

SUBMISSION 31a

**A SUBMISSION TO THE HOUSE STANDING COMMITTEE
ON CLIMATE CHANGE, WATER, ENVIRONMENT AND THE ARTS
INQUIRY INTO *RESALE ROYALTY RIGHT FOR
VISUAL ARTISTS BILL 2008 (CTH)***



Jean-Francois Millet's *The Angelus*

ROBERT DEARN

SOLICITOR

COLQUHOUN MURPHY SOLICITORS

31 TORRENS STREET BRADDON ACT 2612

WORK TELEPHONE NUMBER: (02) 6248 0499

DR MATTHEW RIMMER

SENIOR LECTURER

THE AUSTRALIAN NATIONAL UNIVERSITY

COLLEGE OF LAW

CANBERRA, ACT, 0200

WORK TELEPHONE NUMBER: (02) 61254164

TABLE OF CONTENTS

Preface	3
Profiles	4
Executive Summary	5
1. History	13
2. International Law	21
3. The United States	26
4. The European Union	39
5. The United Kingdom and Ireland	46
6. New Zealand	55
7. Australia	59
8. Constitutional Law	73
9. The Resale Royalty Right: Operative Parts	88
10. Regulation of Collecting Societies	101
11. The Duration of the Resale Royalty Right	108
12. Indigenous Intellectual Property	120

‘The *droit de suite* is *La boheme* and *Lust for Life* reduced to statutory form.’

Monroe Price, *Yale Law Journal* (1968)

**‘On the resale of art, everyone else makes money,
but the artist is forgotten’.**

John Olsen, Australian artist

‘A resale royalty scheme will provide further recognition of the critical contribution artists make to our identity, community and economy.’

**The Minister for the Environment, Heritage, and the Arts, Peter
Garrett.**

‘I think even established artists will be feeling the pinch at the moment, in the current financial environment, so any additional income will be welcome.’

Mandy Martin, Australian artist

‘We cannot with clear conscience buy Aboriginal art without being concerned about the circumstances of the people who make it.’

Former National Gallery of Australia director, Brian Kennedy

PROFILES

Robert Dearn is a senior associate at Colquhoun Murphy Solicitors. He holds a BA and a LLB (Hons) from the Australian National University. Dearn is admitted to practice in the Supreme Court of the Australian Capital Territory and the High Court of Australia. Dearn is an experienced intellectual property and commercial lawyer. He regularly advises clients on IP commercialisation and the protection and enforcement of IP rights. Dearn is also a commercial litigator, representing clients in matters such as defamation, consumer protection and company law. Dearn also holds a keen interest in the creative industries. He acts for a number of print publications, including Orphan Magazine, a free quarterly street press which showcases and promotes up and coming artists. Dearn has a research interest in copyright law. He has been researching and writing on the right of resale since 2003.

Dr Matthew Rimmer is a senior lecturer and the director of Higher Degree Research at the ANU College of Law, and an associate director of the Australian Centre for Intellectual Property in Agriculture (ACIPA). He holds a BA (Hons) and a University Medal in literature, and a LLB (Hons) from the Australian National University. Rimmer received a PhD in law from the University of New South Wales for his dissertation on *The Pirate Bazaar: The Social Life of Copyright Law*. He is a member of the Copyright and Intellectual Property Advisory Group of the Australian Library and Information Association, and a director of the Australian Digital Alliance. Rimmer is the author of *Digital Copyright and the Consumer Revolution: Hands off my iPod* (Edward Elgar, 2007), and *Intellectual Property and Biotechnology: Biological Inventions* (Edward Elgar, 2008). He also edited the thematic issue of *Law in Context*, entitled *Patent Law and Biological Inventions* (Federation Press, 2006). Rimmer was also a chief investigator in an Australian Research Council Discovery Project, 'Gene Patents In Australia: Options For Reform' (2003-2005), and an Australian Research Council Linkage Grant, 'The Protection of Botanical Inventions' (2003). He is currently a chief investigator in an Australian Research Council Discovery Project, 'Promoting Plant Innovation in Australia' (2009-2011). Rimmer has published widely on copyright law and information technology, patent law and biotechnology, access to medicines, clean technologies, and traditional knowledge. His work is archived at *SSRN Abstracts* and *Bepress Selected Works*.

EXECUTIVE SUMMARY

A right of resale, or *droit de suite* (a right to follow), is a legislative instrument under intellectual property law, which enables artists to receive a percentage of the sale price whenever artistic works are resold.

A French legal scholar, Albert Vaunois, first articulated the need for a '*droit de suite*' in connection with fine art back in 1893. The French Government introduced a scheme to protect the right of resale in 1920, after controversy over artists living in poverty, while public auction houses were profiting from the resale of their artistic creations.

In the United States, there has been less support for a right of resale amongst legislatures. After lobbying from artists such as the king of pop art, Robert Rauschenberg, the state of California passed the *Resale Royalties Act* in 1977. At a Federal level, the United States Congress has shown some reluctance in providing national recognition for a right of resale in the United States.

A number of other European countries have established a right of resale. In 2001, the European Council adopted the Artists' Resale directive and recognised that the 'artist's resale right forms an integral part of copyright and is an essential prerogative for authors.' In 2006, the United Kingdom promulgated regulations, giving effect to a right of resale in that jurisdiction.

However, a number of Latin American and African countries have established a right of resale. The New Zealand Parliament has debated a bill on a right of resale.

Policy debate

There has been a long and inconclusive policy debate in Australia about the desirability of a right of resale.

In September 2003, the art collector and philanthropist, Rupert Myer, released a government-commissioned report on contemporary visual arts and craft in Australia. He recommended that the Commonwealth Government should introduce a resale royalty arrangement.

Supporting such a proposal, Senator Aden Ridgeway of the Democrats argued: 'The establishment of a scheme for resale royalty rights for artists is particularly important in the context of the rapidly booming international market for Indigenous artworks as compared to the desperate economic conditions within which many Indigenous artists live and work.'

Curator, Brenda Croft, has observed: 'In my own mind I've had problems with seeing Indigenous works sometimes seemingly traded like stock and bonds, particularly when I know there's no right of resale to the artists.'

In May 2006, Attorney-General Philip Ruddock and Minister for the Arts and Sport, Senator Rod Kemp, announced that the Federal Government had decided against a right of resale for Australian artists: 'The Government carefully considered the issue of a possible resale royalty scheme and concluded that a resale royalty right would not provide a meaningful source of income for the majority of Australia's artists.' The Ministers instead announced \$6 million over four years in the 2006-07 Budget to support visual artists as an alternative to a resale royalty scheme.

In 2007, the Senate Standing Committee on Environment, Communications, Information Technology and the Arts released a report on Indigenous art. The Government majority of the committee recommended that a resale royalty scheme not be introduced at this time, because of the lack of benefit to most artists, and in particular Indigenous artists, and the lack of new evidence to the contrary.

By contrast, the Australian Labor Party has strongly advocated a right of resale. Senator Bob McMullan and Senator Kate Lundy have supported private members' bills to introduce a right of resale. The party's spokesman for the arts, Peter Garrett, has complained:

'Those most opposed to a resale royalty scheme are the major art auction houses. They have lobbied against a resale royalty on a number of grounds including extra administration costs, no guarantees that artists will get a tangible benefit, that the scheme would only benefit a small proportion of artists and that the existing art market would be distorted.'

The politician notes: 'While the legal evolution that has occurred to recognise an expanded framework of artists' rights is extremely important, it is also important that those artists who have hitherto not been sufficiently recognised or rewarded for their work should be provided for.' After forming government, the Australian Labor Party has introduced the *Resale Royalty Right for Visual Artists Bill 2008* (Cth).

Recommendations

We whole-heartedly support the introduction of a right of resale for visual artists in Australia. Such a measure is long overdue – especially given that the doctrine was first theorized in 1893; and first implemented in France in 1920. We firmly believe that the Australian Parliament can fashion a right of resale, which can promote the principles of social justice, and ensure that there is a fair and equitable relationship between artists and the art market in Australia.

We would congratulate the Federal Government for its vision and determination in establishing a resale royalty right for visual artists in Australia. We are heartened that the legislative model is a robust one – unlike the tokenistic Californian resale royalty or the minimalist Irish regime. We believe that the Australian resale royalty right regime will be workable, and will have a positive impact upon artists, galleries, auction-houses, and Indigenous communities. We do not believe that the passage of the legislation should be unduly delayed, or postponed indefinitely.

Nonetheless, we are of the opinion that there are some imperfections in the *Resale Royalty Right for Visual Artists Bill 2008 (Cth)*. We note that the Committee Chair Jennie George has said that ‘The Committee’s task will be to encourage the public scrutiny of the Bill prior to the resumption of the Second Reading Debate in the House’. She has said that the inquiry ‘will concentrate on the content and structure of the Bill with the view to ensuring that the proposed legislation will achieve the objectives as outlined in the Bill and the Minister’s Second reading speech’. We would make a number of recommendations in respect of the *Resale Royalty Right for Visual Artists Bill 2008 (Cth)* in order to improve its formal drafting, and help realise the over-arching objectives of the scheme.

In the following submission, we would make a number of arguments in respect of the right of resale:

- 1. Despite emerging as a parochial response to the economic plight of the artist in late 19th Century France, the legal provenance of the *droit de suite* is founded firmly in an understanding of the application of copyright law to the fine arts.**

2. The Australian Government should pass national legislation to implement Article 14^{ter} of the *Berne Convention*.
3. The *Resale Royalty Right for Visual Artists Bill 2008* (Cth) should not be subject to a residency test.
4. The Californian resale royalty model fails to provide a touchstone for legislative reform and should not be followed in Australia.
5. The US Copyright Office's conclusion that there is no sufficient economic or copyright policy justification for a resale right should not be followed in Australia.
6. The European Union's 2001 Directive embraces the conception of the *droit de suite*, casting the right as an 'integral part of copyright' and an 'essential prerogative for authors'.
7. The codification of the artists' resale right under European law has fostered a contemporary viability for the *droit de suite*.
8. Fierce opposition to the European Union's 2001 Directive by anti-*droit de suite* countries resulted in the adoption of a minimalist resale royalty right scheme.
9. The introduction of the resale royalty right into the United Kingdom has had no adverse impact on the United Kingdom's art market.
The minimalist Ireland model for a right of resale should not be followed. The Committee should consider the option of taxation exemptions for certain earnings of writers, composers and artists in a separate inquiry.
10. We would note that there is a lack of harmonization between the proposed New Zealand right of resale and the proposed Australian right of resale – particularly in respect of the definitions; the duration of the right of resale; and its relationship to copyright law.

11. Ideally, we think that it would be preferable if there was a common right of resale in Australasia – with mirror legislation in Australia and New Zealand.

12. The resale royalty debate in Australia shows a confused local understanding of the theoretical foundations of the right.

13. A viable Australian *droit de suite* ‘translation’ must be governed by the principles of social justice, forged out of the relationship between an artist and the art market.

14. We would submit that the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) is supported by the intellectual property power and the external affairs power of the Federal Government under the Constitution.

15. We note that there are conflicted authorities as to whether the intellectual property power is subject to the proviso with respect to acquisition of property on just terms.

We believe that section 11 of the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) is unnecessary in light of the ruling in *Nintendo Co Ltd v Centronics Systems Pty Ltd*.

We note that, in any event, the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) could have a just terms compensation provision in the unlikely event that the decision in *Australian Tape Manufacturers Association Ltd v Commonwealth* is operative.

The United States jurisprudence on the Takings Clause supports the interpretation of Robertson SC in respect of the *Resale Royalty Right for Visual Artists Bill 2008* (Cth).

16. The right of resale legislation should require an ‘artwork’ to have ‘artistic quality’ – to ensure that utilitarian objects do not come within the inclusive definition of ‘artwork’ provided by the *Resale Royalty Right for Visual Artists Bill 2008* (Cth). Industrial property – such as designs, patents, and trade marks – should be expressly excluded under section 9 of the *Resale Royalty Right for Visual Artists Bill 2008* (Cth).

17. The right of resale legislation should stipulate that an ‘artwork’ must satisfy a high threshold of originality – requiring a creative spark.
18. The right of resale legislation should require an ‘artwork’ to have a ‘material form’.
19. The right of resale legislation should stipulate that an ‘auctioneer’ need not be a specialist art auctioneer.
20. The right of resale legislation should stipulate that a ‘person otherwise involved in the business or dealing in artworks’ includes a person whose involvement or dealings in artworks are not the dominant part of the person’s business.
21. The resale royalty right legislation should not apply to commercial resales of artwork below \$1,000.
22. The resale royalty right legislation should impose a flat royalty rate of 5% on all commercial resales.
23. The resale royalty right legislation should not impose a cap on resale royalty payments.
24. The Government should conduct an extensive review of the market impact of the resale royalty right legislation following its implementation to determine whether or not the royalty rate is set at appropriate level.
25. The *Resale Royalty Right for Visual Artists Bill 2008* (Cth) does not provide sufficient deterrents for unscrupulous art market participants.
26. The pecuniary penalties provided for in the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) should apply to a person who is concerned or takes part in the management of a body corporate liable to be prosecuted for a contravention of the Act as if the person committed the contravention personally.

27. The resale royalty right legislation should make it an offence not to pay the resale royalty on a commercial resale.

28. The right of resale legislation should not apply to literary, musical or dramatic works.

29. We contend that a single collecting society should not have a monopoly on the administration of a right of resale; there should scope for multiple collecting societies.

Section 23 (1) of the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) should be retained. Division 5 of the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) should be amended to allow for individual collection and enforcement of the resale royalty.

30. We would also contend that the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) should ensure that the collecting society or societies for the right of resale are subject to high standards of transparency and accountability.

31. We would submit that there is a need for an independent, statutory-based ombudsman to provide proper oversight of the right of resale.

32. We would submit that the term of protection for the right of resale should be, at most, the life of the author plus 50 years – not life of the author plus 70 years.

33. We would agree that the right of resale should be a personal, inalienable right.

34. We would also agree that the right of resale should not be subject to waivers.

35. The *Resale Royalty Right for Visual Artists Bill 2008* (Cth) should recognise the scope for communal ownership of Indigenous artistic works.

The *Resale Royalty Right for Visual Artists Bill 2008* (Cth) is to be commended for its innovative provisions dealing with the question of succession.

36. The Australian Government should establish a National Indigenous Cultural Authority to administer and manage the right of resale for Indigenous artists.

37. The Australian Government should enact sui generis legislation to comprehensively implement Article 31 (1) of the *United Nations Declaration on the Rights of Indigenous Peoples 2007*: ‘Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.’

1. HISTORY

‘It is to the Auctioneers we go to establish the value of our pasts, of our futures, of our lives.’
Salman Rushdie, *At the Auction of the Ruby Slippers* (*East West*, London: Vintage, 1995, p. 101)

1.1 French beginnings – a parochial genesis

French legal scholar Albert Vaunois is credited with first articulating the usefulness of the doctrine of *droit de suite* in connection with fine art in 1893.¹

However, it required an artistic controversy to garner public support for the introduction of an artists’ *droit de suite* in France in 1920.² Public support for a resale right was engaged by the circulation of a drawing by prominent French realist and impressionist Jean-Louis Forain prior to the First World War. The drawing featured an auctioneer excitedly pounding his hammer to the cry ‘100,000 francs, gone!’, while in the front row of the bidders, two children, dressed in rags, exclaim ‘Look, one of Papa’s paintings!’³ The drawing captured the claim made by artists for a share of the proceeds of their work, conveying the unfairness of a fine art market that bestowed rewards upon market middlemen while artisans and their heirs lived in abject poverty. The press campaign that ensued from the popular reception of Forain’s image

¹ Liliane de Pierredon-Fawcett, *The Droit de Suite in Literary and Artistic Property* (Louise-Martin-Valiquette trans.), 1991, 4, quoted within, Michael B. Reddy, ‘The Droit De Suite: Why American Fine Artists Should Have The Right To A Resale Royalty’ (1995) 15 *Loyola of Los Angeles Entertainment Law Journal* 509, 515; Jeffrey C. Wu, ‘Art Resale Rights and the Art Resale Market: A Follow-Up Study’ (1999) 46 *Journal of the Copyright Society of the USA* 531, 534.

² The importance of art as a vehicle for teaching law and legal principles is discussed by Nancy Illman Meyers in her article ‘Painting the Law’ (1996) 14 *Cardozo Arts and Entertainment Law Journal* 397.

³ Liliane de Pierredon-Fawcett, *The Droit de Suite in Literary and Artistic Property* (Louise-Martin-Valiquette trans.), 1991, 4, quoted within, Michael B. Reddy, ‘The Droit De Suite: Why American Fine Artists Should Have The Right To A Resale Royalty’ (1995) 15 *Loyola of Los Angeles Entertainment Law Journal* 509, 515; Australian Copyright Council, *Bulletin 69: Resale Royalty – A New Right for Artists*, Sydney: Australian Copyright Council, 1990, 3. A similar account of Forain’s drawing/cartoon is relayed by Dr Theodore Feder, President of the Artists Rights Society, in testimony before the Copyright Office: R. Oman, ‘Copyright Office Hearings on the Droit de Suite’ (1992) 16 *Columbia Journal of Law & the Arts* 185, 210.

highlighted the inequalities witnessed in public auction house sales in the early nineteenth century. Prominent in this publicity campaign was the sale of Jean-Francois Millet's *The Angelus*. Millet sold *The Angelus* for only 1,200 francs. A few years later, the painting was resold at auction for one million francs, 'at a time when his grand-daughter was selling flowers in the street'.^{4 5}

Despite the tenor of welfare rights that permeated the groundswell in support for an artists' resale right in France, the legislature's rationale for introducing the scheme in 1920 was based principally on the belief that existing copyright law failed to protect works of fine art to an adequate degree.⁶ This perception emanated from the belief that, because the value imbued in a work of fine art 'lies in its uniqueness',⁷ a fine artist is unable to exploit the benefits conferred under copyright law.⁸ The discriminatory operation of the copyright statute was succinctly articulated by the American commentator Rita Hauser:

⁴ Dianne B. Schulder, 'Art Proceeds Act: A Study of the Droit de Suite and a Proposed Enactment for the United States' (1966-67) 61 *NW. U.L. Rev.* 19, 23, cited within, Jeffrey C. Wu, 'Art Resale Rights and the Art Resale Market: A Follow-Up Study' (1999) 46 *Journal of the Copyright Society of the USA* 531, 534.

⁵ Similar versions of this story are related in: Jennifer R. Clarke, 'The California Resale Royalties Act as a Test Case for Preemption Under the 1976 Copyright Law' (1981) 81 *Columbia Law Review* 1315; Michael B. Reddy, 'The Droit De Suite: Why American Fine Artists Should Have The Right To A Resale Royalty' (1995) 15 *Loyola of Los Angeles Entertainment Law Journal* 509, 515; Jon Stampford, *Economic Analysis of the Droit de Suite – The Artists' Resale Royalty*, The University of Queensland School of Economics Discussion Papers, No. 301, January 2002, 1; Neil F. Siegel, 'The Resale Royalty Provisions of the Visual Artists Rights Act: Their History and Theory' (1988) 93 *Dickinson Law Review* 1, 2; Simon Stokes, *Art and Copyright*, Oxford: Hart Publishing 2001, 77.

⁶ Australian Copyright Council, *Bulletin 69: Resale Royalty – A New Right for Artists*, Sydney: Australian Copyright Council, 1990, 3.

⁷ Donald M. Millinger, 'Copyright and the Fine Artist' (1980) 48 *George Washington Law Review* 354, 355.

⁸ Monroe E Price, 'Government Policy and Economic Security for Artists: The Case of the Droit de Suite' (1968) 77 *Yale Law Journal* 1333, 1342-3; Michael B. Reddy, 'The Droit De Suite: Why American Fine Artists Should Have The Right To A Resale Royalty' (1995) 15 *Loyola of Los Angeles Entertainment Law Journal* 509, 515-6; and Elliot C. Alderman, 'Resale Royalties in the United States For Fine Visual Artists: An Alien Concept' (1992) 40 *Journal of the Copyright Society of the USA* 265, 268.

Copyright protection is given to a creator against any unauthorised reproduction, performance, or exhibition of his work; consequently, the writer or composer generally reserves some pecuniary benefits unto himself when he alienates these exclusive rights of reproduction and performance. In contrast, the artist sells an object, rather than intangible rights, much as if he alienated a suit of clothes he had tailored. There is nothing, practically speaking, that he can reserve unto himself, for the painting cannot be exploited in the broad sense of the word.^{9 10}

The tailored suit, while apt to explain the effect of the first sale doctrine, fails to engage with fact that the ‘commercial insignificance of the reproduction right for fine art’¹¹ emanates from the special nature of fine art as a commodity. Rather than representing a commodity sold free from attendant authorship rights, a painting can be distinguished by its recognition as ‘the one and only perfect embodiment of that work which cannot be matched even by the best reproduction and thus is the only source of complete artistic enjoyment’.¹² Accordingly, under the French copyright statute, the fine artist was discriminated on the basis of their craft. The *droit de suite* thus emerges as a scheme under which to redress this imbalance and accord to fine artists the benefits reserved for the creative arts industry at large. Invested with the capacity to

⁹ Hauser, ‘The French Droit de Suite: The Problem of Protection for the Underprivileged Artists under the Copyright Law (1962) 11 *American Society of Composers, Authors and Publishers, Copyright Law Symposium* 1, 2, quoted within, Monroe E Price, ‘Government Policy and Economic Security for Artists: The Case of the Droit de Suite’ (1968) 77 *Yale Law Journal* 1333, 1343.

¹⁰ Much of the historical *droit de suite* scholarship emanates from a time when the artist was a ‘male’ subject. It is recognised that gender neutral language is appropriate in legal scholarship. However, in the interests of readability, such language henceforth will not be acknowledged.

¹¹ Elliot C. Alderman, ‘Resale Royalties in the United States For Fine Visual Artists: An Alien Concept’ (1992) 40 *Journal of the Copyright Society of the USA* 265, 268.

¹² Paul Katzenberger, ‘The Droit de Suite in Copyright Law’ (1973) 4 *International Review of Industrial Property & Copyright Law* 361, 368, cited within, Michael B. Reddy, ‘The Droit De Suite: Why American Fine Artists Should Have The Right To A Resale Royalty’ (1995) 15 *Loyola of Los Angeles Entertainment Law Journal* 509, 518.

‘reserve a payment commensurate with the use made of his creation’¹³ the French fine artist could now ‘follow the fortunes of his work’.¹⁴

1.2 A ‘personality’ claim to *droit de suite*

Despite claims that ‘it was not alms the authors asked for, but a property right’,¹⁵ the basis of such a claim was founded in moral rights theory and a romantic conception of the artist. An integral part of the model of ‘society and the artist’ promulgated by proponents of the *droit de suite* was the romantic conception that ‘the truth or value of an artwork springs from the special qualities of the artist who impresses upon the work a measure of their own genius’.¹⁶ To this extent, while a right of resale was originally couched in terms of an economic right, the genesis of the concept must be viewed as a ‘natural outgrowth of French moral rights jurisprudence’.¹⁷ Indeed, the concept of *droit de suite* has been widely acknowledged as a ‘hybrid’ of the moral right and an author’s economic right.¹⁸ Paul Katzenberger comments: ‘On the one

¹³ Diane B. Schulder, ‘Art Proceeds Act: A Study of the Droit de Suite and a Proposed Enactment for the United States’ (1966-7) 61 *NW. U.L. Rev.* 19, 24, quoted within, Jeffrey C. Wu, ‘Art Resale Rights and the Art Resale Market: A Follow-Up Study’ (1999) 46 *Journal of the Copyright Society of the USA* 531, 534.

¹⁴ De Sanctiis & Fabiani, *The Right on the Increase in Value of the Works of Fine Arts in the Italian Copyright Law*, 1967 (unpublished manuscript in UCLA Law Library), quoted within, Monroe E Price, ‘Government Policy and Economic Security for Artists: The Case of the Droit de Suite’ (1968) 77 *Yale Law Journal* 1333, 1343.

¹⁵ Rita E. Hauser, ‘The French Droit de Suite: The Problem of Protection for the Underprivileged Artist Under the Copyright Law’ 11 *Copyright L. Symp. (ASCAP)* 1 (1962), (quoting Abel Ferry, 1914 J.O., Chambre des Depute, Doc. Parl., annexe 3423, at 150 et seq., 2d Sess. Of Jan. 23, 1914), quoted in Michael B. Reddy, ‘The Droit De Suite: Why American Fine Artists Should Have The Right To A Resale Royalty’ (1995) 15 *Loyola of Los Angeles Entertainment Law Journal* 509, 516.

¹⁶ Neil F. Siegel, ‘The Resale Royalty Provisions of the Visual Artists Rights Act: Their History and Theory’ (1988) 93 *Dickinson Law Review* 1, 5.

¹⁷ Liliane de Pierredon-Fawcett, *The Droit de Suite in Literary and Artistic Property* (Louise-Martin-Valiquette trans.), 1991, 4, quoted within, Michael B. Reddy, ‘The Droit De Suite: Why American Fine Artists Should Have The Right To A Resale Royalty’ (1995) 15 *Loyola of Los Angeles Entertainment Law Journal* 509, 513.

¹⁸ Liliane de Pierredon-Fawcett, *The Droit de Suite in Literary and Artistic Property* (Louise-Martin-Valiquette trans.), 1991, 4, quoted within, Michael B. Reddy, ‘The Droit De Suite: Why American Fine Artists Should Have The Right To A Resale Royalty’ (1995) 15 *Loyola of Los Angeles Entertainment Law Journal* 509; Paul Katzenberger, ‘The Droit de Suite in

hand, it is inalienable and based on the right of paternity, surviving the sale of the work. Yet if one equates the resale with a new exploitation of the work, it is also remunerative'.¹⁹

The cultural milieu of late eighteenth and early nineteenth century France, steeped in the traditions of the Enlightenment and the French Revolution,²⁰ dictated that the artist must be conferred a special place within the social and legal order. Accordingly, one of the central justifications of the French legislature's attempt to redress the inequalities of the copyright statute was the recognition that an artist impresses their personality upon their work.²¹ It acknowledges 'that art is not merely an economic asset, but is a continuing projection of the artist's personality':²²

When an artist creates, be he an author, a painter, a sculptor, an architect or a musician, he does more than bring into the world a unique object having only exploitative possibilities; he projects into the world part of his personality and subjects it to the ravages of public use.²³

Copyright Law' (1973) 4 *International Review of Industrial Property & Copyright Law* 361, 367-8, cited within, Elliot C. Alderman, 'Resale Royalties in the United States For Fine Visual Artists: An Alien Concept' (1992) 40 *Journal of the Copyright Society of the USA* 265.

¹⁹ Paul Katzenberger, 'The Droit de Suite in Copyright Law' (1973) 4 *International Review of Industrial Property & Copyright Law* 361, 367-8, cited within, Elliot C. Alderman, 'Resale Royalties in the United States For Fine Visual Artists: An Alien Concept' (1992) 40 *Journal of the Copyright Society of the USA* 265.

²⁰ David L. Booton, 'A Critical Analysis of the European Commission's Proposal for a Directive Harmonising the Droit de Suite' (1998) 2 *Intellectual Property Quarterly* 165, 166-72. For a more detailed account of the Revolutionary legislators' invocation of a 'natural right to property in order to legitimise the rights of authors' see Alain Strowel, 'Droit d'auteur and Copyright: Between History and Nature', within, Brad Sherman and Alain, Strowel, *Of Authors and Origins: Essays on Copyright Law*, Oxford: Clarendon Press, 1994; and Jane C. Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America', within, Brad Sherman and Alain Strowel, *Of Authors and Origins: Essays on Copyright Law*, Oxford: Clarendon Press, 1994.

²¹ Michael B. Reddy, 'The Droit De Suite: Why American Fine Artists Should Have The Right To A Resale Royalty' (1995) 15 *Loyola of Los Angeles Entertainment Law Journal* 509, 517; Neil F. Siegel, 'The Resale Royalty Provisions of the Visual Artists Rights Act: Their History and Theory' (1988) 93 *Dickinson Law Review* 5-8; Sheldon W. Halpern, 'Of Moral Rights and Moral Righteousness' (1997) 1 *Marquette Intellectual Property Law Review* 65, 66.

²² Michael B. Reddy, 'The Droit De Suite: Why American Fine Artists Should Have The Right To A Resale Royalty' (1995) 15 *Loyola of Los Angeles Entertainment Law Journal* 509, 517.

²³ Martin A Roeder, 'The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators' (1940) 53 *Harvard Law Review* 554, 557.

The rationale by which the French *droit de suite* was imbued with this romantic ideal was succinctly articulated by Neil Siegel in his influential article about the history and theory of the resale royalty:

The romantic view of art has been predominant for the past several centuries, and the resale royalty logically follows from this view. The qualities which the artist impresses upon his or her work never leave it, and whenever the work changes hands, any enjoyment which the new owner derives is solely attributable to the artist. Since the artist is responsible for the enjoyment of the subsequent owners, he or she should collect a fee or royalty when the work is resold.²⁴

Consequently, under the right of resale, ‘the seller pays for the privilege of having enjoyed a work of art during the time s/he owned it’.²⁵

1.3 Artists’ incomes and *droit de suite*: ‘La Boheme reduced to statutory form’²⁶

A corollary to the romantic conception of the artist as an original genius is the rhetoric that surrounds the understanding of the relationship between culture and the marketplace. Under the rubric of romanticism, the *droit de suite* is coloured by the image of the ‘starving artist’. The ‘deep-seated romantic view’²⁷ of the resale right is facetiously relayed by Monroe Price:

At its core is a vision of the starving artist, with his genius unappreciated, using his last pennies to purchase canvas and pigments which he turns into a misunderstood masterpiece.

²⁴ Neil F. Siegel, ‘The Resale Royalty Provisions of the Visual Artists Rights Act: Their History and Theory’ (1988) 93 *Dickinson Law Review* 8. See also, R Moulin, *The French Art Market: A Sociological View*: London: Rutgers University Press, 1987, 83, quoted within, Rita Hatton and John A. Walker, *Supercollector: A Critique of Charles Saatchi*, London: Ellipsis, 2000, 97.

²⁵ Elliot C. Alderman, ‘Resale Royalties in the United States For Fine Visual Artists: An Alien Concept’ (1992) 40 *Journal of the Copyright Society of the USA* 265, 269.

²⁶ This author credits the inspiration for and substance of this title to: Monroe E Price, ‘Government Policy and Economic Security for Artists: The Case of the Droit de Suite’ (1968) 77 *Yale Law Journal* 1333.

²⁷ *Ibid*, 1334.

The painting is sold for a pittance, probably to buy medicine for a tubercular wife. The purchaser is a canny investor who travels about artists' hovels trying to pick up bargains which he will later turn into large amounts of cash. Thirty years later the artist is still without funds and his children are in rags; meanwhile his paintings, now the subject of a Museum of Modern Art retrospective and a Harry Abrams parlour-table book, fetch small fortunes at Park-Bernet and Christie's.²⁸

This entrenched economic disparity between artists and collectors lies at the heart of the romantic discourse underpinning the *droit de suite*; fixating upon the inequity of a marketplace that reaps 'real gold for the speculator, [but] fool's gold for the artist'.²⁹ The efficacy of this popular icon in *droit de suite* scholarship is founded in the fact that it,

with one thrust preserves the struggling artist, starving in his garret, while it slaves society's conscience by paying a token to him or his estate when it finally recognises the quality of his work.³⁰

Under this rhetoric, an artists' *droit de suite* insists that a fine art market that 'is blind to its avant-garde'³¹ should pay penance for its insensibility. A copyright regime that is 'informed by Romanticism must be one which offers protection to these exceptional but fragile individuals'.³² As one author attested, to circumscribe the romantic ideals of a resale right under copyright law is '*La Boheme* and *Lust for Life* reduced to statutory form'.³³

²⁸ Ibid, 1335.

²⁹ Liliane de Pierredon-Fawcett, *The Droit de Suite in Literary and Artistic Property* (Louise-Martin-Valiquette trans.), 1991, 4, quoted within, Michael B. Reddy, 'The Droit De Suite: Why American Fine Artists Should Have The Right To A Resale Royalty' (1995) 15 *Loyola of Los Angeles Entertainment Law Journal* 509, 515.

³⁰ Monroe E Price, 'Government Policy and Economic Security for Artists: The Case of the Droit de Suite' (1968) 77 *Yale Law Journal* 1333, 1336-7.

³¹ Ibid, 1335.

³² Anne Barron, 'Copyright, Art, and Objecthood', within, (eds) McClean, Daniel and Schubert, Karsten, *Dear Images: Art, Copyright and Culture*, London: Ridinghouse, 2002, 277.

³³ Monroe E Price, 'Government Policy and Economic Security for Artists: The Case of the Droit de Suite' (1968) 77 *Yale Law Journal* 1333, 1335.

1. Despite emerging as a parochial response to the economic plight of the artist in late 19th Century France, the legal provenance of the *droit de suite* is founded firmly in an understanding of the application of copyright law to the fine arts.

2. INTERNATIONAL LAW

One of the justifications for the adoption of the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) is the desire to implement the *Berne Convention* fully. In his second reading speech, the Minister for the Environment, Heritage, and the Arts, Peter Garrett, emphasized: ‘Because the right is recognised in the Berne Convention for the Protection of Literary and Artistic Works, it will be possible for Australia to establish arrangements with other countries which acknowledge the right to a royalty for Australian artists whose work is sold in those countries’.

After France adopted a right of resale in 1920, several other countries followed suit – Belgium in 1921; Czechoslovakia in 1926; Poland in 1935; and Italy in 1941. Such nations lobbied for the recognition of a right of resale at an international level. In *The Law of Intellectual Property*, Sam Ricketson and Chris Creswell discuss the push for the inclusion of a right of resale in the *Berne Convention*:

Support for the concept was expressed by a number of international organisations, such as the International Literary and Artistic Association and the International Institute for Intellectual Cooperation in Rome. This led to a voeu (or resolution) being adopted at the Rome Revision conference of the Berne Convention for the Protection of Literary and Artistic Works in 1928 favouring the adoption of such protection by Berne Union countries. During the late 1930s, considerable work was done by meetings of international experts to formulate a special protocol to the Berne Convention for the protection of droit de suite. This work was cut off by the outbreak of World War II but at the Brussels Conference in 1948 a proposal to insert this protection directly into the convention was advanced by the Belgian Government.³⁴

The article was adopted at the Brussels Conference in 1948, and included in the Stockholm revision in 1967.

Article 14^{ter} of the *Berne Convention* concerns ‘Droit de suite’ in Works of Art and Manuscripts’, providing:

(1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.

³⁴ Sam Ricketson and Chris Creswell, *The Law of Intellectual Property*, Thomson Reuters, 17-1052.

(2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.

(3) The procedure for collection and the amounts shall be matters for determination by national legislation.

In the authoritative, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, Sam Ricketson and Jane Ginsburg provide this gloss on the interpretation of the right of resale under Article 14^{ter} of the *Berne Convention*:

The right accorded under paragraph (1) is an 'inalienable' right which immediately distinguishes it from the other pecuniary rights of the author protected under the Convention. In this respect, it is akin to moral rights under article 6^{bis}, but any further analogy is misleading. The *droit de suite*, whether or not it is regarded as part of the author's copyright, is a right that entitles the author to an 'interest' in subsequent sales of his work, and it is clear from the preparatory work for the Brussels Conference that this was considered to be a 'pecuniary interest' It will be seen that the first sale of his work is excluded, as the artist will usually (but not always) be the person who makes this sale. Only subsequent sales are covered by paragraph (1), but, unlike some national laws and the original proposal of the Belgian Government, this makes no distinction between public and private sales.³⁵

It is worth interpolating here that the proposed Australian model for a right of resale departs from the *Berne Convention*, because it applies to public sales, and not private sales. The explanatory memorandum to the *Resale Royalty Right for Visual Artists Bill 2008 (Cth)* does not adequately justify why Australia is departing from this international standard.

Sam Ricketson and Jane Ginsburg go onto comment about the further paragraphs in the *Berne Convention*:

However, paragraph (2) then makes it clear that there is no obligation on member states to accord this protection, and that it may only be claimed on condition of reciprocity. Finally, paragraph (3) leaves it to national legislation to determine how the collection of the *droit de suite* is to be done, as well as the amount of it.³⁶

The public hearing in the Australian Parliament, we think, did not provide a good account of the rules in relation to reciprocity. Under the *Berne Convention*, the

³⁵ Ibid, p. 676-677.

³⁶ Ibid., p. 676.

European Union would be obliged to protect Australian artists ‘to the extent permitted by the country where this protection is claimed’. It should be noted that the Australian regime for a right of resale is in, many respects, *stronger* than some European countries, such as the United Kingdom and Ireland.

It is worth noting that forty-nine countries currently recognise a right of resale, out of a membership of one-hundred and sixty-three countries of the *Berne Convention*. States which recognise a right of resale include: Algeria, Austria, Belgium, Bolivia, Brazil, Bulgaria, Burkina Faso, Congo, Costa Rica, Cyprus, Czech Republic, Denmark, Ecuador, Estonia, Finland, France, Germany, Greece, Guinea, Holy See, Hungary, Italy, Ireland, Ivory Coast, Latvia, Lithuania, Luxembourg, Madagascar, Mali, Malta, Mongolia, Morocco, Netherlands, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russian Federation, Senegal, Slovakia, Slovenia, Spain, Sweden, Tunisia, Turkey, United Kingdom and Uruguay.

In his treatise, *International Copyright: Principles, Law, and Practice*, Professor Paul Goldstein comments that the right of resale raises complex questions about jurisdiction and territoriality:

In an important 1994 decision, the German Federal Supreme Court ruled that, for the German Copyright Act’s *droit de suite* provision to apply, the resale in issue must have a sufficient connection to German territory, and that the auction in England of three works by Joseph Beuys lacked the necessary connection even though both the artist and the seller were German citizens, the auction contract was negotiated in Germany, and the works were delivered in Germany to the auction house’s subsidiary there.³⁷

The United States professor contends: ‘The fact that the terms of compensation under *droit de suite* differ from country to country, and that many countries have no resale royalty system at all, creates an incentive for sellers to conduct their activities through art galleries and auction houses in countries where resale royalties are low or nonexistent.’³⁸

³⁷ Paul Goldstein, *International Copyright: Principles, Law, and Practice*, Oxford: Oxford University Press, 2001, p. 261.

³⁸ *Ibid.*

Pierre Valentin also comments that there are complex jurisdictional questions involved with the right of resale.³⁹ He laments that the European Union did not directly address the issue:

Almost certainly, there will be disputes between sellers and art market professionals on the one hand, and collecting agencies representing artists on the other, as to whether transactions fall within or without the geographical scope of the Regulations. To leave this issue to the courts will cause uncertainty and may force the parties concerned to incur significant legal costs. An example of a dispute over jurisdiction arose in 1995 when the Hotel des Ventes Mosan SA, a Belgian firm of auctioneers, held an auction in Liège, Belgium. Three paintings included in the sale (including a painting by James Ensor) were sold in Luxembourg, seemingly to avoid the resale right applicable in Belgium but not in Luxembourg. The three paintings were physically in Luxembourg at the time of the auction and the auction was formally recorded in Luxembourg in accordance with Luxembourg law. They were shown on a television screen to the audience attending the auction in Liège. A Belgian artists' collecting society claimed payment of the Belgian resale right over the sale proceeds of the three paintings sold in Luxembourg. Four years later, when the dispute was finally tried, the Belgian court held that the Belgian resale right was payable on the sale price of the three paintings because they formed part of an auction organised in Belgium, and the connection with Luxembourg was 'artificial'.⁴⁰

Valentin also comments: 'The country where the auction or private sale is concluded is notoriously difficult to identify where the buyer and seller are located in different countries and they agree to buy and sell through a website or via email.'⁴¹

Section 14 of the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) seeks to deal with such matters through means of a residency test. The explanatory memorandum explains:

This clause sets out the residency requirements that a potential right holder must meet in order to be eligible to hold the right at the time of any commercial resale (as set out in clause 12). An individual satisfies the residency test at a particular time if that person, at that time, is an Australian citizen, a permanent resident of Australia or a national or citizen of a country prescribed as a reciprocating country in regulations (subclause 14(1)). A country will be prescribed as a reciprocating country on the basis of their implementation of the Article 14ter of Berne Convention for the Protection of Literary and Artistic Works.

³⁹ Pierre Valentin, 'Droit de Suite', *European Intellectual Property Review*, 2006, Vol. 28 (5), p. 268-275.

⁴⁰ Ibid.

⁴¹ Ibid.

It should be noted, though, that in other contexts, the Australian Government has extended copyright protection to copyright owners who were resident of countries who were not parties to treaties.

In the case of *Sony Music Productions Pty Ltd v Tansing (t/a Apple House Music)*, Sony and Michael Jackson found that they could not rely on the performers' protection provisions of the *Copyright Act 1968 (Cth)* because Jackson was from a country which was not a member of the *International Convention for Protection of Performers, Producers of Phonograms and Broadcasting Organisations 1961*.⁴² As a result, an enterprising South Australian company called Apple House was able to legally sell bootleg recordings of the work of Michael Jackson, and a range of other recording artists. In 1994, the Federal Government removed the requirement that one or more performers (of a group) had to be an Australian citizen or resident under the *Copyright (World Trade Organization Amendments) Act 1994 (Cth)*

Given this precedent, we question whether there is a need for residency test for the *Resale Royalty Right for Visual Artists Bill 2008 (Cth)*. It would appear to us to be somewhat discriminatory against artists who, through no fault of their own, have the misfortune of coming from a country which does not recognise a right of resale. This is important in respect of Pacific art, New Zealand art, and South-East Asian art (particularly by Indigenous artists). The more compelling position should be that all artists, whatever their nationality, should be entitled to a right of resale in Australia.

2. The Australian Government should pass national legislation to implement Article 14^{ter} of the *Berne Convention*.

3. The *Resale Royalty Right for Visual Artists Bill 2008 (Cth)* should not be subject to a residency test.

⁴² *Sony Music Productions Pty Ltd v Tansing (t/a Apple House Music)* (1993) 27 IPR 640

3. THE UNITED STATES

3.1 Daughters of the American Revolution

The artists' *droit de suite* emerged in the USA in 1948, in relation to the sale of a painting by Grant Wood titled *Daughters of the American Revolution*, which was resold by a dealer 'for four times the original price shortly after its purchase from Wood'.⁴³

However, it was not until 1973 that a now legendary incident captured the imagination of jurists and the public alike.⁴⁴ The protagonists in this resale right episode were American pop art vanguard Robert Rauschenberg and the taxi mogul-come-art collector Robert Scull.⁴⁵ In a much publicised auction at Parke-Bernet,⁴⁶ Rauschenberg's combine painting *Thaw* sold for \$85,000, much to the umbrage of the artist, who had sold the work in 1958 to Scull for \$900. Having witnessed his patron reap a gross return of 9,333%, Rauschenberg angrily accosted Scull, giving him a 'hard push'⁴⁷ and loudly proclaimed that 'I've been working my ass off just for you to

⁴³ Michael B. Reddy, 'The Droit De Suite: Why American Fine Artists Should Have The Right To A Resale Royalty' (1995) 15 *Loyola of Los Angeles Entertainment Law Journal* 509, 520. A similar account is relayed within Neil F. Siegel, 'The Resale Royalty Provisions of the Visual Artists Rights Act: Their History and Theory' (1988) 93 *Dickinson Law Review* 2.

⁴⁴ John Henry Merryman, 'The Proposed Generalisation of the Droit de Suite in the European Communities' (1997) 1 *Intellectual Property Quarterly* 22.

⁴⁵ This story is dramatically related in Robert Hughes, 'A Modest Proposal: Royalties for Artists' *Time*, March 11, 1974, 65 at 66, with similar accounts rendered in: John Henry Merryman, 'The Proposed Generalisation of the Droit de Suite in the European Communities' (1997) 1 *Intellectual Property Quarterly* 16; Jeffrey C. Wu, 'Art Resale Rights and the Art Resale Market: A Follow-Up Study' (1999) 46 *Journal of the Copyright Society of the USA* 531; Australian Copyright Council, *Bulletin 69: Resale Royalty – A New Right for Artists*, Sydney: Australian Copyright Council, 1990, 3; Neil F. Siegel, 'The Resale Royalty Provisions of the Visual Artists Rights Act: Their History and Theory' (1988) 93 *Dickinson Law Review* 3.

⁴⁶ There appears some contention in the scholarship as to where the sale took place. This author will acknowledge the auction house Parke-Bernet as the relevant agent in accordance with the account proffered by Robert Hughes in his *Time* essay of 1974. It is noted that Jeffrey C. Wu, 'Art Resale Rights and the Art Resale Market: A Follow-Up Study' (1999) 46 *Journal of the Copyright Society of the USA* 531, credits the sale as occurring at Sotheby's.

⁴⁷ Jeffrey C. Wu, 'Art Resale Rights and the Art Resale Market: A Follow-Up Study' (1999) 46 *Journal of the Copyright Society of the USA* 531.

make that profit', and suggested that Scull might give every artist in the auction free taxi rides for a week'.⁴⁸ The resulting commotion was vividly related by Robert Hughes, who maintains that Rauschenburg's petition was summarily dismissed, demonstrating that 'a money-changer is more welcome in the temple than a live artist in the bourse':⁴⁹

The blasphemy gave Mrs. Scull a fit of the vapours, and she was whisked away to a restorative party after Mr. Scull, looking suitably grim, told the rude dauber that he ought to be grateful, since the auction price would push up the price of his new work. Rauschenberg, accompanied by an artists' accountant and financial counsellor named Rubin Gorewitz, went off to Washington to start lobbying.⁵⁰

3.2 A false start in California

Far from stimulating an artists' rights revolution in the USA, the lobbying effort of Rauschenberg received limited support.⁵¹ However, Rauschenberg's lobbying was rewarded five years later with the passage of a state-sponsored resale right in California.⁵² ⁵³ Despite claims that *California Resale Royalties Act of 1977*⁵⁴ (California Act) 'benefits large numbers of artists and encourages more artistic

⁴⁸ Robert Hughes, 'A Modest Proposal: Royalties for Artists' *Time*, March 11, 1974, 65-6, 65 at 66.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ A resale royalty bill introduced into Congress by Representative Waxman stirred activity in the legal community but failed to emerge from Committee: Solomon & Gill, 'Federal and State Resale Royalty Legislation: 'What Hath Art Wrought?'' (1978) 26 *UCLA Law Review* 322, cited within, Neil F. Siegel, 'The Resale Royalty Provisions of the Visual Artists Rights Act: Their History and Theory' (1988) 93 *Dickinson Law Review* 3.

⁵² California Resale Proceed Right Law, Cal. Civ. Code § 986.

⁵³ Jeffrey C. Wu, 'Art Resale Rights and the Art Resale Market: A Follow-Up Study' (1999) 46 *Journal of the Copyright Society of the USA* 531, 535; Michael B. Reddy, 'The Droit De Suite: Why American Fine Artists Should Have The Right To A Resale Royalty' (1995) 15 *Loyola of Los Angeles Entertainment Law Journal* 509, 521; Jennifer R. Clarke, 'The California Resale Royalties Act as a Test Case for Preemption Under the 1976 Copyright Law' (1981) 81 *Columbia Law Review* 1315.

⁵⁴ Cal. Civ. Code §986 (West Supp. 1980).

production’,⁵⁵ the efficacy of the right has been limited by failures in respect of operation and enforcement.⁵⁶ This is found principally in the requirement that either the sale occur or the seller reside in the state of California,⁵⁷ and the burden placed on uncooperative sellers to reserve a 5% royalty from the resale price, locate the artist and send them the proceeds.⁵⁸

Accordingly, rather than forging an exemplary legislative model in the USA, the Californian resale right has emerged as an impotent legal instrument, effectively moribund in the art market⁵⁹. As John McInerney notes: ‘the law has been generally ignored, or as one dealer is reported to have said, ‘nobody’s paid, nobody’s sued, everybody’s avoiding it’.⁶⁰ ⁶¹ The ineffectiveness of an artists’ residual claim under the California Act was confirmed in a 1986 survey which found that ‘thirty-two percent of the respondents [artists] said dealers had refused to give them the name or

⁵⁵ Michael B. Reddy, ‘The Droit De Suite: Why American Fine Artists Should Have The Right To A Resale Royalty’ (1995) 15 *Loyola of Los Angeles Entertainment Law Journal* 509, 524.

⁵⁶ Shira Perlmutter, ‘Resale Royalties for Artists: An Analysis of the Register of Copyrights’ Report’ (1992) 16 *Columbia-VLA Journal of Law & The Arts* 395, 414; Dr Theodore Feder, President of the Artists Rights Society, in testimony before the Copyright Office: R. Oman, ‘Copyright Office Hearings on the Droit de Suite’ (1992) 16 *Columbia Journal of Law & the Arts* 185, 213; and Jimmy A. Frazier, ‘On Moral Rights, Artist-Centered Legislation, and the Role of the State in Art Worlds: Notes on Building a Sociology of Copyright Law’ (1995) 70 *Tulane Law Review* 313, 339.

⁵⁷ Cal. Civ. Code §986(a) (West Supp. 1980).

⁵⁸ Michael B. Reddy, ‘The Droit De Suite: Why American Fine Artists Should Have The Right To A Resale Royalty’ (1995) 15 *Loyola of Los Angeles Entertainment Law Journal* 509, 523; William A. Carleton, ‘Copyright Royalties for Visual Artists: A Display-Based Alternative to the Droit de Suite’ (1991) 76 *Cornell Law Review* 510, 531.

⁵⁹ John E. McInerney III, ‘California Resale Royalties Act: Private Sector Enforcement, (1984) 19 U.S.F.L. Rev. 1, 13, cited within, Neil F. Siegel, ‘The Resale Royalty Provisions of the Visual Artists Rights Act: Their History and Theory’ (1988) 93 *Dickinson Law Review* 3.

⁶⁰ John E. McInerney III, ‘California Resale Royalties Act: Private Sector Enforcement, (1984) 19 U.S.F.L. Rev. 1, 13, quoted within, William A. Carleton, ‘Copyright Royalties for Visual Artists: A Display-Based Alternative to the Droit de Suite’ (1991) 76 *Cornell Law Review* 510, 532.

⁶¹ The California artists’ resale right survived a preemption challenge under the Federal 1909 Copyright Act in the case of *Morseburg v Balyon* 449 U.S. 983 (1980). While not discussed here, an account of the issue can be found in: Jennifer R. Clarke, ‘The California Resale Royalties Act as a Test Case for Preemption Under the 1976 Copyright Law’ (1981) 81 *Columbia Law Review* 1315.

address of the buyer or even the resale price'.⁶² Without free disclosure of information, the requirement that the resale right is triggered only if the sale is greater than or equal to the original sales price⁶³ is 'far too exacting and complicated to encourage an efficient application of the *droit de suite*'.⁶⁴ The California law of 1976 has been rejected by commentators as a scheme against which a contemporary resale right can be modelled. As Jean-Marc Gutton observes: 'An isolated case, ignored by all parties concerned, and far too complicated to apply, it thus cannot be used as [a] reference'.⁶⁵

4. The Californian resale royalty model fails to provide a touchstone for legislative reform and should not be followed in Australia.

3.3 US Register of Copyrights' Report

The claim for a Federal *droit de suite* in the USA was revived in 1990 with the passage of the *Visual Arts Rights Act*⁶⁶ (VARA). A resale right provision was initially circumscribed within the VARA as a corollary to the introduction of a 'limited' artists' moral right in the USA.⁶⁷ However, the *droit de suite* provisions proved 'controversial' and were excised from the bill prior to its passage through Congress.⁶⁸

⁶² Survey by Bay Area Lawyers, cited within, Michael B. Reddy, 'The Droit De Suite: Why American Fine Artists Should Have The Right To A Resale Royalty' (1995) 15 *Loyola of Los Angeles Entertainment Law Journal* 509, 523.

⁶³ Cal. Civ. Code §986(b)(4) (West Supp. 1980).

⁶⁴ Jean-Marc Gutton, *Société de auteurs dans les arts graphiques et plastiques*, in testimony before the Copyright Office: R. Oman, 'Copyright Office Hearings on the Droit de Suite' (1992) 16 *Columbia Journal of Law & the Arts* 185, 188.

⁶⁵ *Ibid*, 187.

⁶⁶ *Visual Rights Act of 1990*, Pub L No 101-650, Title VI, 104 Stat 5089 (1990).

⁶⁷ Jimmy A. Frazier, 'On Moral Rights, Artist-Centered Legislation, and the Role of the State in Art Worlds: Notes on Building a Sociology of Copyright Law' (1995) 70 *Tulane Law Review* 313, 342-3; and Shira Perlmutter, 'Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report' (1992) 16 *Columbia-VLA Journal of Law & The Arts* 395, 396.

⁶⁸ Shira Perlmutter, 'Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report' (1992) 16 *Columbia-VLA Journal of Law & The Arts* 395, 396; Michael B. Reddy, 'The Droit De Suite: Why American Fine Artists Should Have The Right To A Resale Royalty' (1995) 15 *Loyola of Los Angeles Entertainment Law Journal* 509, 525, asserting that opposition to the provision was led by art dealers, gallery owners and auction houses.

Importantly however, Congress mandated a feasibility study on future legislation allowing for resale royalties within the USA.⁶⁹

The US Register of Copyright (Copyright Office) released its report in 1992, encompassing a comprehensive analysis of the resale right's evolution within Europe and extensive consultations with interest groups at a domestic and international level.⁷⁰ While not imposing an absolute bar against the propriety of an artists' resale right in the US,⁷¹ the Copyright Office was 'not persuaded that a sufficient economic and copyright policy justification exist[s] to establish the *droit de suite* in the United States'.⁷² The Copyright Office's report has been criticised for its biased methodology which subjected the arguments advanced by resale right proponents to stringent analysis while giving excessive weight to the testimony of a 'vocal minority' of resale right opponents.⁷³ This outcome, however, reflects the philosophy of the Anglo-American copyright tradition, a tradition governed by a 'marketplace norm'⁷⁴ which has historically precluded claims like a moral right 'in order to assure a marketplace in which third parties may buy rights unburdened by any author's residual claims'.⁷⁵ Indeed, Anglo-American copyright systems have historically emphasised 'economic

⁶⁹ *Visual Rights Act of 1990*, Pub L No 101-650, Title VI, § 608(b), 104 Stat 5089 (1990).

⁷⁰ Shira Perlmutter, 'Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report'(1992) 16 *Columbia-VLA Journal of Law & The Arts* 395, 397.

⁷¹ *Ibid*, 396.

⁷² U.S. Copyright Office, *Droit de Suite: The Artist's Resale Royalty* 8 (1992), 149, quoted within, Edward J. Damich, 'Moral Rights Protection and Resale Royalties for Visual Art In The United States: Development and Current Status' (1994) 12 *Cardozo Arts and Entertainment Law Journal* 387, 405; Michael B. Reddy, 'The Droit De Suite: Why American Fine Artists Should Have The Right To A Resale Royalty' (1995) 15 *Loyola of Los Angeles Entertainment Law Journal* 509, 526; Shira Perlmutter, 'Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report'(1992) 16 *Columbia-VLA Journal of Law & The Arts* 395, 397.

⁷³ Shira Perlmutter, 'Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report'(1992) 16 *Columbia-VLA Journal of Law & The Arts* 395, 398; Michael B. Reddy, 'The Droit De Suite: Why American Fine Artists Should Have The Right To A Resale Royalty' (1995) 15 *Loyola of Los Angeles Entertainment Law Journal* 509, 526.

⁷⁴ Paul Edward Geller, 'Must Copyright Be For Ever Caught between Marketplace and Authorship Norms?', within, (eds) Brad Sherman, and Alain Strowel, *Of Authors and Origins: Essays on Copyright Law*, Oxford: Clarendon Press, 1994, 159.

⁷⁵ *Ibid*, 159-60.

reward and social exchange rationales for protecting... artistic property'⁷⁶ and emanate from the assumption that 'the public's interest [is] equal, if not superior, to the author's'.⁷⁷ Accordingly, the moral right revision of US law circumscribed within the VARA 'marked a startling breakthrough in what had been a wholly economic based American copyright system'.⁷⁸

3.4 An American resale right – motivating fine artists in the marketplace

The Copyright Office's analysis is grounded in an examination of whether the artists' resale right accords with the ideals inscribed in the Constitutional goal for copyright.⁷⁹ Under this 'logical matrix',⁸⁰ the US copyright's goal of promoting progress in the arts⁸¹ demands that the monopoly grant is contingent on its ability to serve as an incentive for creation. By impressing this imperative upon their analysis, the Copyright Office's *droit de suite* discourse shifts the emphasis of the resale right debate away from 'an artist's intrinsic right to benefit from the resale of his or her work'⁸² and toward an economic criterion.

After finding that 'from a purely economic perspective, the copyright protection extended to fine artists is more favourable, or at least equal to, that given to

⁷⁶ Jane C. Ginsburg, 'Moral Rights in a Common Law System', within, Peter Anderson, and David Saunders (eds), *Moral Rights Protection in a Copyright System*, Brisbane: Institute for Cultural Policy Studies Griffith University, 1992, p. 13.

⁷⁷ Jane C. Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America', within, Brad Sherman and Alain Strowel, *Of Authors and Origins: Essays on Copyright Law*, Oxford: Clarendon Press, 1994, 131.

⁷⁸ Jill R. Applebaum, 'The Visual Artists Rights Act of 1990: An Analysis Based on the French Droit Moral', (1992) 8 *American University Journal of International Law and Policy* 209, quoted within, Jimmy A. Frazier, 'On Moral Rights, Artist-Centered Legislation, and the Role of the State in Art Worlds: Notes on Building a Sociology of Copyright Law' (1995) 70 *Tulane Law Review* 313, 343.

⁷⁹ Shira Perlmutter, 'Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report' (1992) 16 *Columbia-VLA Journal of Law & The Arts* 395, 405.

⁸⁰ Elliot C. Alderman, 'Resale Royalties in the United States For Fine Visual Artists: An Alien Concept' (1992) 40 *Journal of the Copyright Society of the USA* 265, 272.

⁸¹ *US Constitution*, Art. 1, Sec. 8, Cl 8.

⁸² Neil F. Siegel, 'The Resale Royalty Provisions of the Visual Artists Rights Act: Their History and Theory' (1988) 93 *Dickinson Law Review* 10.

authors and composers’,⁸³ the Copyright Office asserted that the introduction of a resale right would not act as an incentive to create because it would ‘decrease rather than increase the return to artists’.⁸⁴ The notion that the *droit de suite* would induce a ‘chilling’ effect on the art market is based on the assumption that where a prudent, investment-minded, art collector purchases a work of fine art,

the royalty would be considered at the time of the initial sale, and the investor’s offer diminished by the present value of the anticipated royalty. Since the artist has no bargaining power, he or she would have to accept this low offer. The effect of the resale royalty then would be to decrease both the number and the price of initial purchases. Fewer artists would sell fewer works and our artistic heritage would suffer.⁸⁵

However, as Shira Perlmutter attests, the weight placed upon this assumption by the Report, ‘whether or not supportable in theory’,⁸⁶ is endorsed ‘to the exclusion of the voice of experience and countervailing claims of equity’⁸⁷ advanced in witness testimony. Empirical evidence tended to the Copyright Office Hearings by representatives of European associations that administer artists’ rights demonstrated

⁸³ U.S. Copyright Office, *Droit de Suite: The Artist’s Resale Royalty* 8 (1992), 131, quoted within, Shira Perlmutter, ‘Resale Royalties for Artists: An Analysis of the Register of Copyrights’ Report’(1992) 16 *Columbia-VLA Journal of Law & The Arts* 395, 403.

⁸⁴ U.S. Copyright Office, *Droit de Suite: The Artist’s Resale Royalty* 8 (1992) 131, cited within, Shira Perlmutter, ‘Resale Royalties for Artists: An Analysis of the Register of Copyrights’ Report’(1992) 16 *Columbia-VLA Journal of Law & The Arts* 395, 403.

⁸⁵ Neil F. Siegel, ‘The Resale Royalty Provisions of the Visual Artists Rights Act: Their History and Theory’ (1988) 93 *Dickinson Law Review* 5. For a more detailed application of market economic theory to the issue of the artists resale royalty see, Jon Stampford, *Economic Analysis of the Droit de Suite – The Artists’ Resale Royalty*, The University of Queensland School of Economics Discussion Papers, No. 301, January 2002, 1; Roland Kirstein and Dieter Schmidtchen, *Do Artists benefit from Resale Royalties? An Economic Analysis of a New EU Directive*, Centre for the Study of Law and Economics, <www.uni-saarland.de/fak1/fr12/csle/publications/200-07_dds4.pdf>.

⁸⁶ Shira Perlmutter, ‘Resale Royalties for Artists: An Analysis of the Register of Copyrights’ Report’(1992) 16 *Columbia-VLA Journal of Law & The Arts* 395, 409.

⁸⁷ Shira Perlmutter, ‘Resale Royalties for Artists: An Analysis of the Register of Copyrights’ Report’(1992) 16 *Columbia-VLA Journal of Law & The Arts* 395, 424.

that despite claims that the resale right would drive down the first or subsequent sales prices, ‘in no country with the resale right has this been known to happen’.⁸⁸

Testimony proffered by the USA art dealer John Weber illustrated that where the resale royalty had been imposed by him in contract, not one sale was lost over a twenty year period.⁸⁹ Moreover, evidence was tended to the Copyright Office that if a loss of custom were to result from artists refusing to lower their initial sales price, the exit of a small number of collectors in response to a 5% levy might be welcomed by artists as a ‘spiritual gain’;⁹⁰ for ‘is it really worth having a system of ‘patronage’ that would collapse if collectors, who have been known to realise profits as high as 10,000%, were compelled to give artists [5]% of the windfall’.⁹¹ As the artist Hans Haacke observes:

If you don’t want to play ball with me, and your sole interest in buying my work is to have complete control over everything in it, including whatever profits could be gained from it, and if you not willing even to share a few percent of profit with me, I don’t want to have anything to do with you—I don’t want you to be the custodian of my work!⁹²

A similarly dismissive attitude to voice of experience was manifested by the Copyright Office in determining that the imposition of a royalty on resales of fine art would drive investment out of the US and into royalty-free jurisdictions.⁹³ To the

⁸⁸ Dr Theodore Feder, President of the Artists Rights Society, in testimony before the Copyright Office: R. Oman, ‘Copyright Office Hearings on the Droit de Suite’ (1992) 16 *Columbia Journal of Law & the Arts* 185, 210.

⁸⁹ John Weber, owner, John Webber Gallery, in testimony before the Copyright Office: R. Oman, ‘Copyright Office Hearings on the Droit de Suite’ (1992) 16 *Columbia Journal of Law & the Arts* 185, 205.

⁹⁰ Robert Hughes, ‘A Modest Proposal: Royalties for Artists’ *Time*, March 11, 1974, 65.

⁹¹ *Ibid.*

⁹² Hans Haacke, in testimony before the Copyright Office: R. Oman, ‘Copyright Office Hearings on the Droit de Suite’ (1992) 16 *Columbia Journal of Law & the Arts* 185, 207.

⁹³ U.S. Copyright Office, *Droit de Suite: The Artist’s Resale Royalty* 8 (1992) at 149, cited within, Shira Perlmutter, ‘Resale Royalties for Artists: An Analysis of the Register of Copyrights’ Report’ (1992) 16 *Columbia-VLA Journal of Law & The Arts* 395, 407.

contrary, statistical evidence submitted by collection agencies in Europe ‘proves that *droit de suite* does not depress the market’:⁹⁴

the marketplace for works of art subject to such a requirement is not much affected. The most important auction houses in the United Kingdom, Switzerland or the Netherlands, where this law does not exist, do not obtain a turnover very much higher in this field than France or Germany. The art market in France which has thrived over the last few years has never been adversely affected by this law (tripled value of auction sales). The main point is that a marketplace should be a centre of creation which is the case of France and especially Paris.⁹⁵

The Copyright Office further asserts that a resale right would not act as an incentive to create by insisting that too few artists have a resale market to make such a scheme worth the effort.⁹⁶ Empirical evidence substantiates the claim that the percentage of artists that enjoy a resale market is low. The French legislature has noted that ‘of the 2,000 artists who benefited from *droit de suite*, 2-3% received 43% of the total sum collected’,⁹⁷ with the remaining artists receiving an average remuneration of 2,400 francs (US\$384).⁹⁸ However, it is important to note the efficacy of the French system, which collects US\$10.5 million for its 2,500 registered artists.⁹⁹ Evidence presented to

⁹⁴ Jean-Marc Gutton, *Société de auteurs dans les arts graphiques et plastiques*, in testimony before the Copyright Office: R. Oman, ‘Copyright Office Hearings on the Droit de Suite’ (1992) 16 *Columbia Journal of Law & the Arts* 185, 188.

⁹⁵ U.S. Copyright Office, *Droit de Suite: The Artist’s Resale Royalty* 8 (1992) at 149 (quoting the *Société de auteurs dans les arts graphiques et plastiques*), quoted within, Shira Perlmutter, ‘Resale Royalties for Artists: An Analysis of the Register of Copyrights’ Report’ (1992) 16 *Columbia-VLA Journal of Law & The Arts* 395, 408. For further analysis about the impact that cultural centres may play upon the operation of an international *droit de suite*, see, David L. Booton, ‘A Critical Analysis of the European Commission’s Proposal for a Directive Harmonising the Droit de Suite’ (1998) 2 *Intellectual Property Quarterly* 165, 176-182.

⁹⁶ U.S. Copyright Office, *Droit de Suite: The Artist’s Resale Royalty* 8 (1992) at 103-5, quoted within, Shira Perlmutter, ‘Resale Royalties for Artists: An Analysis of the Register of Copyrights’ Report’ (1992) 16 *Columbia-VLA Journal of Law & The Arts* 395, 408.

⁹⁷ Elspeth Moncrieff, ‘Artists oppose resale rights: A decision on the implementation of *droit de suite* in Britain has been deferred yet again’ *The Art Newspaper*, 17 December 1999, <<http://www.theartnewspaper.com/news/article.asp?idart=596>> at 11/07/2003.

⁹⁸ *Ibid.*

⁹⁹ Jean-Marc Gutton, *Société de auteurs dans les arts graphiques et plastiques*, citing figures from the year 1990, in testimony before the Copyright Office: R. Oman, ‘Copyright Office Hearings on the Droit de Suite’ (1992) 16 *Columbia Journal of Law & the Arts* 185, 189.

the German Parliament dictates that ‘nine times as much was paid to heirs of artists as to the artists themselves...[and] of the 7,454 artist who registered with the agency which collected the levy, only 274 were eligible for any payment’.¹⁰⁰ In his comprehensive USA study, Jeffrey Wu found that only 357 of the 233,000 (or 0.15 per cent) US citizens identifying themselves as artists had a resale market greater than that of the threshold requirement necessary to invoke the Californian resale royalty provisions (US\$1,000).¹⁰¹ Further, of those that qualified, ‘the top five artists would have earned more than fifty-five percent of the total resale right’.¹⁰²

However, rather than repudiate US copyright philosophy, the fact that a resale right would only benefit successful artists is merely ‘an inherent aspect of a copyright system based on capitalism: success is rewarded, with incentives tied to popularity’.¹⁰³ Further, as Perlmutter attests: ‘even a royalty of fifty dollars may allow an artist to purchase supplies sufficient to create her next work of art—or pay the electricity bill, allowing her to continue to create rather than devoting all her time and energy to finding another job’.¹⁰⁴ Ultimately, the Copyright Office’s conclusions are marked by a contradiction:

[i]f the royalty is too remote and contingent to mean anything financially to artists, it is hard to understand how it will mean anything financially to collectors. If the royalty decreases initial prices sufficiently to make it valueless to artists, then collectors will not bear an increased risk. By saving money on the initial purchase, they will defray any royalty to be paid upon resale. In other words, collectors only lose if artists gain. Opponents of resale royalties cannot have it both ways; either a royalty will help the artist and hurt the collector, or it will do neither.¹⁰⁵

¹⁰⁰ Elspeth Moncrieff, ‘Artists oppose resale rights: A decision on the implementation of droit de suite in Britain has been deferred yet again’ *The Art Newspaper*, 17 December 1999, <<http://www.theartnewspaper.com/news/article.asp?idart=596>> at 11/07/2003.

¹⁰¹ Jeffrey C. Wu, ‘Art Resale Rights and the Art Resale Market: A Follow-Up Study’ (1999) 46 *Journal of the Copyright Society of the USA* 531, 543.

¹⁰² Ibid.

¹⁰³ Liliane de Pierredon-Fawcett, *The Droit de Suite in Literary and Artistic Property* (Louise-Martin-Valiquette trans.), 1991 at 144, cited within, Shira Perlmutter, ‘Resale Royalties for Artists: An Analysis of the Register of Copyrights’ Report’(1992) 16 *Columbia-VLA Journal of Law & The Arts* 395, at 416.

¹⁰⁴ Shira Perlmutter, ‘Resale Royalties for Artists: An Analysis of the Register of Copyrights’ Report’(1992) 16 *Columbia-VLA Journal of Law & The Arts* 395, 416.

¹⁰⁵ Ibid, 409.

Finally, US opponents have sought to distinguish the romantic ideology imbued in the *droit de suite* by rejecting the ongoing relationship between an artist and their oeuvre. The US Copyright Office declared that this principle is ‘inconsistent with [the US] system of property rights’.¹⁰⁶ The notion of free alienability thus emerges to abut the romantic ideology that ‘the artist is the sole source of the work’s market value: in commercial transactions, the cleverness of the speculator had little to do with the price increase, which was essentially attributable to the artist’s genius’.¹⁰⁷ Under the art market ‘ecology’¹⁰⁸ paradigm lauded by the USA, the connection between an artist and the value of their work is mitigated at the point of sale, and the value of a work is calculated in light of the investment made to an artistic reputation by a variety of market stakeholders.¹⁰⁹ ‘Talking back’ to the Rauschenberg affair, John Merryman provides an analysis of *Thaw’s* appreciation in value under this paradigm:

Where did the increase in market value come from? In part, of course, it came from the artist’s activity in continuing to create a body of highly regarded work...But some of that increase was due to Castelli’s¹¹⁰ successful efforts in promoting Rauschenberg’s work. Some of it was due to the activities of critics, museum curators and venturesome collectors (like the Sculls) who admired, supported, showed and bought Rauschenberg’s works before he became famous. Some of it was created by the Venice Biennale which...awarded Rauschenberg its internally publicised grant for painting...Some of it was created by the auction house, which created the occasion on which so much money would be bid for the painting. Such activities, which required the investment of capital and the continuing expenditure of effort and money, made and supported the market for Rauschenberg’s art and added value to it.¹¹¹

¹⁰⁶ U.S. Copyright Office, *Droit de Suite: The Artist’s Resale Royalty* 8 (1992), quoted within, Shira Perlmutter, ‘Resale Royalties for Artists: An Analysis of the Register of Copyrights’ Report’(1992) 16 *Columbia-VLA Journal of Law & The Arts* 395, 409.

¹⁰⁷ John Henry Merryman, ‘The Proposed Generalisation of the *Droit de Suite* in the European Communities’ (1997) 1 *Intellectual Property Quarterly* 21.

¹⁰⁸ This term is employed by John Henry Merryman to describe the art world by ‘its own set of inner relationships and interdependencies’: John Henry Merryman, ‘The Proposed Generalisation of the *Droit de Suite* in the European Communities’ (1997) 1 *Intellectual Property Quarterly* 18

¹⁰⁹ See eg, Bunny Smedley, ‘How the EU will destroy Britain’s art market’ (2001) 8(7) *European Journal* 22.

¹¹⁰ Rauschenberg’s dealer.

¹¹¹ John Henry Merryman, ‘The Proposed Generalisation of the *Droit de Suite* in the European Communities’ (1997) 1 *Intellectual Property Quarterly* 22-3.

Merryman takes this construction further, lauding the notion that ‘the Scull sale made Rauschenberg a millionaire’.¹¹² This analysis is specious, as it is exactly on the terms proffered by Merryman that the *droit de suite* was originally justified. Art market middlemen receive direct returns from the success of their investments, while the artists do not. If the art market ecology thesis is to be advanced as a model to understand the relationship between artist and the market, then surely the ‘interdependency’ flows both ways. Dealers are dependent upon artist in order to make a living, and as such should return a relatively trivial remuneration to the artist when profiting from their ‘hand on into infinity’.¹¹³ Furthermore, the situation proffered by Merryman could apply equally to all authors, and ‘yet copyright law has never limited the author’s reward for the success of one work to its impact on the sales of the next’.¹¹⁴

Why should artists be the only socialists in this capitalist society? If they are successful, why shouldn’t they get richer just like anyone else? Imagine calling up Irving Berlin after having broadcast an hour-long concert of his music, and telling him he should be grateful for the exposure. Now he’ll sell more sheet music and records, and, after all, he has all the money that a centenarian could possibly need. No, it is his music and he is entitled to be paid for the broadcasting of his music. And so too, why shouldn’t a collector be required to pay the artist a royalty for the ongoing enjoyment of his work (the every existence of a secondary market in which to sell the work).¹¹⁵

¹¹² Ibid 23.

¹¹³ Henry T. Hopkins of Los Angeles, before the Senate Subcommittee on Patents, Copyrights and Trademarks in December 1987 (extracted in 35 *Pat. Trademark & Copyright J.* (BNA) No. 859, 125 (Dec. 10, 1987)), quoted within, Jay B. Johnson, ‘Copyright: Droit de Suite: An Artist is Entitled to Royalties Even After He’s Sold His Sole to the Devil’ (1992) 45 *Oklahoma Law Review* 493, 505.

¹¹⁴ Shira Perlmutter, ‘Resale Royalties for Artists: An Analysis of the Register of Copyrights’ Report’(1992) 16 *Columbia-VLA Journal of Law & The Arts* 395, 412.

¹¹⁵ Thomas M. Goetzel, ‘In Support of the Resale Royalty’, 7 *Cardozo Arts & Entertainment Law Journal* 227, 259, extracted within both: Shira Perlmutter, ‘Resale Royalties for Artists: An Analysis of the Register of Copyrights’ Report’(1992) 16 *Columbia-VLA Journal of Law & The Arts* 395, 412; Michael B. Reddy, ‘The Droit De Suite: Why American Fine Artists Should Have The Right To A Resale Royalty’ (1995) 15 *Loyola of Los Angeles Entertainment Law Journal* 509, 545.

5. The US Copyright Office's conclusion that there is no sufficient economic or copyright policy justification for a resale right should not be followed in Australia.

4. THE EUROPEAN UNION

4.1 A ‘Continental’ concept – the development of the *droit de suite* within the ‘romantic shores’ of Europe¹¹⁶

The legal concept of the artists’ *droit de suite*, emerging as a parochial response to the specific conditions befalling the French artist at the turn of the nineteenth century, has found a broadening recognition in Europe. Despite early ‘jurisprudential confusion’¹¹⁷ concerning the legal nature of the resale right, which consigned this new form of copyright or moral right to the realm of taxation,¹¹⁸ support for the resale right has grown steadily¹¹⁹ throughout the twentieth century. The *droit de suite*’s place within the ‘copyright family’ was affirmed in 1948 with the adoption of the *droit de suite* under the Berne Convention for the Protection of Literary and Artistic Property.¹²⁰ Importantly, the expansion of the artists’ resale right into the legal systems of Continental Europe was fostered by the fertile nature of the European copyright philosophy. The European copyright tradition is grounded in natural law jurisprudence and extols the principle that ‘an exclusive right is conferred on authors because their property is the most justified since it flows from their intellectual creation’. More importantly, under the paradigm of Continental European copyright,

¹¹⁶ The author credits this expression of notion that the *droit de suite* was forged within the fertile ‘romantic shores’ of Europe to: Monroe E Price, ‘Government Policy and Economic Security for Artists: The Case of the Droit de Suite’ (1968) 77 *Yale Law Journal* 1333, 1337.

¹¹⁷ Michael B. Reddy, ‘The Droit De Suite: Why American Fine Artists Should Have The Right To A Resale Royalty’ (1995) 15 *Loyola of Los Angeles Entertainment Law Journal* 509, 519.

¹¹⁸ Michael B. Reddy, ‘The Droit De Suite: Why American Fine Artists Should Have The Right To A Resale Royalty’ (1995) 15 *Loyola of Los Angeles Entertainment Law Journal* 509, 515. See also, John Henry Merryman, ‘The Proposed Generalisation of the Droit de Suite in the European Communities’ (1997) 1 *Intellectual Property Quarterly* 16.

¹¹⁹ David L. Booton, ‘A Critical Analysis of the European Commission’s Proposal for a Directive Harmonising the Droit de Suite’ (1998) 2 *Intellectual Property Quarterly* 165, 166.

¹²⁰ Article 14^{ter}, *Berne Convention for the Protection of Literary and Artistic Works* of 9 September 1886, as revised [1978] ATS.

‘*authorship norms* dictate rules to empower authors to control the use by others of their self-expression’.¹²¹

Significantly, every legislative incorporation of the artists’ resale right in Europe bears ‘the marks of its French origin’.¹²² The German *droit de suite* is grounded in the theory of ‘intrinsic value’,¹²³ whereby the increased value received for an artwork in the secondary market was always latent in it, and ‘since good art is ahead of public whim, artists should not be punished for their prescience’.¹²⁴ The Belgium *droit de suite* similarly issues from a French romanticism, founding a resale right on the principle of unjust enrichment, presupposing that ‘value increases are not the result of any specific activity or ability of the owner of a work who, therefore, should not benefit at the creator’s expense’.¹²⁵ Accordingly, the movement in Europe to furnish upon fine artists a legislative resale right is ‘based on a set of specific assumptions about the relationship between price and ‘value’ and the kinds of commercial transaction which characterise the market for paintings and sculpture’.¹²⁶

4.2 The *droit de suite* in 21st Century Europe – the European Commission Directive on the artists’ resale right¹²⁷

On July 19 2001 the European Council (EC) adopted the Artists’ Resale Right Directive,¹²⁸ enshrining in European law the artists’ *droit de suite* and giving

¹²¹ Paul Edward Geller, ‘Must Copyright Be For Ever Caught between Marketplace and Authorship Norms?’, within, (eds) Sherman, Brad and Strowel, Alain, *Of Authors and Origins: Essays on Copyright Law*, Oxford: Clarendon Press, 1994, 159.

¹²² John Henry Merryman, ‘The Proposed Generalisation of the Droit de Suite in the European Communities’ (1997) 1 *Intellectual Property Quarterly* 17.

¹²³ Australian Copyright Council, *Bulletin 69: Resale Royalty – A New Right for Artists*, Sydney: Australian Copyright Council, 1990, 3; Elliot C. Alderman, ‘Resale Royalties in the United States For Fine Visual Artists: An Alien Concept’ (1992) 40 *Journal of the Copyright Society of the USA* 265, 270.

¹²⁴ Elliot C. Alderman, ‘Resale Royalties in the United States For Fine Visual Artists: An Alien Concept’ (1992) 40 *Journal of the Copyright Society of the USA* 265, 270.

¹²⁵ *Ibid.*, 271.

¹²⁶ Monroe E Price, ‘Government Policy and Economic Security for Artists: The Case of the Droit de Suite’ (1968) 77 *Yale Law Journal* 1333, 1337.

¹²⁷ *Directive 2001/84 of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art* [2001] OJ L272/32.

legislative weight to the Commission's presupposition that 'the artist's resale right forms an integral part of copyright and is an essential prerogative for authors'.¹²⁹ The Directive emanated from the 'annoying distortions in competition conditions in [the] art works market'¹³⁰ that existed in the absence of a harmonised resale royalty policy within the EU. The approach adopted by the EU, treating the artists' *droit de suite* as if it were a 'settled legal institution embodying sound policy',¹³¹ accords strongly with the Continental European copyright theory. That said, the express purpose of the resale right proffered in the Recitals to the Common Position grounds the EU conception of the *droit de suite* in the traditional rights conferred by a copyright grant:

The resale right is intended to ensure that authors of graphic and plastic works of art share in the economic success of their original works of art. It helps to redress the balance between the economic situation of authors of graphic and plastic works of art and that of other creators who benefit from successive exploitation of their works.¹³²

Despite the rich *droit de suite* tradition forged in Continental Europe, the EC Directive has met with significant opposition. Indeed, French galleries have engaged in a prolonged campaign to exact an exemption from the *droit de suite* under the

¹²⁸ *Direction 2001/84 on the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art*, [2001] O.J. L272/32: Charles-Edouard Renault, 'Resale Rights: Toward a European Harmonisation' (2003) 14(2) *Entertainment Law Review* 44; and Simon Stokes, 'Implementing the Artists' Resale Right (Droit de Suite) Directive into English Law' (2002) 13(7) *Entertainment Law Review* 153, 153.

¹²⁹ Commission of the European Communities, 'Proposal for a European Parliament Directive, on the resale right for the benefit of the author of an original work of art' COM (96) 97 final, 96/085 (COD), quoted within, John Henry Merryman, 'The Proposed Generalisation of the Droit de Suite in the European Communities' (1997) 1 *Intellectual Property Quarterly* 16.

¹³⁰ André Lucas and Pierre-Yves Lucas, *Traité de la propriété littéraire et artistique*, Litec, 1994, 351, quoted within, Charles-Edouard Renault, 'Resale Rights: Toward a European Harmonisation' (2003) 14(2) *Entertainment Law Review* 44.

¹³¹ John Henry Merryman, 'The Proposed Generalisation of the Droit de Suite in the European Communities' (1997) 1 *Intellectual Property Quarterly* 16.

¹³² *Common Position adopted by the Council on 19 June 2000* [2000] OJ C300, Recital 8(3), extracted within, Simon Stokes, *Art and Copyright*, Oxford: Hart Publishing 2001, 84.

Directive.¹³³ The dissatisfaction of the French galleries stems from the domestic exemption historically granted because they paid 1 per cent of their turnover into an ‘artists’ social security fund’.¹³⁴ Under the EC Directive, gallery operators would also be subject to the resale royalty, leading one parliamentarian to exclaim that the *droit de suite* ‘should not be added to the burdens borne by the art galleries which finance the house of the artists’.¹³⁵

The most vociferous opposition to the introduction of a compulsory resale right across Europe was articulated by the United Kingdom Government.¹³⁶ Its primary concern was that the *droit de suite* would depress the British art market - which makes up about 60% of the European art market with an annual turnover of approximately £3,278 million¹³⁷ - by impelling the transfer of London’s ‘thriving contemporary art market’ to Geneva or New York.¹³⁸ Such was the British opposition that Prime Minister Tony Blair, wrote to the French Prime Minister, Lionel Jospin, complaining: ‘I do not see what Europe has to gain from forcing Britain to sacrifice its

¹³³ Georgina Adam, ‘Uprow in France over droit de suite: Levy to be extended to galleries’, *The Art Newspaper*, 8 June 2001, <<http://www.theartnewspaper.com/news/article.asp?idart=4832>> at 11/07/2003.

¹³⁴ Ibid; Charles-Edouard Renault, ‘Resale Rights: Toward a European Harmonisation’ (2003) 14(2) *Entertainment Law Review* 44 at 47.

¹³⁵ Member of Parliament Nicole Ameline, quoted within, Charles-Edouard Renault, ‘Resale Rights: Toward a European Harmonisation’ (2003) 14(2) *Entertainment Law Review* 44 at 47.

¹³⁶ David L. Booton, ‘A Critical Analysis of the European Commission’s Proposal for a Directive Harmonising the Droit de Suite’ (1998) 2 *Intellectual Property Quarterly* 165 at 172; Simon Stokes, *Art and Copyright*, Oxford: Hart Publishing 2001, 77; Simon Stokes, ‘Implementing the Artists’ Resale Right (Droit de Suite) Directive into English Law’ (2002) 13(7) *Entertainment Law Review* 153; see for eg, House of Lords Hansard, *Art Market: VAT and Droit de Suite*, 18 May 1998, <www.parliament.the-stationery-office.co.uk/pa/1d199798/1dhansrd/vo980518/text/80518-01.html> (20/09/2003).

¹³⁷ Data from the year 1998, Market Tracking International Company Limited, *The European Art Market 2000*, The European Fine Arts Foundation, London, 2000, cited within, Clare McAndrew and Lorna Dallas-Conte, *Implementing Droit de Suite (artists’ resale right) in England*, Research Report 23, The Arts Council of England, London 2001, 20, <www.artscouncil.org.uk/publications/pdfs/implementing.pdf>; Similar figures are provided in, Anna Somers Cocks, ‘Artists’ resale rights postponed in EU for fifteen years: Relief of UK art trade because levy might have driven market to the US’ *The Art Newspaper*, 17 March 2000, <<http://www.theartnewspaper.com/news/article.asp?idart=11175>> at 11/07/2003.

¹³⁸ Henry Lydiate, ‘EU Directive: Droit de Suite’, (May 2002) 256 *Artlaw* 48, 48.

art market to the US'.¹³⁹ The persistent lobbying of the UK Government resulted in generous delays for implementation.¹⁴⁰ The Directive stated that those member states without the *droit de suite* have five years in which to incorporate the measure into domestic law, and a further 10 years before being required to give full force to the law.¹⁴¹

A corollary to the UK's argument that the introduction of the *droit de suite* will 'wreck Europe's most successful art market and, in doing so, chip away ineluctably at Britain's standing in the world',¹⁴² was the challenge made to the contemporary viability of the social and economic logic of the resale right. Michael Tollemache, former chairman of the Society of London Art Dealers, has rebuffed the Directive as 'an outmoded piece of social engineering from a period when there was no social security at all and the world of the artist eating dry bread in his garret was commonplace'.¹⁴³ Under this rationale, the sentimental appeal imbued in the *droit de suite*'s romantic ideology is merely 'a textbook example of uninformed good intentions in support of a bad cause...[that] has little connection with reality'.¹⁴⁴ John

¹³⁹ Bunny Smedley, 'How the EU will destroy Britain's art market' (2001) 8(7) *European Journal* 22, 23; Anna Somers Cocks, 'Artists' resale rights postponed in EU for fifteen years: Relief of UK art trade because levy might have driven market to the US' *The Art Newspaper*, 17 March 2000, <<http://www.theartnewspaper.com/news/article.asp?idart=1175>> at 11/07/2003; and Charles-Edouard Renault, 'Resale Rights: Toward a European Harmonisation' (2003) 14(2) *Entertainment Law Review* 44 at 47.

¹⁴⁰ Anna Somers Cocks, 'Artists' resale rights postponed in EU for fifteen years: Relief of UK art trade because levy might have driven market to the US' *The Art Newspaper*, 17 March 2000, <<http://www.theartnewspaper.com/news/article.asp?idart=1175>> at 11/07/2003; Charles-Edouard Renault, 'Resale Rights: Toward a European Harmonisation' (2003) 14(2) *Entertainment Law Review* 44 at 46. See also, Simon Stokes, 'Implementing the Artists' Resale Right (Droit de Suite) Directive into English Law' (2002) 13(7) *Entertainment Law Review* 153.

¹⁴¹ *Directive 2001/84 of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art* [2001] OJ L272/32, Article 8, cited within, Charles-Edouard Renault, 'Resale Rights: Toward a European Harmonisation' (2003) 14(2) *Entertainment Law Review* 44 at 46.

¹⁴² Bunny Smedley, 'How the EU will destroy Britain's art market' (2001) 8(7) *European Journal* 22, 23.

¹⁴³ A. Labi, 'The Art of the Deal', 155(13) *Time Europe*, April 3 2000, <www.time.com/time/europe/magazine/2000/0403/action.html> at 28/07/2003.

¹⁴⁴ John Henry Merryman, 'The Proposed Generalisation of the Droit de Suite in the European Communities' (1997) 1 *Intellectual Property Quarterly* 17, 20.

Merryman, has articulated the supposed irrelevance of the romantic rationale in a contemporary marketplace:

That was then. Today in the international art world, where international artists in their thirties have seven figure incomes and are given retrospective exhibitions in major museums, it is even more difficult to take the starving artist or *la Boheme* art world mythology seriously. Critics, dealers, curators and collectors constantly seek fresh talent to promote and to collect; the scouting system leaves no undiscovered geniuses. Artists who achieve critical success and the esteem of their fellow-artists find a strong market for their works. Picasso was a billionaire. Chagall, Dabuffet, Miro and Warhol left multi-million dollar estates. Frankenthaler, Hockney, Johns, Lichtenstein, Rauschenberg, Stella and other living artists are wealthy. These artists are not victims of exploitation, they are beneficiaries of an active, supportive market for contemporary art.¹⁴⁵

Certainly, the image of an artist ‘starving in his garret’ no longer carries the currency it once had, with the advent of government sponsored social security ameliorating this claim. However, Merryman fails to appreciate that while the *droit de suite* emanated from parochial origins, its foundation rests upon a universal understanding of artists and the art market. That is, while conceived by French jurists in the 1920’s as a legal institution directed at alleviating the specific concern of the ‘starving artist’, the historical discourse of the *droit de suite* is one grounded in relationships; between an artist and their market and artists and their work. As such, the liberation of Europe’s artists from their collective garret does not denote a system that is free from the tenor of exploitation. Indeed, given the trend toward using art as a vehicle for investment,¹⁴⁶ artists remain exploited under a system that reserves significant profits for the investor but fails to turn back any of the profit to the artists.¹⁴⁷

6. The European Union’s 2001 Directive embraces the conception of the *droit de suite*, casting the right as an ‘integral part of copyright’ and an ‘essential prerogative for authors’.

¹⁴⁵ Ibid 21.

¹⁴⁶ See eg, Bunny Smedley, ‘How the EU will destroy Britain’s art market’ (2001) 8(7) *European Journal* 22, 23 (‘the art market is, after all, a specialised branch of the financial services industry’).

¹⁴⁷ Robert Hughes, ‘A Modest Proposal: Royalties for Artists’ *Time*, March 11, 1974, 65-6, 65.

7. The codification of the artists' resale right under European law has fostered a contemporary viability for the *droit de suite*.

8. Fierce opposition to the European Union's 2001 Directive by anti-*droit de suite* countries resulted in the adoption of a minimalist resale royalty right scheme.

5. THE UNITED KINGDOM AND IRELAND

5.1 The Artist's Resale Right Regulations 2006 (UK)

A reluctant recipient of the EU Directive, the United Kingdom finally introduced the right of resale into United Kingdom law in 2006.¹⁴⁸ Critics of the EU Directive forecast that the art market industry respond to the law's introduction by decamping from its modern hub in London and setting up shop in New York and other *droit de suite* free jurisdictions. However, three years after the introduction of the right of resale in the United Kingdom, the results are encouraging for *droit de suite* advocates. The United Kingdom's Intellectual Property Institute's ('IP Institute') January 2008 study into the effect on the United Kingdom art market of the introduction of the artist's resale right¹⁴⁹ found that 'AAR [Artist's Resale Right] as currently implemented has not had a negative impact on the United Kingdom market.'¹⁵⁰

Key features of the United Kingdom legislation include:

- The royalty applies to all resales of artwork of €1,000.00 or more (12(3)(b));
- Royalty payments are calculated on the net sale price excluding tax on a sliding scale from 4% of the sale price up to €50,000.00, 3% for works €50,000.01 to €200,000.00, 1% for works €200,000.01 to €350,000.00, 0.5% for works €350,000.01 to €500,000.00 and 0.25% for works exceeding €500,000.00. (Schedule 1)
- Single royalty payments cannot exceed €12,500.00 (Schedule 1);
- The class of artists covered by the right accords with the protection offered by copyright (Section 3(2)), subject to the derogation referred to below; and
- Payments are collected and distributed through a collecting society (Section 14);

The low threshold adopted by the United Kingdom is notable. The EU Directive only required Member Countries to meet a maximum threshold of €3,000.00. The United Kingdom Government's decision was explained to in the House of Lords accordingly:

setting this threshold at €1,000 will greatly increase the number of UK artists who will receive royalty payment. In 2003, 998 works by living artists were sold at auction for over €3,000.

¹⁴⁸ The Artist's Resale Right Regulations 2006 (UK).

¹⁴⁹ Katy Graddy, Noah Horowitz and Stefan Szymanski *A study into the effect on the UK market of the introduction of the artist's resale right*, Intellectual Property Institute, January 2008.

¹⁵⁰ *Ibid.*, 22.

Setting the threshold at €1,000 would have encompassed 770 more sales; 88 per cent of these works by living British artists. Many of the additional artists to benefit from a lower threshold are on very low incomes or are just starting out in their careers. A lower threshold would also allow a wider range of artists to benefit from resale rights. Works of sculpture, illustrations and cartoons which are also covered by the directive rarely resell for as much as €3,000.¹⁵¹

The United Kingdom Government's 'gold plating'¹⁵² of the EU Directive distinguished Britain's treatment of the *droit de suite* from its fellow anti-*droit de suite* EU members.¹⁵³ However, it is striking that the class of artist the United Kingdom Government sought to protect by expanding on the minimum rights mandated by the EU Directive was also the class of artist least likely to adversely impact the UK art market.

At the time of the EU's adoption into United Kingdom law, then Minister for Science and Innovation, Lord Sainsbury, declared:

The Artist's Resale Right Regulations ensure a just reward for living British artists' creativity while protecting the valuable UK art market...The balanced Government approach will benefit struggling artists without placing a heavy administrative burden on the art market and will minimise the risk that sales would be driven offshore.¹⁵⁴

The purported 'balance' struck by the United Kingdom Government was unsurprisingly influenced by the supposed vulnerability of the London art market.

5.2 Derogation

¹⁵¹ The Parliamentary Under-Secretary of State, Department of Trade and Industry (Lord Sainsbury of Turville), Lord Hansard text for 24 January 2006, <http://www.publications.parliament.uk/pa/ld200506/ldhansrd/vo060124/text/60124-24.htm>

¹⁵² This term was first used by then Chancellor Gordon Brown with reference to domestic implementation of European Union directives. The term was applied to the artist's resale right in parliament debate on the issue.

¹⁵³ Fellow members such as the Netherlands and Austria legislated a €3,000 threshold in their domestic laws.

¹⁵⁴ Intellectual Property Office (UK) 'Press Release: United Kingdom (UK) Artists' Creativity Rewarded' 14 February 2006, <http://www.ipo.gov.uk/about/press/press-release/press-release-2006/press-release-20060214b.htm> at 12/01/2009.

At the same time as extolling benefits of the additional resales caught by the €1,000 threshold, the United Kingdom took advantage of the flexibility offered to Member States to phase in the application of the law. Accordingly, under the initial Regulations, deceased estates are excluded from benefiting under the right where a sale contract precedes January 1 2010.¹⁵⁵

The United Kingdom Government's decision to take benefit under the EU derogation was met by criticism from resale right supporters. On the same day that Christie's auction house sold a work by Francis Bacon, who died in 1992, for £17.3m¹⁵⁶, a group of 497 artists, including Damien Hirst, Sir Nicholas Grimshaw CBE RA, Tom Phillips RA, Eileen Cooper RA Sonia Lawson RA, published a letter in the United Kingdom's Telegraph newspaper:

We are a group of British artists and artists' families. Some artists achieve success during their lifetime; many do not achieve recognition until after their death... Our loved ones often sacrifice a lot to support the artist in the family. When it comes to the inheritance of a legacy, ensuring the preservation of works, operating charitable trusts and investing in British artists of the future are just some of the activities undertaken by heirs, often at considerable expense. The royalties arising from the resale right will help fund these projects...The Government must make the right decision in order to protect the legacy of artists and the heritage of our nation...We should be entitled to bequeath our intellectual property – the value of our life's work – to our families.

Perhaps the group of activist artists should have had recourse to a Jean-Louis Forain inspired drawing or editorial cartoon, as the letter did not have the desired effect.

In June 2008 the United Kingdom Intellectual Property Office launched a consultation document 'The Artist's Resale Right: Derogation for Deceased Artists'.¹⁵⁷ The document was in relation to the derogation in Directive 2001/84/EC1 which the United Kingdom currently uses so that the artist's resale right only applies in the United Kingdom to works by living artists. The consultation sought views on whether to maintain the existing derogation for a further two years until 1st January

¹⁵⁵ Statutory Instrument 2006 No. 346, Section 17
(<http://www.opsi.gov.uk/si/si2006/20060346.htm>)

¹⁵⁶ 'Royalties on art: Sharing the wealth' July 3rd 2008 *The Economist*,
http://www.economist.com/world/britain/displaystory.cfm?story_id=11670890.

¹⁵⁷ Intellectual Property Office. *The Resale Right: Derogation for Dead Artists*.
<http://www.ipo.gov.uk/consult-artist.pdf>

2012 or to allow the derogation to lapse and for the works by artists who are deceased, but are still protected by copyright, to be eligible for resale right.

The exclusion of successors from benefiting under resale right was extended to sale contracts preceding January 1 2012 in December 2008. The Right Honourable John Denham MP, Secretary of State for Innovation, excused the United Kingdom's further delay on the economic climate and, with an eye to 'balance', the protection of artists:

The current economic climate could only but affect the UK art market's ability to cope with the application of artist's resale right to the works of deceased artists...Some in the art market are already reporting reduced prices due to the economic climate. Therefore it would be difficult for the art market to continue to remain viable if, at the same time, they also had to deal with a reduction in volume of sales...Artists are also affected by the state of the art market. If the UK art market shrinks then the UK art trade will buy and sell fewer works of art for artists, which will make the financial situation of living artists even more difficult. Apply resale right to the works of deceased artists in the UK is likely to reduce the size of the UK art market which will therefore have a knock on effect to artists.¹⁵⁸

Denham blamed the current financial crisis for the decision: 'It is doubtful whether the UK art market could deal with these changes during such a difficult economic climate.'¹⁵⁹

5.3 Impact of the Artist's Resale Right

In 2008, Katy Graddy, Noah Horowitz and Stefan Szymanski of the IP Institute conducted 'A Study into the Effect on the UK Art Market of the Introduction of the Artist's Resale Right.'¹⁶⁰ The study made the following major findings:

Based on auction house data, we estimate about £2.5 million of ARR is being collected annually, of which around £1.5 million accrues to British artists. Most of these payments are

¹⁵⁸ Letter from The Rt Hon John Denham MP, Secretary of State for Innovation, Universities and Skills to European Commissioner for Internal Market and Securities, 18 December 2008.

¹⁵⁹ John Denham, 'Letter on the Resale Right and the Derogation for Deceased Artists' Works'. <http://www.ipo.gov.uk/press-release-20081219-letter.pdf>

¹⁶⁰ Katy Graddy, Noah Horowitz and Stefan Szymanski. *A Study into the Effect on the UK Art Market of the Introduction of the Artist's Resale Right*, IP Institute, January 2008, <http://www.ipo.gov.uk/study-droitdesuite.pdf>

quite small, and the median payment to artists based on auction house data is £256. Auction house data indicate that during the period since its introduction, 80% of all ARR payments should have gone to the top 100 artists.

Based on our survey and interviews, the cost of administering ARR entailed a set-up cost in the region of £1 million and recurrent administration costs of £50,000 per year. There is no evidence that ARR has diverted business away from the UK, where the size of the art market has grown as fast, if not faster, than the art market in jurisdictions where ARR is not currently payable.

There is no evidence that ARR has reduced prices, as prices have appreciated substantially for art eligible for ARR, and faster than in markets where ARR is not currently payable.

The extension of ARR in 2012 would on current figures increase the size of ARR payments about fourfold. Art market professionals expressed the view in the strongest terms that the extension will significantly damage the UK market by diverting trade elsewhere.

While the administrative burden of ARR does not seem to have been excessive for most businesses, there have been a number of problems associated with difficulties in establishing the nationality of artists and the requirement to calculate ARR liabilities in euros. A significant minority of art market professionals, including the major auction houses, deem the administration of ARR to be intrusive and burdensome.¹⁶¹

The United Kingdom's Intellectual Property Institute's January 2008 study into the effect on the UK art market of the introduction of the artist's resale right¹⁶² found that 'AAR [Artist's Resale Right] as currently implemented has not had a negative impact on the UK market.'¹⁶³

9 (a). The introduction of the resale royalty right into the United Kingdom has had no adverse impact on the United Kingdom's art market.

5.4 Ireland

¹⁶¹ Ibid., 2.

¹⁶² Ibid.

¹⁶³ Ibid., 22.

The *Irish Times* reported in March 2000 that Irish Prime Minister Taoiseach was personally pressed by UK Prime Minister Blair to drop the provision of a droit de suite in an amendment to the Irish copyright legislation.¹⁶⁴

Ireland reluctantly introduced a minimalist resale royalty scheme – the *European Communities (Artist's Resale Right) Regulations 2006* (Ireland). As Glen Gibbons notes:

During the course of the enactment of the *Copyright and Related Rights Act 2000*, there was a possibility that the Oireachtas (Irish Parliament) would implement the Droit de Suite Directive. It was seemingly omitted though owing to strong lobbying by the British Government. The failure by Ireland to implement the Directive by January 1, 2006 resulted in the well-known artist, Robert Ballagh, instituting legal proceedings against the Irish state. In response, the *European Communities (Artist's Resale Rights) Regulations 2006* (2006 Regulations) were introduced in June 2006.¹⁶⁵

A commentator notes that the regime is a minimalist one in a number of respects: 'The 2006 Regulations adopt a minimalist approach in relation to the following discretionary matters under the Directive: first, it fixes the minimum resale price at €3,000 (net of tax); secondly, it fixes a rate of 4 per cent for sales up to €50,000; thirdly, it only provides protection to the nationals of Member States, and Iceland, Liechtenstein and Norway; fourthly, the obligation on a seller to pay a royalty to joint authors is discharged where the total amount is paid to one of the authors; and finally, and perhaps most importantly, the rights afforded to an artist under droit de suite only last for the duration of his or her life.'¹⁶⁶

Ireland also has taxation exemptions of certain earnings of writers, composers and artists. S 195 of the *Taxes Consolidation Act 1997* (Ireland) is a complex provision, which provides the following prescriptions:

(1) In this section, 'work' means an original and creative work which is within one of the following categories- (a) a book or other writing; (b) a play; (c) a musical composition; (d) a painting or other like picture; (e) a sculpture.

¹⁶⁴ See 'Who owns your brainchild?' *Irish Times*, March 21 2000, 10, cited in Glen Gibbons, 'Droit de Suite' (2007) 29 (5) *European Intellectual Property Review* 163-166.

¹⁶⁵ Glen Gibbons, 'Droit de Suite', (2007) 29 (5) *European Intellectual Property Review* 163-166.

¹⁶⁶ Ibid.

(2) (a) This section shall apply to an individual—

(i) who is— (I) resident in the State and not resident elsewhere, or

(II) ordinarily resident and domiciled in the State and not resident elsewhere, and

(ii) (I) who is determined by the Revenue Commissioners, after consideration of any evidence in relation to the matter which the individual submits to them and after such consultation (if any) as may seem to them to be necessary with such person or body of persons as in their opinion may be of assistance to them, to have written, composed or executed, as the case may be, either solely or jointly with another individual, a work or works generally recognised as having cultural or artistic merit, or

(II) who has written, composed or executed, as the case may be, either solely or jointly with another individual, a particular work which the Revenue Commissioners, after consideration of the work and of any evidence in relation to the matter which the individual submits to them and after such consultation (if any) as may seem to them to be necessary with such person or body of persons as in their opinion may be of assistance to them, determine to be a work having cultural or artistic merit.

(b) The Revenue Commissioners shall not make a determination under this subsection unless—

(i) the individual concerned duly makes a claim to the Revenue Commissioners for the determination, being (where the determination is sought under *paragraph (a)(ii)(II)*) a claim made after the publication, production or sale, as the case may be, of the work in relation to which the determination is sought, and

(ii) the individual complies with any request to him or her under *subsection (4)*.

(3) (a) An individual to whom this section applies and who duly makes a claim to the Revenue Commissioners in that behalf shall, subject to *paragraph (b)*, be entitled to have the profits or gains arising to him or her from the publication, production or sale, as the case may be, of a work or works in relation to which the Revenue Commissioners have made a determination under *clause (I) or (II) of subsection (2) (a) (ii)*, or of a work of the individual in the same category as that work, and which apart from this section would be included in an assessment made on him or her under Case II of Schedule D, disregarded for the purposes of the Income Tax Acts.

(b) The exemption authorised by this section shall not apply for any year of assessment before the year of assessment in which the individual concerned makes a claim under *clause (I) or (II) of subsection (2)(a)(ii)* in respect of which the Revenue Commissioners make a determination referred to in *clause (I) or (II) of subsection (2)(a)(ii)*, as the case may be.

(c) The relief provided by this section may be given by repayment or otherwise.

(4) (a) Where an individual makes a claim to which *subsection (2)(a)(ii)(I)* relates, the Revenue Commissioners may serve on the individual a notice or notices in writing requesting the individual to furnish to them within such period as may be specified in the notice or notices such information, books, documents or other evidence as may appear to them to be necessary for the purposes of a determination under *subsection (2) (a) (ii) (I)*.

(b) Where an individual makes a claim to which *subsection (2)(a)(ii)(II)* relates, the individual shall—

(i) in the case of a book or other writing or a play or musical composition, if the Revenue Commissioners so request, furnish to them 3 copies, and

(ii) in the case of a painting or other like picture or a sculpture, if the Revenue Commissioners so request, provide, or arrange for the provision of, such facilities as the Revenue Commissioners may consider necessary for the purposes of a determination under *subsection (2)(a)(ii)(II)* (including any requisite permissions or consents of the person who owns or possesses the painting, picture or sculpture).

There was some discussion during the public hearing in the Australian Parliament as to whether there should be an Irish-style taxation exemption for visual artists in Australia. Opponents of the right of resale suggested that it should be a preferable alternative to a right of resale. Supporters of the right of resale argued that a taxation exemption should be a supplement to the right of resale.

We would make a number of points here. First, Ireland combines a right of resale with taxation exemptions. So the policy options are not mutually exclusive. Second, the regime of Ireland is quite complex, both in terms of its substance and its form (as can be seen from excerpts from the provision). There has been some controversy in Ireland about the application of the regime to high-earning creative artists – most notably, the rock band, U2. We note that there was some discussion about the issue in the Myer Report of the Contemporary Visual Arts and Craft Inquiry.¹⁶⁷ Careful attention would be needed before developing a similar scheme in Australia. A separate committee inquiry would need to explore this policy option. Third, because of the Australian constitutional laws, any tax exemption would need to be made in tax legislation, which is separate from the right of resale legislation.

9 (b). The minimalist Ireland model for a right of resale should not be followed. The Committee should consider the option of taxation exemptions for certain earnings of writers, composers and artists in a separate inquiry.

¹⁶⁷ Rupert Myer, *Report of the Contemporary Visual Arts and Crafts Inquiry*. Canberra: Department of Communications, Information Technology and the Art, 2002.

6. NEW ZEALAND

In May 2008 the New Zealand government introduced the *Copyright (Artists' Resale Right) Amendment Bill 2008* (NZ). This Bill proposed amending the *Copyright Act 1994* (NZ) to insert a section to establish a resale right for visual artists in New Zealand. It is worth noting the different approach taken by the Australian Government – which has sought to establish a sui generis for the right of resale outside the copyright regime.

The Associate Minister Arts, Culture and Heritage Minister, Judith Tizard, provided the following commentary on the proposed New Zealand scheme:

A resale right is really about giving artists a fair deal in terms of the economic returns they get from their work. Very few visual artists are able to make a living from their art alone. In tackling this issue, government is honouring an election promise to examine international developments relating to a resale right and its possible application to New Zealand. We are demonstrating our international commitment, under an optional clause in the Berne Convention for the Protection of Literary and Artistic Works, and also engaging with like-minded countries that enable their artists to have an ongoing benefit from their artistic work. The only way creative New Zealanders will be able to make a living from their work is if we protect and respect the work here and work internationally to get reciprocal recognition for New Zealanders across the world.¹⁶⁸

It is worthwhile mentioning the key features of the *Copyright (Artists' Resale Right) Amendment Bill 2008* (NZ). The legislation proposes to amend the *Copyright Act 1994* (NZ) to establish a mandatory resale right for artists when their artistic works are resold in New Zealand. The bill defines an 'artistic work' as meaning an 'original work that is '(a) a graphic work, photograph, sculpture, collage, or model, irrespective of artistic quality; or (b) a work of artistic craftsmanship not falling within paragraph (a); or (c) an artistic work that is one of a limited edition of artistic works created by the artist or under the artist's authority; but (d) not—(i) a work of architecture (being a building or model for a building); or (ii) a layout design or integrated circuit within the meaning of section 2 of the Layout Designs Act 1994.' A resale right would entitle an artist to receive a resale royalty payment each time an original artistic work is resold on the secondary art market. It does not apply to the first sale of the work.

¹⁶⁸ Judith Tizard, 'Artist Resale Right Legislation Introduced', New Zealand Government, 13 May 2008, <http://www.beehive.govt.nz/release/artist+resale+right+legislation+introduced>

The right of resale would be managed by a collecting society. The rate of the royalty would be determined through regulations. The New Zealand right of resale lasts for the life of the artist plus 50 years. The right of resale would be inalienable. The legislation recognises sole and joint ownership of artistic works – but not communal ownership.

There was significant debate in the New Zealand Parliament over the *Copyright (Artists' Resale Right) Amendment Bill 2008 (NZ)*.

Dail Jones of New Zealand First supported the legislation, observing:

We in New Zealand First wish to try anything that can be done to support artists, who are not terribly wealthy people. We want to do things for people to encourage them to produce more art in New Zealand, and if they can get some sort of royalty over the years for the work they have done, then why not? Why should a, perhaps, speculative buyer make all the profit rather than the person who painted the item or did whatever was necessary to bring it within this definition?... New Zealand First is all in favour of having a market economy in this area if artists, in particular, can profit on the open market by some sort of system being set up. New Zealand First wants to see legislation that allows something to happen. We are a party that wants to do things in favour of the arts, so we will support this bill going to a select committee. We look forward with great interest to the submissions, which I hope will do a lot to continue to improve art in New Zealand.

The National party refused to support the legislation. National politician Christopher Finlayson enumerated eight criticisms of the proposal bill. First, he noted that the legislation was ‘yet another example of the episodic reform of copyright law’. In his view, ‘What is required is comprehensive reform’. Second, Finlayson contended, strangely, that the right of resale was alien to the concepts of property in a common law system: ‘The droit de suite was founded on, and is consistent with, civil law notions of property.’ Third, Finlayson argued that the legislation would encourage an exodus of art transactions to jurisdictions where the royalty was not paid:

Art resales will become private and underground, in order to avoid the resale imposition. It is worth noting that the UK Government fought the introduction of the droit de suite scheme, arguing that the levy would cost up to 5,000 industry jobs and would divert trade to the United States and Switzerland in order to avoid it. The effect on the French market since the introduction of droit de suite supports that argument. At present, although roughly a third of the fine art sold in the world is French in origin, only 7 percent of all French art sales take place in France. Indeed, I was reading an article just last week that indicated that the French are trying to water down their own system because they have seen the harmful effects of it.

Fourth, Finlayson argued that the measure would be detrimental economically to the art market and artists generally: ‘It is basically a tax on sales, and as such it could have the effect of discouraging investment in, and consequently depressing, the art market’. Fifth, he maintained that the measure would only benefit successful artists: ‘Resale royalty payments therefore benefit only a small number of already successful artists, as those are the artists whose works attract large prices and typically resell frequently.’ Sixth, Finlayson argued that ‘the scheme will be very costly to administer, and I note that \$500 is a very low threshold price’. He suggested: ‘It is probable that the cost of administering the scheme would outweigh the benefit of the royalty.’ Seventh, Finlayson asserted that ‘some schemes have not been particularly successful overseas.’ Finally, he contended, rather hollowly, that ‘the scheme may create privacy concerns.’

Judy Turner, the deputy leader of United Future, also opposed the legislation. She observed:

United Future is opposing this bill because although similar schemes or variants of it exist in other countries—like France and, as has been mentioned, the UK—the application of those schemes is broader than what is proposed for this New Zealand scheme. Those countries also have long-established art markets and a greater population of art benefactors and investors, whereas the New Zealand market—particularly of works by New Zealand artists—is a comparatively fledgling market. It is only in recent times that emerging notable and collectable New Zealand artworks have attracted premium prices. United Future believes that as this emerging market develops, it could come under threat by this proposed scheme.

The bill has a tendency to be elitist. By restricting the scheme to visual artworks, it also starts to define, in economic terms, what art is. A key argument for a royalty fee is to help artists, and, in particular, emerging artists, to get early recognition of their creative outputs, and to enable them to support themselves as full-time professionals. The claim is often made that a struggling artist, out of necessity, often sells work at a very low price, and thereafter derives no benefit from capital gain, should the artist’s work subsequently appreciate in value.

Turner argued: ‘United Future asks when it is the State’s role to legislate in order to guarantee in virtual perpetuity an assured share of the potential capital gain of any goods or any service’. She concluded: ‘If the State is concerned about ensuring the financial viability of professional artists, then it would be better to specifically target funding at assisting such groups.’

In the New Zealand House of Representatives, there were 66 votes in favour of the bill – including New Zealand Labour 49; New Zealand First 7; Green Party 6; Māori Party 3; and Progressive 1. There were 54 votes against the legislation – including New Zealand National 48; United Future 2; ACT New Zealand 2; Independents: Copeland, Field. The bill was referred to the Government Administration Committee.

With New Zealand National winning government, it would appear that the right of resale legislation may founder in the New Zealand Parliament.

10. We would note that there is a lack of harmonization between the proposed New Zealand right of resale and the proposed Australian right of resale – particularly in respect of the definitions; the duration of the right of resale; and its relationship to copyright law.

11. Ideally, we think that it would be preferable if there was a common right of resale in Australasia – with mirror legislation in Australia and New Zealand.

7. AUSTRALIA

7.1 Howard's End

In 1999 internationally renowned Australian painter Howard Arkley was found dead from a heroin overdose in his suburban Melbourne studio. The legacy of his sudden demise, a tragic medley of a grieving widow and the 'post-mortem profiteering'¹⁶⁹ of his impressive oeuvre, has provoked a lively debate within the Australian artistic community. Arkley's widow, Alison Burton, has stood 'disgusted' outside auction house doors while the auction market 'feeding frenzy...capitalised on Howard's death, appropriating and exploiting his long-established and significant career'.¹⁷⁰ Prior to his death, Arkley's technicolour airbrushed paintings had sold for approximately \$20,000 to \$40,000.¹⁷¹ However, with very little of his work in his possession at the time of his death, Burton watched on as Arkley's *Shadow Factories* set a saleroom record at \$362,635¹⁷² and his 1987 painting, *Bungalow Home*, fetched \$174,750 on the secondary market, reaping a 2,400% increase for the seller.^{173 174}

In the absence of an artists' *droit de suite* in Australia, Alison Burton sought 'the only real avenue through which the Estate might benefit financially from the commercial upturn'¹⁷⁵ and asserted her right to receive a copyright fee for the reproduction of Arkley's work.¹⁷⁶ Shocked to observe *Shadow Factories* on the cover of a Deutscher-Menzies catalogue after the auction house had refused to enter into a

¹⁶⁹ Edwina Preston, 'Creative Diplomacy' (2003) 5 *Heat* 195, 202.

¹⁷⁰ Michael Hutak, 'Howard's End', *Bulletin* vol 119 No. 35, 2000, </bulletin/EdDesk.nsf/All/F63EB378BABACA256A8F0022FCA6!open&login> at 28/09/2003.

¹⁷¹ Raymond Gill, 'Arkley Widow Hits Out At Auction Houses', *The Age* (Melbourne), 12 August 2000, 10.

¹⁷² Michael Hutak, 'Howard's end', *Bulletin* vol 119 No. 35, 2000, </bulletin/EdDesk.nsf/All/F63EB378BABACA256A8F0022FCA6!open&login> at 28/09/2003.

¹⁷³ Ibid.

¹⁷⁴ While Arkely's prices receded after the initial boom, this would have no impact upon the operation of the *droit de suite*.

¹⁷⁵ Edwina Preston, 'Creative Diplomacy' (2003) 5 *Heat* 195, 202.

¹⁷⁶ Cloudband, *Artists Demand Catalogue Fees*, Cloudband Magazine (2001), <http://www.cloudband.com/frames.mhtml/magazine/news/2001/01/31/main.html> at 2/10/2003.

\$5,000 licence agreement for the use of the work, Burton commenced legal proceedings for copyright infringement.¹⁷⁷ Her motivation was summed up by artist Juan Davila: ‘Howard would have received about \$6,000 for this painting which after [a] 40 per cent dealer’s fee, tax and the cost of materials would have left him little. To ask for a fee of \$5,000, you are not asking much’.¹⁷⁸

Following her success against Deutscher-Menzies,¹⁷⁹ Burton formalised her reproduction royalty entitlement, establishing a fee schedule of licensing costs.¹⁸⁰ However, the imposition of a royalty fee has resulted in biographies of Arkley being published devoid of his creations and exhibitions being staged without promotional material.¹⁸¹ Accordingly, Burton’s recourse to her only economic right under the present copyright regime is retarding the dissemination of Arkley’s work, injuring both Arkley’s legacy and Australia’s cultural heritage.¹⁸² While many artists can rely on a contractual resale right in the absence of a legislative prerogative,¹⁸³ because Arkley sold off his stock as a young artist, Alison Burton is left with little other choice if she is to share in the ‘golden age’ of her late husband.

¹⁷⁷ Raymond Gill, ‘Arkley Widow Hits Out At Auction Houses’, *The Age* (Melbourne), 12 August 2000, 10.

¹⁷⁸ Ibid.

¹⁷⁹ Edwina Preston, ‘Creative Diplomacy’ (2003) 5 *Heat* 195, 202; See also, Visual Arts Copyright Collecting Agency (VISCOPY), ‘Copyright Agreement with Auction Houses heralds now income for Visual Artists’ (Press release, 20 February 2002), <www.viscopy.com>.

¹⁸⁰ For a copy of the fee schedule, see: Lookart, *Why Lookart can’t show you Arkley images* (2001), <http://www.lookart.net/pictures/modern1/Arkley/arkley_burton.htm> at 2/10/2003.

¹⁸¹ Edwina Preston, ‘Creative Diplomacy’ (2003) 5 *Heat* 195, 202; Cloudband, *Artists Demand Catalogue Fees*, Cloudband Magazine (2001), <<http://www.cloudband.com/frames.mhtml/magazine/news/2001/01/31/main.html>> at 2/10/2003; and Lookart, *Why Lookart can’t show you Arkley images* (2001), <http://www.lookart.net/pictures/modern1/Arkley/arkley_burton.htm> at 2/10/2003.

¹⁸² John Mangan, ‘Artist’s mother urges public display of Arkley paintings’, *The Age* (Melbourne), 29 April 2002, <<http://www.theage.com.au/articles/2002/04/28/10194413241532.html>> at 2/10/2003.

¹⁸³ See for a copy of ‘Agreement of Original Transfer of Work’ devised by lawyer Bob Projansky and art patron Seth Siegel: Alexander Alberro, *Conceptual Art and the Politics of Publicity*, Cambridge: The MIT Press, 2003, 165. See also, Neil F. Siegel, ‘The Resale Royalty Provisions of the Visual Artists Rights Act: Their History and Theory’ (1988) 93 *Dickinson Law Review* 2; R. Oman, ‘Copyright Office Hearings on the Droit de Suite’ (1992) 16 *Columbia Journal of Law & the Arts* 185, 202-9.

7.2 The Myer Report: Framing An Australian Right of Resale.

In 2001, the Australian Federal Government commissioned businessman and noted philanthropist and art collector Rupert Myer to Chair the Contemporary Visual Arts and Craft Inquiry (the Inquiry). The resale rights' theoretical foundation and marketplace viability was highlighted from the outset as a matter of going concern for the Inquiry.¹⁸⁴

Released in September 2003, the *Report of the Contemporary Visual Arts and Craft Inquiry* (Myer Report) was enthusiastically welcomed by the fine arts sector¹⁸⁵ and cautiously endorsed by the Federal Government. Prominent in the 'strategic interventions' contained in the Report is the recommendation that the 'Commonwealth Government introduce a resale royalty arrangement'.¹⁸⁶ Rather than put forward a legislative model, the Report recommended that the Government 'establish a working group, comprising representatives from government and the visual arts and craft sector, to analyse the options for introducing a resale royalty arrangement'.¹⁸⁷

7.3 A Conceptual Foundation for an Australian *Droit de Suite*

Despite the Myer Report's support for the introduction of a resale royalty scheme in Australia, the extent to which it advances a sustainable theoretical foundation for the right is uncertain. In marked contrast to the rich conceptual debates fostered overseas,

¹⁸⁴ Contemporary Visual Arts and Craft Inquiry, *Issues Paper*, September 2001, <<http://www.cvacinquiry.dcita.government.au/issues/printable.html>>.

¹⁸⁵ See, Australian Copyright Council, *The Myer Report: What does it mean for the future of Contemporary Visual Arts and Craft?*, (2002) <www.copyright.com.au>; 'Breath easy; arts gets a new start', *Sydney Morning Herald*, 15 May 2003, <<http://www.smh.com.au/articles/2003/05/14/1052885293274.html>> at 18/08/2003; Visual Arts Copyright Collecting Agency (VISCOPY), *VISCOPY's Response to Myer Inquiry*, (Press release 9 September 2002), <www.viscopy.com>.

¹⁸⁶ Rupert Myer, *Report of the Contemporary Visual Arts and Crafts Inquiry*. Canberra: Department of Communications, Information Technology and the Art, 2002, 170.

¹⁸⁷ Ibid.

the Report provides a skeletal account of the benefits conferred upon artists under a resale royalty scheme:¹⁸⁸

- providing artists with a contingent income...which is not currently available.
- empowering artists by allowing them to enjoy a direct economic benefit from the success of the [sic] work, as improving the financial status of the artist will assist the artist to assert their interest more effectively in the market place and minimise exploitation of their disadvantaged position; and
- recognising the ongoing relationship between the artist and their work, and the extent to which an artist's reputation is linked to the physical product of their creative labour...[and]
- reciprocal arrangements [under EU law].¹⁸⁹

The emphasis placed upon 'income' and 'financial status' in the Report's conception of the *droit de suite* reflects the document's engagement in a social welfare discourse founded in 'slightly hysterical statistics highlighting artist's low incomes'.¹⁹⁰ Myer persuasively articulates the contradiction that artists supply a \$551.6 million commercial marketplace,¹⁹¹ but exist in financial penury. The median annual income of Australian visual artists is recorded in the Report as \$15,300 (compared with the median income of the total Australian workforce at \$25,500).¹⁹² ¹⁹³ The 'adverse

¹⁸⁸ It is important to note that the Report's analysis was highly reflective of the submissions received: See, National Association for the Visual Arts, *Submission to the Inquiry into the Contemporary Visual Arts and Craft*, para. 2.4; National Gallery of Australia, *Response to Invitation to Comment to Contemporary Visual Arts and Craft Inquiry*, 12 November 2001, 4; Australian Copyright Council, *Submission to Contemporary Visual Arts and Craft Inquiry*, November 2001, 3; copies held by the Department of Communications, Information Technology and the Arts.

¹⁸⁹ Rupert Myer, *Report of the Contemporary Visual Arts and Crafts Inquiry*. Canberra: Department of Communications, Information Technology and the Art, 2002, 161.

¹⁹⁰ Jane Rankin-Reid, 'The politesse of current arts funding muffles artists' voices' (2002) *One Line Opinion*, <<http://www.onlineopinion.com.au/2002/Oct02/Rankin-Reid1.htm>> at 7/08/2003, 4.

¹⁹¹ Rupert Myer, *Report of the Contemporary Visual Arts and Crafts Inquiry*. Canberra: Department of Communications, Information Technology and the Art, 2002.

¹⁹² *Ibid.*, 33, citing 1996 figures published by the Australian Bureau of Statistics.

income situation of visual artists¹⁹⁴ is further compounded by the fact that this average income level has been declining by between 1.6 and 2 percent per year.¹⁹⁵

The consequence of this discourse is to advance the notion that ‘resale royalties are an intrinsic link to the improvement of the inherent rights of Australian artists to a fair income’.¹⁹⁶ This approach marks a departure from the conceptual philosophy advanced under the rubric of European law. Indeed, despite the historical rhetoric concerning the starving artist, the *droit de suite* has never been exclusively conceptualised under the paradigm of social welfare.¹⁹⁷

The danger of establishing a theoretical conception of the *droit de suite* based on the economic plight of artists rather than as a counterpart to the author’s right of reproduction is that it invokes ‘arguments about the truth or otherwise of the picture of the ‘young starving artist’ selling his or her work at an undervalue’.¹⁹⁸ This argument is becoming tenuous, with an empirical record being accumulated by economists¹⁹⁹ that corroborates the argument put forward by resale right opponents that ‘royalties are an inappropriate mechanism to reallocate wealth to struggling artists’.²⁰⁰ Accordingly, if the mischief sought to be cured by a resale right is the inadequate income levels of fine artists, the *droit de suite* is an impotent institution,

¹⁹³ For a comprehensive analysis of the visual arts economy, see, David Throsby and Beverly Thompson, *But What Do You Do For A Living?: A New Economic Study of Australia Artists*, Sydney: Australia Council, 1994.

¹⁹⁴ *Ibid*, 25.

¹⁹⁵ Rupert Myer, *Report of the Contemporary Visual Arts and Crafts Inquiry*. Canberra: Department of Communications, Information Technology and the Art, 2002, 33, citing 1996 figures published by the Australian Bureau of Statistics.

¹⁹⁶ Bronwyn Bancroft, quoted within, Visual Arts Copyright Collecting Agency (VISCOPY), *VISCOPY’s Response to Myer Inquiry*, (Press release 9 September 2002), <www.viscopy.com>.

¹⁹⁷ See eg, Jean-Marc Gutton, *Société de auteurs dans les arts graphiques et plastiques*, in testimony before the Copyright Office: R. Oman, ‘Copyright Office Hearings on the Droit de Suite’ (1992) 16 *Columbia Journal of Law & the Arts* 185, 196.

¹⁹⁸ Australian Copyright Council, *Bulletin 69: Resale Royalty – A New Right for Artists*, Sydney: Australian Copyright Council, 1990.

¹⁹⁹ See, especially, Jeffrey C. Wu, ‘Art Resale Rights and the Art Resale Market: A Follow-Up Study’ (1999) 46 *Journal of the Copyright Society of the USA* 531.

²⁰⁰ Elliot C. Alderman, ‘Resale Royalties in the United States For Fine Visual Artists: An Alien Concept’ (1992) 40 *Journal of the Copyright Society of the USA* 265, 279.

‘reward[ing] the wrong painters with probably inconsequential amounts of money at the wrong time in their lives’.²⁰¹

Importantly, the Myer Report’s insistence upon tendering the spectre of poverty as ‘a uniform which distinguishes the artist from his bourgeois audience’²⁰² comes at the expense of any copyright dialogue. Despite privileging the ‘ongoing relationship between the artist and their work’,²⁰³ the Report is silent in respect of the copyright analogy that has traditionally represented the conceptual touchstone of the *droit de suite*. In the absence of a copyright dialogue, the legal nature of the right recommended by the Report remains equivocal.

12. The resale royalty debate in Australia shows a confused local understanding of the theoretical foundations of the right.

7.4 Toward a legislative scheme in Australia

The Australian Democrats, under the advocacy of long time campaigner for extended Indigenous intellectual property rights,^{204 205} Senator Aden Ridgeway, sought to

²⁰¹ Monroe E Price, ‘Government Policy and Economic Security for Artists: The Case of the Droit de Suite’ (1968) 77 *Yale Law Journal* 1333, 1366.

²⁰² Ibid.

²⁰³ Rupert Myer, *Report of the Contemporary Visual Arts and Crafts Inquiry*. Canberra: Department of Communications, Information Technology and the Art, 2002, 161.

²⁰⁴ See eg, Senator Aden Ridgeway, ‘Survival - Call for Action on Indigenous Cultural Rights’ (Press Release, 26 January 2003), <<http://www.deomocrats.org.au/news/index.htm>> at 26/09/2003.

²⁰⁵ Australian law is moving toward a greater recognition of Indigenous intellectual property issues, including communal moral rights: See eg, *Bulun Bulun and Another v R & T Textiles Pty LTD* (1998) 86 FCR 244; T. Janke, *Our Culture: Our Future. Report on Australian Indigenous Cultural and Intellectual Property Rights*, Prepared for Australian Institute of Aboriginal and Torres Strait Islander Studies and ATSIC by Michael Frankel & Co, Canberra, 1998, at www.icip.lawnet.com.au/index.html; Senator the Hon Richard Alston, The Hon Daryl

politicise the *droit de suite* debate in Australia in the wake of the Sotheby's Indigenous art sale:

This week's Sotheby's auction in Sydney has seen Indigenous artworks sold for record prices, with around \$6 million changing hands...The establishment of a scheme for resale royalty rights for artists is particularly important in the context of the rapidly booming international market for Indigenous artworks as compared to the desperate economic conditions within which many Indigenous artists live and work.²⁰⁶

The need for a legislatively imposed artists' resale right in Australia was taken up by the Federal Opposition following the release of the Myer Report in September 2003 when it announced that it had 'committed itself to implementing the visual arts communities' top priority - a Resale Royalty Scheme'.²⁰⁷ Marked by an overarching concern for indigenous artists,²⁰⁸ the Labor Party's resale right policy is suffused with good intention. However, the extent to which its model represents a suitable legislative vehicle for achieving such worthy pursuits is equivocal.

Labor's 2003 resale right policy proposed that 'visual artists will enjoy a direct benefit from their work if it is resold for a higher value'.²⁰⁹ Scholarship on the resale right, including the Myer Report has long demonstrated an aversion to imposing a royalty on 'successful' art works due to the impracticality of establishing a register to monitor prior sales prices, and the difficulty in distinguishing between appreciation

Williams MP, the Hon Philip Ruddock MP, 'Indigenous communities to get new protection for creative works' (Joint Press Release: 19 May 2003); Justice Ronald Sackville, 'Legal Protection of Indigenous Culture in Australia', (2003) 11 *Cardozo Journal of International Comparative Law* 711. See also, Brad Sherman, 'From the Non-original to the Aboriginal: A History', within, Brad Sherman and Alain Strowel (eds), *Of Authors and Origins: Essays on Copyright Law*, Oxford: Clarendon Press, 1994.

²⁰⁶ Senator Aden Ridgeway, 'Record Art Prices Show Need for Resale Royalty Rights' (Press Release, 29 July 2003), <http://www.deomocrats.org.au/news/index.htm> (26/09/2003).

²⁰⁷ Senator Kate Lundy and Bob McMullan, 'Labor announces resale rights for artists' (Joint press release, 10 September 2003), <<http://www.katelundy.com.au/sept2003.htm#10September2003>> at 19/09/03.

²⁰⁸ Bob McMullan MP, quoted within, ABC Radio National (Peta Donald), 'Re-sale royalty scheme for Aboriginal artists', *PM*, Friday 12 September 2003, <<http://www.abc.net.au/pm/content/2003/s945093.htm>> at 14/09/2003.

²⁰⁹ Senator Kate Lundy and Bob McMullan, 'Labor announces resale rights for artists' (Joint press release, 10 September 2003), <<http://www.katelundy.com.au/sept2003.htm#10September2003>> at 19/09/03.

and inflation.^{210 211} Significantly, in the absence of sophisticated art market infrastructure within remote Aboriginal art centres, the problems associated with administration would be particularly acute for Indigenous artists.

Furthermore, such a scheme would have distinguished Australian fine artists from practitioners in other creative industries. While opponents of the *droit de suite*²¹² have long argued that ‘there is something inherently unjust in permitting an artist to benefit from increases in the value of his work upon resale, without having to share the risk of loss’,²¹³ other authors that receive a benefit under the Australian copyright regime are treated no differently. A resale royalty blind to an artwork’s level of financial appreciation ‘is no different...than a playwright being paid a royalty by a theatre company if a play flops, or an author getting to keep an advance for an unsuccessful book’.²¹⁴ To demand that artists should only receive a royalty for successful work holds artists ‘to a higher standard of fairness than other authors’.²¹⁵ Accordingly, it can be argued that rather than establishing an equitable relationship

²¹⁰ See eg, Michael B. Reddy, ‘The Droit De Suite: Why American Fine Artists Should Have The Right To A Resale Royalty’ (1995) 15 *Loyola of Los Angeles Entertainment Law Journal* 509; Shira Perlmutter, ‘Resale Royalties for Artists: An Analysis of the Register of Copyrights’ Report’(1992) 16 *Columbia-VLA Journal of Law & The Arts* 395; Elliot C. Alderman, ‘Resale Royalties in the United States For Fine Visual Artists: An Alien Concept’ (1992) 40 *Journal of the Copyright Society of the USA* 265.

²¹¹ Rupert Myer, *Report of the Contemporary Visual Arts and Crafts Inquiry*. Canberra: Department of Communications, Information Technology and the Art, 2002, 383. See also, Australian Copyright Council, *Droit de Suite: The Art resale Royalty and its Implications for Australia*, A Report Commissioned by the Australia Council and the Department of the Arts, Sport, the Environment, Tourism and Territories, February, 1989, 15.

²¹² See, ABC Radio National (Gerald Tooth), ‘Stretching the Canvas: Investing in Art in Australia’, *Background Briefing*, 11 August 2002, <<http://www.abc.net.au/rn/talks/stories/s647142.htm>> at 15/06/2003, citing opposition from galleries and auction houses.

²¹³ U.S. Copyright Office, *Droit de Suite: The Artists Resale Royalty* (1992), 135, quoted within, Michael B. Reddy, ‘The Droit De Suite: Why American Fine Artists Should Have The Right To A Resale Royalty’ (1995) 15 *Loyola of Los Angeles Entertainment Law Journal* 509, 532.

²¹⁴ Professor Thomas M. Goetzl, cited within, Elliot C. Alderman, ‘Resale Royalties in the United States For Fine Visual Artists: An Alien Concept’ (1992) 40 *Journal of the Copyright Society of the USA* 265, 268.

²¹⁵ Shira Perlmutter, ‘Resale Royalties for Artists: An Analysis of the Register of Copyrights’ Report’(1992) 16 *Columbia-VLA Journal of Law & The Arts* 395, 417.

between artists and their creations, Labor's 2003 resale right model would have proved administratively prohibitive, and conceptually abstruse.

The Australian Federal Government responded to growing political and public pressure in late 2003 by proposing to introduce a resale royalty scheme in early 2004.²¹⁶ The then Arts Minister²¹⁷, Senator Richard Alston affirmed that 'I have been in favour of a resale royalty for quite some time, but it has taken us a while to work out a sensible program'.²¹⁸ ²¹⁹ By intimating that the Government had determined a 'sensible program'²²⁰ for the *droit de suite*, including a rate of between 3 and 5 per cent imposed on the purchase price of 'significant' sales,²²¹ the resale right was conceived as a settled institution, a ready-made instrument. This stood in marked contrast to the Government's earlier intention to fund the Myer Report's 'working group' recommendation.²²² What's more, a member of a group established to investigate the implementation of the Myer Report's recommendations was quoted as saying:²²³

We've been thinking about this and asking what's the point? Would a scheme have economic value or is social justice its underpinning? Is it a right - symbolically important - because of what it says about a creator and the work? If you look at the economic side and try to calculate the value of contemporary art sold in any year, and what a royalty based on the EU model might be, a tiny amount of money would go to a small number of artists. And it is those selling at the top end who are already well-established, whose work is often resold, who would get most of the money collected.²²⁴

²¹⁶ Georgina Safe, 'Royalties to be paid on art sales', *The Australian*, 7 October 2003, 3.

²¹⁷ Minister for Communications, Information Technology and the Arts.

²¹⁸ Georgina Safe, 'Royalties to be paid on art sales', *The Australian*, 7 October 2003, 3.

²¹⁹ Despite *The Australian* quoting Senator Alston himself, along with one of his representatives, this author has learnt that the Minister's office was surprised to read of Senator Alston's comments and at the time of writing were attempting to determine the Government's position in respect of the issue.

²²⁰ Georgina Safe, 'Royalties to be paid on art sales', *The Australian*, 7 October 2003, 3.

²²¹ Ibid.

²²² Senator Rod Kemp, 'Launch of Contemporary Visual Arts and Craft Inquiry report' (Speech delivered in Canberra, 6 September 2002).

²²³ 'Knocked down; still out', *The Age* (Melbourne), 29 September 2003, <<http://www.theage.com.au/articles/2003/09/26/1064083177490.html>> at 9/10/2003.

²²⁴ Ibid.

Emboldened by the government’s failure to bring forth legislation in a timely manner, opposition Senator Kate Lundy introduced a Private Member’s Bill in March 2004 for an Australian resale royalty²²⁵. The Bill sought to amend the Copyright Act ‘to provide for the payment of a resale royalty to visual artists if their work is resold thus ensuring they enjoy a direct financial benefit from the increasing value of their work’²²⁶. The proposed resale royalty of 5% was payable by the seller of an artwork in respect to any act of resale (not limited to resales where the value of the artwork had appreciated, as previously advocated by Labor) through an art market intermediary.

The Government refused to support Senator Lundy’s Bill and instead released a discussion paper calling for submissions on whether Australia should introduce a resale royalty, what form it should take and how it should operate²²⁷ (‘the 2004 Discussion Paper’).

The 2004 Discussion Paper traversed the history of the resale royalty, discussed possible models which could be implemented in Australia and proffered four alternative options for a resale royalty arrangement in Australia:

1. A fully legislated scheme;
2. Industry self-regulation;
3. Contract-based resale royalties; and
4. No resale royalty arrangement – but interventions to support Indigenous artists.²²⁸

To the disappointment of Australian resale royalty advocates, the Government failed to provide a prompt response to the debate it had solicited by way of the 2004 Discussion Paper. Without a government appointed working group stimulating further research and debate, the reform agenda lost momentum as the Government remained silent as to whether it would proceed with legislating for the resale right.

In the absence of a response from Government, the Labor Party again put forward a Private Member’s Bill for the introduction of a resale right (‘the 2006

²²⁵ *Resale Royalty Bill* 2004 (Cth) (parlinfoweb.aph.gov.au/piweb/Repository/Legis/Bills/Linked/11030413.pdf)

²²⁶ Resale Royalty Bill, 2004, Section 3.

²²⁷ Department of Communications, Information Technology and the Arts, Proposed Resale Royalty Arrangement Discussion Paper (2004).

²²⁸ Department of Communications, Information Technology and the Arts, Proposed Resale Royalty Arrangement Discussion Paper (2004), pp 35 – 39.

Bill')²²⁹. Bob McMullan MP's Bill was couched as an overt challenge to the Government to 'give to visual artists equivalent rights to those enjoyed by authors and musicians – the right to receive a small portion of the wealth which their skill and imagination creates.'²³⁰ The 2006 Bill was modeled on the European Union Directive whereby the royalty was calculated in accordance with a sliding scale and royalty payments capped at \$25,000.00²³¹. Interestingly, the 2006 also provided that:

- (1) Where the sale price of a work regarded as a resale exceeds \$50000, ten percent of the resale royalty shall be paid by the collective agency into an Artists Support Fund administered by the Australia Council.'
- (2) The Australia Council shall disperse the monies from the Artists Support Fund to new and emerging artists.²³²

While the 2006 Bill did not pass the parliament, it did elicit a response from the Government. On 9 May 2006 Attorney-General Philip Ruddock and Minister for the Arts and Sport, Senator Rod Kemp, announced that the Government no longer supported the introduction of a resale royalty into Australia:

'The Government considered the effectiveness of a resale royalty scheme following the recommendations of the 2002 Contemporary Visual Arts and Craft Inquiry and in light of submissions in response to the discussion paper it released in July 2004.

Research shows that resale royalty schemes bring most benefit to successful late career artists and the estates of deceased artists.

It would bring little advantage to the majority of Australian artists whose work rarely reaches the secondary art market and would also adversely affect commercial galleries, art dealers, auction houses and investors.

One of the main arguments put forward in support of resale royalty was that Indigenous artists are particularly disadvantaged by the secondary sales market. Research shows, however, that a resale royalty scheme would not end disadvantage for Indigenous artists.'²³³

²²⁹ The *Artist's Resale Rights Bill* 2006 (Cth)

²³⁰ Bob McMullan MP, *Press Release: A Challenge to Act: Artist's Resale Rights Bill*, 27 March 2006.

²³¹ The *Artist's Resale Rights Bill* 2006 (Cth), Section 248X(3)-(4).

²³² The *Artist's Resale Rights Bill* 2006 (Cth), Section 248AJ(1)-(2)

²³³ Attorney-General Philip Ruddock and Senator Rod Kemp, 'Press Release: New Support For Australia's Visual Artists', 9 May 2006,

By casting resale right as a silver bullet ‘expected to remedy or uniformly ameliorate the financial disadvantage suffered by artist’²³⁴ the Government demonstrated a misunderstanding of the resale rights conceptual provenance. This may be, in part, the fault of Rupert Myer’s Report, which instituted an Australian discourse which failed to envisage the *droit de suite* in a copyright law paradigm. What is clear is that the Government’s conception of the resale right had little to do with the relationship that existed between an artist and the marketplace and the act of resale itself.

On 3 October 2008 the new Labor Government announced that it would introduce into the Australian Parliament the *Resale Royalty Right for Visual Artists Bill 2008* (Cth). The Minister for the Environment, Heritage, and the Arts, the Hon. Peter Garrett, heralded Labor’s new resale royalty scheme as ‘a landmark moment for Australia’s visual artists’²³⁵:

A resale royalty scheme will provide further recognition of the critical contribution artists make to our identity, community and economy. The scheme will provide artists with proper recognition on their ongoing rights in their work and will provide a potential additional source of income. This scheme will bring Australia into line with similar resale royalty arrangements operating in the United Kingdom and Europe and will embody the recognition that visual artists’ rights extend beyond the first sale of an artwork.²³⁶

The Minister added: ‘By enshrining in law the right of artists and their heirs to receive a benefit from the secondary sale of their work, we are building an environment where the talent and creativity of visual artists receive greater reward and recognition.’²³⁷

In the Bill’s Second Reading Speech, Peter Garrett explained:

Historically, the achievements of our visual artists have not been recognised to the same extent as those of our composers, authors and performers, who are able to earn copyright and performance fees from their work, and thus have an ongoing financial interest in their creative

http://www.minister.dcita.gov.au/kemp/media/media_releases/new_support_for_australias_visual_artists?SQ_DESIGN_NAME=printer%20friendly

²³⁴ Robynne Quiggin, ‘The Resale Royalty: An Overview’, (2006) 6(18) *Indigenous Law Bulletin*.

²³⁵ The Hon Peter Garrett, *Press Release: Artists to benefit from Resale Royalty Right*, 3 October 2008.

²³⁶ Ibid.

²³⁷ Ibid.

efforts...Auction sales in 2007 amounted to \$175 million with works sold by 1,578 Australian artists, of which 379 were Indigenous. The value of the auction sales market increased by 75 per cent in 2007. Sadly, local artists have not shared in the benefits of this substantial activity...The resale royalty right the government is introducing is not just about raising additional income for artists.²³⁸

Significantly, the policy basis underpinning the proposed scheme demonstrates a keen understanding of the dual philosophical bases for the right: the ‘romantic’ ideals that underscore the concepts parochial origins and the economic relationship that exists between an artist and the marketplace.

13. A viable Australian *droit de suite* ‘translation’ must be governed by the principles of social justice, forged out of the relationship between an artist and the art market.

²³⁸ Hansard, ‘Second Reading Speech on the *Resale Royalty Right for Visual Artists Bill* 2008 (Cth)’, House of Representatives, Thursday 27 November 2008.

8. CONSTITUTIONAL LAW

8.1 The Intellectual Property and the External Affairs Power

The proposed *Resale Royalty Right for Visual Artists Bill* 2008 (Cth) would be supported by the Federal Government's constitutional power in respect of intellectual property and its constitutional power relating to external affairs (given that the legislation seeks to implement the *Berne Convention*) under s 51 (xviii) and s 51 (xxix) of the Australian *Constitution*.

In the case of *Grain Pool of Western Australia v Commonwealth*, the High Court of Australia took a broad and flexible approach to the interpretation of s 51 (xviii) of the Australian Constitution, which refers to the power of the Commonwealth in respect of 'Copyrights, patents of inventions and designs, and trade marks'.²³⁹

In this case, the plaintiff, the Grain Pool of West Australia, challenged the constitutional validity of the *Plant Variety Rights Act* 1987 (Cth) and its successor, the *Plant Breeders' Rights Act* 1994 (Cth). The Grain Pool of Western Australia maintained that the legislation was not supported by the intellectual property power under s 51 (xviii) of the *Constitution*, because plant breeders' rights did not fall within the constitutional definition of 'Copyrights, patents of invention, and designs, and trade marks'. Furthermore, the plaintiff argued that the legislation was not supported by the external affairs power under s 51 (xxix) of the *Constitution* because it was not a matter of international concern and the relevant treaty, the *International Convention for the Protection of New Varieties of Plants* 1991, had not been ratified.

The joint judgment - undoubtedly written by the intellectual property specialist, Justice Gummow - held that the *Plant Variety Rights Act* 1987 (Cth) and the *Plant Breeder's Rights Act* 1994 (Cth) were valid under the intellectual property power of the Constitution.²⁴⁰ It relied upon a number of sources of authority, including historical studies into the development of intellectual property, constitutional law, and a fine, close reading of the legislation and the case law dealing with plant breeder's rights. The joint judgment emphasized:

²³⁹ *Grain Pool Of Western Australia v Commonwealth* (2000) 46 IPR 515.

²⁴⁰ The joint judgment consisted of Chief Justice Gleeson and Justices Gaudron, McHugh, Gummow, Hayne and Callinan.

These words do not suggest, and what follows in these reasons does not give effect to any notion that the boundaries of the power conferred by s 51 (xviii) are not to be ascertained solely by identifying what in 1900 would have been treated as a copyright, patent, design or trade mark. No doubt some submissions by the plaintiff would fail even upon the application of so limited a criterion. However, other submissions, as will appear, fail, because they give insufficient allowance for the dynamism which, even in 1900, was inherent in any understanding of the terms used in s 51 (xviii).²⁴¹

Kirby J also held that the *Plant Variety Rights Act 1987 (Cth)* and the *Plant Breeder's Rights Act 1994 (Cth)* were valid. His Honour reached this conclusion not on the basis of the meaning of s 51 (xviii) of the *Constitution* according, or even by reference, to the accepted understandings of the terms used in 1900. Kirby J concludes that the court must characterise the limits of the legislative power over 'patents', 'trade marks' and copyright law' by identifying the 'really essential characteristics' of the notion referred to. His Honour observes: 'What constitute such 'really essential characteristics' may grow and expand, or may contract over time. But the key to finding the meaning is not to be discovered in the statutes and case books before and at 1900 or in the inventions of the framers of the Constitution adopted immediately before and given effect in that year.'²⁴²

The ruling means that the intellectual property power of the Federal Government is not limited to merely the traditional regimes of copyright law, patent law, designs law, and trade marks; it extends to a range of sui generis forms of intellectual property, such as plant breeders' rights, and conceivably, the right of resale, the *droit de suite*.

14. We would submit that the *Resale Royalty Right for Visual Artists Bill 2008 (Cth)* is supported by the intellectual property power and the external affairs power of the Federal Government under the Constitution.

8.2 Acquisition of Property on Just Terms

²⁴¹ *Grain Pool Of Western Australia v Commonwealth* (2000) 46 IPR 515 at 522.

²⁴² *Grain Pool Of Western Australia v Commonwealth* (2000) 46 IPR 515 at 549.

Section 11 of the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) provides: ‘If an artwork exists on the commencement of this Part, there is no resale royalty right on the first transfer of ownership of the artwork on or after commencement, even if the transfer of ownership is under a commercial resale.’

There has been some ambivalent debate as to whether the constitutional provision dealing with ‘acquisition of property on just terms’ extends to intellectual property.

In *Australian Tape Manufacturers Association Ltd v Commonwealth*, the majority of the High Court of Australia held that a ‘royalty’ levied on the vendors of blank tapes by s.135ZZP(1) was a tax and this conclusion entailed the consequence that, by reason of non-compliance with s.55 of the Constitution, Pt VC of the Act was invalid.²⁴³ There was some debate as to whether there would have otherwise been an acquisition of property on unjust terms. The judges observed:

Payment of the ‘royalty’ imposed by s.135ZZP(1) would, if the sub-section were valid, involve a compulsory transfer of property (i.e., money) by the payer to the recipient for a purpose in respect of which the Commonwealth Parliament has power to make laws, namely, as compensation for disadvantage sustained under a law with respect to copyright. As has been seen, that compulsory transfer of property by the person obliged to make it is neither a quid pro quo for any benefit or advantage received by that person nor accompanied by any countervailing compensation to that person. If it were not a tax, that compulsory transfer of property would constitute an ‘acquisition of property’ by the transferee from the transferor. Notwithstanding a submission of the Commonwealth to the contrary, the Act would not, if that were so, provide ‘just terms’ in the sense in which that phrase is used in s.51(xxxi). That being so, the law imposing the obligation to make it and conferring the entitlement to receive it would be unconstitutional by reason of the absence of the ‘just terms’ which the Constitution guarantees.²⁴⁴

Mason, Brennan, Deane and Gaudron JJ observed: ‘If we had not reached the conclusion that the ‘royalty’ was a tax, we would have been of the view that the imposition of the obligation to pay it involved an unconstitutional acquisition of property on other than just terms’.²⁴⁵

In the minority, Dawson and Toohey JJ held that a blank tape levy did not constitute an ‘acquisition of property’:

²⁴³ *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480.

²⁴⁴ *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480

²⁴⁵ *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480

Whilst the word ‘property’ in s.51(xxxi) is to be construed liberally so that it extends to ‘innominate and anomalous interests’, for the paragraph to apply it must be possible to identify an acquisition of something of a proprietary nature. The mere extinction or diminution of a proprietary right residing in one person does not necessarily result in the acquisition of a proprietary right by another. Section 135ZZM(1) confers nothing upon any person which may be described as being of a proprietary nature. If the immunity which the section confers can correctly be described as a right, it is a right which is applicable to all but arises only on the occasions upon which copying takes place. It is not a right which is of a permanent character or capable of being assigned to third parties, those being usual characteristics of a right of property. It is not a right which can be described as being by way of copyright or of a licence under copyright since it entirely lacks exclusivity. It does not, in our view, amount to an interest in property. Section 135ZZM(1) is not, therefore, a law with respect to the acquisition of property.²⁴⁶

McHugh J agreed with the conclusions of Dawson and Toohey JJ that Pt VC of the *Copyright Act 1968* (Cth) was a valid exercise of the power conferred on the Parliament of the Commonwealth to make laws with respect to copyrights and that it does not constitute an acquisition of property within the meaning of s.51(xxxi) of the *Constitution*.

In *Nintendo Co Ltd v Centronics Systems Pty Ltd*, the High Court considered the operation of the *Circuit Layouts Act 1989* (Cth) in its application to silicon chips used in computer games.²⁴⁷ Centronics argued that the impact of this legislation on their previous commercial operations amounted to an ‘acquisition of property’ entitling them to ‘just terms’. Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh J observed the power over intellectual property was not confined by the provision dealing with acquisition of property on just terms:

The grant of Commonwealth legislative power which sustains the Act is that contained in s 51 (xviii) of the Constitution with respect to ‘Copyrights, patents of inventions and designs, and trade marks’. It is of the essence of that grant of legislative power that it authorises the making of laws which create, confer, and provide for the enforcement of, intellectual property rights in original compositions, inventions, designs, trade marks and other products of intellectual effort. It is of the nature of such laws that they confer such rights on authors, inventors and designers, other originators and assignees and that they conversely limit and detract from the proprietary rights which would otherwise be enjoyed by the owners of

²⁴⁶ *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480

²⁴⁷ *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134.

affected property. Inevitably, such laws may, at their commencement, impact upon existing proprietary rights. To the extent that such laws involve an acquisition of property from those adversely affected by the intellectual property rights which they create and confer, the grant of legislative power contained in s 51 (xviii) manifests a contrary intention which precludes the operation of s 51 (xxxix).²⁴⁸

This judgment held that the grant of legislative power contained in the intellectual property power (s 51 (xviii)) manifested an intention which precluded the operation of the acquisition of property on just terms clause (s 51 (xxxix)).

In the case of *Commonwealth v. WMC Resources Ltd*, Gummow J – a leading intellectual property specialist – seeks to reconcile the two decisions, thus:

The Commonwealth submitted that any right which has no existence apart from a law of the Commonwealth ‘is inherently subject to modification or diminution by later Commonwealth statute’. It was said to follow that the contingency of subsequent legislative abrogation or extinguishment denied the protection of s 51(xxxix) to any right created solely by a law of the Commonwealth. Such propositions are too broad. This may be illustrated by reference to laws made under s 51(xviii) of the Constitution, such as the *Copyright Act 1968* (Cth) (‘the Copyright Act’) and the *Patents Act 1990* (Cth) (‘the Patents Act’).

Copyright which subsists under the Copyright Act is identified therein in terms of exclusive rights (ss 31, 85-88) and is classified by s 196 as ‘personal property’ which is ‘transmissible by assignment, by will and by devolution by operation of law’. Likewise the exclusive rights given by the Patents Act to a patentee are classified by s 13(2) as ‘personal property’ and as ‘capable of assignment and of devolution by law’. In *In re Usines de Melle's Patent*, Fullagar J said: ‘Such ‘property’ exists by virtue of a grant from the Crown in right of the Commonwealth, and it is locally situate in Australia, but cannot be regarded as locally situate in any State or Territory of the Commonwealth.’

The exercise of those intellectual property rights may limit and detract from the proprietary rights of third parties which otherwise would exist unaffected in infringing articles. However, ‘[t]o the extent that such laws involve an acquisition of property from those adversely affected by the intellectual property rights which they create and confer, the grant of legislative power contained in s 51(xviii) manifests a contrary intention which precludes the operation of s 51(xxxix)’ (*Nintendo Co Ltd v Centronics Systems Pty Ltd*). Nevertheless, the position with respect to those intellectual property rights themselves is quite different. As a result of the decision in *Australian Tape Manufacturers Association Ltd v The Commonwealth*, it is settled that these species of exclusive right constitute property to which s 51(xxxix) of the Constitution may apply.²⁴⁹

²⁴⁸ *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134.

²⁴⁹ *Commonwealth v. WMC Resources Ltd* (1998) 194 CLR 1 at 70-71.

This approach is affirmed by Gleeson CJ, Gummow, Hayne and Crennan J in the 2007 case of *Attorney-General (NT) v. Chaffey*.²⁵⁰

The High Court of Australia's current approach to acquisition of property on just terms is illuminated by the decision in *Wurridjal v. The Commonwealth of Australia (the Northern Territory Intervention case)*, which was handed down in the same week as the public hearings in Federal Parliament on the resale royalty.²⁵¹ In this matter, the High Court held by a majority of 6-1 that proper provision had been made for compensation of Aboriginal organisations and people in the Northern Territory where property rights had been affected by the Commonwealth's Northern Territory intervention laws.

French CJ cites the ruling in *Nintendo Co Ltd v. Centronics Systems Pty Ltd*,²⁵² making the point:

A law which is not directed to the acquisition of property as such, but which is concerned with the adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity, is unlikely to be susceptible of legitimate characterisation as a law with respect to the acquisition of property for the purposes of s 51(xxxi). Such a law would therefore be beyond the reach of the just terms guarantee.²⁵³

French goes onto to allude to *Australian Tape Manufacturers Association Ltd v Commonwealth*: 'Similarly, a law reducing the content of subsisting statutory exclusive rights in intellectual property could attract the operation of s 51(xxxi).'²⁵⁴ He observes: 'On the other hand, where a statutory right is inherently susceptible of variation, the mere fact that a particular variation reduces an entitlement does not make that variation an acquisition of property.'²⁵⁵

²⁵⁰ *Attorney-General (NT) v. Chaffey* (2007) 231 CLR 651 at 664

²⁵¹ *Wurridjal v. The Commonwealth of Australia (the Northern Territory Intervention case)* [2009] HCA 2 at para. 306.

²⁵² *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, and *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134.

²⁵³ *Wurridjal v. The Commonwealth of Australia (the Northern Territory Intervention case)* [2009] HCA 2 at para. 91.

²⁵⁴ *Wurridjal v. The Commonwealth of Australia (the Northern Territory Intervention case)* [2009] HCA 2 at para. 93.

²⁵⁵ *Wurridjal v. The Commonwealth of Australia (the Northern Territory Intervention case)* [2009] HCA 2 at para. 93.

Similarly, her honour, Crennan J, cites at length from the decision in *Nintendo Co Ltd v. Centronics Systems Pty Ltd*:

It is a well-established principle that ‘every species of valuable right and interest’ including ‘innominate and anomalous interests’ are encompassed by ‘property’ in s 51(xxxi) of the Constitution. Even an indirect acquisition of property may attract the constitutional guarantee of just terms. It follows from the width of the meaning of ‘property’ that the phrase ‘acquisition of property’ must also be construed widely.

Notwithstanding the width of the meaning of ‘property’, the existence of other heads of Commonwealth legislative power which may support an acquisition of property means that the guarantee of just terms in s 51(xxxi) is not to be applied in ‘a too sweeping and indiscriminating way’. Limits upon the scope of s 51(xxxi) have been recognised in numerous cases, in different ways.

There are some kinds of acquisitions of property which are, of their nature, antithetical to the notion of just terms, but which are plainly intended to be permissible under heads of power within s 51 of the Constitution. Obvious examples include acquiring property in the context of tax, bankruptcy, condemnation of prize and forfeiture of prohibited imports.

In *Mutual Pools & Staff Pty Ltd v The Commonwealth*, McHugh J said: ‘When, by a law of the Parliament, the Commonwealth ... compulsorily acquires property in circumstances which make the notion of fair compensation to the transferor irrelevant or incongruous, s 51(xxxi) has no operation.’

In *Nintendo Co Ltd v Centronics Systems Pty Ltd*, decided some months later, Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ further explained: ‘Th[e] operation of s 51(xxxi) to confine the content of other grants of legislative power, being indirect through a rule of construction, is subject to a contrary intention either expressed or made manifest in those other grants. In particular, some of the other grants of legislative power clearly encompass the making of laws providing for the acquisition of property unaccompanied by any quid pro quo of just terms. Where that is so, the other grant of legislative power manifests a contrary intention which precludes the abstraction from it of the legislative power to make such a law.’²⁵⁶

The ruling confirms both the rulings in *Australian Tape Manufacturers Association Ltd v. Commonwealth*, and *Nintendo Co Ltd v. Centronics Systems Pty Ltd*.²⁵⁷

The decision also emphasizes that the constitutional issues concerning acquisition of property can be remedied by compensation provisions. In *Wurridjal v.*

²⁵⁶ *Wurridjal v. The Commonwealth of Australia (the Northern Territory Intervention case)* [2009] HCA 2 at para. 356-360.

²⁵⁷ *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, and *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134.

The Commonwealth of Australia (the Northern Territory Intervention case), the High Court, by a 6-1 majority, held that the creation of the statutory lease on the Maningrida land constituted an acquisition of property from the Land Trust but the acquisition was on just terms due to the compensation provisions in the *Northern Territory National Emergency Response Act*.²⁵⁸ Furthermore, there was no acquisition of Mr Wurridjal and Ms Garlbin's rights under section 71 of the *Land Rights Act* because those rights had been preserved throughout the intervention. To the extent that abolition of the permit system had resulted in an acquisition of property, just terms were afforded by the compensation provisions of the *FaCSIA Act*.

15 (a). We note that there are conflicted authorities as to whether the intellectual property power is subject to the proviso with respect to acquisition of property on just terms.

8.3 Legal Advice

There has been conflicting legal advice as to the constitutional need for section 11 of the *Resale Royalty Right for Visual Artists Bill 2008 (Cth)*.

The Federal Government has decided to limit the *Resale Royalty Right for Visual Artists Bill 2008 (Cth)* to the second transfer of ownership after the commencement of the legislation, because of conservative constitutional advice received from the Solicitor General that there might otherwise be a problem in respect of acquisition of property on less than just terms under the Constitution. At the Committee Hearing, the Department's public servants explained:

Mr Tucker—All the options were considered about ways that we could make the scheme essentially retrospective. So all options were considered, but the legal advice that came through was that with the potential impact on property rights it was best to make the scheme prospective.

CHAIR—So, returning to my original question: what has been the response from the department and from A-G's to the contrary opinion that has been provided?

Ms Bean—Once we received that—because we had taken advice previously from the Australian Government Solicitor—we went back to them, and they referred it to the Solicitor-

²⁵⁸ *Wurridjal v. The Commonwealth of Australia (the Northern Territory Intervention case)* [2009] HCA 2.

General. He provided commentary to us on the AGS advice and the senior counsel advice—I am sorry, I cannot remember the name of the senior counsel—so we then based the final form of the bill on advice essentially from the Solicitor-General.

One could surmise the reasons for this caution. The precedents dealing with intellectual property and acquisition of property on just terms have been conflicted. It is difficult to reconcile the rulings in *Australian Tape Manufacturers Association Ltd v Commonwealth*, and *Nintendo Co Ltd v Centronics Systems Pty Ltd*.²⁵⁹ The right of resale – the *droit de suite* – is also unusual in that involves both tangible and intangible property. Having said that, there are some forms of intellectual property that involve such a cross-over – such as moral rights under copyright law; the sui generis regime in respect of geographical indications; and the regulations governing access to genetic resources, and benefit-sharing. Quite apart from constitutional concerns, the Federal Government appears to take the position that it is seldom good policy-making to introduce retrospective or retroactive intellectual property legislation.²⁶⁰

The Coalition for an Australian Resale Royalty has obtained legal advice from Robertson SC, saying that the right of resale legislation would be constitutional, notwithstanding the removal of section 11.²⁶¹ The Coalition contends:

CARR has received unequivocal advice from a Senior Counsel specialising in constitutional law that the Government could introduce a resale royalty right, consistently with the requirements of the Australian Constitution, that applies to works acquired *before* as well as after commencement of the legislation.

We understand, however, that the government has been advised that there is a risk that legislation requiring payment of the royalty on resales of works acquired before commencement could be held by the High Court to result in an acquisition of property on other than just terms, and thus be in breach of the Constitution.

²⁵⁹ *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, and *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134.

²⁶⁰ See for instance the discussion by Dennis Karjala about retroactive versus prospective copyright term extensions: Dennis Karjala, *Judicial Review of Copyright Term Extension Legislation*, *Loyola University Los Angeles Law Review*, 2002, Vol. 36, p. 199.

²⁶¹ The Coalition for an Australian Resale Royalty, ‘Resale Royalty Right for Visual Artists Bill 2008,’ 22 December 2008, <http://www.visualarts.net.au/files/A08n30.pdf>

Although not stated anywhere by the government, its concern about this risk appears to be at least one factor in its decision to confine the royalty to works acquired after commencement.

Given that CARR's advice is that there is no risk, we assume the risk the government is apparently concerned about is a small one. Confining the Bill to works acquired after commencement would thus appear to be an overreaction.

One option for the government is to include a provision in the Bill for compensation in the event that the legislation (or one its provisions) results in an acquisition of property on other than just terms. This is an option that has been exercised in other legislation, including the Copyright Act. In some legislation, the compensation is payable by the government. In section 16AAA of the Copyright Act, the compensation is payable by a performer rather than by the government. Section 16AAA relates to amendments to the Copyright Act in 2005 which granted performers a share in the copyright in existing sound recordings; the copyright had, until then, been wholly owned by someone else (usually a record company).²⁶²

Robertson SC provided the advice that the proposed scheme does not involve an acquisition of property within s. 51 (xxxii) of the Constitution. He also made the point, than in the era in the 1990's when s 51 (xxxii) had a wider ambit, the contrary contention was rejected in *Nintendo Co Ltd v Centronics Systems Pty Ltd*.

After some deliberation, we are of the view that the preferable opinion is that section 11 of the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) is not demanded by the acquisition of property on just terms clause. We suggest that the legislative drafters replace section 11 with a provision similar to section 16 (1) of *The Artist's Resale Right Regulations 2006* (UK), which provides: 'These Regulations— (a) do not apply to sales where the contract date preceded the commencement of the Regulations; but (b) apply notwithstanding that the work sold was made before that commencement.'

We have five justifications for our position. First, we agree that the decision in *Grain Pool of Western Australia v. Commonwealth* provides support for the broad powers of the Commonwealth Government in making laws with respect to intellectual property.²⁶³ The creation of a resale royalty regime is analogous in this respect to the establishment of the *Plant Breeder's Rights Act 1994* (Cth) – both are sui generis regimes of intellectual property. Second, we agree that the preferable view is that the decision in *Nintendo Co Ltd v. Centronics Systems Pty Ltd* will apply to the *Resale*

²⁶² Ibid.

²⁶³ *Grain Pool Of Western Australia v Commonwealth* (2000) 46 IPR 515.

Royalty Right for Visual Artists Bill 2008 (Cth).²⁶⁴ The creation of a sui generis regime in respect of circuit layouts is very similar to the creation of a sui generis regime in respect of the resale royalty right. It would be incongruous for the *Resale Royalty Right for Visual Artists Bill 2008 (Cth)* to be limited by the acquisition of property on just terms clause, given that its objective is to ensure that visual artists are justly compensated for their contribution to the nation's identity, community, and economy. Third, we do not believe that the resale royalty right could be properly characterized as a tax as in *Australian Tape Manufacturers Association Ltd v Commonwealth*.²⁶⁵ The resale royalty is clearly a well established species of intellectual property. Fourth, we are of the opinion that the resale royalty is not a mere reduction of existing statutory rights, as in *Australian Tape Manufacturers Association Ltd v Commonwealth*.²⁶⁶

Finally, we are of the view that, in any case, a just compensation clause could be used, if the High Court took the view that the decision in *Australian Tape Manufacturers Association Ltd v Commonwealth* was operative.²⁶⁷ Roberston SC also makes the good point that are standard drafting techniques available to legislative drafters to preserve the validity of the legislation by providing a mechanism for the calculation of just terms. The Australian Copyright Council has also supported a 'shipwrecks' clause. We note that the Federal Government has used such just compensation provisions before in intellectual property legislation. S 118 of the *US Free Trade Agreement Implementation Act 2004* established a compensation regime for certain agreements made before royal assent – after the change in duration in respect of copyright vesting in photographs. S 132 of the same legislation provides for a compensation scheme for certain agreements made before royal assent in respect of copyright in a work or other subject matter. The collecting society Screenrights

²⁶⁴ *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134.

²⁶⁵ *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480.

²⁶⁶ *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, and *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134.

²⁶⁷ *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, and *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134.

obtained legal advice that a scheme for the collection of royalties on recordable media for personal use would be constitutional.²⁶⁸

15 (b). We believe that section 11 of the *Resale Royalty Right for Visual Artists Bill 2008 (Cth)* is unnecessary in light of the ruling in *Nintendo Co Ltd v Centronics Systems Pty Ltd*.

15 (c). We note that, in any event, the *Resale Royalty Right for Visual Artists Bill 2008 (Cth)* could have a just terms compensation provision in the unlikely event that the decision in *Australian Tape Manufacturers Association Ltd v Commonwealth* is operative.

8.4 United States Jurisprudence on the Takings Clause

In *Wurridjal v. The Commonwealth of Australia (the Northern Territory Intervention case)*, Kirby J notes that the Australian constitutional provision dealing with acquisition of property on just terms was inspired by the United States Constitution:

Section 51(xxxi) of the Australian Constitution was inspired by the Fifth Amendment to the Constitution of the United States of America. The final requirement in that amendment is that ‘nor shall private property be taken for public use, without just compensation’. The drafters of the Australian Constitution considered the Fifth Amendment. In adopting what became par (xxxix) of s 51 of the Australian Constitution, it must be assumed that they intended to differentiate between ‘just compensation’ and ‘just terms’.²⁶⁹

The last Clause of the Fifth Amendment to the United States Constitution provides ‘nor shall private property be taken for public use without just compensation.’ It is popularly known as the ‘Takings Clause’.

The great United States copyright authority, and legal counsel for Google, William Patry, includes in *Patry on Copyright* a Memorandum on Constitutionality of

²⁶⁸ Screenrights, ‘Draft Legislation for Collection of Royalties on Recordable Media for Personal Use’,

http://www.screenrights.org/pdfs/about/submissions/ScreenrightsSub_%20Ro434DB.pdf

²⁶⁹ *Wurridjal v. The Commonwealth of Australia (the Northern Territory Intervention case)* [2009] HCA 2.

Retroactive Copyright Protection prepared by the Justice Department's Office of Legal Counsel in 1994.²⁷⁰ The Office considers whether certain provisions in the Administration's draft legislation to implement the results of the Uruguay Round of Multilateral Trade Negotiations would constitute a 'taking' under the Fifth Amendment of the Constitution. Specifically, the Office considered whether the provisions to restore copyright protections for certain foreign works that fell into the public domain in the United States, but are still under protection in their country of origin, would create Takings Clause liability. The Office determined: 'We conclude that the draft legislation restoring copyright protections would not constitute a taking of private property under the Fifth Amendment.'²⁷¹

The Office refers to an oft-cited law review article by Professor Joseph Sax, which contends that when 'the government merely adjusts the economic rights and burdens of third parties and does not itself benefit from its regulation, compensation is not required'.²⁷² The Office quotes the doctrine of the Supreme Court of the United States in *Connolly v. Pension Benefit Guaranty Corp.*:

In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others. For example, Congress may set minimum wages, control prices, or create causes of action that did not previously exist. Given the propriety of the governmental power to regulate, it cannot be said that the Taking[s] Clause is violated whenever legislation require one person to use his or her asset for the benefit of another. In *Userv* ... we sustained a statute requiring coal mine operators to compensate former employees disabled by pneumoconiosis, even though the operators had never contracted for such liability, and the employees involved had long since terminated their connection with the industry. We said: '[O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.' This is not to say that contractual rights are never property rights or that the Government may always take them for its own benefit without compensation. But here, the United States has taken nothing for its own use That the statutory withdrawal liability will ... redound to the benefit of pension trusts does not justify a holding that the provision violates the Taking[s] Clause and is invalid on its face. This interference with the property rights of an employer arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and, under our cases, does not constitute a taking requiring Government compensation.²⁷³

²⁷⁰ William F. Patry. Chapter 24. The GATT Amendments: The Uruguay Round Agreements Act. Appendix C. Patry on Copyright. Updated September 2008.

²⁷¹ *Ibid.*, p. 2.

²⁷² Joseph Sax, 'Takings and the Police Power', *Yale Law Journal*, 1964, Vol. 74, p. 36.

²⁷³ *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986).

The Office concluded: ‘In summary, the draft legislation you have asked us to review is constitutional on its face’.²⁷⁴ Additionally, ‘from what we know of the operation of the legislation and the possible reliance parties under the legislation, we know of no set of facts that will produce a successful Takings Clause challenge to the draft legislation’.²⁷⁵

It is notable that the eventual constitutional challenge to the validity of the *Sonny Bono Copyright Term Extension Act 1998* (US) related to the intellectual property power and the First Amendment – not the Fifth Amendment clause in respect of acquisition of property on just terms.²⁷⁶ Furthermore, this constitutional challenge was unsuccessful. The Supreme Court of the United States has been deferential to Congressional decisions about policy-making in respect of intellectual property.

We are of the opinion that the United States jurisprudence on the Takings Clause supports and reinforces the interpretation of *Robertson SC* in respect of the *Resale Royalty Right for Visual Artists Bill 2008* (Cth).

15 (d). The United States jurisprudence on the Takings Clause supports the interpretation of *Robertson SC* in respect of the *Resale Royalty Right for Visual Artists Bill 2008* (Cth).

²⁷⁴ William F. Patry. Chapter 24. The GATT Amendments: The Uruguay Round Agreements Act. Appendix C. Patry on Copyright. Updated September 2008.

²⁷⁵ Ibid, 10.

²⁷⁶ *Eldred v Ashcroft* (2003) 123 S. Ct. 769.

9. THE RESALE ROYALTY RIGHT: OPERATIVE PARTS

9.1 ‘Artworks’

Despite being an independent piece of legislation, the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) nonetheless implicitly relies upon the copyright concept of ‘artworks’. Section 7 (1) of the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) provides: ‘An artwork is an original work of graphic or plastic art that is either: (a) created by the artist or artists; or (b) produced under the authority of the artist or artists.’

Section 7 (2) adds: ‘Works of graphic or plastic art include pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs.’

Section 9 of the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) provides: ‘There is no resale royalty right on the commercial resale of: (a) a building, or a drawing, plan or model for a building; or (b) a circuit layout within the meaning of the *Circuit Layouts Act 1989*; or 8 (c) a manuscript (in whatever form) of a literary, dramatic or musical work.’

Compare this clause with section 10 (1) of the *Copyright Act 1968* (Cth) which defines ‘artistic work’ as meaning - (a) a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not; (b) a building or a model of a building, whether the building or model is of artistic quality or not; or (c) a work of artistic craftsmanship to which neither of the last two preceding paragraphs applies; but does not include a circuit layout within the meaning of the *Circuit Layouts Act 1989*.’ There are a few key differences here. Copyright law applies to architectural buildings and models – but the right of resale does not. Copyright law requires evidence of artistic quality for works of artistic craftsmanship – but the right of resale does not. Furthermore, copyright law has a requirement of material form – but there does not seem to be such a requirement for the right of resale.

There has long been conflict over whether utilitarian works – like Frisbees,²⁷⁷ lawn mower-mechanisms,²⁷⁸ and boats – can qualify for the protection as ‘artistic works’. In the case of *Burge v. Swarbrick*, the High Court of Australia noted that it

²⁷⁷ *Lincoln Industries Ltd v. Wham-O Manufacturing Co* (1984) 3 IPR 115.

²⁷⁸ *Greenfield Products v. Rover Scott Bonnar* (1990) 17 IPR 417.

was difficult to determine and delimit the subject matter falling within the definition of a ‘work of artistic craftsmanship’:

It may be impossible, and certainly would be unwise, to attempt any exhaustive and fully predictive identification of what can and cannot amount to ‘a work of artistic craftsmanship’ within the meaning of the Copyright Act as it stood after the 1989 Act. However, determining whether a work is ‘a work of artistic craftsmanship’ does not turn on assessing the beauty or aesthetic appeal of work or on assessing any harmony between its visual appeal and its utility. The determination turns on assessing the extent to which the particular work's artistic expression, in its form, is unconstrained by functional considerations. To decide the appeal it is sufficient to indicate the following. The more substantial the requirements in a design brief to satisfy utilitarian considerations of the kind indicated with the design of the JS 9000, the less the scope for that encouragement of real or substantial artistic effort. It is that encouragement which underpins the favourable treatment by the 1989 Act of certain artistic works which are applied as industrial designs but without design registration. Questions of fact and degree inevitably arise.²⁷⁹

The High Court of Australia noted: ‘With wallpaper, a tapestry, stained glass window, piece of jewellery or Tiffany artefact, there is considerable freedom of design choice relatively unconstrained by the function or utility of the article so produced’.²⁸⁰ On the facts of this case, it held that a yacht did not satisfy the requirements demanded of a work of artistic craftsmanship: ‘But, as the evidence disclosed, that was not the case with the design constraints upon a class of yacht such as the JS 9000’.²⁸¹

The right of resale legislation should require an ‘artwork’ to have ‘artistic quality’ – to ensure that utilitarian objects do not come within the inclusive definition of ‘artwork’ provided by the *Resale Royalty Right for Visual Artists Bill 2008 (Cth)*.

16. The right of resale legislation should require an ‘artwork’ to have ‘artistic quality’ – to ensure that utilitarian objects do not come within the inclusive definition of ‘artwork’ provided by the *Resale Royalty Right for Visual Artists Bill 2008 (Cth)*. Industrial property – such as designs, patents, and trade marks – should be expressly excluded under section 9 of the *Resale Royalty Right for Visual Artists Bill 2008 (Cth)*.

²⁷⁹ *Burge v Swarbrick* [2007] HCA 17 (26 April 2007)

²⁸⁰ *Burge v Swarbrick* [2007] HCA 17 (26 April 2007)

²⁸¹ *Burge v Swarbrick* [2007] HCA 17 (26 April 2007)

9.2 Originality

Section 7 (1) of the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) requires that an ‘artwork’ be ‘an original work’.

There has been great controversy in Australia over the low threshold of originality required under copyright law. In Australia, the Full Federal Court in *Desktop Marketing Systems v Telstra Corporation* pitched the threshold of originality very low, requiring mere skill and labour.²⁸² By contrast, the Supreme Court of the United States in *Feist Publications Inc v Rural Telephone Service* has raised the threshold of originality much higher, requiring a creative spark.²⁸³ As a result, there will be a wider range of copyright material protected in Australia than the United States. In particular, there will be a much greater amount of factual information protected under copyright law. The Supreme Court of Canada has established a middling requirement of skill and judgment for the requirement of originality under copyright law.²⁸⁴

The High Court of Australia is currently reconsidering the requirement of originality in the case of *IceTV Pty Limited & Anor v Nine Network Australia Pty Limited*.²⁸⁵ The judgment in this matter is still awaited.

We are concerned that a number of utilitarian works could be protected under the right of resale, if Australian courts continue to attribute a low threshold to the requisite level of originality. As a result, we recommend that the legislation require that an ‘artwork’ must show a ‘creative spark’ and ‘artistic quality’ to be ‘an original work’.

17. The right of resale legislation should stipulate that an ‘artwork’ must satisfy a high threshold of originality – requiring a creative spark.
--

9.3 Material Form

²⁸² *Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited* (2002) 55 IPR 1

²⁸³ *Feist Publications Inc v Rural Telephone Service* (1991) 499 US 340

²⁸⁴ *CCH Canadian Limited v. The Law Society of Upper Canada* [2004] 1 SCR 339

²⁸⁵ *IceTV Pty Limited & Anor v Nine Network Australia Pty Limited* [2008] HCATrans 356; 358

It is also curious that there is no requirement of ‘material form’ in respect of ‘artwork’ in the *Resale Royalty Right for Visual Artists Bill 2008* (Cth).

There have been, under copyright law, legal conflicts over ephemeral works. In *Merchandising Corporation of America v. Harpbond Inc*, the plaintiffs (Adam and the Ants) sued for infringement of copyright, alleging infringement of a painting (of the make-up on his face) and indirect infringement of a sketch. The Court held that a painting must be on a surface of some kind.²⁸⁶ If makeup is taken off the face, there cannot be a painting for the purposes of copyright protection. Furthermore, the facial makeup was too insubstantial to attract copyright.

Given the long duration accorded to the right of resale, thought should be given to the need for the ‘artwork’ to be fixed in some physical form.

18. The right of resale legislation should require an ‘artwork’ to have a ‘material form’.

9.4 Commercial resales

Section 8 of the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) provides that the royalty will only be payable in respect to transfers facilitated by an ‘art market professional’ acting in that capacity. This falls short of the provisions of the Berne Convention where the right applies to ‘any sale’ following the first sale.²⁸⁷

The exclusion of private sales from the operation of the resale royalty right is an aspect common to resale royalty schemes throughout the world. Only Germany, California and, at certain times, France²⁸⁸, have attempted to impose a royalty

²⁸⁶ *Merchandising Corporation of America v. Harpbond Inc* [1983] FSR 32

²⁸⁷ *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, Article 14^{ter}, Paris Revisions 1971.

²⁸⁸ See the summaries provided in Clare McAndrew and Lorna Dallas-Conte, Arts Council of England Report: Implementing Droit de Suite (artists’ resale right) in England, Arts Council of England, 2002, see also Katy Graddy, Noah Horowitz and Stefan Szymanski *A study into the effect on the UK market of the introduction of the artist’s resale right*, Intellectual Property Institute, January 2008, p. 38.

payment in respect of private sales. None has done so effectively, with the right usually only enforced with respect to public sales²⁸⁹.

The *Resale Royalty Right for Visual Artists Bill 2008* (Cth) defines ‘art market professional’ to include ‘(a) and auctioneer; or (b) the owner or operator of an art gallery; or (c) the owner or operator of a museum; or (d) an art dealer; or (e) a person otherwise involved in the business of dealing in artworks.’

The number of resales caught by the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) will turn on which individuals or businesses are deemed to be an ‘auctioneer’ or ‘involved in the business or dealing in artworks’. The Australian Copyright Council, in their paper *Response to Issues Paper: Artists Resale Royalty Scheme for Visual Artists – Framework and Parameters* identified confusion over whether the relevant business must have the sole activity of dealing in works of art in order to be covered by the proposed Act. They argue that the definition should ‘cover business that do not necessarily specialise in selling art, as well as ones that do, such as specialist auction houses and commercial galleries’²⁹⁰. It would be incongruous for resales of artworks on an auction site such as ebay to escape resale royalty liability.

At the time of writing this Submission, ebay.com.au was advertising the sale of 276 Indigenous paintings alone, many in excess of \$1,000.00.²⁹¹

19. The right of resale legislation should stipulate that an ‘auctioneer’ need not be a specialist art auctioneer.

20. The right of resale legislation should stipulate that a ‘person otherwise involved in the business or dealing in artworks’ includes a person whose involvement or dealings in artworks are not the dominant part of the person’s business.

9.5 Resale price threshold

²⁸⁹ Clare McAndrew and Lorna Dallas-Conte, Arts Council of England Report: Implementing Droit de Suite (artists’ resale right) in England, Arts Council of England, 2002, p. 28.

²⁹⁰ Australian Copyright Council, *Response to Issues Paper: Artists Resale Royalty Scheme for Visual Artists – Framework and Parameters*, May 2008, p. 2.

²⁹¹ The writers note that it is not known how many of the artworks are sales by artists or resales by collectors.

Section 10 of the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) provides that ‘There is no resale royalty right on the commercial resale of an artwork for a sale price of less than...\$1,000.’

The 2004 report prepared by Access Economics for the collection agency Viscopy²⁹² (‘Access Economics Report’) claimed that approximately 1,550 artists would receive a royalty payment where the threshold for resales is set at \$1,000.00²⁹³. This compared with 2,372 artists if no threshold were applied²⁹⁴. This difference in coverage is substantial.

The European Union lowered its minimum threshold from €1,000 to €500 to ‘ensure that new and lesser-known artists’²⁹⁵ would benefit from the right. The Government has made explicit its view that it is ‘committed to enlarging the creative endeavour and recognizing artists’ contribution to our economy, community and identity’²⁹⁶. A lower threshold would accord with this ideology. As stated by Linda Weir, and artist from Cornwall in the United Kingdom, in response to receiving a royalty payment from the UK collection society DACS: ‘It was one of the nicest things that happened this year, receiving the [GP Pounds] 32 royalty cheque you sent me...I felt so supported and cared for’²⁹⁷.

However, at a certain point, the fees associated with the administration of a resale royalty, from both art market professionals and collection societies, make the imposition of a royalty on modestly priced artworks prohibitively expensive.

²⁹² Access Economics Pty Ltd, *Evaluating the Impact of an Australian Resale Royalty on Eligible Visual Artists*, 2004.

²⁹³ Access Economics Pty Ltd, *Evaluating the Impact of an Australian Resale Royalty on Eligible Visual Artists*, 2004, pages 20 – 22.

²⁹⁴ Access Economics Pty Ltd, *Evaluating the Impact of an Australian Resale Royalty on Eligible Visual Artists*, 2004, pages 17 – 19.

²⁹⁵ European Parliament Report, Committee on Legal Affairs and Citizen’s Rights, February 3, 1997, A4-0030/97, p 18, cited in Simon Hughes ‘Droit de Suite: A critical analysis of the approved directive’, *EIPR* 1997, 19(12) 694 at 696.

²⁹⁶ Hansard, House of Representatives, Thursday 27 November 2008

²⁹⁷ Design and Artists Copyright Society, *The Artists Resale Right in the UK: Submission to the post-implementation review conducted by the UK Intellectual Property Office*, February 2008, p. 20

Assuming that the collecting society will charge a collection fee of about 15%²⁹⁸, an artist selling an artwork for \$1,000.00 can expect to receive a royalty payment of \$42.50. If the threshold is dropped to encompass commercial resales of \$500.00, the royalty payment for a \$500.00 artwork, minus collection fee, would represent \$21.25. On the basis of the UK experience, where art dealer's reported that the costs of complying with British resale right accounted for between £10 – £20 per transaction²⁹⁹, a royalty payment to Australian artists of around \$20 is not sustainable.

21. The resale royalty right legislation should not apply to commercial resales of artwork below \$1,000.

9.6 Royalty rate

Section 18 of the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) provides that the 'Resale royalty is payable at the rate of 5% of the sale price on the commercial resale of an artwork.'

Peter Garrett has argued that 'the simple 5 per cent flat rate will make the scheme easy to understand'³⁰⁰. We would argue that in addition to the benefits derived from simplicity, the imposition of a flat rate focuses the basis for the right on the exploitation or resale of the artwork rather than the artwork's success.

The alternative option for an Australian resale royalty would be to adopt the sliding scale which is a feature of the EU Directive. After considerable debate, the European Union elected to proceed with a sliding scale of rates whereby the royalty rate decreased with the increased value of the resale. It has been argued that the effect of the EU approach is that 'artists producing works selling for lower prices would receive a proportionately higher *droit de suite* than artist producing higher-value

²⁹⁸ This is the charge imposed by the UK Design and Artists Copyright Society, see www.dacs.co.uk.

²⁹⁹ Katy Graddy, Noah Horowitz and Stefan Szymanski *A study into the effect on the UK market of the introduction of the artist's resale right*, Intellectual Property Institute, January 2008, p. 25.

³⁰⁰ Hansard, *Second Reading Speech: Resale Royalty Right for Visual Artists Bill 2008*, 27 November 2008.

works; thus assisting the young and less established artists.’³⁰¹ However, the more likely motivation is the protection of the European Union’s, and specifically London’s, art market, as high-value works are insulated from a substantial royalty payment, keeping resale right costs below the costs ‘entailed by transferring the sale to New York or Zurich’³⁰².

It has been argued that ‘a sliding scale would not seem necessary for Australia, given that the maximum amounts for royalties in Australia are much lower than in Europe’³⁰³. However, because the proposed resale royalty legislation does not impose a cap on the resale royalty payable in respect to each transaction, the resale royalty payable on certain sales in Australia will in fact be far higher than those seen in England, where royalties are capped at €12,500. It is therefore likely that for sellers at the top end of the Australian market, the resale royalty payment will exceed the costs of shipping artworks to New York or to China. Accordingly, it is possible that the introduction of the resale royalty right into Australia will produce a situation like that which occurred in 2001 when ‘Frenchman Rene Gaffe’s 50 million collection of Impressionists and contemporary artworks was auctioned in New York at the request of the sale’s beneficiary, UNICEF, to avoid droit de suite charges in Paris.’³⁰⁴

There is little doubt that a flat 5% royalty rate, combined with the absence of a cap on royalty payments, will expose the Australian resale royalty to criticism that it rewards enormous sums of money to successful wealthy artists and their estates. However, we would argue that this is no good reason to copy the (more) minimalist approach adopted by the European Union. Indeed, it must be remembered that all resale royalty payments, no matter how large, provide an economic interest commensurate to the financial rewards reaped by the collector.

³⁰¹ Simon Hughes ‘Droit de Suite: A critical analysis of the approved directive’, *EIPR* 1997, 19(12) 694 at 697.

³⁰² European Parliament Report, Committee on Legal Affairs and Citizen’s Rights, February 3, 1997, A4-0030/97, p 21, cited in Simon Hughes ‘Droit de Suite: A critical analysis of the approved directive’, *EIPR* 1997, 19(12) 694 at 696.

³⁰³ Australian Copyright Council, *Response to Issues Paper: Artists Resale Royalty Scheme for Visual Artists – Framework and Parameters*, May 2008, p. 2

³⁰⁴ The Art Newspaper, April 2001, p. 67, in Victor Ginsburgh, *The Economic Consequences of Droit de Suite in European Union*, March 2005, <http://bib17.ulb.ac.be:8080/dspace/bitstream/2013/3295/1/vg-0171.pdf>

22. The resale royalty right legislation should impose a flat royalty rate of 5% on all commercial resales.

23. The resale royalty right legislation should not impose a cap on resale royalty payments.

24. The Government should conduct an extensive review of the market impact of the resale royalty right legislation following its implementation to determine whether or not the royalty rate is set at appropriate level.

9.7 Civil Penalties

Section 39 of the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) provides that ‘Within 6 years of a person (the wrongdoer) contravening a civil penalty provision, the collecting society may apply on behalf of the Commonwealth to the Federal Court or the Federal Magistrate’s Court for an order that the wrongdoer pay the Commonwealth a pecuniary penalty ... that the Court determines appropriate (but no more than the relevant amount specified for the provision)’.

Section 39 further provides that ‘(3) In determining the pecuniary penalty, the Court must have regard to all relevant matters, including: (a) the nature and extent of the contravention; and (b) the nature and extent of any loss or damage suffered as a result of the contravention; and (c) the circumstances in which the contravention took place; and (d) whether the person has previously been found by a court in proceedings under this Act to have engaged in similar conduct.’ The Bill also provides that it is an offence to be involved in a contravention of a civil penalty provision, such as to aid, abet, induce, or conspire.

The *Resale Royalty Right for Visual Artists Bill 2008* (Cth) includes only two penalty provisions:

1. Section 28, which requires a seller to give the collecting society notice of a commercial resale. The civil penalty attaching to a contravention of Section 28 is, for an individual, \$22,000.00, and for a body corporate, \$110,000.00.
2. Section 29, which requires a party to a resale to comply with a request for information by the collecting society. The civil penalty attaching to a contravention of Section 29 is, for an individual, \$11,000.00, and for a body corporate, \$55,000.00.

There is a general perception that the art industry is ‘an industry governed more by wink and nod than by a clear set of rules’³⁰⁵. Indeed, the suspect practices of major Australian auction houses, and the exploitation of Indigenous artists have been well documented³⁰⁶. It is unlikely that the advent of resale royalty right legislation in Australia will eliminate the exploitative practices of carpet-baggers and art market manipulators. Therefore, it is important that the legislation imposes sufficient penalties to deter non-compliance.

The pecuniary penalties provided under the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) appear sufficient. They are comparable with the penalties imposed on individuals and body corporates for non-disclosure offences under Australian taxation laws. Furthermore, the maximum penalty would be commensurate with the royalty payable for a large portion of resales in Australia. The public visibility of resales at the top end of the art market, where the royalty payment would dwarf the pecuniary penalties available under the proposed Act, would militate against non-compliance.

However, we would argue that the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) falls short of providing appropriate deterrents for unscrupulous art market participants because it does not make it an offence to fail to pay the resale royalty. Section 19 of the Bill provides that a ‘resale royalty on the commercial resale of an artwork is a debt due to the holders of the resale royalty right on the commercial resale by those who have a liability to pay the resale royalty.’ That is, the resale royalty is a debt which must be recovered by recourse to the Courts or the *Corporations Act 2001* (Cth). Many artists will not have the financial capacity to commence enforcement proceedings to recover the royalty. As such, the proposed legislation will depend upon a sufficiently funded and motivated collecting society to

³⁰⁵ Four Corners, *Art for Art’s Sake?*, Australian Broadcasting Corporation, 28 June 2008.

³⁰⁶ See Four Corners, *Art for Art’s Sake?*, Australian Broadcasting Corporation, 28 June 2008; Steve Dow, ‘Canberra push on indigenous art carpetbaggers’, *The Age*, 22 June 2007; Senate Standing Committee on Environment, Communications, Information Technology and the Arts, *Indigenous Art - Securing the Future Australia’s Indigenous visual arts and craft sector*, Canberra: The Australian Parliament, 20 June 2007, http://www.aph.gov.au/senate/committee/ecita_ctte/completed_inquiries/2004-07/indigenous_arts/report/index.htm

take action on behalf of the artist. Of course, the costs of recovery action will often exceed the amount of the unpaid resale royalty payment.

Further, the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) falls short in providing appropriate deterrents because it does not make company directors and officers personally liable for the pecuniary penalties of the body corporate. We would argue that the resale royalty right legislation should impose pecuniary penalties on a person who is concerned or takes part in the management of a body corporate liable to be prosecuted for a contravention of the Act as if the person committed the contravention personally. To extend the pecuniary penalties to an officer of a company who is knowingly concerned in the contravention of the Act would prevent unscrupulous persons from deliberately using a company to defeat the operation of the Act and dissuade repeat contraventions.

25. The *Resale Royalty Right for Visual Artists Bill 2008* (Cth) does not provide sufficient deterrents for unscrupulous art market participants.

26. The pecuniary penalties provided for in the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) should apply to a person who is concerned or takes part in the management of a body corporate liable to be prosecuted for a contravention of the Act as if the person committed the contravention personally.

27. The resale royalty right legislation should make it an offence not to pay the resale royalty on a commercial resale.

9.8 Excluded Subject Matter

Section 9 of the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) provides: ‘There is no resale royalty right on the commercial resale of: (a) a building, or a drawing, plan or model for a building; or (b) a circuit layout within the meaning of the *Circuit Layouts Act 1989*; or 8 (c) a manuscript (in whatever form) of a literary, dramatic or musical work.’

Some literary authors have complained that the proposed Australian right of resale does not extend to literary works, although the Berne Convention refers to

‘original works of art and original manuscripts of writers and composers’. For instance, Frank Moorhouse, the Australian novelist and copyright activist, has argued:

A small tax on recycling of books could be directed to a fund for support of the writing community – or statistical sampling could be used to set up a mechanism similar to the [Public Lending Right] which would pay authors directly for the resale of their books. In a way, this resembles the right which painters receive for resale of their work in some countries and which is being considered in Australia.³⁰⁷

Similarly, the British novelist, A.S. Byatt, has called for royalties to be paid in respect of second-hand books: ‘*Droit de suite* is a very good way to protect us. I hope they do something because earnings for an author can be absolutely pitiful.’³⁰⁸

In the United States, the Author's Guild protested about the sale of second-hand books on the Internet.³⁰⁹ Similarly, the United Kingdom Society of Authors has expressed concerns. Mark LeFanu, its secretary, says: ‘I expect authors will be concerned because of the potential loss of sales and the blurring of the distinction between new and secondhand books.’³¹⁰ In response to such criticism, Jeff Bezos, the founder of Amazon.com, sent out a letter saying:

We've found that our used books business does not take business away from the sale of new books. In fact, offering customers a lower-priced option causes them to visit our site more frequently, which in turn leads to higher sales of new books while encouraging customers to try authors and genres they may not have otherwise tried. In addition, when a customer sells used books, it gives them a budget to buy more new books.³¹¹

³⁰⁷ Frank Moorhouse, ‘The Escape from ‘Eccentric Penury’ – How Should We Pay Authors? Policy Visions for the Australian Writing Economy’. *Copyright Reporter*, March 2008, Vol. 26 (1), p. 4-15.

³⁰⁸ Jack Malvern, ‘Authors Want a Cut of Second-Hand Sales’, *The Times*, 29 January 2005.

³⁰⁹ Andrew Brown, ‘Brought to Book’, *The Guardian*, 23 April 2002, <http://www.guardian.co.uk/technology/2002/apr/23/g2.booksnews>

³¹⁰ Ibid.

³¹¹ Jeff Bezos, ‘Open Letter on Used Book Sales’, 15 April 2002, <http://www.oreillynet.com/pub/wlg/1291>

Bezos concludes: ‘When someone buys a book, they are also buying the right to resell that book, to loan it out, or to even give it away if they want. Everyone understands this.’³¹²

We would argue, though, that there would be no merit in extending the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) to literary works, as well. We contend that the Public Lending Right and the Educational Lending Right already serve a similar function for literary works.

28. The right of resale legislation should not apply to literary, musical or dramatic works.

³¹² Ibid.

10. REGULATION OF COLLECTING SOCIETIES

There has been a laissez-faire approach taken by successive Australian governments to regulation of copyright collecting societies. This has been surprising – given that copyright collecting societies have significant market power as a result of their administration of the economic rights of a large number of copyright owners, and manage large amounts of license fees.

10.1 Collecting Societies

In his book, *The True History of Copyright: The Australian Experience 1905-2005*, Benedict Atkinson laments the lack of transparency in the operation of Australia's copyright collecting societies, observing:

In 2006, APRA and CAL each collected more than \$100 million annually from their licensees. The other main societies lagged far behind in income returns but most collected multiple millions of dollars each year. The final destination of money collected remains largely unknown. Collecting societies jealously guard the details of distributions and outsiders, including major licensees such as government agencies, cannot ascertain to whom, and in what amount, licence fees are distributed... The refusal of collecting societies to disclose at least rudimentary statistics about distributions precludes meaningful debate about the merits of the collecting system. Another fact is inimitable. The copyright industries are intimately connected with the major collecting societies, and though it cannot be said definitely that they represent the collecting arms of the industries, the societies and industries are entwined in relationships of mutual benefit.³¹³

Atkinson makes a strong argument that copyright collecting societies should be subject to stronger government regulation in order to ensure greater transparency and accountability in their dealings, and better corporate governance.

By and large, Australian copyright collecting societies have been left to their own devices. At most, they have only been subject to limited, irregular oversight by the Copyright Tribunal, the Australian Competition and Consumer Commission, and the Attorney General's Department. There is a need to abandon the failed model of self-regulation of copyright collecting societies, and establish a modern regulatory

³¹³ Benedict Atkinson. *The True History of Copyright: The Australian Experience, 1905-2005*, Sydney: Sydney University Press, 2007, p. 379

regime for copyright collecting societies. Australian copyright collecting societies established a voluntary code of conduct in 2002; the regime has been revised in 2008.³¹⁴ However, this cosy and chummy model of self-regulation has provided little in the way of scrutiny of the operations of copyright collecting societies. The Australian Libraries Copyright Committee and the Australian Digital Alliance have observed that the code of conduct is poorly drafted, leaving ‘the rights and responsibilities contained in the code become uncertain in scope and application.’³¹⁵ Furthermore, the organizations express concern about the lack of independence of the code reviewer and suggest: ‘We would recommend that, in order to increase confidence in the operation of the Code, consideration be given to incorporating strong guarantees of the independence of the Code Reviewer; including, for example, input from licensees, government, and Collecting Societies into appointment decisions’.³¹⁶

The Canadian model devised by Professor Daniel Gervais is worth investigating.³¹⁷ This approach would provide for greater scrutiny of copyright collecting societies, and also encourage greater competition between copyright collecting societies. Gervais observes:

Collective management is not perfect, nor is it a panacea. However, the fact remains that it is nearly impossible for individual rights holders to manage their rights themselves, as rights management is highly complex and involves a significant investment of both time and money. Sound, open, and efficient collective management is thus often the best way to ensure an optimal administration of rights – that is, to maximize the number of times that users are able

³¹⁴ Code of Conduct for Collecting Societies, <http://www.screenrights.org/pdfs/about/CodeOfConduct/CodeConduct0208.pdf>

³¹⁵ Australian Libraries Copyright Committee and the Australian Digital Alliance *Submission to the Code Reviewer: Code of Conduct for Copyright Collecting Societies*, February 2008, http://www.digital.org.au/submission/documents/0208_CollSoc_Code.pdf

³¹⁶ Ibid.

³¹⁷ Daniel Gervais. *Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective*. Report prepared for the Department of Canadian Heritage, August 2001, http://aix1.uottawa.ca/~dgervais/publications/collective_management.pdf; Daniel Gervais. *Application of an Extended Collective Licensing Regime in Canada: Principles and Issues Related to Implementation*. Report prepared for Heritage Canada, 2003, http://aix1.uottawa.ca/~dgervais/publications/extended_licensing.pdf; and Daniel Gervais. *Collective Management of Copyright and Related Rights*. Alphen aan den Rijn and London: Kluwer Law International, 2006.

to obtain, from the rights holder, an authorization at a reasonable price (for both sides) and in an acceptable amount of time.³¹⁸

Gervais contends: ‘To attain optimal efficiency on a reasonable scale, Collective Management Organizations should thus be encouraged to build sector-based systems.’³¹⁹ He observes: ‘Each major sector, the needs of which will vary, should be able to justify and support the necessary investment, especially if it can be shown that their own interests (and the survival of copyright) are at stake’.³²⁰

In light of the history of concerns about the model of self-regulation of copyright collecting societies in Australia, there is a need for stronger oversight of the collecting society for the right of resale. To its credit, the Federal Government has taken a more proactive approach to the regulation of the collecting society under the *Resale Royalty Right for Visual Artists Bill 2008 (Cth)*. Part 3 of the bill deals with the operation of the collecting society for the right of resale. Section 35 deals with the appointment of the collecting society. The explanatory memorandum observes:

Subclause 35(3) provides that only one body may be appointed as the collecting society at a time and that a body must not be appointed to be the collecting society while another body is appointed to be the collecting society. Subclause 35(4) sets out the requirements a body must meet before the Minister can appoint it to be the collecting society. The requirements include that the body be a company limited by guarantee and incorporated under the *Corporations Act 2001*, that all resale royalty rights holders are entitled to become members and that the body’s rules prohibit the payment of dividends to its members. The Minister may determine, by legislative instrument, other matters that the rules of the body need to make provision for to ensure that holders of a resale royalty right and their agents are adequately protected (paragraph 35(4)(d)). This includes access by rights holders and their agents to records of the collecting society, such as details of the royalty due to them and the action the collecting society has taken to collect or enforce their right. Section 27A of the *Administrative Appeals Tribunal Act 1975*, which requires a person who makes a reviewable decision to give any person who interests will be affected by the decision, notice of the decision and the right of the person to have the decision reviewed, will be complied with in making the appointment.

³¹⁸ Daniel Gervais. *Application of an Extended Collective Licensing Regime in Canada: Principles and Issues Related to Implementation*. Report prepared for Heritage Canada, 2003, http://aix1.uottawa.ca/~dgvais/publications/extended_licensing.pdf, p. 11.

³¹⁹ Daniel Gervais. *Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective*. Report prepared for the Department of Canadian Heritage, August 2001, p. 88, http://aix1.uottawa.ca/~dgvais/publications/collective_management.pdf;

³²⁰ Ibid.

Section 36 deals with the revocation of the appointment of the collecting society. Section 37 concerns the annual report and accounts. Section 38 concerns amendment of the rules.

We would argue that the creation of natural monopolies for copyright collecting societies in Australia has led to a lack of competition – which has been to the detriment of both copyright owners and copyright users. Accordingly, we would recommend that subclause 35 (3) legislation be revised, so that more than one collecting society is permitted to administer the right of resale. We contend that there should be greater competition between and amongst collecting societies – as is the case with Canadian copyright collecting societies.

We note that there are a number of entities who could conceivably perform the role of a collecting society in respect of the right of resale, including:

- Existing copyright collecting societies (such as Viscopy, the Copyright Agency Limited, Screenrights, and APRA);
- Community legal centres (such as the Australian Copyright Council, and the Arts Law Centre of Australia);
- IP Australia (a government agency, which manages regimes of industrial property, such as designs, patents, trade marks and plant breeders' rights);
- The Lending Rights Committees based at the Department of Environment, Heritage and the Arts; and
- Representative bodies (such as the proposed National Indigenous Cultural Authority, put forward by Terri Janke).

We hope that the tender process is a comprehensive one, which involves all such possible providers of intellectual property management services.

29 (a). We contend that a single collecting society should not have a monopoly on the administration of a right of resale; there should scope for multiple collecting societies.

10.2 Opt-Out Clause

Section 23 (1) of the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) provides that an individual can notify the collecting society that it is not entitled to collect the resale royalty, or enforce the resale royalty on its behalf. The provision is designed to allow individuals to manage their own resale royalty.

There was some controversy about this provision in the public hearing. The Coalition for an Australian Resale Royalty – including the Australian Copyright Council, the Copyright Agency Limited, Viscopy and the Arts Law Centre of Australia – argued that the opt-out clause should be omitted from the legislation. We are of the opinion that the justifications offered by the Coalition were weak and unconvincing on this point.

We would strongly disagree with the position of the Coalition for an Australian Resale Royalty that the ‘opt-out’ clause for individuals should be removed. We observe that many of the economic rights under copyright law allow for individual management, and not just collective management by copyright collecting societies. We note that moral rights under copyright law – personal, inalienable rights introduced in Australia in 2000 – are not subject to collective administration by collecting societies at all. We are of the opinion that it would be bizarre to provide personal, inalienable rights in respect of resale royalty to visual artists, but stipulate that they were unable to manage these provisions, personally.

However, the legislation will need to be amended to allow individuals both to collect the resale royalty and enforce the resale royalty in Division 5 of the *Resale Royalty Right for Visual Artists Bill 2008* (Cth).

29 (b). Section 23 (1) of the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) should be retained. Division 5 of the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) should be amended to allow for individual collection and enforcement of the resale royalty.

10.3 Transparency, Accountability and Sustainability

We are mindful of the failure a decade ago of the authenticity marks scheme.³²¹ This scheme was set up by the Department of Communications, Information Technology,

³²¹ Matthew Rimmer, ‘Australian Icons: Authenticity Marks And Identity Politics’, *Indigenous Law Journal* (University of Toronto), Fall 2004, Vol. 3, p. 139-179, SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=603233

and the Arts, and the Australia Council, and administered by the National Indigenous Arts Advocacy Association. The administering organization failed to implement the authenticity marks scheme within the scheduled time period. There was a lack of transparency and accountability in respect of its operations. The relevant Department and the Australia Council did not supervise the authenticity marks scheme efficiently.

It is very important the collecting society in charge of the resale royalty right in Australia should be subject to rigorous standards of transparency and accountability to ensure the success of the scheme. Accordingly, we would contend that the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) should go further in its regulatory requirements for the collecting society or collecting societies charged with running the resale royalty.

We are concerned that the broad, principle-based approach is inadequate and insufficient in the regulation of collecting societies. The Federal Government should formulate rules in the bill dealing with ‘access by rights holders and their agents to records of the collecting society, such as details of the royalty due to them and the action the collecting society has taken to collect or enforce their right’ – rather than leave that till later legislative instruments. The legislation should take a prescriptive approach to ensure that the collecting society or societies for the right of resale are subject to high standards of transparency and accountability.

We note that, at present, the reporting standards by Lending Rights Committees based at the Department of Environment, Heritage and the Arts have been more informative and extensive than some of the copyright collecting societies.

30. We would also contend that the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) should ensure that the collecting society or societies for the right of resale are subject to high standards of transparency and accountability.

10.4 Ombudsman

We would submit that there is a need for an independent, statutory-based ombudsman to provide proper oversight of the right of resale. Again, previous experience has shown that self-regulation or oversight by government departments is insufficient in regulating collecting societies. We note that the Copyright Tribunal does play an important role in overseeing the operations of copyright collecting societies.

31. We would submit that there is a need for an independent, statutory-based ombudsman to provide proper oversight of the right of resale.

11. THE DURATION OF THE RESALE ROYALTY RIGHT

There is a lack of international consensus as to the appropriate duration for the right of resale. The United Kingdom and Ireland's schemes for the right of resale only apply to living artists; California's right of resale lasts for life of the author plus 20 years; and New Zealand has proposed that the term of protection last for the life of the author plus 50 years; and under Article 8 (1) of the European Union Directive, the right of resale is coextensive with the copyright term – in other words, life of the author plus 70 years. This variation in the term of protection reflects a philosophical tension between the notion of the right of resale as a personal right (thus lasting for the life of the artist), and the theory that the right of resale is an economic right (thus being similar to the term for copyright law).

The Federal Government appears to have tied the duration of the right of resale to the duration of the current overly-long copyright term in Australia. Section 32 of the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) provides that: 'Resale royalty right continues to subsist in relation to an artwork until the end of 70 years after: (a) if there is only one artist of the artwork—the end of the calendar year in which the artist dies; or (b) if there is more than one artist of the artwork then, in relation to the proportion of the resale royalty right held by or through a particular artist—the end of the calendar year in which the artist dies.'

11.1 The Controversy over the Copyright Term Extension

As we have discussed in previous submissions to the Australian Parliament, there has been great controversy over the extension of the copyright term in the European Union, the United States, and Australia.³²²

In the United States, the electronic publisher, Eric Eldred, brought a constitutional challenge to the validity of the *Sonny Bono Copyright Term Extension Act 1998* (US).³²³ He was also bolstered by a number of amicus curiae submissions by historians, intellectual property academics, economists, cultural institutions, various

³²² Matthew Rimmer. 'Submission on the United States-Australia Free Trade Agreement And The Copyright Term Extension to the Senate Select Committee', April 2004, http://www.aph.gov.au/Senate/committee/freetrade_ctte/submissions/sub183.pdf

³²³ *Eldred v Ashcroft* (2003) 123 S. Ct. 769.

copyright users, and members of the new economy.³²⁴ Of particular note was the submission by the College Art Association, Visual Resources Association, National Humanities Alliance, Consortium of College and University Media Centers and National Initiative for a Networked Cultural Heritage.³²⁵ The submission emphasized the problems of artists, teachers, and galleries in gaining access to copyrighted artistic works:

Retrospective term extension suppresses and distorts many speakers' messages, whether artistic, scholarly or pedagogical, inhibits the creation of new works based on old ones and deprives the public of access to older works of historical and cultural interest. No justification offered by Congress is based on substantial evidence, nor outweighs these very palpable harms.³²⁶

For the respondents, there were a number of amicus curiae - including members of Congress, copyright owners and professional organisations, as well as intellectual property lawyers and academics.³²⁷

³²⁴ Fourteen amici supported Eric Eldred in the Supreme Court, including: College Art Association, Visual Resources Association, National Humanities Alliance, Consortium of College and University Media Centers and National Initiative for a Networked Cultural Heritage; Five Constitutional Law Professors; Eagle Forum Education & Legal Defense Fund and Association of American Physicians and Surgeons; seventeen Economists; Free Software Foundation; Hal Roach Studios and Michael Agee; Intel Corporation; fifty-three Intellectual Property Law Professors; Internet Archive, Prelinger Archives, and Project Gutenberg Literary Archive Foundation; Fifteen Library Associations; National Writers Union et al; Tyler T. Ochoa, Mark Rose, Edward C. Walterscheid, Organization of American Historians, H-Net; Malla Pollack; and Progressive Intellectual Property Law Association and Union for the Public Domain.

³²⁵ College Art Association, Visual Resources Association, National Humanities Alliance, Consortium of College and University Media Centers and National Initiative for a Networked Cultural Heritage, <http://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/caa.pdf>

³²⁶

Ibid. at 30.

³²⁷

Twenty amici supported the government in the Supreme Court, including: American Intellectual Property Law Association; ASCAP, BMI, et al; Amsong, Inc; AOL Time Warner, Inc; Association of American Publishers et al; The Bureau of National Affairs, Inc; Symphonic and Concert Composers; Directors Guild of America et al; Dr. Seuss Enterprises, L.P. et al; Senator Orrin G. Hatch; Intellectual Property Owners Association; International Coalition for Copyright Protection; Motion Picture Association of America; The Nashville Songwriters Association International; New York Intellectual Property Law Association; Recording Artists Coalition; Recording Industry Association of America; New York Law

The Supreme Court of the United States in *Eldred v Ashcroft*³²⁸ rejected a constitutional challenge to the validity of the *Sonny Bono Copyright Term Extension Act* 1998 (US) by a majority of seven to two.³²⁹ In the leading judgment, Ginsburg J opined that Congress had the authority under the Copyright Clause to extend the term of copyright protection.³³⁰ She maintained that the monopolies granted by copyright law were compatible with the freedom of speech and said a successful constitutional challenge could render all past copyright extensions similarly vulnerable. Breyer and Stevens JJ strongly dissented against the ruling.

In the leading majority judgment, Ginsburg J engaged in a defence of judicial quietism: 'Rather than subjecting Congress' legislative choices in the copyright area to heightened judicial scrutiny, we have stressed that 'it is not our role to alter the delicate balance Congress has labored to achieve.'³³¹ Elaborating upon academic arguments about the role of the judiciary, Ginsburg J concludes:

As we read the Framers' instruction, the Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause. Beneath the facade of their inventive constitutional interpretation, petitioners forcefully urge that Congress pursued very bad policy in prescribing the CTEA's long terms. The wisdom of Congress' action, however, is not within our province to second guess. Satisfied that the legislation before us remains inside the domain the Constitution assigns to the First Branch, we affirm the judgment of the Court of Appeals.³³²

Ginsburg J opined that Congress had the authority under the Copyright Clause to extend the term of copyright protection. She maintained that the monopolies granted by copyright law were compatible with the freedom of speech and said a successful constitutional challenge could render all past copyright extensions similarly vulnerable.

School Professor Edward Samuels; House Judiciary Committee Members; and the Songwriters Guild of America.

³²⁸ *Eldred v Ashcroft* (2003) 123 S. Ct. 769.

³²⁹ Linda Greenhouse. 'Supreme Court To Intervene In Internet Copyright Dispute', *The New York Times*, 19 February 2002.

³³⁰ Justice Ginsburg delivered the opinion of the majority of the court. She was joined by Rehnquist CJ, and O'Connor, Scalia, Kennedy, Souter and Thomas JJ.

³³¹ *Eldred v Ashcroft* (2003) 123 S. Ct. 769 at 781.

³³² *Eldred v Ashcroft* (2003) 123 S. Ct. 769 at 790.

In his dissent, Breyer J addressed the concern of his colleagues that ‘our holding in this case not inhibit the broad decision-making leeway that the Copyright Clause grants Congress’.³³³ His Honour maintained that the Supreme Court of the United States was perfectly entitled to rule that the statute in question was unconstitutional:

We cannot avoid the need to examine the statute carefully by saying that ‘Congress has not altered the traditional contours of copyright protection,’ for the sentence points to the question, rather than the answer. Nor should we avoid that examination here. That degree of judicial vigilance - at the far outer boundaries of the Clause - is warranted if we are to avoid the monopolies and consequent restrictions of expression that the Clause, read consistently with the First Amendment, seeks to preclude. And that vigilance is all the more necessary in a new Century that will see intellectual property rights and the forms of expression that underlie them play an ever more important role in the Nation’s economy and the lives of its citizens.³³⁴

Stevens J also dissented that there is a need for greater judicial scrutiny of Congress in this field: ‘Fairly read, the Court has stated that Congress’ actions under the Copyright/Patent Clause are, for all intents and purposes, judicially unreviewable. That result cannot be squared with the basic tenets of our constitutional structure’.³³⁵ He recalled the trenchant words of Chief Justice John Marshall: ‘It is emphatically the province and duty of the judicial department to say what the law is.’³³⁶ It should not be taken for granted that copyright law is compatible with freedom of speech.

In his dissenting judgment, Breyer J discusses the serious cultural costs of the copyright term extension. His Honour comments:

This statute will cause serious expression-related harm. It will likely restrict traditional dissemination of copyrighted works. It will likely inhibit new forms of dissemination through the use of new technology. It threatens to interfere with efforts to preserve our Nation’s historical and cultural heritage and efforts to use that heritage, say, to educate our Nation’s children. It is easy to understand how the statute might benefit the private financial interests of corporations or heirs who own existing copyrights. But I cannot find any constitutionally legitimate, copyright-related way in which the statute will benefit the public. Indeed, in respect

³³³ *Eldred v Ashcroft* (2003) 123 S. Ct. 769 at 812.

³³⁴ *Eldred v Ashcroft* (2003) 123 S. Ct. 769 at 812.

³³⁵ *Eldred v Ashcroft* (2003) 123 S. Ct. 769 at 801.

³³⁶ *Eldred v Ashcroft* (2003) 123 S. Ct. 769 at 801.

to existing works, the serious public harm and the virtually nonexistent public benefit could not be more clear.³³⁷

The judge emphasizes that the statute imposes two kinds of public expression-related costs, which relate to the capacity of the copyright owner to deny permission to use a copyright work, or else charge an impost of royalties upon a copyright user.

The legislation will have a severe impact upon cultural institutions - such as libraries, galleries, orchestras. It will interfere with the activities of electronic publishers of public domain works - such as Eric Eldred's Eldritch Press, the Internet Archive, and Project Gutenberg. In his dissenting judgment, Breyer J observes:

Similarly, the costs of obtaining permission, now perhaps ranging in the millions of dollars, will multiply as the number of holders of affected copyrights increases from several hundred thousand to several million. The costs to the users of nonprofit databases, now numbering in the low millions, will multiply as the use of those computer-assisted databases becomes more prevalent. And the qualitative costs to education, learning, and research will multiply as our children become ever more dependent for the content of their knowledge upon computer-accessible databases - thereby condemning that which is not so accessible, say, the cultural content of early 20th-century history, to a kind of intellectual purgatory from which it will not easily emerge.³³⁸

Thus, the American Association of Law Libraries points out that the clearance process associated with creating an electronic archive, Documenting the American South, 'consumed approximately a dozen man-hours' per work.³³⁹ The College Art Association says that the costs of obtaining permission for use of single images, short excerpts, and other short works can become prohibitively high.³⁴⁰ The National Writers Union provides similar examples.³⁴¹ Petitioners point to music fees that may prevent youth or community orchestras, or church choirs, from performing early 20th-

³³⁷ *Eldred v Ashcroft* (2003) 123 S. Ct. 769 at 813.

³³⁸ *Eldred v Ashcroft* (2003) 123 S. Ct. 769 at 806.

³³⁹ Arnold Lutzer. 'Brief for American Association of Law Libraries et al as Amici Curiae Supporting Petitioners', 20 May 2002, p. 20.

³⁴⁰ Jeffrey Cunard. 'Brief for College Art Association et al. as Amici Curiae Supporting Petitioners', 20 May 2002, p. 7-13.

³⁴¹ Peter Jaszi. 'Brief for the National Writers Union et al as Amici Curiae Supporting Petitioners', 20 May 2002, p. 25-27.

century music.³⁴² Copyright extension caused abandonment of plans to sell sheet music of Maurice Ravel's *Alborada Del Gracioso*.³⁴³ Furthermore electronic libraries such as the Internet Archive, Prelinger Archives and Project Gutenberg will find it difficult to provide digital access to historical texts, audio-visual works, and literary works, which are subject to the control of copyright owners.

Breyer J nevertheless insists that the 'economic effect' of the *Copyright Term Extension Act* 1998 (US) is to make the copyright term 'virtually perpetual.'³⁴⁴ He observes that the legislation creates a copyright term worth 99.8% of the value of a perpetual copyright:

The economic effect of this 20-year extension - the longest blanket extension since the Nation's founding - is to make the copyright term not limited, but virtually perpetual. Its primary legal effect is to grant the extended term not to authors, but to their heirs, estates, or corporate successors. And most importantly, its practical effect is not to promote, but to inhibit, the progress of 'Science' - by which word the Framers meant learning or knowledge.³⁴⁵

His Honour Stevens J also dissented on similar grounds: 'It is important to note, however, that a categorical rule prohibiting retroactive extensions would effectively preclude perpetual copyrights. More importantly, as the House of Lords recognized when it refused to amend the Statute of Anne in 1735, unless the Clause is construed to embody such a categorical rule, Congress may extend existing monopoly privileges *ad infinitum* under the majority's analysis'.³⁴⁶ It is a strange regression that the law should lapse back into providing virtually perpetual protection of copyright works - when the Statute of Anne was supposed to guard against such a fate.

In 2000, the Australian Intellectual Property and Competition Review considered whether it was appropriate to extend the term of copyright extension to the same duration as the United States and the European Union.³⁴⁷ The Committee

³⁴² Lawrence Lessig and others. 'Brief For Petitioners in *Eldred v Ashcroft*', 20 May 2002, p 3-5.

³⁴³ Caroline Arms. 'Getting the Picture: Observations from the Library of Congress on Providing Online Access to Pictorial Images', *Library Trends*, 1999, Vol. 48, p. 379, 405.

³⁴⁴ *Eldred v Ashcroft* (2003) 123 S. Ct. 769 at 801.

³⁴⁵ *Eldred v Ashcroft* (2003) 123 S. Ct. 769 at 801.

³⁴⁶ *Eldred v Ashcroft* (2003) 123 S. Ct. 769 at 801.

³⁴⁷ Intellectual Property and Competition Review Committee (2000), 'Copyright Term' in *Review of Intellectual Property Legislation under the Competition Principles Agreement*, at <http://www.ipcr.gov.au/IPAustralia.pdf>, September, p. 80-84.

specifically sought from the Australian Copyright Council evidence that an extension would confer benefits in excess of the costs it would impose. No such evidence was provided. Consequently, the Committee recommended that the current term should not be extended.³⁴⁸ It also recommended that no extension of the copyright term should be introduced in future without a prior thorough and independent review of the resulting costs and benefits.³⁴⁹

Paying little heed to such advice, the Coalition Federal Government agreed to extend the copyright term as part of the *Australia-United States Free Trade Agreement* 2004. The Coalition Government argued that the decision would boost Australia's competitiveness by giving it access to the United States economy. The chief Australian negotiator, Stephen Deady, told the Senate Estimates Committee that the Australian economy would receive an economic boost from the copyright term extension:

One of the numbers I have seen is that between 1996 and 2000 Australia's exports in this area - IP type areas, copyright industries - grew faster than the national economy, with an average growth rate of about 5.7 per cent. Exports grew by around nine per cent. So there are certainly some advantages in this area of copyright extension.³⁵⁰

However, Deady confessed he had not perused the Ergas Intellectual Property and Competition Review, or the amicus brief of the economists in *Eldred v Ashcroft*. Deady ignored the obvious point that Australia was a net importer of copyright works, and would continue to be so with the United States. Any marginal gains by Australian exporters should be weighed against the costs associated with those imports.

Dr Phillipa Dee was commissioned by the Senate Select Committee to provide an independent economic analysis of the impacts of the *AUSFTA*.³⁵¹ She noted: 'The intellectual property (IP) rights chapter is precedent setting in many respects.'³⁵² Dee denied that it was impossible to quantify the effects of the copyright term extension.

³⁴⁸ Ibid.

³⁴⁹ Ibid.

³⁵⁰ Senate Estimates Committee (2004), 'Foreign Affairs, Defence And Trade', Australian Parliament, 2 March.

³⁵¹ Phillipa Dee. *The Australia-US Free Trade Agreement: An Assessment, A Report prepared for the Senate Select Committee on the Free Trade Agreement*, June 2004, at http://www.aph.gov.au/Senate/committee/freetrade_ctte/rel_links/dee_fta_report.pdf

³⁵² Ibid, p. 13.

Drawing upon data from the Australian Bureau of Statistics, Dee calculated: ‘According to this calculation, Australia's net royalty payments could be up to \$88 million higher per year as a result of extending the term of copyright. And the discounted present value of the cost to Australia of extending the copyright term is about \$700 million’.³⁵³ In response, the Australian Government asserted that the costs of extending the term of copyright estimated in Dee’s report were overstated, because the economic life of most copyright material is short. Dee replied: ‘My estimation used the same assumptions as were used in the CIE/DFAT report to estimate the gains from extending the term of copyright’.³⁵⁴ She noted: ‘If the costs are overstated, then so too are the benefits’.³⁵⁵ The economist concluded unequivocally: ‘The fact remains that this provision is not in Australia's economic interests’.³⁵⁶

During the debate over the *Australia-United States Free Trade Agreement* 2004, a number of Australian Labor Party politicians expressed concerns about the copyright term extension. Indeed, the Labor members of the Senate Select Committee recommended that there was a need to ameliorate the impacts of the copyright term extension: ‘Labor Senators recommend that the Senate Select Committee on Intellectual Property should investigate the possibility of establishing in Australia a similar regime to that set out in the *Public Domain Enhancement Bill 2004 (US)*, with a view to addressing some of the impacts of the extension of the term of copyright, in particular the problems relating to 'orphaned' works.’³⁵⁷

11.2 The Duration of the Resale Royalty Right

It is disappointing and unfortunate that the Australian Labor Party seems to have forgotten the debate over the copyright term extension, and have presented a term of life of the author plus 70 years as a norm for the right of resale. It seems incredible

³⁵³ Ibid, p. 22.

³⁵⁴ Philippa Dee. *AUSFTA: A Response to Comments by the Department of Foreign Affairs and Trade*, the Senate Select Committee on the Free Trade Agreement, June 2004, p. 4, at http://www.aph.gov.au/Senate/committee/freetrade_ctte/rel_links/response_dfat.pdf

³⁵⁵ Ibid.

³⁵⁶ Ibid.

³⁵⁷ Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, 2004. *Final Report* (August), at http://www.aph.gov.au/Senate/committee/freetrade_ctte/report/final/report.pdf.

that the strongest form of intellectual property, patent law, should have protection limited to twenty years – but a satellite system such as the right of resale to provide protection for anywhere up to 150 years for an artwork (depending on the age of artist).

The Australian Federal Government has provided no compelling justification or rationale for why the right of resale should last such a long period of time. Indeed, the 2004 Discussion Paper provides evidence, suggesting that the right of resale will unduly benefit the estates of deceased artists:

Where modelling extends the duration of a resale royalty right beyond the lifespan of an artist, the estates of deceased artists benefit more than living artists. This reflects a common market trend for a recognised artist’s work to appreciate significantly following his or her death.³⁵⁸

The 2004 Discussion Paper concludes that ‘the deceased artists’ estates would be eligible to receive 58% of total royalties payable.’³⁵⁹

In a submission to the 2004 inquiry, Sotheby’s contended that ‘the 5 top selling artists in 2003 would have received between 24-39% of all resale royalties depending upon the model used’.³⁶⁰ These artists were Sir Russell Drysdale, Arthur Boyd, Brett Whiteley, Fred Williams, and Sir Sidney Nolan (all deceased). Sotheby’s posed the question: ‘Do the beneficiaries of these estates need this support when all these artists achieved considerable financial success in their lifetimes?’³⁶¹

It is a popular conception that the value of an artist’s oeuvre increases substantially upon his/her death. The posthumous golden ages of artists such as Vincent Van Gough and Howard Arkley attest to this. Indeed, the results of the UK IP Institute’s study revealed that the resale of artwork by living artists accounted of only

³⁵⁸ The Department of Communications, Information Technology, and the Arts. *Proposed Resale Royalty Discussion Paper*, 2004, http://www.arts.gov.au/__data/assets/pdf_file/0009/12024/Proposed_Resale_Royalty_Arrangement_Discussion_Paper.pdf

³⁵⁹ Ibid.

³⁶⁰ Sotheby’s. ‘Submission on Proposed Resale Royalty’, 10 August 2004.

³⁶¹ Ibid.

about 10% of auction sales³⁶² and that the percentage of sales for artwork by artists within 70 years of their death accounted for about 40% of the entire art market.³⁶³

We share the concerns of the art industry that the overly long period of protection for the right of resale could unduly benefit the estates of dead artists, to the detriment of consumers, galleries, and intermediaries.

32. We would submit that the term of protection for the right of resale should be, at most, the life of the author plus 50 years – not life of the author plus 70 years.

11.3 Inalienability

The right of resale is best conceived of as a personal, inalienable right – rather than an economic, alienable right, like say the economic right of reproduction or the economic right of communication to the public under copyright law.

The Government’s priority to ‘significantly increase the transparency of the art market’³⁶⁴ with particular attention on Indigenous artists ‘who have sadly continued to be exploited by some unscrupulous dealers’³⁶⁵ represents a persuasive argument to make the resale right inalienable.

The Australian legal system has decent experience dealing with personal, inalienable rights – since the introduction of moral rights in 2000.³⁶⁶

33. We would agree that the right of resale should be a personal, inalienable right.

11.4 Waiver

³⁶² Katy Graddy, Noah Horowitz and Stefan Szymanski *A study into the effect on the UK market of the introduction of the artist’s resale right*, Intellectual Property Institute, January 2008, p 19.

³⁶³ Ibid., p. 20.

³⁶⁴ Hansard, ‘Second Reading Speech: Resale Royalty Right for Visual Artists Bill 2008’, 27 November 2008.

³⁶⁵ Hansard, ‘Second Reading Speech: Resale Royalty Right for Visual Artists Bill 2008’, 27 November 2008.

³⁶⁶ S 195AN of the *Copyright Act 1968* (Cth)

The art market has its fair share of mendacity and chicanery. At the time of writing, there is a huge scandal over an art dealer, Ronald Coles, allegedly stealing both the art and the money of his clients.³⁶⁷ There is a long shameful history of carpet-bagging and skulduggery in respect of the sale of Indigenous art.³⁶⁸ In this context, it is only prudent to provide that the right of resale is not affected by waivers or contracting out. As the explanatory memorandum notes:

A waiver of a resale royalty right has no effect (subclause 34(1)). Subclause 34(2) provides that an agreement to share or repay a resale royalty, other than an agreement between joint artists to apportion shares in the resale royalty differently, is void. The purpose of this clause is to prevent artists being exploited and pressured into waiving or otherwise dealing detrimentally in their right to receive resale royalty.

Again, the Australian legal system has decent experience dealing with waivers in the moral rights regime introduced in 2000.³⁶⁹

34. We would also agree that the right of resale should not be subject to waivers.

³⁶⁷ Eamon Duff, 'Broken hearts, lost art and missing millions', *The Sydney Morning Herald*, 23 January 2009, <http://www.smh.com.au/news/national/broken-hearts-lost-art-and-missing-millions/2009/01/22/1232471495700.html>

³⁶⁸ Four Corners, *Art for Art's Sake?*, Australian Broadcasting Corporation, 28 June 2008.

³⁶⁹ S 195AZG (1) of the *Copyright Amendment Bill 1997*

12. INDIGENOUS INTELLECTUAL PROPERTY

Since the publication of the *Stopping the Rip-Offs* report in 1994, successive Labor and Coalition Governments have failed to implement effective measures to protect Indigenous intellectual property. Despite the promises of the then Attorney-General Philip Ruddock, the proposed communal moral rights regime for Indigenous art works never materialised in the Federal Parliament.³⁷⁰ The authenticity trade marks scheme collapsed.³⁷¹ The Federal access to genetic resources and benefit-sharing regime lacks effective enforcement mechanisms.³⁷² Accordingly, in light of such past policy failures, there is a need to ensure that the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) provides an effective scheme of protection for Indigenous artists.

12.1 Indigenous Art Auctions

Representing the ‘biggest and most valuable collection of Aboriginal art put together for sale’,³⁷³ Sotheby’s 2003 Aboriginal Art Auction has shone a spot-light upon the dynamics of the Indigenous fine art market, prompting observers to ask ‘why dealers and collectors were making fortunes when the creators and their communities lived in third world poverty’.³⁷⁴ This contradiction has been embraced by the media as an icon for exploitation in the industry and a touchstone for the deservedness of a resale right in Australia. *The Age* newspaper set the context for the Sotheby’s auction:

While Johnny Warangulka Tjupurrula lay destitute and dreaming in a dry creek bed outside Alice Springs in June 1997, one of his early 1970s paintings [*Water Dreaming at Kalipinyapa* that brought him only \$150] was sold at Sotheby’s auction in Melbourne to a California collector for \$206,000. It was an auction record for a work by an Aboriginal artist and almost doubled the previous highest price. Tjupurrula, by then partly blind and with only two fingers

³⁷⁰ *Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003* (Cth)

³⁷¹ Matthew Rimmer, ‘Australian Icons: Authenticity Marks And Identity Politics’, *Indigenous Law Journal (University of Toronto)*, Fall 2004, Vol. 3, p. 139-179, SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=603233

³⁷² Matthew Rimmer, ‘Blame It On Rio: Biodiscovery, Native Title, And Traditional Knowledge’, *The Southern Cross University Law Review*, December 2003, Vol. 7, p. 1-49, SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=603229

³⁷³ Susan McCulloch, ‘Dreams on the Block’ *The Australian* (Sydney), 11 July 2003, 14.

³⁷⁴ ‘Knocked down; still out’, *The Age* (Melbourne), 29 September 2003, <<http://www.theage.com.au/articles/2003/09/26/1064083177490.html>> at 9/10/2003.

on one hand, was a pioneer among the Western Desert artists who created the ‘dot’ painting movement that became famous around the globe... Three years later, Sotheby’s again put the picture under the hammer. By this time, the artist was in the Hetti Perkins home for elderly Aborigines in Alice Springs, where he was to die. He was unaware that 10 of his early paintings had been auctioned, with *Water Dreaming* alone fetching \$486,500.³⁷⁵

Another work by Tjupurrula, *Water and Bush Tucker Dreaming*, featured in Sotheby’s Indigenous art auction, fetching a staggering \$117,000 for an American woman who had bought the work for \$30 during a visit to Australia in the 1970’s.³⁷⁶ The scale of the Tjupurrula sale, along with the benchmark setting \$509,300 and \$480,000 fetched for works by Emily Kngwarreye and Rover Thomas respectively, has received widespread coverage.³⁷⁷ Importantly, much of the publicity has highlighted the disparity between the \$7.46 million³⁷⁸ posted for the 560 works³⁷⁹ on sale and the absence of a ‘direct benefit back to the... artists’.³⁸⁰

The public outrage directed at the disparity between artists and collectors has been politicised under the advocacy of Australian Democrats Arts and Indigenous Affairs spokesman Senator Aden Ridgeway. Ridgeway, a long time campaigner for

³⁷⁵ Ibid. See also, Terry Ingram, *Aboriginal Painting Doubles its Own Record* (25 August 2000) Cloudband Magazine, <http://www.cloudband.com/magazine/articles3q00/mark_ingram_water_0800.html> at 2/10/2003.

³⁷⁶ Gabriella Coslovich, ‘Aboriginal Works and Artful Dodgers’, *The Age* (Melbourne), 20 September 2003, 3; Tony Clifton, ‘An Aboriginal Painting, Just a Souvenir, Brings a Windfall’, *The New York Times* (New York), 29 July 2003, <<http://www.nytimes.com/2003/07/30/art/design/30ABO.html>> at 03/08/2003.

³⁷⁷ Along with Australian coverage, the *New York Times* featured the auction on its front page, and *Daily Times* of Pakistan covered the event: Professor Adam Shoemaker, ‘From Embassy to ‘Embarrassment’: Debates over Indigenous Cultural Property in the Public Sphere’ (Speech delivered at the Art and human Rights Conference, Canberra, 10 August 2003).

³⁷⁸ Michael Hatak, ‘Records Tumble for Indigenous Art’, *Australian Art Collector*, Issue 26, October-December 2003, 103.

³⁷⁹ Susan McCulloch, ‘Dreams on the Block’ *The Australian* (Sydney), 11 July 2003, 14.

³⁸⁰ ‘Knocked down; still out’, *The Age* (Melbourne), 29 September 2003, <<http://www.theage.com.au/articles/2003/09/26/1064083177490.html>> at 9/10/2003.

extended Indigenous intellectual property rights,^{381 382} used the 2003 Sotheby's auction to illustrate the need for an artists' resale right in Australia:

This week's Sotheby's auction in Sydney has seen Indigenous artworks sold for record prices, with around \$6 million changing hands...The establishment of a scheme for resale royalty rights for artists is particularly important in the context of the rapidly booming international market for Indigenous artworks as compared to the desperate economic conditions within which many Indigenous artists live and work.³⁸³

The *droit de suite* debate in Australia has now found the provocative image requisite to garner the sympathy of the general public. Indeed, under the rubric of Indigenous art, even Sotheby's defensive stance³⁸⁴ softens, with Tim Klingender, Director of Aboriginal Art, endorsing the concept wholeheartedly.³⁸⁵ A tenor of ethics and fairness now permeates Australia's *droit de suite* dialogue, as the wider community

³⁸¹ See eg, Senator Aden Ridgeway, 'Survival - Call for Action on Indigenous Cultural Rights' (Press Release, 26 January 2003), <<http://www.deomocrats.org.au/news/index.htm>> at 26/09/2003.

³⁸² Australian law is moving toward a greater recognition of Indigenous intellectual property issues, including communal moral rights: See eg, *Bulun Bulun and Another v R & T Textiles Pty LTD* (1998) 86 FCR 244; Terri Janke, *Our Culture: Our Future. Report on Australian Indigenous Cultural and Intellectual Property Rights*, Prepared for Australian Institute of Aboriginal and Torres Strait Islander Studies and ATSIC by Michael Frankel & Co, Canberra, 1998, at www.icip.lawnet.com.au/index.html; Senator the Hon Richard Alston, The Hon Daryl Williams MP, the Hon Philip Ruddock MP, 'Indigenous communities to get new protection for creative works' (Joint Press Release: 19 May 2003); Justice Ronald Sackville, 'Legal Protection of Indigenous Culture in Australia', (2003) 11 *Cardozo Journal of International Comparative Law* 711. See also, Brad Sherman, 'From the Non-original to the Aboriginal: A History', within Brad Sherman, and Alain Strowel (eds), *Of Authors and Origins: Essays on Copyright Law*, Oxford: Clarendon Press, 1994.

³⁸³ Senator Aden Ridgeway, 'Record Art Prices Show Need for Resale Royalty Rights' (Press Release, 29 July 2003), <http://www.democrats.org.au/news/index.htm> (26/09/2003).

³⁸⁴ See eg, Sotheby's Australia, *Submission to the Inquiry into Contemporary Visual Arts & Craft*, November 2001, copy held by the Department of Communications, Information Technology and the Arts; Australian Copyright Council, *Droit de Suite: The Art Resale Royalty and its Implications for Australia*, 63.

³⁸⁵ ABC Radio National (Tooth), 'Stretching the Canvas: Investing in Art in Australia', Background Briefing, 11 August 2002, <<http://www.abc.net.au/rn/talks/stories/s647142.htm>> at 15/06/2003.

has been forced to associate the hundreds of thousands of dollars spent on fine art with ‘the circumstances of its making’.³⁸⁶

In 2007, Sotheby's sold the late Clifford Possum Tjapaltjarri's painting, ‘Warlugulong’. The auction-house's spokesman, Tim Klingender, was enthusiastic about the high price commanded by the art work: ‘The painting was a really great painting and it deserved to make a really fantastic price, and it made that price.’ The painting has undergone significant appreciation over the last few decades. The significant art work was bought by the Commonwealth Bank for a mere \$1,200 in 1977, and spent 20 years hanging in the canteen of the bank's Mornington Peninsula training centre. In 1996, Melbourne art dealer Hank Ebes acquired the painting for \$36,000. It has been revealed that the National Gallery of Australia acquired the painting at the Sotheby's auction for a princely sum of \$2.4 million.

In light of Sotheby's auction of Indigenous art, the policy debate reopened as to whether Australian artists - especially Indigenous artists and their families - deserved a right of resale. Donald Richardson captured this sentiment in a letter to the *Adelaide Advertiser*:

The sale of the late Clifford Possum Tjapaltjarri's painting Warlugulong for \$2.4 million highlights the obscurity of the art market. Possum received only \$1200 for the picture in 1977, and neither he nor members of his family will get a cent from this sale. The art market is an almost perfect example of laissez-faire economics. Prices are set solely through raw exercise of supply and demand. It is the only area of the market that has absolutely no government regulation. Whether this is justifiable or not is an open question. However, it is manifestly unfair that the very people - the artists - without whose talent and effort works of art would never even exist should be excluded from benefiting from the enormous profits being made in the secondary art market. The remedy for this injustice is a resale royalty scheme, such as exists in many countries, by which a percentage of secondary profits is paid to the original creators or their heirs.³⁸⁷

Similarly, Benjamin Genocchio of *The Australian* observed of the auction: ‘None of this money-mad speculation connects to the remote world of Aboriginal settlements, which gain little from the global art trade but are among the most vulnerable to its

³⁸⁶ Brian Kennedy, ‘Witnessing and reconciliation: Indigenous Art and Human Rights in Australia Today’ (Keynote address to the conference Art and Human Rights, Canberra, 8 August 2003).

³⁸⁷ Donald Richardson, ‘Adopt art resale royalty scheme’, *Adelaide Advertiser*, 26 July 2007, p. 17.

adverse effects, such as changing fashion cycles'.³⁸⁸ He noted: 'The human tragedy engulfing these people remains a national shame and a political challenge'.³⁸⁹ Genocchio concluded: 'Part of tackling these issues means embracing change and new ideas that lift sights and point in the direction of a new compact in which Aboriginal people can claim a greater share of the spoils.'³⁹⁰

12.2 Policy Debate

In 2006, Terri Janke and Robynne Quiggin wrote a report under commission from the Australia Council on Indigenous Cultural and Intellectual Property.³⁹¹ The lawyers dissect a number of the specious arguments made about the right of resale:

Many of these arguments against the resale royalty are based on premises which either do not apply to the Indigenous art market or which misunderstand the purpose of the resale royalty. The resale royalty would not only benefit 'dead white males' as it is sometimes put. The work of young Indigenous female artists such as Tracey Moffatt, Judy Watson, Rosella Namok and Julie Dowling reach high sales figures would also be protected. Opponents also argue that the limited number of artists who will benefit is a reason to shun the resale royalty. But this misunderstands its purpose. The resale royalty is not intended to provide returns in any uniform manner of distribution, like welfare payments or CDEP payments. It is intended to provide a share in the market success of sold works.³⁹²

Janke and Quiggin conclude: 'The resale royalty would provide a return to artists, founded on the same fundamental principles of intellectual property laws: the encouragement of innovation, creativity and excellence'.³⁹³ Moreover, in their view, 'Australia's cultural heritage, Indigenous art markets and arts sector would benefit from proper recognition of visual artists rights and returns from their successes in the market place.'³⁹⁴

³⁸⁸ Benjamin Genocchio, 'Behind the Dollar Signs', *The Australian*, 26 June 2008, p. 10.

³⁸⁹ Benjamin Genocchio, 'Behind the Dollar Signs', *The Australian*, 26 June 2008, p. 10.

³⁹⁰ Benjamin Genocchio, 'Behind the Dollar Signs', *The Australian*, 26 June 2008, p. 10.

³⁹¹ Terri Janke and Robynne Quiggin, 'Indigenous Cultural and Intellectual Property', May 2006, Attachment to Australia Council, *Submission 38*.

³⁹² Ibid.

³⁹³ Ibid.

³⁹⁴ Ibid.

In 2007, the Senate Standing Committee on Environment, Communications, Information Technology and the Arts released a report on Indigenous art, *Indigenous Art - Securing the Future Australia's Indigenous visual arts and craft sector*.³⁹⁵ The Coalition Government majority of the committee recommended that a resale royalty scheme not be introduced at this time, because of the lack of benefit to most artists, and in particular Indigenous artists, and the lack of new evidence to the contrary. Drawing rather speculative conclusions from a report by the Department of Communications, Information Technology, and the Arts, the majority report asserted:

Introduction of a resale royalty scheme would not, for the majority of Indigenous artists, provide significant financial benefits. Under all models, non- Indigenous Australian artists dominate the royalty payments. Indigenous artists do not feature in the top royalty payment tier and the top-grossing Indigenous artists receive less than the top-grossing non-Indigenous Australian artists. Up to 29 per cent of artists benefiting from the scheme would be Indigenous, depending on the structure adopted. Benefits that would flow to Indigenous artists differ significantly under the models presented, with average royalty payments ranging from \$1000 (sliding scale, no threshold) to \$5000 (5 percent rate, \$8000 threshold).³⁹⁶

The majority committee contended: ‘Across the models, Indigenous artists did not feature in the top royalty payment tier and the top-grossing Indigenous artists received significantly less than the top-grossing non-Indigenous Australian artists.’³⁹⁷ Its 26th recommendation was: ‘The majority of the committee recommends that a resale royalty scheme not be introduced at this time, because of the lack of benefit to most artists, and in particular Indigenous artists, and the lack of new evidence to the contrary’.³⁹⁸ This does seem to be a rather intellectually weak position. In a capitalist marketplace, there is always going to be an uneven distribution of benefits in relation to the sale of art works. That is very much the case with copyright law and other related forms of intellectual property. It is entirely unrealistic to expect a right of resale to be socialistic in its intent – and provide the same benefit for all artists,

³⁹⁵ Senate Standing Committee on Environment, Communications, Information Technology and the Arts, *Indigenous Art - Securing the Future Australia's Indigenous visual arts and craft sector*, Canberra: The Australian Parliament, 20 June 2007, http://www.aph.gov.au/senate/committee/ecita_ctte/completed_inquiries/2004-07/indigenous_arts/report/index.htm

³⁹⁶ Ibid, p. 167.

³⁹⁷ Ibid., p. 175.

³⁹⁸ Ibid., p. 175.

notwithstanding their experience or ability or reputation. It is a shame that the majority committee report paid little heed to the Janke and Quiggin paper.

The non-government members of the committee argued that a resale royalty scheme must be carefully designed: ‘While noting the modelling of DCITA, they believe that options exist for a scheme that merit introduction’.³⁹⁹ The non-government members of the committee take the view that there should be introduced a resale royalty scheme that is designed to ensure appropriate resale rights accrue to artists, particularly Indigenous artists.

In her piece, ‘The Resale Royalty and Indigenous Art: An Opportunity for the Recognition of Economic and Cultural Rights’, Robynne Quiggin emphasizes that ‘One of the many important issues for Indigenous and non-Indigenous artists in Australia today is the possible introduction of a resale royalty.’⁴⁰⁰ She contends:

Discussions about the resale royalty right require us to find the correct combination of issues of equality, recognition of difference, fair allocation of rights and the benefits arising from them. A resale royalty right, which recognises artists’ contribution to the cultural life of the nation, their economic right to benefit from art increases in the commercial value of their work, and recognition of their ongoing connection to their work, is a right which could be usefully applied to all artists. Artists, Indigenous included, can make their own decisions to distribute those funds as they see fit.⁴⁰¹

Quiggin expresses concerns about the dismissive way in which the question of Indigenous intellectual property has been dealt with by governments:

In Australia, much of the discussion has focused on the situation of Indigenous artists because of the glaring disparity between the sale price of some works and living conditions. But that tends to lead discussion away from implementation of a basic economic right of artists. The resale royalty is subjected to the same new, narrow test applied to Indigenous rights questions, like rights to land, language, life ways and other cultural expressions. Can it fix health, education, employment or housing? If not, can it be reframed to do that? If it still fails the new test, it is labelled ‘symbolic’ and rejected. This is clearly unsatisfactory.⁴⁰²

³⁹⁹ Ibid., p. 175.

⁴⁰⁰ Robynne Quiggin. ‘The Resale Royalty and Indigenous Art: An Opportunity for the Recognition of Economic and Cultural Rights’ in Fiona Macmillan and Kathy Bowrey, *New Directions in Copyright Law Volume 3*. Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2006, p. 229

⁴⁰¹ Ibid., p. 239.

⁴⁰² Ibid., p. 240.

She concludes: ‘Hopefully, discussion can take place with a level of acceptance that rights attach to people and peoples for reasons other than their need for the basics of survival, and that their distinct contributions, whether as First Peoples, authors or both, can be recognised, valued, and rewarded.’⁴⁰³

12.3 Communal Ownership

The *Resale Royalty Right for Visual Artists Bill 2008* (Cth) is a little peculiar in the way in which it deals with the ownership of artistic works. Section 12 of the legislation recognises that there can be a single author or joint authors of artistic works. Our concern is that this provision is not broad enough to accommodate communal ownership of artistic works by Indigenous clans and communities. Section 12 should be amended to recognise the possibility of communal authorship and ownership of artistic works by Indigenous communities in the first instance (and not merely in cases of succession).

In the modern era, there have been attempts to protect Indigenous cultural property within the framework of copyright law. Solicitor Martin Hardie and barrister Colin Golvan have brought a number of test cases before the Federal Court of Australia. In *Yumbulul v Reserve Bank Of Australia And Others*, French J – now French CJ of the High Court of Australia - acknowledged that ‘it may be that Australia’s copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and the use of works which are essentially communal in origin’.⁴⁰⁴ In *Milpururru And Others v Indofurn Pty Ltd And Others*, von Doussa J made a collective award to the artists rather than individual awards so that the artists could distribute it according to their custom.⁴⁰⁵ In *Bulun Bulun v R & T Textiles Pty*, von Doussa J was willing to find that the relationship between Bulun Bulun and the Ganalbingu people gave rise to fiduciary obligations. He concluded that ‘if the copyright owner of an artistic work which embodies ritual knowledge of an Aboriginal clan is being used inappropriately, and the copyright owner fails or refuses to take appropriate action to enforce the copyright, the

⁴⁰³ Ibid., p. 240.

⁴⁰⁴ *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481.

⁴⁰⁵ *Milpururru v Indofurn Pty Ltd* (1994) 30 IPR 209.

Australian legal system will permit remedial action through the courts by the clan'.⁴⁰⁶ The proposed *Copyright Amendment (Indigenous Communal Moral Rights) Bill 2006* (Cth) – which was not introduced into Parliament, in the end - contemplated greater recognition of communal ownership of moral rights.

We are of the view that the recognition of communal ownership in section 12 of the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) would be a natural progression from developments in Australian courts over the last two decades.

The Federal Government could do this in one of two ways. It could amend section 12 to add a new category of 'communal authorship'. Alternatively, the Federal Government to amend the definition of 'joint authorship' to specifically include 'communal ownership' by Indigenous communities.

35 (a). The *Resale Royalty Right for Visual Artists Bill 2008* (Cth) should recognise the scope for communal ownership of Indigenous artistic works.

12.4 Succession

In an interview, the Minister for the Environment, Heritage and the Arts, Peter Garrett, contended that the *Resale Royalty Right for Visual Artists Bill 2008* (Cth) would benefit Indigenous artists:

Peter Garrett: Over time we will see a greater income flow for Indigenous artists and to their families. I think it will provide the confidence that where their work is in the medium and the longer term resold at much greater values than the work was originally sold that they can actually see some return on the basis of that later value being so high. This is a really good day for Australia's visual artists, it is a good day, a very good day for Australia's Indigenous artists, were delivering on a resale royalty scheme which is fair and balanced and I think that Australian artists but especially Indigenous painters and artists will be the beneficiaries now and into the future.

Journalist: What happens when they die without a will?

Peter Garrett: Well that is something that is going to be an issue that will be important to Indigenous artists and I think by introducing this scheme we will have a greater recognition of

⁴⁰⁶ *Bulun Bulun and Milpurrurru v R & T Textiles Pty Ltd* (1998) 41 IPR 513.

the need on the basis of artists and people generally, particularly in Indigenous communities to consider the issues of succession and make sure that they actual do have wills.⁴⁰⁷

It is also imperative that the right of resale is not merely a stand-alone measure; but that is part of a coherent legal framework designed to protect Indigenous intellectual property.

Section 15 of the legislation deals with the question of succession in an innovative fashion. The right of resale can pass to ‘(a) an individual with a beneficial interest in the right; (b) a charity or charitable institution with a beneficial interest in the right; (c) a community body with a beneficial interest in the right; (d) a person who holds an interest in the right in trust for: (i) an individual; or (ii) a charity or charitable institution; or (iii) a community body.’ Thus, conceivably, the right of resale could pass to an Indigenous community through succession.

(Given this situation, it is surprising that an Indigenous community cannot be considered to be an owner of an artistic work in the first instance – and not merely through succession.)

We note that there have been legal controversies in the past about wills in respect of visual artists - for both Indigenous and non-Indigenous artists. One of the key decisions is *Whiteley v. Clune (No 2) – The Estate of Brett Whiteley*.⁴⁰⁸ In this matter, Powell J had to deal with complex questions about the testamentary intentions of Brett Whiteley, and the interests of a range of parties. (The current leader of the Opposition, Malcolm Turnbull, appeared as a lawyer acting for Janice Spencer). The judge ruled:

Execution of the April informal Will being established - albeit that in circumstances in which there is called for, and it is now agreed that it is proper that there be made, a Declaration under s18A WPA Act - and Mr Kuhn's recollection of its substance and effect now being accepted as accurate, the question thus is, whether, in all the circumstances, the presumption of destruction, *animo revocandi*, ought to be regarded as having been rebutted.

In my view, the presumption ought so to be regarded. Far from this being, as Mr Turnbull submitted it was, a case in which ‘the Deceased was in a state of mental uncertainty as to his testamentary intentions’ and, thus, one in which he was ‘likely to make a Will, think better of it, destroy it and write another one’, it is my view that the overwhelming effect of the

⁴⁰⁷ The Hon. Peter Garrett, ‘Artists to Benefit from Resale Royalty Right’, Transcript, 8 October 2008, <http://www.environment.gov.au/minister/garrett/2008/tr20081003.html>

⁴⁰⁸ *Whiteley v Clune (No 2) – The Estate of Brett Whiteley* (1993) Unreported.

evidence to which I have earlier referred - and which I accept as true - is that, as from about January 1991, the Deceased's testamentary intentions remained constant. This being so, and that Will making a complete disposition of the Deceased's Estate, it seems to me - particularly as the possibility of others having access to the studio during the Deceased's absence, or after his death, cannot be excluded - this is a case in which it is proper to say that the presumption is so weak as not to exist.

I therefore propose that there should be a grant to Miss Whiteley and Mr Clune in the form which I set out below, and that the Cross Claim, the success of which depended, in the first instance, upon there being an intestacy, should be dismissed.⁴⁰⁹

The judge concluded that the will had the following effect: 'I Brett Whiteley of 2 Raper Street, Surry Hills do hereby revoke all my previous wills and declare this to be my final will and testament. I appoint my daughter Arkie Whiteley and Tony Clune as Executors. I give to my mother Beryl Whiteley the sum of \$500,000.00. I give to my sister Wendy Hopkirk the sum of \$500,000.00. I give to Janice Spencer the painting 'Afternoon in Surry Hills'. I give to the Scots School, Bathurst the painting 'Rembrandt Self Portrait.' I give the sum of \$500,000.00, to be obtained from the sale of my paintings known as 'Paris' works or 'Bird' works, to set up a scholarship for young artists.'

We are confident that the legal system will be able to resolve disputes over the right of resale, if need be, given its ability to address complex issues about artists' will in the past.

We would also commend the Arts Law Centre of Australia and the National Association for the Visual Arts' initiative to encourage estate planning by visual artists.⁴¹⁰ The two organizations emphasize the importance of estate management in their excellent guide:

As Michael Ondaatje so acutely put it in his book *The English Patient*, 'We die containing a richness of lovers and tribes, tastes we have swallowed, bodies we have plunged into and swum up as if rivers of wisdom, characters we have climbed into as if trees, fears we have hidden in as if caves.' Fortunately for all of us, artists not only live this richness but seemingly miraculously manifest these ideas, experiences, hindsight and foretelling, the striving for

⁴⁰⁹ Ibid.

⁴¹⁰ Arts Law Centre of Australia and the National Association for the Visual Arts. *Where's There a Will: Estate Planning for Visual Artists*, 2007, <http://www.artslaw.com.au/legalinformation/WhereTheresAWill.asp> and http://www.artslaw.com.au/_documents/files/WhereTheresAWill.pdf

understanding, speculation about meaning, the consciousness of being which distinguishes us all as humans. And when artists die they leave behind an archaeology, which is of value both as evidence of a particular life and also of a people, a time and a place. In order for this archaeology neither to remain buried nor be looted by treasure hunters, safe keeping places and guardians must be predetermined by its creators. And so we come to the practicality of how artists should manage their estates.⁴¹¹

Perhaps this initiative of estate planning for visual artists could be expanded to specifically address the new regime set in place for succession under the *Resale Royalty Right for Visual Artists Bill 2008 (Cth)*.

35 (b). The *Resale Royalty Right for Visual Artists Bill 2008 (Cth)* is to be commended for its innovative provisions dealing with the question of succession.

12.5 National Indigenous Cultural Authority

In the 2008 Wentworth Lecture, Terri Janke contended that there is a need for a National Indigenous Cultural Authority to administer and manage the right of resale for Indigenous artists. She notes:

I note the Australian government's response to the Senate Standing Committee on the Environment, Communications, Information Technology and the Arts Committee Report – Indigenous art – *Securing the Future*, the report on the Inquiry into Australia's Indigenous visual arts and craft sector. The Committee recommended that the Indigenous Art Commercial Code of Conduct be developed and that the Commonwealth undertake a project examining and making recommendations regarding further initiatives to enhance the integrity of the Indigenous arts market. The report also recommended resale royalty rights – another administration and management issue for Indigenous artists. Perhaps, the National Indigenous Cultural Authority could perform some of these functions.⁴¹²

36. The Australian Government should establish a National Indigenous Cultural Authority to administer and manage the right of resale for Indigenous artists.

⁴¹¹ Ibid.

⁴¹² Terri Janke, 'Guarding Ground: A Vision for a National Indigenous Cultural Authority', Wentworth Lecture 2008, August 2008, http://www1.aiatsis.gov.au/exhibitions/wentworth/Janke_21Aug08.rtf

12.6 Indigenous Intellectual Property

Erin Mackay of the Indigenous Law Centre has wisely observed: ‘It remains vitally important that a resale right scheme is implemented as one of several measures directed towards enhancing the position of Indigenous artists, and that the designers of the proposed resale right scheme pay careful attention to administrative arrangements to ensure that the maximum benefit is returned to those that need it most.’⁴¹³

Of course, a right of resale is only one legal element of a framework for the protection of Indigenous intellectual property. The Australian Government should enact *sui generis* legislation to comprehensively implement Article 31 (1) of the *United Nations Declaration on the Rights of Indigenous Peoples 2007*, which provides:

‘Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.’

This declaration was drafted in part by Professor Mick Dodson, Australian of the Year in 2009. There are a number of ways in which the clause could be implemented in national legislation. A possible model would be the *Intellectual Property Laws Amendment Bill 2008* (South Africa).

37. The Australian Government should enact *sui generis* legislation to comprehensively implement Article 31 (1) of the *United Nations Declaration on the Rights of Indigenous Peoples 2007*: ‘Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of

⁴¹³ Erin Mackay, ‘Australian Visual Artists: Joining the Resale Rights Arena’, *Indigenous Law Bulletin*, May 2008, Vol. 5 (3).

their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.'