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THE ECONOMIC CONSEQUENCES OF DROIT DE SUITE IN THE EUROPEAN UNION

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In the EU the author of an original artwork enjoys 'Droit de suite', a right to an economic interest in successive commercial sales of that work. This is intended to ensure that artists benefit from successive 'exploitations' of their work. The ensuing royalty is a percentage of the sale price. It is argued that it worsens the position of contemporary artists, but diminishes trade in the tertiary art market, is detrimental to their position on the international art market for those states introducing it and is severely anti-redistributive. It diminishes purchasers' property rights, reducing the price of artworks. This most severely affects early career artists who value the ensuing marginal decreases in income most highly, but whose work has not yet reached the secondary market.

1. INTRODUCTION

Droit de suite (DDS) is the right, enjoyed by the author² of an original work of art, to an economic interest in its successive sales. According to the Directive of the European Parliament,³ the right is supposed to ensure that artists benefit from successive 'exploitations'⁴ of their work. All EU countries have to comply with the Directive before January 1, 2006, though derogations are possible until January 2010.

In principle, the right extends to all resales, with the exception of those effected between persons acting in their private capacity. The royalty is calculated

¹ Université Libre de Bruxelles, C.P.114, 50, avenue F. Roosevelt, 1050, Brussels. Email: vginsbur@ulb.ac.be. I freely draw on Bogle and Ginsburgh (1998) and Ginsburgh (2005). I am grateful to Anthony Browne for very helpful and clarifying comments.

² Including his/her heirs, since the right runs for 70 years after the author's death.

³ Directive 2001/84/EC of 27 September 2001 on the resale right for the benefit of the author of an original work of art.

⁴ This is the word used in the Directive. According to the *Oxford Advanced Learner's Dictionary*, 'to exploit' means 'to use or treat sb/sth in an unfair and selfish manner for one's own advantage or profit'. I found it important to quote this word, since it gives an idea of the tone of discussions at the time the decision to implement DDS was made!

as a percentage of the sale price, and not of the increase in value of works whose original value has increased.

Economists who have analysed the economic consequences of DDS have generally reached the conclusion that it is inefficient. Those who are in favour of its introduction tend to concentrate upon the uneven bargaining position between the artist and the art dealer, and condemn the profits that the dealers and auction houses supposedly reap from the artist's labour. Whether or not these injustices can be corrected by introducing DDS is dealt with from a protectionist perspective and, consequently, the deeper implications of the right are usually not analysed. It is suggested here that not only would DDS worsen the position for the contemporary artist, it would also remove trade from the tertiary art market and have a detrimental effect on international art trade for the states in which it is introduced. As I will also show, it happens to be severely anti-redistributive.

2. EFFECT ON PRICES

Artists' incomes have been found to be a great deal more variable than incomes in other groups, which reflects the risk that the occupation carries with it. It is at the time when the artist is likely to value the marginal increases of income most highly, that he is placed in a position of foregoing a percentage of his present earnings. This builds upon the economic intuition that the initial price will adjust to a lower level. The rationale behind this can be seen in terms of property-right analysis. Rather than the full bundle of property rights passing over to the new owner at the first sale, the artist still retains certain rights, and this lowers the value of the work. The decrease will obviously depend on the amount of the resale right, on the expectations the artist and his client have about future resale values, on the way they both value risk, and on their time preference, but the resulting effect is clear: there will be a decrease and the artist will earn less. In competitive markets, the rebate on the price of the new artwork will exactly represent the expected discounted value of the future resale right.

Although many artists start along the pathway which they hope will lead to fame, the exception, rather than the rule, is the artist who finds his works being sought among the auction houses in centres such as London, New York and Paris. Singer (1990) suggests that an estimate would put the figure of such a possibility at one in three thousand, or even lower. It is from these few success stories that the image of the exploited artist in his younger days is drawn. For the majority, any increase in the value of the work will be relatively small and will entail little real gain for the artist in terms of future royalty income.

When huge sums are commanded by the market for a work, it would suggest its author has already achieved a degree of fame as the price reflects the reputation of the artist. This fame is likely to have brought with it greater wealth already, or the potential to command high prices for future works. The effect of DDS for the exception is thus to distribute his income from a period of greater necessity (his first years as an artist), to a time when money has lower utility. There is also the

further risk that the work will be sold in a jurisdiction which does not even provide for DDS.

It is reasonable to draw the conclusion that a rational, risk-averse artist would choose to take the full and certain price of the work immediately, rather than investing in the hope that his work will be resold in the future. The fact that very few private contracts exist that make provision for such an arrangement would appear to bear out this conclusion. It is remarkable that some artists (including Appel, Baselitz, Hockney, and Polke) are even opposed to DDS, and see it as a violation of their human rights.⁵

How many artists benefit from DDS? Such numbers are hardly public. Here is one case which is probably representative of the situation of artists in the EU. In Germany, in 1998, collecting agencies represented over 7,400 artists, of whom only 480 collected DDS.⁶ The prices of all others are nevertheless negatively affected by the right.

3. THE SELLER'S PERSPECTIVE

The seller is also carrying the risk that the artist may lose favour.⁷ Yet it has never been suggested that compensation should exist for this. In addition, the investment which has tied up capital over the time of ownership had an opportunity cost which could maybe have had a higher rate of return, and so it seems reasonable to allow profits from a work of art to be seen as equivalent to normal rates of return on an investment. Note that there is more and more scientific evidence that art is not a good investment, and does not do any better than government bonds. The introduction of DDS will add to the overall costs of selling a work, the more so that it is levied on the value of the work at the time of the sale, and not on the profit (or the loss!) that the seller has made.

4. EFFECT ON THE QUANTITY OF ART PRODUCED

What effect does the loss of a portion of income and a forced investment have on the quantity of works produced? The supply of art will vary according to the number of artists and their productivity. If artists are faced with an even slightly lower present income, this will inevitably be the turning-point for a number of artists to leave the industry and the deciding factor for others not to enter and to seek an alternative career.

Those who remain will face lower earnings and this will have two consequences. Firstly, through a mechanism that is too long to describe here,⁸ fewer works may

⁵ *The Art Newspaper*, December 2000, p. 75.

⁶ Declaration of Norbert Lammert member of the German Parliament, and culture and media spokesman of the CDU/CSU parties.

⁷ The Directive suggests that 'the person by whom the royalty is payable should, in principle, be the seller'. In fact, the result holds, no matter who pays the DDS.

⁸ For details, see Filer (1984).

be produced. It is fair to presume that the effect on production of art will be small, but there is certainly little reason to hope, as was claimed a few years ago by EU Commissioner Mario Monti, that 'the directive [on resale rights] will contribute decisively to the development of modern art in the European Union'.⁹

5. INALIENABILITY AND RETROACTIVITY

Under the Commission's proposals, the right is inalienable. If, for a moment, transaction costs are assumed to be zero, it does not matter whether the law divides the property rights between the artist and the purchaser, provided the rights can be passed on via a private contract, through a process of bargaining, and an optimal outcome would always be reached whether or not DDS existed. However, if the right is made inalienable, there are important implications. Those who promote an inalienable right follow the belief that artists are in an inferior bargaining position. What makes a painter's position so different from that of actors or novelists who are free to waive their rights? There exist very few such inalienable rights which remain the exception to the rule and it appears somewhat strange that DDS has been warranted such a privileged position. Note also that the right cannot be transferred (it is unassignable), an additional restriction.

Retroactivity is also at issue since in many legal systems, including the English, non retroactivity of law is the rule. Here the DDS will affect those sellers who bought the work of art while there was no DDS, but therefore at a higher price. They will lose when selling, since the price will take into account the newly introduced levy, whoever pays it.

6. TRANSACTION COSTS AND COLLECTING SOCIETIES

According to the Directive, Member States are responsible for the exercise and the management of the right. Collecting societies are one possibility, but Member States should ensure that these 'operate in a transparent and efficient manner'.

The administrative costs of DDS are not merely those of drafting a regulation. Once such a directive is instated, there exist the ongoing costs of monitoring sales, administering the collection and distributing the royalties. To turn firstly to the monitoring costs, it seems somewhat unrealistic to try to regulate every sale. Parties to some sales would lack incentives to declare such an exchange and the information costs would be excessively high for a single body to acquire knowledge on every transaction, let alone if it were left to the artist himself. To insist upon registration of ownership is likely to meet problems of privacy and would create its own establishment costs.

The Directive suggests DDS to be applied at the level of art dealers. This will also generate substantial costs. The instatement of sanctions would be necessary in order to ensure that payment is not evaded. Such sanctions would bring about

⁹ Suzanne Perry, 'Artists should benefit when works sold, EU says', Reuters REU2348 3 OVR 365 (ECR EEC GB LIF NEWS) F1301225, March 13, 1996.

their own costs of detection and enforcement. The level of the auction house is probably the most realistic stratum at which sales could be monitored, as they are well documented.

The effect of all these administrative costs will be that the amount which the artist or his heirs will receive will not be the full amount which is set aside. In some cases, especially in France during the last years, very little, if anything, is left for the artists.

The anecdotes related to mismanagement of the 27 French authors societies are frightening. The French copyright society SPADEM faced a financial crisis in 1996 and was placed under court-ordered administration. The Tribunal noted that its running costs, in particular staff salaries, could only be paid if the money which should be used to pay artists' dues was drawn on.¹⁰ ADAMI, another French authors' society audited by the French Ministry of Finance, did not pay the royalties due to Sean Connery, Charles Bronson and Laura Antonelli because 'it could not find their addresses'.¹¹ ADAMI also used money earmarked to promote artistic creation, to renovate its offices.¹² SACEM, another French society, needs 1,490 employees to manage the accounts of 12,000 members (out of the 76,000) who receive regular payments.¹³ The most scary, however, is a society that promotes itself under the name of SCAM (Société Civile des Auteurs Multimedia)¹⁴. Nobody is perfect.

The Danish society in charge of DDS takes as much as 40% of the royalty to cover administrative costs. ADAGP, the French collecting agency, levies 20% before paying artists.¹⁵

While the disparate legal jurisdictions create a system with incentives to sell works in jurisdictions with no DDS, there will also exist the wasteful cost of transportation. For example, if a Frenchman decides to sell the work of a contemporary artist, doing so in New York to avoid payment of the DDS, there is a chance that the purchaser will also live in France. This creates a wasteful additional transaction cost through shipment and insurance expenses, which would have been avoided had the seller not had the incentive to go outside his domestic market.

7. REDISTRIBUTIVE EFFECTS

A memo issued by the Commission on December 14, 1999,¹⁶ claims that DDS will benefit 'approximately 250,000 artists [and] any suggestion that the resale right

¹⁰ *The Art Newspaper* 57, February 1996.

¹¹ *Le Canard Enchaîné*, October 8, 1997.

¹² *Le Monde*, April 8–9, 2001.

¹³ *Le Canard Enchaîné*, March 25, 1998.

¹⁴ Website <http://www.scam.fr/scam.php>

¹⁵ *The Art Newspaper*, October 2004. See also Hummel et al. (1995).

¹⁶ Memo/99/68.

would benefit only eight rich families (e.g. Picasso heirs) is therefore inaccurate'.

In other words, DDS is redistributive. When young, the artist sells at low prices, in the belief that she will be compensated when she is older, since DDS on resales of her works will compensate for her past misfortunes, because of the large prices obtained on her early paintings when resold. This assumption is wrong for two reasons. First, as we have already seen, the resale right detracts from the price of a work when sold for the first time. If she ever becomes entitled to DDS, she will only receive, on average, and if collecting societies become honest, the benefit forfeited when she was young. Second, as can be expected, the proceeds of resale rights are very unevenly redistributed.

Indeed, Kusin and McAndrew (2005) show that the number of living artists whose works are sold in the secondary market is much smaller than the '250,000' claimed by the European Commission. During the four and a half year period analysed (2000 to June 2004), the work of only 3,876 artists was sold at auction throughout the whole world. Also many of these artists would not qualify to receive DDS, since they fall outside the scope of the EU Directive. The work of 9,987 deceased artists was sold during the same period. Even allowing for the fact that the Kusin and McAndrew study focuses on auction sales and it is possible that the work of some artists may only be resold through dealers, the figure of 250,000 clearly represents a wild exaggeration.

How much does DDS represent living artists and their heirs? Table 1 compares the situation in France, Germany, Italy, and the United Kingdom.¹⁷ **Droit de suite**, which is highlighted in bold, is calculated as a 3% share of the value of sales per artist. This takes into account that 4% is the highest levy, and that some 10 to 20% is kept by collecting societies to administer the right.

The uneven redistribution that results from the calculations can be summarised by four numbers. Heirs of dead artists cash some 85% (88.5% in France) of DDS. But there is worse for those who live, since in the group of those who are most sold (top 50) 95.2% goes to heirs. So essentially, DDS is collected for heirs of dead artists. Those who live received 1,000 euros in 2003, and often much less, while each heir received ten to 50 times more. The top 50 artists collect over 55% of the proceeds in France and Germany and as much as 69% in Italy.

This, one can claim, concerns salesrooms. But the situation is not much different in general. In Germany for instance, in 1998, a living artist, whether sold at auction or by a gallery, collected less than 2,000 DM (some 1,000 euros), while each heir collected 17,000 DM, and over 94% of artists received nothing.¹⁸

¹⁷ Note that Italy and Great Britain do not yet collect DDS. The numbers are given as examples of what will happen.

¹⁸ Declaration of Norbert Lammert, member of the German Parliament, and culture and media spokesman of the CDU/CSU parties.

TABLE 1
WHO RECEIVES DROIT DE SUITE
(WORKS AUCTIONED IN 2003)

	Living artists		Heirs	
	Top 50	All other	Top 50	All other
France				
Total sales	3.5	7.7	51.1	34.3
Number of artists	5	204	45	996
Value/artist	700.0	37.7	1135.6	34.4
Droit de suite/artist	21.0	1.1	34.1	1.0
Germany				
Total sales	1.8	2.2	16.7	12.3
Number of artists	7	108	43	660
Value/artist	257.1	20.4	388.4	18.6
Droit de suite/artist	7.7	0.6	11.6	0.6
Italy				
Total sales	1.7	4.1	24.8	8.1
Number of artists	7	152	43	413
Value/artist	242.8	27.0	576.7	19.6
Droit de suite/artist	7.3	0.8	17.3	0.6
United Kingdom				
Total sales	23.1	25.1	128.7	100.1
Number of artists	9	299	41	138.5
Value/artist	2566.7	83.9	3139.0	72.2
Droit de suite/artist	77.0	2.5	94.2	2.2

Calculations are based on Kusin and McAndrew (2005). They concern the year 2003. Total sales are in millions of euros; value/artist and droit de suite are in thousand euros. Top 50 relates to artists who are ranked first according to the value of their sales in 2003. For Italy and the UK the numbers are illustrative, since there was no DDS collected in 2003.

This would be good, though unreasonably small, if artists or their heirs received the proceeds. In some countries, Germany for example, a share of the resale right does not return to the artist whose painting is resold, but is paid to a fund which supports needy or elderly artists. In Finland and Sweden, it is used to support young artists. French art galleries are exempted from DDS, since in 1954, artists and galleries reached an agreement according to which DDS would be replaced by a social contribution paid by galleries to a fund for elderly and needy artists.

DDS is likely to be introduced in Australia, the avowed reason being that it will compensate aboriginal painters who have, in the past, sold at very low prices, while their works command very high prices today.¹⁹

¹⁹ *The Art Newspaper*, July–August 2004, p. 27.

In all these cases, the levy may be socially desirable and its implementation loaded with good intentions, but it is no longer an intellectual right, and intellectual rights should not be taken as an excuse for social security contributions, or for compensating past immoral acts such as depriving aboriginal tribes from their cultural possessions. In all these instances, DDS is just a tax on resales of art, and this is what it should be called. It is useful to add that the Directive is quite lenient in imposing changes to such drifts. It merely suggests that 'in order to allow Member States which do not, at the time of the adoption of this Directive, apply a resale right for the benefit of the artist [...] to enable operators to adapt gradually [...]. Member States should be allowed a limited transitional period during which they may choose not to apply the resale right for the benefit of those entitled under the artist after his death'. Time will tell us how long the transition will take...

8. EFFECTS ON THE PLACE OF TRANSACTION

The Directive's intention is to smooth out distortions of competition, as well as displacement of sales within the Union, but very little is said about displacements to the rest of the world. Initially, the argument runs that the necessity for harmonisation is to alleviate the anomalies that affect trade within the EU and thereby to create a more competitive art market, with the national markets starting from a more equitable basis. But this is forgetting what was already realised in 1958 by Jean Cassou, director of the Musée National d'Art Moderne in Paris who, in a letter addressed to the President du Comité Professionnel des Galeries d'Art, dated November 13, 1958, writes: 'I am aware that Paris does no longer host important sales, and I am afraid that droit de suite will impose a new threat [on the Paris art market]'.²⁰ There are many examples of dislocations. The £50 million French Gaffé collection was sold in New York in 2001, because UNICEF, the beneficiary of the sale, decided so in order to avoid paying DDS.²¹

How many paintings would be involved, and how much would this represent for European salesrooms? Nobody can provide definitive answers to these questions, but it is possible to examine some data on which answers could be based. Table 2 provides illuminating figures concerning sales of Modern and Contemporary art (subject to DDS) in 2003.

The table shows that over 97% of the number of works are priced under 200,000 euros, and that the 811 works that fetch more than 200,000 euros account for 50% of the value of sales. These are precisely the works for which New York already captures over 50% of the trade (78% for works worth over 2 million euros). The UK is left with 31 per cent, even before the arrival of DDS. The six EU countries where DDS is levied count for a lean 8.8 per cent. It would be unfair and exaggerated to claim that continental Europe lost the market it had in the early sixties because

²⁰ See Comité des Galeries d'Art (1997), p. 127.

²¹ *The Art Newspaper*, April 2001, p. 67.

TABLE 2
WORKS AUCTIONED IN 2003
BREAKDOWN BY LOCATION OF SALE
(MILLIONS OF EUROS, NUMBERS AND SHARES)

Value of the works	Number of works	Number of artists	Value (millions)	DDS6 %	UK %	US %
3,000-200,000	34,641	7,929	586.9	22.3	11.0	31.2
200,000-2 million	769	465	369.7	8.8	31.5	53.3
Over 2 million	42	29	184.3	4.5	17.6	77.9

Source: Kusin and McAndrew (2005). DDS6 represents the six EU countries in which DDS is already implemented.

of DDS only, but the levy, as well as other taxes, has certainly contributed to its decline. It is obvious also that the introduction of DDS in the UK (and the VAT on transactions, as suggested by the European Commission) will move a substantial part of the most profitable British and possibly other trade to New York. This is bound to happen since some 40% of the turnover of auctions in the UK consist of works imported from non EU countries.²² This would leave European salerooms with a large number of only marginally profitable works, and it is questionable whether salesrooms and galleries can live in handling a large number of less valuable works, given that it takes probably as much time to market a work under 200,000 euros (and there are over 34,000) than it takes for expensive works (811), while the total value of both types is almost identical (587 vs. 554 million euros).

At a time when many states in Europe are promoting a 'romantic nationalism' around works of art, it is slightly vexing to see that these same states are encouraging a system which would lead to incentives to sell their cultural heritage in countries such as the US and Switzerland (a market that is often overlooked, since it is dominated by art galleries, and not by salesrooms, and for which data are therefore difficult to access). This would, moreover, increase the risk of the works to remain there, as European collectors who would be interested in purchasing may be discouraged from paying customs in order to reimport them. If it is the ambition of these countries to encourage their national works to be kept within their own territory, it would make more sense to provide incentives for the sales to take place at their national locations.

8. CONCLUSIONS

Key issues which have arisen from this examination question the desirability of DDS and add to the growing number of expressions of concern that there has been a move to increase its role within the EU.

²² This figure has been kindly communicated to me by Christie's and Sotheby's.

A consideration for any artist facing such a regulation is that he may be placed in the position of having to forego present income at a stage when there is greater marginal utility for the income from the sale of works. It may be assumed that any future recompense will be at a time when he is better established – and hopefully, still alive – and there is then lower utility from an equivalent amount. Consequently, it can be seen that a struggling young artist (whom the legislation aims to benefit) will only be discouraged by the disincentives of lower initial return and the risks which he faces for return on the lost portion.

The numbers show that DDS is not redistributive. Living artists who do not happen to be among the happy few in the top 50 list derive, on average, one thousand euros in 2003. Much ado about nothing.

From the point of view of international trade, it has become clear that the art market is relatively mobile and will take into account the cost incurred in locations where DDS is levied. The Commission's proposals aim to benefit trade within the Union. In reality, once again the result is likely to be the exact opposite. This is compounded by the increasing risk for artworks to leave European collections and European museums which, in the long-run, are dependent on national collectors for most of their additions.

To conclude, DDS appears to lack any appeal, both in theory and because it solves no practical problem. The disadvantages weigh heavily while the positive proposals of the Commission lack the guidance of long-term efficiency considerations. A no DDS-world would seem to be the most efficient solution. There is a danger of over-regulation which the Commission may not have been willing to recognise to date. Simple economic analysis shows how even a well-intentioned law could bring about exactly the opposite effect to its original purpose. The resale right would appear to be a law which illustrates this pitfall and requires urgent reassessment.

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