

INTERGOVERNMENTAL COPYRIGHT COMMITTEE
Eleventh Session of the Committee of the Universal Convention as revised in 1971 Paris 23-27 June 1997

COMITÉ INTERGOUVERNEMENTAL DU DROIT D'AUTEUR
Onzième session du Comité de la Convention universelle révisée en 1971 Paris 23-27 juin 1997

COMITÉ INTERGUBERNAMENTAL DE DERECHO DE AUTOR
Undécima reunión del Comité de la Convención Universal revisada en 1971 Paris 23-27 de junio de 1997

МЕЖПРАВИТЕЛЬСТВЕННЫЙ КОМИТЕТ ПО АВТОРСКОМУ ПРАВУ
Одиннадцатая сессия Комитета Всемирной конвенции, пересмотренной в 1971 г. Париж 23-27 июня 1997 г.

اللجنة الدولية الحكومية لحقوق المؤلف
الدورة الحادية عشر للجنة الاتفاقية العالمية المعدلة في ١٩٧١، باريس ٢٣-٢٧ يونيو/حزيران ١٩٩٧

Distribution : limited

IGC(1971)/XI/4
Paris, 9 april 1997
Original : English

Item 5 of the Revised Provisional Agenda

THE RE SALE RIGHT OF ARTISTS*
("DROIT DE SUITE")

I. Principles

The *droit de suite* - the right of visual artists to a percentage share in the proceeds of the resale of their works of art on the art market - was first codified in the French special statute on *droit de suite* of May 20, 1920. It first entered into international conventions through the adoption of article 14bis in the revised Berne Convention of 26 June 1948. The special feature of article 14bis is that it allows the Member States to make the application of *droit de suite* subject to reciprocity. All existing laws make use of this possibility.

In contrast to all other creators, visual artists can only sell their works of art, editions of prints and sculptures once, and in virtue of this fact, without the protection of *droit de suite* they cannot benefit from the proceeds of any auction of their works which takes place after the first sale.

On the other hand, within the framework of the statutory term of copyright, artists from other creative professions, such as composers and writers may, with regard to the use of their works through reproduction, public performance, mechanical duplication on records and audio-visual media, broadcasting in television and radio etc., both for private and personal purposes, authorise such use in individual cases or may license it through collecting societies and make claims to remuneration. Apart from the *droit de suite*, visual artists merely have the right to authorise the reproduction and broadcasting of their works and to a

* This document was prepared by Mr Gerhard Pfennig, Lawyer, Bonn, Germany, at the request of the UNESCO Secretariat. The views expressed are not necessarily those of UNESCO

share in payments resulting from private copying; however, compared to the above-mentioned creative professions, they receive only relatively low earnings for such use because this exploitation of their works has only limited significance in purely quantitative terms.

This disadvantage is, to some extent, compensated for through the participation of visual artists and taking into account the way the art market is developing this includes photographers, in the accruing value which works of art generally achieve on the market.

The introduction of this right is also supported by the ascertainable, long-term, continuous development of the art market, in particular the resale market. This trend can be seen in all recent studies, including that undertaken by the IFO Institute cited in document CLT-95/CONF.205/ LD.14 The statistics quoted below are taken from this study.

Strangely enough, the increase in earnings which benefits above all those artists (and their heirs) whose works meet with particular approval on the art market, especially the resale market, is used as an argument against *droit de suite*. The argument is that the "rich" heirs benefit, rather than the "poor" artists. However, this overlooks the fact that, in practice, there is no area of protected works, use or claim for remuneration where the creators whose works are used most comprehensively achieve high earnings.

It is also incorrect from an objective point of view. Experience shows that for economic reasons, artists frequently sell their first works at very low prices but which later fetch unbelievably high prices on the art market. In this respect it is superfluous to quote the example of Vincent Van Gogh. One has merely to look at the work of the German artist Joseph Beuys, who, as is generally known, during his lifetime generally sold his works at very low prices but who is now chalking up prices to match those of the great American pop artists.

In addition, in view of the increasingly fast changing trends in the art world, in particular in the area of visual art, *droit de suite* certainly fulfills the function of a retributive justice factor. The experience of relevant authors' societies reveals that those very artists whose works do not attract much appreciation nowadays, certainly profit from the values estimated on the resale market for works originating from their initial creative phases.

More than ever before, *droit de suite* attempts to ensure that creators of artworks can benefit, at least to a minimum extent, from the financial exploitation of their works, in conformity with copyright legislation and the adjudication which provides that artists should benefit from all earnings gained through the sale of their works.

Finally, it is interesting to note that artists from countries with strong copyright systems who traditionally found the idea of *droit de suite* difficult to understand, are changing their opinions and are now, partly due to the development of the market, calling for the introduction of *droit de suite*. This was most apparent in the study which the Registrar of Copyright presented to the U.S. Senate on December 1, 1992, in order to fulfill an obligation under the Visual Rights Act of 1990. A remarkable aspect of this is not only the

very fact that the American law of 1990 obliged the Registrar of Copyright, in an explicit statutory regulation, to carry out a feasibility study on the introduction of *droit de suite*, but even more so the fact that in public hearings in 1992 in San Francisco and New York, the majority of world-famous artists spoke out in favour of this right. The report cited for the first time a majority of witnesses who voted for the recognition of this right.

The rising importance of *droit de suite*, which is reflected in the increase in the amounts collected by the societies which administers this right but which, in the final analysis, only reflect the development of the market, at the same time reveals a growing problem: up to now it has not been possible to enforce this right throughout the world. Now that the imposition of *droit de suite* is becoming a factor on the art market, there is to the same degree an increasing interest in shifting markets and the relocation of art market operations to countries that do not recognise this right, thus creating an imbalance between the markets which could negatively impact art sales in countries that recognise *droit de suite*. This problem which in the European Union has led to the Commission's harmonisation project, will not be solved by the harmonisation of legislation in the European states but rather, could under certain circumstances lead to discrepancies between more global markets both inside and outside Europe. However, in evaluating the *droit de suite* one should not overlook the fact that the art market is subject to a whole range of other influences which develop independently from copyright law, for instance, the economic situation in large trading markets such as the United States of America, taxation and the general cost situation, in particular with regard to auction markets as a whole.

Therefore, in a context where culture markets are also developing in an increasingly global direction, in particular through the use of electronic media, there is no doubt that the recognition and harmonisation of *droit de suite* is becoming increasingly important.

II. Legal Recognition of *droit de suite*

Droit de suite has already been recognized under the copyright legislation of the following countries:

Algeria, Belgium, Brazil, Bulgaria, Burkina Faso, Chile, Congo, Costa Rica, the Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Germany, Greece, Guinea, Iceland, India, Italy, Ivory Coast, Latvia, Lithuania, Luxembourg, Madagascar, Morocco, Norway, Peru, the Philippines, Poland, Portugal, Romania, Russian Federation, Sweden, Senegal, Slovenia, Spain, Togo, Tunisia, Hungary, Uruguay, the United States (State of California), Venezuela, and Zaire.

For the time being, however, efficient systems for the application of *droit de suite* only exist in a number of Member States of the European Union namely, Belgium, Denmark, France, Germany, Portugal, Sweden, and Spain, as well as in Iceland. Because of the distortions which arose in the common internal market of the European Union, on 13 March 1996 the European Commission proposed that this right should be harmonised in all Member States that is, to introduce it in all countries which to date had not recognised it and

to improve the statutory regulations in the other countries to such an extent that the obstacles standing in the way of the efficient application of this right could be overcome.

In the countries which recognise *droit de suite*, its implementation is either designated by legislation or by the artists through the societies which collect the fees paid in accordance with the legislation in force in those countries, for distribution to the artists. As an integral part of the International Confederation of Societies of Authors and Composers (CISAC) network of the which links the collecting societies, foreign artists also benefit from the earnings gained from the administration of this right. In this case, all dealings are treated as domestic transactions by the Member States of the European Union that is, even citizens of those Member States that do not recognise *droit de suite* have, as a matter of principle, the right to benefit from the earnings gained in the other Member States who do. This also applies to citizens of Member States of the European Economic Region. Citizens from non-member countries can generally only benefit if their country's legislation also recognises *droit de suite* and permits a reciprocal agreement.

It should be pointed out that when conceiving new copyright regulations, in particular in Central and Eastern Europe, *droit de suite* has always been taken into account thus decisively widening worldwide recognition in recent years. One can also observe that the recognition of *droit de suite* in the Member States of the European Union which has only achieved notable results over the past ten years, has had an influence on the attitude of artists in other countries. According to examples of a number of countries, the cautious attitude which artists had held with regard to the feasibility of *droit de suite* has changed greatly, as illustrated in particular by the results of the above-mentioned 1992 study commissioned by the government of the United States of America.

The failure of Switzerland and Austria in 1993 to recognize *droit de suite*, while it was clear that the proposal to introduce it had received considerable support from a growing number of artists and had met with increasing opposition from the art trade in these countries, which finally led to a postponement of the introduction of this right, only further underlined its economic significance.

III. Economic Importance of *droit de suite*

1. Importance of the Market Development

The prerequisite for an effective application of *droit de suite* is the existence of an appreciable art market with an existing infrastructure of galleries and places of auction.

The current situation of the art markets is illustrated in Table 1

Table IFO Study, p. 21, no. 7, "Market Shares..."

Market shares (in %) of the most important art markets from 1988/'89 to 1993/'94

Year/Country	1988/89	1989/90	1990/91	1991/92	1992/93	1993/94
USA	44.9	47.3	41.1	38.5	43.7	44.8
Great Britain	31.2	24.7	24.3	29.2	30.2	25.6
France	12.0	16.1	13.0	10.1	8.5	10.6
Germany	1.7	1.5	5.0	5.2	4.2	3.9
Switzerland	1.2	1.1	2.3	2.3	2.3	2.3
Italy	2.2	2.2	1.6	1.2	0.9	1.6
Sweden	2.7	2.2	1.6	1.2	0.9	1.6
Rest of the world	4.1	4.1	8.6	10.7	8.6	9.6

Source: Art Sales Index.

Turnover, related to the market segment of art auctions from 1989/90 to 1992/93 is shown in table 2.

Turnover on art auction markets from 1989/'90 to 1993/'94 (in millions of pounds)

Year/Country	1988/89	1989/90	1990/91	1991/92	1992/93	1993/94
USA	802.4	1,331.5	348.9	257.2	360.1	401.4
Great Britain	557.5	695.3	206.3	195.1	248.8	229.4
France	214.4	453.2	110.4	67.5	70.0	95.0
Germany	30.4	42.2	42.5	34.7	34.6	34.9
Switzerland	21.4	31.0	19.5	15.4	19.0	20.6
Italy	39.3	84.5	34.8	18.7	13.2	14.3
Sweden	48.2	619.3	13.6	8.0	7.4	14.3
Rest of the world	73.3	115.4	73.0	71.5	70.9	86.0

Source: Art Sales Index; Calculations made by the IfO Institute.

It should be noted that Table 2 illustrates the situation of upheaval on the art market, i.e. a phase in which the speculative high prices achieved in the years 1988 and 1989 were brought down to an average level which was observed during the previous years but which is now rising again.

The development in the countries of the European Union where the administration of *droit de suite* has been observed in recent years and documented in statistics, fluctuates according to the market development. The benefits acquired from the application of *droit de suite* in individual European countries can be seen in Table 3.

The amounts of resale remuneration collected by artists' societies in 1991, 1992 and 1993 are as follows:

	1991	1992	1993
Belgium	2,326,000 BF	3,719,000 BF	772,000 BF
Denmark	3,200,000 DK	2,400,000 DK	1,700,000 DK
France	25,000,000 FF	13,000,000 FF	1,700,000 FF
Germany	4,117,000 DM	4,546,000 DM	4,167,000 DM
Portugal	236,000 ESC	1,168,000 ESC	107,000 ESC
Spain	5,066,000 Pts.	1,830,000 Pts.	4,131,000 Pts.

Source: Statistics of the EVA, European Visual Artists

According to the experience of European collecting societies, an individual action by individual artists or artists' estates cannot be determined in statistical terms, due to the practical difficulties involved. With the exception of a few individual cases, it is not possible in the Federal Republic of Germany, a country with a well developed and transparent art market, to exercise this right outside the collecting society, nor has it been attempted.

Due to the different legal situations, comparisons cannot be made between the earnings on the individual European markets. In France, for instance, *droit de suite* is currently only imposed at auctions, while in Denmark, Germany, and Spain, the resale art trade turnover is included. While the above tables show comparable fluctuations in the development of the art market, growth rates can be observed which can be solely attributed to the expansion of the administration of *droit de suite* and which to some extent contradict market developments, in Germany for instance.

2. Beneficiaries of *droit de suite*

There are no statistics available on the distribution of sums collected by artists' societies, which would provide a special trade weighting related to beneficiaries..

In terms of the auction market, from lists published by auctioneers which lend themselves more easily to analysis than the art trade market, but which, in the final analysis also reflect turnover in the art trade, one can observe that by far the greatest number of works of art are sold in the lower price categories (87.4% for less than \$10,000 and 95 % for less than \$25,000). In contrast, in the individual price category, shares in turnover are relatively constant.

From the point of view of the artists' societies, this reflects the significance of the prices obtained in the low turnover category; the majority of participating artists belong to this category and receive remuneration from these market segments.

With regard to beneficiaries of *droit de suite*, there are no reliable statistics available on the relationship between heirs and living artists. However, one can with all certainty dispel the notion spread, in particular by its opponents, that *droit de suite* primarily benefits the heirs of well-known artists. The rapid turnover of works of art as a result of the frequent change in preferred art trends increases the number of resales, in particular in the sector of the living generation. One can therefore assume with all certainty that two thirds of the resale turnover in the art trade involves works of contemporary artists. It should be pointed out in passing with regard to the sharing of income, that within the scope of the statutory duration of copyright, the question does not arise as to whether the entitled party still lives or whether he or she is represented by his or her heirs, or plays any role whatever in the share of the exploitation of protected works. Hence, an argument against *droit de suite* based on the assumption that it also benefits heirs, is not a valid argument..

3. Implementation

The *droit de suite* is administered by collecting societies in the countries which recognize it. From a practical point of view and in particular with regard to the application of the right to information and the development of collecting systems, the role of collecting societies in the administration of this right requires discussion with representatives of the art market and the auctioneers. When the law is first introduced, controversies often arise between the art market and representatives of the artists' interests. Agreements have to be reached for the application of the law, keeping administration costs to a minimum.

In the case of the Federal Republic of Germany for example, an agreement was reached between the art dealers' associations, on the one hand, and the collecting society, Bild-Kunst on the other, whereby the money owed to the artists' society would be raised through lump sums paid by the participating galleries, thus alleviating the burden on the individual galleries without restricting the rights of the artists. Even if it may prove difficult to put such an arrangement into practice in other countries, it does show that despite the claims against it, the administration of *droit de suite* can be organised in an efficient way, just like the administration of the rights of musical authors which has been in practice for many years. Depending on the importance of the market and the efficiency of the national collecting societies, administration costs fluctuate between 10 and 30%. They decrease accordingly as the law becomes internationalised and a greater number of artists and other areas of the art trade are reached by this law.

4. Social and Cultural Components

In accordance with the national legislation on the activities of collecting societies and the will of the legislator, as well as with the respective formulation of *droit de suite* in the law, a proportion of the earnings, usually not more than 10%, can be allotted for supporting young, creative artists and helping them to gain access to the art market. In this way the

principle of solidarity between creators of art works, whereby successful artists support beginners, can be put into practice. It is also conceivable that the percentage of earnings gained from the administration of *droit de suite* could be used for supporting art markets, thus promoting the development of the art trade in the interests of all concerned.

IV. Necessary contents of a statutory regulation of *droit de suite*

1. Definition of the works of art to be covered by *droit de suite*

With regard to the extension of the concept of "art" to include new kinds of creative work, it is not only "classical works of art," such as paintings, original engravings, cuttings, etchings and lithographs and sculptures which should be regarded as originals, but all other creative prints, in particular silk-screen printing and tapestries. Both creators of works of art and art dealers believe that *droit de suite* should also include photographs, since over the past ten years these have evolved into a special sector of the art market and can fetch top prices, which are in no way inferior to those demanded for works of art (see also: *Droit de suite*, Draft guiding principles concerning the operation of this right, Document of the Executive Committee of the International Union for the Protection of Literary and Artistic Works (Berne Union), 24th Session, Paris 17- 25 June 1985, to June 25, 1985).

Concerning works of applied art, in accordance with court decisions, taken in France in particular, on the application of *droit de suite* vis-à-vis this category of protected works, the guiding principle should be the extent to which such works are protected under national copyright law.

In view of the insurmountable difficulties encountered in finding a globally acceptable definition of the concept "original works of visual art", this should be decided by national legislation.

2. Definition of Sales Subject to *droit de suite*

Bearing in mind the diversity of the art market which is increasingly organized by professional agents in the conduct of auctions, special galleries, art trade rooms and negotiation by telephone, a statutory regulation of *droit de suite* cannot be restricted to sales in just one segment of the art trade. In order to rule out any distortion which might result from competition and the relocation of turnover within a country, a statutory regulation must cover all sales involving professional dealers as sales persons, auctioneers, agents or purchasers. A minimum price of about 1,500 French francs, would help to avoid the inclusion of small turnovers.

On the other hand, sales between private persons should not be covered because they cannot be controlled and private relationships could be strained by charging fees. One must, however, make a clear distinction between reselling and first sales by galleries. Here the term first sales means all sales whereby the selling dealer buys the works of art directly from the artist who produces it without any involvement of an agent.

In this case a charge through *droit de suite* would not be not worthwhile since this would immediately be passed on to the artist but *Droit de suite* should be applied in all other cases of resale.

3. Amount of Fees

A distortion of the art market through the application of *droit de suite* in a great number of countries can only be avoided if equivalence of the system of fees is reached. The countries which up to now recognise *droit de suite* and apply it assume a participation in earnings by the artists of between 3 and 5% of the revenue earned by the seller. Such a uniform amount has the advantage that the calculation can be simply made and provides a clear calculation basis for the market.

However, the proposal for harmonisation put forward by the European Union takes another approach and suggests applying digressive fees, depending on the resale price of the work of art. Sales would, accordingly, bear charges (regulation from the Directive). In the debate currently being held on the final formulation of this Directive, the art trade is naturally proposing to further reduce the fees.

With regard to the benefit to the artist of this regulation, it should be noted that sales which fetch low prices generally relate to young, up-and-coming artists while top prices are obtained by artists who have a secure income and are leaders in the art world. It should also be observed that when a sale price goes up, the risk of the relocation of sales in markets without *droit de suite* also increases. It is therefore, not only in the interest of the artists, but of the market itself if, for example, in the case of the introduction of graduated fee rates, payments for comparatively low resale earnings are set as high as possible. Calculating different payment rates can cause problems when it is put into practice, for example, next to frontiers in particular, prices are manipulated in order to achieve more favourable charges incurred by *droit de suite*.

It is impractical to link the claim to *droit de suite* exclusively to the value-added achieved through resale as, in general, this cannot be accurately calculated.

4. Right to information

The prerequisite for the effective exercise of *droit de suite* is that the beneficiary artist must receive information on the sales proceedings, in particular the sales prices. Experience shows that the implementation of *droit de suite* is to a great extent impractical if the right to demand such information is not established.

There are, however, practical difficulties with regard to the introduction of a right to demand information for each individual beneficiary in that art dealers and auctioneers involved in the resale market can find themselves confronted with a mass of such demands on the part of all beneficiaries, possibly from many different countries.

It is therefore advisable that the exercise of the right to demand information should be limited and, as in Germany, should only be granted to one collecting society. Thus, the art trade has to deal only with one society, which has the right to demand information on resales via an agreed procedure about once a year. On the basis of the information received, the collecting society can then collect the share of earnings on behalf of the artists and pass it on to them. Nevertheless, some laws envisage the exclusive collection of information by state institutions which in turn would pass it on to the artists. In view of the bureaucracy involved in this system, preference should be given to a collecting society which is generally formed by the beneficiaries themselves for this purpose.

5. Entitlement to claims

In accordance with the basic principles of copyright law, claims for asserting *droit de suite* are primarily granted to the creators and, within the framework of the statutory protection period, to their heirs. A further restriction of the law of succession, limiting the exercise of the *droit de suite* only to family members of the deceased artists, would not be in accordance with the principles generally recognised by copyright laws and should therefore be avoided.

It is particularly important to rule out the transferability of *droit de suite* during the lifetime of the artist in order to avoid it being forcibly assigned in favour of the art trade. Experience shows that in countries in which *droit de suite* is practised without this provision, artists are requested to renounce *droit de suite* the first time their works are sold, with the result that they are exempted from the effective exercise of this right in later years. Only the principle of the non-transferability of this right protects artists from repression by the art trade or an attempt to make them renounce their rights in return for small additional payment, when their works are being sold for the first time.

6. National treatment or reciprocal transaction

Article 14^{ter} of the Berne Convention as revised in 1971 limits national treatment. It is certainly worth keeping to this provision. The prerequisite of reciprocity limits the possibility of disproportion in world standards between different markets and rules out the likelihood of individual markets making excessive payments to artists from other countries which do not recognise the right and which could result in imbalances in the art market. In the interest of the art trade in the countries which recognise *droit de suite* the continuation of the application of Article 14^{ter} is most firmly recommended.

7. Collecting societies

In general, *droit de suite* cannot be exercised by individual artists, because they do not have an overview of the national and international markets in which their works are may be sold. This does not rule out the possibility for individual artists to exercise their rights themselves if clear information is available, insofar as there is no need to exclusively link the administration of *droit de suite* to the services of a collecting society.

On the other hand, a realistic legislator must assume that it is practically impossible to exercise this right without recourse to such an organisation. The collecting society can not only handle claims in a way acceptable to the art trade, for instance through annual inquiries allowed under statutory regulations, it also provides a guarantee that the entire market is controlled and, at the same time, that charges are evenly spread. Apart from this, within the framework of the appropriate statutory regulations, collecting societies can use part of their earnings for social support for artists or for promoting young up-and-coming artists. They can also enable foreign artists to benefit from this right through their network of international cooperation. It is therefore advisable that at least the option of exercising *droit de suite* through collecting societies should be incorporated into the law.

V. Summary

Economic statistics on the development of the art market and in particular the scope of the auction market and on the administration of *droit de suite*, clearly show that the resale of works of art makes up a considerable part of the market which is growing on a global scale. It is therefore unacceptable that artists from many countries are permanently prevented from participating in this market. However, this right, which up to now has not yet been introduced universally on a uniform basis, also creates difficulties for the art market which can only be overcome if this right is recognized in all countries. Such a policy, which corresponds to the principle of supporting art and culture, is one to which all UNESCO Member States should be committed.

The harmonisation of a legal approach would mean that artists from non-European countries could, in future, benefit from *droit de suite* and discrimination resulting from Article 14ter of the revised Berne Convention would be eliminated. The harmonization of this law would be favourable to the economic situation of visual artists worldwide and, as the experience of European countries has shown, would not place an unacceptable burden on the art market.