payments that would have arisen for the season 2001/02. We find that total payments would have amounted to about 5% less than the amount estimated by Leeuwenburgh, consistent with our finding that there were about 10% fewer eligible works, with the bulk of the discrepancies in the lower price brackets. The differences by category are much larger. We estimate that payments to British living and deceased artists would have been nearly 50% smaller. It may be that Leeuwenburgh attributed droit de suite payments to British artists that should in fact have been attributed to artists from the rest of the world (non- EU), perhaps because he used a broader definition of British artists than we used, though the criteria used was not addressed in his paper.

**Table 3 Comparisons:** Number of British artists whose resales were analysed

**Leeuwenburgh**

	Droit de Suite eligible works <€50000	Droit de Suite eligible works >€50000	Total
Living artists	181	8	189
Deceased artists	508	41	549
Total	689	49	738

*B. Recalculated*

	Droit de Suite eligible works <€50000	Droit de Suite eligible works >€50000	Total
Living artists	209	22	231
Deceased artists	407	55	462
Total	616	77	693

We are also still unsure as to the method used, and the thinking behind, table 3. The author's results for number of artists analysed are much lower than ours, and suggest that he may have taken into account the problem that the same artists will be recorded in each price band, and hence there will be significant double counting. However, again this is not clearly stated in his paper.

## **Notes of the meeting with Anthony Browne, Chairman of the British Art Market Federation, 26<sup>th</sup> September 2005**

Anthony Browne said he thought the data tables in the report broadly supported the perception expressed in previous studies that droit de suite will have its biggest diversionary impact on the upper end of the art market (notably sales valued at €20,000 and above) rather than at the lower end of the market.

He believes that droit de suite will cause a relocation of sales at the top end of the market to be relocated primarily to New York, and that this will lead to a downsizing of the operations of the big auction houses in London, leading to loss of employment and a weakening of London as a global centre for the art market.

He argued that the auction houses and dealers would have to choose between passing on the charge or absorbing it in their own margins. Such decisions would be based on individual financial assessments and on competitive considerations. However, he argued that net margins in the highly competitive market to attract major collections and works of art were very slim. If a British dealer or auctioneer absorbed the droit de suite charge, his rival in New York would either be more profitable, or more likely would be in a position to offer better terms to the vendor. He attributed the increasing competitiveness of the market at the top end to improved access to information, notably the internet, and the increasing willingness of vendors to shop around for the best deal. He suggested that somewhere in the region of 30% of art work sold by the big auction houses in London was brought there by vendors from outside the EU, and that much of this trade might be lost, since overseas vendors are already subject to the rival attractions of other art market centres. While business sourced outside the EU is likely to be the most vulnerable to loss, even major artworks from British sellers will be vulnerable to the cheaper transaction charges that non-EU centres, like New York, will be in a position to offer. He stressed the larger auction houses and dealers would be unlikely to lose business in total, merely that their business would move to wherever it was financially efficient to locate it. Rather, it would be London and the UK as an art centre that would suffer. BAMF's concern was for the maintenance of employment and commercial competitiveness in the UK art sales business.

At the lower value end of the market he considered that the droit de suite payment would be likely to be passed on to the vendors. Dealers might suffer from a reduced volume of transactions, as the burden would be particularly heavy on works of art that are currently traded several times over a short period of years. However, he also identified a knock-on effect from the activities of the large auction houses and dealers to lower value end of the market. He argued that the presence of the high value/prestige business in London stimulated the market at the lower value levels- if a buyer is in London to purchase a major work it is quite likely they will take the opportunity to look at work at the lower value end of the market. The lower end of the market would suffer indirectly from the introduction of droit de suite, losing the interest of customers whose primary reason for being in the UK was to purchase at the upper end of the market. He also pointed out that the administrative burden of managing droit de suite would be greater proportionately on

small businesses, handling a number of lower value transactions. He concluded that droit de suite was like a tax in that the owners of valuable works of art were in a position to shop around in order to avoid it, whereas the owners of lower value pictures had no alternative but to sell locally and to pay the levy.

He cited Paris as a good example of how ill-considered legislative and fiscal measures can cause a market to migrate. After WW2 Paris was the principal European centre of the art market and lost much of that business due to the imposition of a tax on the art trade during the 1960s. He pointed out that London's emergence as a global centre was relatively recent, largely dating from the 1970s and that this lead can just as easily be lost if business shifts elsewhere because of the costs associated with doing business in London. He also cited the example of Germany, where the introduction of droit de suite in the 1980s caused a lot of business to shift to the UK. He argued that many dealers in these countries now regretted the harmonisation of droit de suite in Europe and the likely shift of business to New York and elsewhere that will follow.

The major impact of droit de suite would be unlikely to be felt in 2006, when it is introduced for the works of living artists, but when it is introduced for artists deceased up to 70 years previously, which will be in 2010 at earliest and by 2012 at the latest. He said that studies demonstrated that something in the region of 80% of total payments under droit de suite would be for the works of deceased artists. He pointed out that even if this segment of the market (i.e. the resale of works by living and deceased for less than 70 years) accounted for only 35% of art sales in the UK, the effect of droit de suite could spread much wider. For example, suppose a Japanese vendor wanted to sell a collection including works by Cezanne (died 1906, therefore not droit de suite eligible) and Picasso (died 1973, therefore eligible)- the vendor would be unlikely to want to break up the collection, and therefore it would be unlikely to be sold in London. Since the late nineteenth century and early twentieth century works represent the most buoyant segment of the art market, the loss of collections in this segment would be a particularly heavy blow to the London market.

He argued that the experience of the introduction of import VAT in the UK since 1995 was of only limited relevance. While the administration of VAT imposed a substantial burden on auction houses and dealers, it did not distort trade, since an artwork imported into the UK for sale and then bought by a non-EU resident would not attract VAT, while a work brought into the EU, wherever it had been bought, would be liable for VAT. Hence vendors did not face a different cost of selling depending on where the item was sold. Droit de suite, on the other hand, was an unrefundable charge which would relate to sales in London and not to New York. Unlike VAT it therefore represented an additional cost of doing business in the EU, that can only be avoided by selling elsewhere.

One issue is the extent to which the services associated with selling art work might remain in the UK while the simple transactions might be done elsewhere. It was put to him, for example, that one might imagine a buyer and seller being introduced in London, while the transaction was registered in a non-eligible country such as Switzerland: The analogy being between a financial centre such as London and an offshore tax haven like

the Cayman Islands. However, he argued the analogy did not work because of the need for the physical presence of the work of art. He said that London would always be a place where works were exhibited, just as art work sold in London might have been first exhibited in a road show in Paris or Munich. However, if the transaction itself were to be lost to London, then this would weaken the case for maintaining other transaction- related services in London. He argued that the annual Basel art fair is already a significant event and that it is possible that Switzerland might transform itself into the European centre for this segment of the art trade, with the EU capitals operating as exhibition satellites. However, the movement of high value items to New York is probably the larger threat posed by droit de suite.

Finally, he argued that the derogation won by the British Government to delay the application of droit de suite until 2010/12 for artists deceased in the previous 70 years should be reconsidered. When the Directive was being drafted the British Government tried to persuade the Commission and Member States to link the implementation of the directive to the conclusion of an international agreement on droit de suite (by amending Article 14 of the Berne Convention). This was refused at the time, and, since then, attempts to persuade third countries to introduce droit de suite had failed. He said that some Member States, which are not permitted to make use of the derogation, have already expressed a wish to do so. He argued that a solution which would be desirable from BAMF's perspective would be to open the derogation to any Member State that wanted to use it, and, at the same time, to link the ending of the derogation, not to a fixed date as at present, but to the date on which an international agreement was secured. He argued that by doing this, the most significant adverse effect of droit de suite would be removed.

**Notes of the meeting with Joanna Cave (Chief Executive) and Tania Spriggins (Communications Officer) of the Design and Artists Copyright Society, 28<sup>th</sup> September 2005**

DACS provided an overview of their views on three key issues in this study

- (i) The economic impact of droit de suite on artists and the art market
- (ii) The likelihood that trade will be diverted as a result of droit de suite legislation
- (iii) The costs associated with administering droit de suite

(i) The economic impact of droit de suite on artists and the art market

They pointed out that the primary intention behind the Directive is to improve the welfare of artists by allowing them to share in the profit arising from resale of their artwork. They said that the principle that a creative individual should benefit from subsequent resale of their works is well recognised e.g. the payment of royalties to writers on their publications and that therefore the Directive is merely bringing artists rights into line with other creative individuals. They argued that artists are often extremely poor and that therefore even small amounts paid under droit de suite could be of great benefit. Economists have argued that resale rights are no more than a form of forced savings, since buyers will demand a discount in compensation of the future liability to pay droit de suite. They entirely rejected the argument that the artists will lose when they first sell their works and said that there is no evidence to support this idea. Hence droit de suite is entirely benign for the artist, depriving her of nothing on first sale and producing a financial gain on subsequent resale. Several artists have expressed opposition to droit de suite, but in most cases DACS believes that this has been because their dealer has warned them that the legislation will drive them out of business, and that once they are given evidence that the dealer's business will not collapse, they are far more sanguine.

As far as the impact on the art market was concerned, they said that the impact on the profitability of dealers and auction houses would be negligible. At the low value end of the market droit de suite payments would be most likely to be passed on to the buyer, while at the high value end, it would probably be absorbed by the dealer/auction house.

One area of concern is the possibility that dealers might seek either to avoid (legally circumvent) or even avoid (illegally fail to register payment) droit de suite liabilities. However, DACS said it was impossible to know at present how substantial such activities might be.

(ii) The likelihood that trade will be diverted as a result of droit de suite legislation

DACS are convinced that there will be no trade diversion arising from droit de suite. In their view, there are so many factors involved in choosing a location for sale, the issue of a payment of a maximum of €12,500 will make no difference to the final decision. In their view, New York is already an attractive location for the sale of contemporary art,

and any seller choosing that location would do so with or without droit de suite. Moreover, they said that there has been no trade diversion arising from the existence of droit de suite either in France or Germany, even though these countries have higher rates and lower thresholds for droit de suite payments. In support of this they said that in their discussions with the art trade they have found no dealer from those countries who identified droit de suite payments as an issue, and they further said that they have never seen any evidence produced that droit de suite rules can divert trade, and that no dealer or auction house had produced any evidence that any sales had ever been diverted as a result of droit de suite rules. They also drew a comparison with import VAT on sales, which was strongly resisted by the UK art trade in the 1990s prior to its harmonisation in 1999 (on the grounds, inter alia, that it would add significantly to administrative costs and divert business to New York) but which they said has had no impact on the London art market which has thrived over the last decade.

(iii) The costs associated with administering droit de suite

DACS believes that the appropriate mechanism for collecting droit de suite payments is through a compulsory scheme administered by the collecting society, largely because of the associated reduction in administrative costs and because such a system offers the best prospects of achieving compliance and ensuring entitled artist are paid. DACS, through its network of relationships with collecting societies in other countries represents 52,000 artists and their beneficiaries, a significant fraction of all artists who will be eligible. DACS have conducted an analysis of recent sales at auction in the UK, but had not yet estimated the percentage of eligible sales accounted for by artists that they represent.<sup>34</sup>

As far as their costs are concerned, DACS have made an undertaking not to charge more than their current commission rates which are 25% in relation to revenue collected in the UK and 10% in relation to revenue collected from abroad. They have said that their costs in relation to the resale right may be less. DACS are currently preparing a detailed analysis of their cost structure for Lord Sainsbury.

They explained the process by which resale right liabilities will be assessed and royalties will be collected from art market professionals:

Stage 1: (optional) an art market professional may submit a list of works to be sold (this can be done online or with hard copy) in order to check eligibility for the resale right

Stage 2: (optional) DACS produce a report explaining which works are droit de suite eligible

Stage 3: the art market professional reports to DACS the sale price of the eligible works

Stage 4: DACS report the droit de suite liability based on the sale price

Stage 5: the art market professional sends payment to DACS

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<sup>34</sup> This statistic was requested of them at short notice, and therefore they did not have time to respond.

Stage 6: DACS forward payment to the artist/beneficiary.

This process can be done on a work-by-work basis or for all works sold in a given period.

DACS argue that most of the costs here are borne by DACS, and that the administrative costs for the dealer or auction will be negligible, amounting to little more than typing in some names and signing a cheque. Based on the amount of time taken and the typical salary costs of those who would carry out the work they estimate that administering the scheme will cost £10 per quarterly submission plus 40p per eligible work sold (in a submission of 50 eligible works this equates to less than 60p per lot.)

This estimate assumes that the process works smoothly and there are no glitches or disputes. DACS did not believe that disputes would arise over payments, since in almost all cases the nationality of the artists will be clear. For deceased artists there could be disputes over dates of birth, but DACS did not think this likely to be significant. However, in the event of a dispute, DACS agreed that it would be desirable to create some kind of dispute resolution process, since at the moment the only way to resolve a dispute would be through a civil suit.

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