

Going Going Gone?

The impact of the *droit de suite* on London's art market
January 2006



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Greater London Authority
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About the Committee

The membership of the Economic Development, Culture, Sport and Tourism Committee, agreed by the Assembly on 11 May 2005, is:

Dee Doocey (Chair)	Liberal Democrat
Bob Blackman (Deputy Chair)	Conservative
Tony Arbour	Conservative
Angie Bray	Conservative
Nicky Gavron	Labour
Sally Hamwee	Liberal Democrat
Peter Hulme Cross	One London
Joanne McCartney	Labour

The terms of reference of the Committee are:

1. To examine and report from time to time on –
 - o matters of importance to Greater London as they relate to economic development/wealth creation, social development, culture, sport and tourism in London.
 - o the strategies, policies and actions of the Mayor, the London Development Agency, and the other Functional Bodies where appropriate
2. To examine and report to the Assembly from time to time on the Mayor's Economic Development Strategy and Culture Strategy, particularly their implementation and revision.
3. To take into account in its deliberations the cross cutting themes of: the health of persons in Greater London; the achievement of sustainable development in the United Kingdom; and the promotion of opportunity.
4. To respond on behalf of the Assembly to consultations and similar processes when within its terms of reference.

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Rapporteur's Foreword



The British Art market is London. Our vibrant city is the centre of visual culture and the sale of art is an area of commerce we excel at, second only to New York, and a business that is worth billions to the UK economy.

Reflecting on the importance of the art market in London prompted me to ask the committee to support an investigation into the effects of the new EU directive that came into force in January 2006, introducing the artist's resale right to the United Kingdom. The committee appointed me as rapporteur and this report, which is published on behalf of the Committee, is the result of my research.

The artist's resale right, or *droit de suite*, is a royalty right for visual artists, who are entitled to a percentage of the selling price when their work is sold on. In a global market as competitive as contemporary art sales, any additional costs to business have the potential to have serious implications for the ability of art dealers and auction houses to stay ahead of the game.

The United Kingdom has no choice on whether or not to implement the directive, so the aim of this report was never to argue whether or not to implement *droit de suite* in January 2006. What we wanted to do is examine the potential effects for good or bad, to try to influence how the directive is implemented, and to make recommendations that could be adopted when it is reviewed in 2009.

There is some flexibility which enables the Government to set some of the terms of the implementation of *droit de suite* in the UK. This flexibility was the result of effective negotiations by the Government aimed at minimising the impact of the *droit de suite* on UK businesses. We welcome some of the safeguards put in place by the Government to protect businesses. But we are concerned and surprised by the Government's recent decision to lower the minimum price at which *droit de suite* royalties are payable, from €3,000 to €1,000 (£2,000 to £667). This represents a disappointing and potentially damaging (to dealers and artists alike) reversal of previous policy. We call on the Government to reinstate its original policy of setting a minimum threshold of €3,000 (£2,000). This would achieve an appropriate balance between the rights of the artists and the ability of dealers to absorb the costs.

We are also mindful of the review in 2009, and are anxious to encourage the government not to water down any of the important concessions won on this directive, and keen to persuade those conducting the review that this might be an opportunity to introduce further protection depending on what evidence is presented to it.

Angie Bray AM

Rapporteur for the Economic Development, Culture, Sport and Tourism Committee

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Summary of recommendations

This report contains the following recommendations:

1. The three main political parties all opposed the adoption of the *Droit de Suite* Directive. We are now bound to take all possible steps to minimise its negative impact on the UK art market. The Government should, at the earliest opportunity, revise the minimum sale price at which the *droit de suite* applies. The minimum threshold should be €3,000 (£2,000), as was originally envisaged.
2. The UK Government and the Mayor should lobby for London's international competitors to introduce *droit de suite* in their countries, in line with the existing international agreement. In particular:
 - (a) The Mayor and UK Government should support the efforts of Assemblyman Brodsky in New York to introduce legislation that would introduce a resale right in New York.
 - (b) The Mayor and UK Government should lobby the European Union to persuade Switzerland to adopt *droit de suite*. This could be done through the bilateral negotiation process that has already been successfully used in relation to other EU law. These bilateral negotiations have demonstrated that the Swiss Government has been prepared to adopt EU-compliant legislation in return for access to the EU market.
3. In order to minimise the diversion of sales at the upper end of the art market to the US and Switzerland, the UK should seek to extend its derogation on the works of deceased artists until such time as the US and Switzerland implement *droit de suite* and thus create a level international playing field. Alternatively, the Government should argue for the derogation to be permanently written into the Directive at the point of the 2009 review, in order that our fellow member states may enjoy the same protection as the UK market currently enjoys.
4. The UK government, Mayor of London and London's art trade should endeavour to demonstrate how a vibrant art market in London is good for the rest of Europe and how this is compatible with a strong single market in Europe. The Mayor should take a lead in promoting London's art market in Europe and lobbying on its behalf.
5. We recommend that the Patent Office publish details of how it intends to measure the impact of the *droit de suite* on the UK art market, including the evidence base it intends to use and the models it will use to assess its impact compared to other factors. In particular, it will be important to assess the impact of the levy on the sale of contemporary works of art and the diversion of the market to New York and Zurich, the impact of the levy on small businesses, and the balance between the costs of administering the levy and the benefits accruing to artists. The impact assessment should include a full cost-benefit analysis of the application of the minimum price at which the directive applies, and its impact on dealers in London and an analysis of the effect of the sliding scale of royalty payments and the maximum royalty payment of €12,500 (£8,333). This information will enable us properly to assess the effects of the UK's implementation of the Directive.

6. We recommend that the Patent Office undertake to publish in full the results of its research annually, with a final report being published well in advance of the European Commission's 2009 review of the *droit de suite*.
7. The Mayor of London, in partnership with other agencies, should facilitate a regular campaign and series of events to celebrate and publicise art in London. Like the London Fashion Week and British Film Institute London Film Festival in these fields, it should capitalise on the vitality of London's art scene and be used to stimulate interest in art and the London art market. It should be funded from within the art sector, with the Mayor playing a coordinating and facilitating role.

Going, Going, Gone?

The impact of the *Droit de Suite* on London's art market

1. London's art market

- 1.1 London's art market makes a vital contribution to the economy of the capital and the country at large. Sales of art in the UK in 2001 amounted to £4.2 billion (€6.3 billion), with the majority of the trade by both volume and value in London. The UK accounts for more than 50 per cent of the European art market and had a global market share of 25.3 per cent in 2001, second only to the United States¹. And although it records a lower rate of sales by value than the US, the UK is the world market leader in auction sales by volume, with a 29.4 per cent world market share. During the 2004/5 season, 22.3 per cent of world fine art auction sales by volume were made in the UK, compared to 19.7 per cent in the US.² Given London's pre-eminence within the UK market – in terms of art dealing by value, London *is* the UK art market³ – this makes the city by far the most important location for art sales in Europe. Internationally, only New York and – to a lesser extent – Zurich challenge London's position as the centre of the global art market.
- 1.2 London's global significance in the art market is further demonstrated by the geographical origins of buyers. Among members of the Society of London Arts Dealers, less than half of business by value (43 per cent) was conducted with domestic buyers; American buyers accounted for 33 per cent of transactions by value and other EU buyers 15 per cent. In 2003, imports of antiques and fine art to the UK from outside the European Union amounted to £1.43 billion (€2.15 billion⁴) and exports totalled £2.15 billion (€3.23 billion). The proportion of business originating outside the UK has increased since 2002.⁵ The increase in American collectors came despite the relative weakness of the dollar and may reflect their greater willingness to travel compared to 2002, when the impact of 9/11 resulted in a reduction in the numbers of Americans visiting Europe. Altogether, non-UK buyers accounted for some 57 per cent of value of the Society of London Art Dealers' members' business in 2005. They will also have made a significant wider contribution to the capital's economy through their spending on, for instance, travel to and within the capital, accommodation and visits to London's restaurants and theatres in addition to their art purchases. As such, the transport, hospitality and entertainments sectors are, among others, all beneficiaries of London's international standing as a centre for art sales.

¹ The European Art Market in 2002, The European Fine Art Foundation, 2002, p. 29.

² The Market for Art, House of Commons Culture, Media and Sport Select Committee; Sixth Report of Session 2004-05, p. 8.

³ Louisa Buck, Arts Council England, October 2004 'Market Matters: the dynamics of the contemporary art market', page 18

⁴ For the purposes of this report, a conversion rate of £1 = €1.50 has been applied

⁵ Society of London Art Dealers, Survey of Members, June 2005, p. 5.

- 1.3 The art market makes a significant contribution each year to the UK Treasury. The economic benefit of art and antiques to the UK Treasury in 1998 was calculated by the consultancy Market Tracking International at more than £426 million (€639 million). Some £130 million (€195 million) of this was from income taxes levied on employees, £193 million (€290 million) from corporation taxes on profits and £104 million (€156 million) from VAT.⁶ Total sales within the UK art market amounted to £3.2 billion (€4.8 billion) in 1997/8;⁷ given the growth of the UK's art market since then, with total sales reaching £4.2 billion (€6.3 billion) by 2001 (an increase of approximately 31 per cent), we can assume that the economic benefit of the art market to the UK Treasury has grown considerably since 1998.
- 1.4 The British art market is also a major employer in the UK accounting for more than 10,000 businesses (9,463 art dealers and 754 auction houses), employing some 28,000 full time and 9,000 part time staff.⁸ Auction houses account for approximately half of art sales by value in the UK. The two largest international auction houses, Sotheby's and Christie's have significant operations in London, with Christie's headquartered in London. In the 2003/4 season, Sotheby's recorded £276 million (€414 million) of sales in London and Christie's £200m (€300 million), compared with £441 million (€662 million) and £276 million (€414 million) in New York respectively. The remaining half of art sales by value are made by art dealers. Concentrated in London, these range in size from single-person operations to galleries employing more than 6 members of staff, including the owner.⁹
- 1.5 In addition to the thousands directly employed by art dealers and auction houses, many more people work in ancillary services, such as framing, conservation and restoration, specialist shipping and packaging, as well as insurance and legal services. These services rely upon the art market. This concentration of expertise in support of art dealers and auction houses is one of London's principal assets in the art market, 'a critical mass that is unsurpassed globally'.¹⁰ The art trade's stimulation of these supporting industries is estimated to create an economic multiplier of at least 13 per cent, feeding into the wider UK economy.¹¹
- 1.6 Twentieth century art accounts for a high proportion of London's art trade. According to the Society of London Art Dealers' 2005 survey of its members, almost half trade in at least one genre or period of twentieth century art.¹² Modern and Contemporary art dealers in London are concentrated around Piccadilly, with Cork Street a particular centre. Art fairs, many of which take place in London, such as the Frieze Art Fair, the 20/21 British Art Fair, Grosvenor House and Art Islington, are another common method of showcasing and selling art.

⁶ *ibid.*, p. 8.

⁷ *Droit de Suite in the UK*, Market Tracking International Consultants, 1999, p. 3.

⁸ The European Fine Art Foundation, 2002.

⁹ Society of London Art Dealers, p. 9.

¹⁰ The European Fine Art Foundation, 2002, p. 29.

¹¹ *ibid.*, p. 29.

¹² 46 per cent of these trade in Impressionist / Modern art, 48 per cent in Post War art (to 1980) and 44 per cent in Contemporary art (since 1980) (The percentages add up to more than 100 per cent because most members deal in more than one area of the fine art market.) Society of London Art Dealers, pp.1-2.

- 1.7 The Society's survey demonstrates the robust health of art dealing in London. The calendar year 2004 was, it notes, 'characterised by a marked improvement in trading conditions compared to the situation revealed by the 2002 survey'.¹³ Nearly half the Society's members reported that 2004 had turned out to be better than expected, against 23 per cent for whom the year had turned out worse. Some 43 per cent expected even better prospects for the coming year against just 15 per cent who thought improvements would not continue. The general improvement in market conditions appears to have been enjoyed by the Society's members across the board. 26 per cent of members achieved a year-on-year increase in net sales, compared to just seven per cent who experienced a decrease of a similar size. Changes to pre-tax profits closely corresponded to changes in turnover.¹⁴
- 1.8 This picture of a buoyant art market in the UK is supported by written evidence submitted to the House of Commons Culture, Media and Sport Committee in 2005. The independent art market strategist Sarah Thelwall stated that the market for the production and sale of works of art is "demonstrating significant and ongoing growth from the position it occupied a decade ago", both in London and the rest of the UK.¹⁵
- 1.9 Amid the generally healthy climate for London's art dealers, however, lurk some developing concerns. Like other economic sectors, London's art market is subject to macro-economic pressures and periodic peaks and troughs, as well as competition from other international art markets. The market's current buoyancy will not inoculate it against a future economic downturn or increased competition. It also faces more specific fiscal and administrative issues, such as the impact on business of import VAT and the lowering of EU export licence thresholds. Of greatest concern to many art dealers and auction houses, however, is the implementation in the UK of the European Parliament and Council Directive 2001/84/EC, generally known as *droit de suite* (or artist's resale right).

2. What is *droit de suite*?

- 2.1 Musicians and writers have long been able to claim royalties each time their work is performed in a concert or on stage, played on the radio or reprinted. Visual artists, many of whom are relatively poor and have to supplement their artistic work with other jobs,¹⁶ receive money when their work is first sold, but not thereafter (they do, under copyright law, receive a fee if their work is reproduced, but not when the original is sold). So visual artists do not gain the same ongoing income from their work as other artists, and do not benefit from the potentially increasing value of their work over time. The *droit de suite* is a mechanism which provides for visual artists to receive a proportion of the price of a piece of their work, each time it is sold.

¹³ *ibid.*, p. i.

¹⁴ *ibid.*, pp. 3-4.

¹⁵ The Market for Art, *ev.* 70-72.

¹⁶ 37 per cent of UK artists earn less than £5,000 (€7,500) per year - DACS, 'The artist's resale right and its effect on the British art market - an assessment by the British Art Market Foundation'

- 2.2 The *droit de suite* applies to ‘original work of art’, which are defined as ‘works of graphic or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs, provided they are made by the artist himself or are copies considered to be original works of art’. It entitles the author of an original work of art and, for 70 years after his or her death, his or her successor in title, to receive a royalty payment whenever an original work is resold through an art market professional within the EU (an auctioneer or dealer). *Droit de suite* came into force in the UK on 1 January 2006 for the resale of works by living artists only. There is some flexibility within the Directive which allows Member States to determine some of the terms of the implementation of the resale right. The application of this flexibility will be crucial in minimising the potential negative impact of the Directive on the London art market whilst providing for artists to receive royalty payments on sales of their work. The UK Government’s approach is discussed in section four of this Report.
- 2.3 Some EU member states, such as France, Germany and the countries of Scandinavia, each with considerably smaller art markets than the UK, already apply a *droit de suite*. The terms of the right currently vary from country to country. In Germany and Denmark, five per cent of the selling price has to be paid to the artist; in Belgium it is four per cent and in France three per cent. The minimum threshold – the price at which works of art are subject to *droit de suite* – also varies from country to country. In France all eligible works of art sold for more than approximately €15 are covered by the right; in Sweden and Denmark the threshold is equivalent to €200 and €300 respectively.
- 2.4 A directive to apply *droit de suite* throughout the European Union was first put forward by the European Commission in the early 1990s. During several years of negotiation, the British government voiced consistent opposition to the directive, with support from the other member states, which did not apply a resale right (Ireland, the Netherlands and Austria) on the grounds that internal EU harmonisation should be conditional on international agreement on *droit de suite*. Throughout the deliberations, all three main British political parties were opposed to the measure. Attempts to reach a compromise during the German and Finnish presidencies in 1999 failed. These efforts included the personal intervention of the British Prime Minister, who suggested that implementation of the directive should be delayed until an international agreement on *droit de suite* had been agreed.¹⁷
- 2.5 After some compromises and amendments to the terms of the directive, the European Parliament and Council Directive 2001/84/EC – henceforth referred to as the *droit de suite* – was adopted on 27 September 2001. As a ‘single market’ measure, the directive was subject to qualified majority voting under Article 100a of the EC Treaty. The UK and Austria took the significant step of voting against the directive, but were unable to prevent its passage into law. The right is now, for all member states, a *fait accompli*. This report is about how the implementation of the *droit de suite* can be managed in the

¹⁷ Response by the British Art Market federation to the Consultation on the Implementation of Directive 2001/84/EC on the Resale Rights for the benefit of the author of an original work of art, p.2.

UK so as to minimise its potential detrimental impact on the London art market in relation to its main non-EU competitors, New York and Zurich.

3. ***Droit de suite* and the London art market**

Diversion of trade and a diminishing market

- 3.1 London's art trade has expressed widespread concern about the potential consequences of *droit de suite* for the London art market. Some of those who contributed to this review equated the *droit de suite* to a four per cent tax on turnover for dealers specialising in modern and contemporary art. The foremost concern within the trade is that the royalty payment incurred on modern and contemporary art sold in London will result in trade being diverted to alternative markets where there is no *droit de suite* and transaction costs are therefore lower.¹⁸
- 3.2 Many in the trade predict that New York and Zurich - where art will not be subject to the right - will be the chief beneficiaries of the introduction of *droit de suite* in the UK. Given the portability of art and since comparable professional expertise is also offered in New York and Zurich, it is feared that sellers will take advantage of their lower costs and simply switch transactions to these markets. It was also suggested that the increased transaction costs of art sales would further compound the effects of this shrinkage of the market. In this scenario, as London's art trade diminishes, so does turnover among art dealers and auction houses, which could result in job losses throughout the art market, in ancillary sectors and in London's wider economy.
- 3.3 In evidence to this review, Thomas Lighton, Director of Waddington's Gallery, reflected a common concern that *droit de suite* would have a similarly harmful effect on the ancillary services which depend on a vibrant art market in London such as framers, photographers, restorers and shipping specialists.¹⁹ It was also suggested that other parts of the London art market would feel a knock-on effect of any decline in London's modern and contemporary art market. Fewer people coming to London to buy art would mean fewer customers, for example, for furniture and other antiques and pre-20th century art.²⁰
- 3.4 Small businesses are expected to suffer most under *droit de suite*, since they would be least able to absorb higher costs or relocate parts of their business to follow the market. The Society of London Art Dealers' 2005 survey of its members found that 35 per cent felt they would be seriously affected by *droit de suite* and 30 per cent slightly affected. 35 per cent of its members felt that they would not be affected by *droit de suite*. According to a Patent Office-commissioned survey, it appears that, were the fears of many within the London art market about *droit de suite* to be realised, art dealers rather

¹⁸ A nexus is the legal and accounting term that defines the specific location where a transaction generates tax liability.

¹⁹ Transcript of meeting with Thomas Lighton, Waddington's Gallery, p. 2.

²⁰ *ibid.*, p. 1.

than auction houses would be the hardest hit, since they generate proportionately more *droit de suite* eligible sales than auctions.²¹ The survey estimated that the *droit de suite* would result in a 20.2 decline in dealer sales (£44.6 million or €66.9 million) and a loss of 8.6 per cent of all jobs in art dealing firms. Furthermore, the survey report stated that, 'this does not take into account the fact that 50 per cent of art dealers are considering moving part of their (*droit de suite*-eligible) business to other countries (for example the USA), which might result in a further 8.7 per cent (£19.2 million, or €28.8 million) decline in sales and consequential job losses of 3.7 per cent'.²²

- 3.5 Research suggests that a diversion of trade away from the EU as a result of *droit de suite* would disproportionately affect higher priced works of art. The lower the price of an art sale eligible to *droit de suite*, the less likely it is that the seller based within the EU would seek to sell it elsewhere in order to avoid the additional cost of the *droit de suite*. However, above a certain threshold the *droit de suite* is likely to be a significant disincentive to selling art within the EU. Ceri Witchard from the Patent Office told this review that it would not be financially worthwhile for the seller to divert sales for under £10,000 (€15,000) to New York.²³ The British Art Market Federation cites a study conducted for the French government which concluded that transportation costs would make it uneconomical to ship lower priced works of art from Paris to New York or Zurich purely to avoid the *droit de suite*. However, the study found that once the value exceeds the threshold of €22,000, the *droit de suite* royalty incurred would be greater than the transportation costs involved and it would be economically more attractive to divert the item to Zurich. At a value of more than €33,000, it would be more economical for the vendor to divert the item to New York.²⁴ Economies of scale dictate that the larger the collection, the lower the collective cost of transporting the works of art within it. A 1999 report by MTIC for the Patent Office suggested that the loss of business resulting from the *droit de suite* could be as much as £205 million (€307 million) of sales, assuming that sales at a value of over £50,000 (€75,000) were diverted to New York. The report stated that, 'there is no indication as to how quickly this would switch to the US, but it is generally regarded that the highest priced items would move almost immediately, which would result in a loss of some £94 million (€141 million) worth of sales'. The report suggested that £57.6 million (€86.4 million) of earnings would be at risk.²⁵
- 3.6 Many of the items sold in London are imported into the UK from locations across the world for international sale.²⁶ For a collection originating in, for instance, Hong Kong or Japan, the transport and insurance costs involved in shipping items to London or New York are likely to be very similar. The additional transaction cost incurred through *droit*

²¹ Artists' Resale Right, p. 10.

²² Garard Leeuwenburgh (commissioned by the Patent Office), December 2003, 'Study of the Potential Impact of Droit de Suite on the UK Art Market 2006/2012', page 2

²³ Transcript of meeting with Ceri Witchard, UK Patent Office, 27th October 2005, p. 2.

²⁴ The Artist's Resale Right and its effect on the British Art Market, p. 6.

²⁵ MTIC Limited (commissioned by the Patent Office), April 1999, 'Droit de suite in the UK – a study of the impact of the proposed harmonisation of EC artist resale rights levies on the UK art market', page 17

²⁶ In this way, *droit de suite* is potentially far more damaging to the London art market's international trade than has been the impact of VAT on art imports. Droit de suite is nexus-specific and therefore inescapable while, under VAT import rules, imported works of art are exempt from the tariff if they are re-exported within two years.

de suite in London – up to €12,500 per item – could be a significant deterrent to selling the collection in the UK and it might accordingly be diverted in its entirety to New York. Even in a collection where only some items would be subject to *droit de suite*, some argue that owners would be likely to sell the collection as one sale, rather than breaking it up to sell at different nexuses. In this case, London might be expected to lose an entire sale even if only some items were *droit de suite*-eligible.

- 3.7 Precedent from other European countries, such as Sweden and Denmark may give some indication as to the likely effect of the new levy on the London art market. Sweden was the latest EU member state to introduce *droit de suite* before the EU directive. Although its art trade had been convinced that *droit de suite* would be the death of the art trade in Sweden, presuming that the market would relocate to the UK, these fears were not realised. Mats Lindberg, from Sweden's royalty collection society, BUS, said that, '*droit de suite* seems to be a neutral factor in the art market when looking at sales and market development . . . we cannot find any evidence that *droit de suite* has changed the market at all'.²⁷ Similarly, Denmark, which introduced the right in 1990, has not seen any significant shrinkage of its art market. But due to the differing nature and size of the Scandinavian and British art markets, such comparisons do not provide much comfort for London's art dealers. They believe that because Britain's art market is significantly larger than any other in Europe, and more dependent on non-domestic trade, there is no like-for-like comparator that has already implemented the *droit de suite*.
- 3.8 Some evidence suggests that the London art market may not be as vulnerable as assumed to price competition. London's two largest auction houses, Sotheby's and Christie's, have progressively increased their buyer's premium in the past decade, now standing at 20 per cent, without any consequent decline in sales. Art buyers' ability to absorb this bodes well for auction houses' absorption of *droit de suite*, levied at no more than 4 per cent of sale price. This has led some to infer that *droit de suite* may not have the dire consequences for the wider art market that some fear. On the other hand, this is another unreliable predictor of the likely impact of the *droit de suite*. The effect of the 20 per cent buyers' premium at Sotheby's and Christie's is an inexact analogy for the potential impact of *droit de suite*, given the two auction houses' dominance of the international art market on either side of the Atlantic and their capacity to influence global market practices in the auction house segment of the art market.
- 3.9 One of the British art market's principle strengths is its expertise, both in art connoisseurship and in ancillary services, built up through generations. Coupled with the 'irrationality' of the global art market, this may offset the reduced economic competitiveness of the London art market which *droit de suite*, along with other financial and fiscal burdens, seems likely to impose. By the same token, however, if the reduced economic competitiveness of the London art market as a result of *droit de suite* does instigate relocations to alternate nexuses and a sudden or gradual decline in the

²⁷ Submission by Mats Lindberg, BUS, to the consultation on the implementation in the UK of the EU Council and Parliament Directive 84/2001 on Resale Right, p. 1.

accrued expertise within the London art market, the collective loss of expertise would have a disastrous – and possibly irrecoverable – effect on the capital.

- 3.10 The market in contemporary art is most likely to be affected by the introduction of *droit de suite*, for two reasons. First, contemporary works are more likely to be subject to the levy, and secondly the market for contemporary art is global. Old British works, armour and instruments can be expected to continue to sell well in London, where there is the necessary expertise and a strong existing market. But there is an expectation among art dealers and auction houses that sales of contemporary art will be diverted to New York or Zurich. The Patent Office-commissioned research of December 2003 reported that ‘all of the art dealers interviewed expected the US market in modern and contemporary art to profit from the introduction of *droit de suite* in Britain. 83 per cent expect the US market to profit considerably’.²⁸ Among dealers interviewed in the survey, 25 per cent suggested that their trade in modern and contemporary art would decline immediately, another 29 per cent that it would decline slowly. Only 7 per cent felt that it would not affect their business at all.²⁹ A representative from Sotheby’s in New York told us that the existence of expertise within London may not prevent sales from moving to New York, because it would be easy to transport people to New York for the duration of a sale. He said, ‘most of this type of background talent can be transported to different locations. At the end of the day, the decision by clients to sell in London or New York will be down to the dollars and cents of the transaction’.³⁰
- 3.11 In itself, *droit de suite* may not be the calamity which some in the London art market fear. But the balance of evidence suggests that *droit de suite* will place an additional economic burden on the London art market. Experience from the implementation of VAT on art coming into the UK has shown that additional costs can be perceived to be damaging to the industry. Indeed, in line with the EU’s 7th Directive on VAT, Britain has since 1995 applied VAT on art coming into the UK, levied initially at 2.5 per cent and, since a UK derogation expired in 1999, at 5 per cent, although items are exempted from payment if they are re-exported within two years. Among art dealers surveyed by the Society of London Art Dealers, import VAT was felt to be the EU measure with the greatest adverse impact on their business, with 90 per cent reporting that they had been either seriously or slightly affected by it.³¹
- 3.12 The effect of *droit de suite* should be seen within the context of multiple market interventions and a growing bureaucratic burden, largely stemming from EU measures, which may have the collective effect of reducing the London art market’s international competitiveness. Ironically, it was a Sotheby’s New York spokesman who best encapsulated the cumulative threat to the British art market, noting that ‘multiple costs add up’.³² The likely impact of the *droit de suite* on the London art market is difficult

²⁸ Garard Leeuwenburgh (commissioned by the Patent Office), December 2003, ‘Study of the Potential Impact of Droit de Suite on the UK Art Market 2006/2012’, page 13

²⁹ *ibid.*, p.11.

³⁰ Meeting with representative from Sotheby’s New York

³¹ Society of London Art Dealers, p. 12.

³² Transcript of meeting with Sotheby’s New York, 13th September 2005, p. 2.

to predict, but it is clear that there are genuine and valid concerns among art dealers in London about the risks it may pose to the London market.

4. Implementation of *Droit de suite*

- 4.1 Although *droit de suite* cannot be avoided, it is possible to offer some recommendations on its operation and how it can be reviewed. These fall largely under four headings:
- a. Using the flexibility afforded by the Directive to set terms for the *droit de suite* in the UK that will minimise its negative impact on the UK art market. This includes setting the threshold at £3,000, introducing compulsory collective management, and extending the derogation to exclude works by deceased artists.
 - b. Promoting universal adoption of *droit de suite*;
 - c. Monitoring and assessing the impact of *droit de suite* in order to influence the EU's review in 2009;
 - d. Promoting the vibrancy and strength of London's art market.

Terms of the Directive

- 4.2 The Directive permits for some national variations in the rates and thresholds levied on works of art. In February 2005, the Patent Office published a consultation paper outlining the proposed rates and thresholds to be applied in the UK upon implementation of the Directive. The consultation paper included a number of important measures designed to protect the UK art market from the potential detrimental effects of the *droit de suite*, whilst providing artists with the new right to receive royalties on their work. The terms set out in the draft statutory instrument which would bring the Directive into force in the UK, and included in the consultation paper, were as follows.
- a. The *droit de suite* would not apply to works bought by galleries directly from the author and resold within three years and for €10,000 (£6,667) or less. This was designed to preserve the ability of galleries to support artists by buying their work, at the risk of financial loss, in order to support them.
 - b. The UK would use the derogation (a provision in the Directive for Member States to opt out of certain provisions for a limited period of time) not to apply the resale right to deceased artists until 2010, with a possible extension to 2012.
 - c. The royalty rate on the lowest price band (up to €50,000, or £33,333) would be 4 per cent, compared to the maximum of five per cent provided for in the Directive. There would then be a sliding scale of royalty rates with a maximum amount of €12,500 (£8,333).
 - d. The resale right would not apply to works sold for less than €3,000 (£2,000).
- 4.3 We welcome the provision for a sliding scale of fees with a maximum royalty payment of €12,500 (£8,333). This will to some extent protect the art market from the potential for sales of high-value works of art to be redirected to New York or Zurich.
- 4.4 We also welcome the exclusion of works bought by galleries and sold within three years for less than €10,000 (£6,667). This will protect the custom of galleries supporting

unknown artists by buying their work early in their careers, at the risk of having to sell the work on at a loss at a later date.

The €1,000 threshold

- 4.5 According to the British Art Market Federation, the maximum limit on *droit de suite* payments, the exclusion of sales below €3,000 (£2,000) and the UK derogation to exclude the work of deceased artists until 2012 were all important concessions secured by the British government.³³
- 4.6 In mid-December 2005, just two weeks before the implementation of the Directive, the Patent Office finally published the results of its consultation and a new statutory instrument. Some of the measures set out in the consultation paper will be implemented as previously planned: the three-year waiver for galleries purchasing work and reselling it for less than €10,000 (£6,667); the exclusion of works of deceased artists until 2010; and the royalty rates, including the maximum rate of €12,500 (£8,333). However, there was one significant revision to the draft statutory instrument. The threshold will now be set at €1,000 (£667) instead of €3,000 (£2,000).
- 4.7 The UK Government, during negotiations about the Directive, fought for the inclusion of a right for Member States to set the minimum sale price at which the resale right would apply, and successfully argued for there to be a maximum threshold of €3,000 (£2,000).³⁴ In fact, during negotiations, the UK Government argued for a much higher threshold of €10,000 (£6,667).³⁵ The consultation paper published by the Patent Office in February 2005 asked whether the UK should apply a €3,000 (£2,000) threshold.
- 4.8 The benefit of the €3,000 (£2,000) threshold that was planned to be applied in the UK was that it struck a balance between the costs of administering the *droit de suite* and the royalties accruing to the artist. The lowering of the threshold is a response to representatives of artists, who wish to see as many payments being made to as many artists as possible. This is premised on the assumption that more payments will be better for artists. Whilst this view is understandable, this is not necessarily the case. *Droit de suite* has been shown to result in far greater benefits to successful artists whose work attracts a high price. Gerard Leeuwenburgh's research, published in 2003, showed that if the *droit de suite* had been in place in the UK in the 2001/02 season, eight out of 189 artists would have received 30.8 per cent of all royalties collected. Those eight artists would have received an average of £12,969 (£19,454), whilst the remaining 181 artists would have received an average of £1,289 (£1,933). The total amount of royalties payable to living British artists would have been £337,038 (£505,557), of which 30.8 per cent (£103,750, or £155,625) would have been payable on artworks sold for more than €50,000 (£33,333).

³³ The Artist's Resale Right and its effect on the British Art Market: an Assessment by the British Art Market Federation, p. 1.

³⁴ Evidence from Simon Stokes, partner in law firm Tarlo Lyons, to Culture, Media and Sport Select Committee, March 2005, Ev 68 para 2.3

³⁵ Culture, Media and Sport Select Committee, March 2005, The Market for Art, page 15 para 49

- 4.9 This bias towards successful artists cannot be mitigated simply by increasing the *number* of payments made. Gerard Leeuwenburgh's research for the Patent Office showed that the effect of increasing the threshold from €1,000 to €3,000 (£667 to £2,000) would be to reduce the number of *droit de suite* eligible artworks sold at British auction houses by 38.6 per cent.³⁶
- 4.10 The amount received by artists whose work is sold for €1,000 (£667) will be less than €40 (£27) – the rate applicable will be 4 per cent, minus any commission payment to the collection agency. The cost to the dealer or auction house of applying the *droit de suite* to each sale has been estimated at as much as £28 (£42) per artwork,³⁷ although the Patent Office has evidently been persuaded by the Design and Artists Copyright Society that the cost is likely to be closer to ten per cent of the sale price. Selling a work of art for €1,000 (£667) will now cost a dealer an additional £7 to £28 (£11 to £42) in administration costs, and will cost a further £30 (£45) in royalties. Added together, this amounts to a disincentive to dealers to sell such works at all. Lord Sainsbury told the House of Commons Culture, Media and Sport Committee that the Government was not minded to lower the threshold because, 'we think at that point the administrative costs become an absurdly high proportion of the actual payments which will go to artists.'³⁸ In that case, the lower threshold may act against artists whose work is sold for less than €3,000 (£2,000), because dealers and auction houses may be less willing to sell such works because of the additional cost. And if dealers do continue to sell lower-value works, the *droit de suite* will make a significant dent in their profits.
- 4.11 It was for these reasons that the UK Government fought successfully for the right to apply a minimum threshold of up to €3,000 (£2,000). We are concerned as to why this hard-won concession has now been dropped, especially given that the Patent Office's report on the responses to its consultation on the terms of the Directive does not provide any evidence as to why this decision has been taken. This is a move which reverses the Government's previously stated policy and which has the effect of gold-plating the Directive.

Recommendation 1:

The three main political parties all opposed the adoption of the *Droit de Suite* Directive. We are now bound to take all possible steps to minimise its negative impact on the UK art market. The Government should, at the earliest opportunity, revise the minimum sale price at which the *droit de suite* applies. The minimum threshold should be €3,000 (£2,000), as was originally envisaged.

³⁶ Gerard Leeuwenburgh, 2003, page 15

³⁷ Gerard Leeuwenburgh, 2003, page 15

³⁸ Culture, Media and Sport Select Committee, March 2005, The Market for Art, page 16, para 54

Excluding deceased artists

- 4.12 The derogation secured by the UK defers the implementation of the right for deceased artists – widely felt by the art trade to be the most onerous element of the directive – until 2010, extensible to 2012.
- 4.13 A study of British art sales in 2001/2 for the Patent Office found that the total value of *droit de suite*-eligible business, including works by deceased artists, would have amounted to £442 million (€663 million). Works by living artists would have accounted for £64.8 million (€97.2 million) of this, and would have generated £1.8 million (€2.7 million) of royalties.³⁹ The Design and Artists Copyright Society told us that *droit de suite* will apply to two per cent of the UK art market whilst it only covers the work of living artists, but that this will rise to 10 per cent once it applies to both living artists and those who died less than 70 years ago.⁴⁰ This suggests that the impact of *droit de suite* on the London art market will be felt most strongly after the derogation on deceased artists' works expires.
- 4.14 Evidence supplied by the British Art Market Federation from the French and German art market supports this. It notes that the *droit de suite* 'mainly benefits the descendents of artists, particularly the most famous ones', and observes that in Germany in 1998, artists' heirs received over seven times more in royalties than living artists. Similarly in France in 1996, it is estimated that some 70 per cent of the *droit de suite* collected was paid to the families of six or seven artists.⁴¹ In addition to the main society for collecting royalties payable under the *droit de suite* in France, the Société des Auteurs Dans les Arts Graphiques et Plastiques, there are two agencies, Succession Picasso and Succession Matisse, which exist solely to manage the royalties for these two artists.⁴² Art dealers interviewed for this review have voiced concerns that the economic burden placed on the London art market from 2010 will far outweigh the benefits of *droit de suite* for living artists. The derogation, unless it is extended beyond 2010, could be seen as simply putting off the inevitable damage to the UK art market that would be caused by the full *droit de suite*, whilst not bringing any additional benefits to living UK artists.
- 4.15 Working with European partners will be essential to maintaining the UK's derogation on the works of deceased artists and to help alleviate the predicted effects of *droit de suite* as it will operate in the UK from 2010 onwards. Above all, the UK needs to demonstrate through governmental and diplomatic channels the value of a vibrant art market in the UK to the whole of the EU. What is good for London will be good for the rest of Europe in maintaining its position in the global market.
- 4.16 Given that the European Commission saw the implementation of *droit de suite* as a means to reduce distortions to the internal market, arguments to the European

³⁹ Study of the Potential Impact of Droit de Suite, p. 1.

⁴⁰ Artists' Resale Right: getting it right first time, Design and Artists Copyright Society, August 2005, p. 4.

⁴¹ Background briefing: *droit de suite*, p. 5.

⁴² Implementing Droit de Suite in England, Clare Mc Andrew and Lorna Dallas-Conte. The Arts Council of England, p. 33.

Commission on the validity of the derogation should be couched in these terms. A harmonised internal market may be conceived to be a fair market for all within it, but it must also be a strong market, able to compete internationally. In arguing for an extension to the derogation, the UK will need to present its derogation as a measure of pan-European good, in line with the principles of a strong single market, rather than a specifically national issue. Again, building support among other Member States will be essential if this approach is to have any chance of success.

- 4.17 In the long term, the most effective way of mitigating the risk of the diversion of trade would be for the *droit de suite* to be implemented internationally, creating a level playing field across the board. Provision for *droit de suite* is made in article 14 of the main international copyright convention, the Berne Convention, administered by the World Intellectual Property Organisation. Article 14 is, however, not mandatory for parties to the Convention and, as such, *droit de suite* has not been adopted by some countries outside the EU, principally the UK's two largest competitors in the international art market, the US (except California) and Switzerland. The World Intellectual Property Organisation has indicated that extending the right internationally is not a priority for the organisation.⁴³ The US and Switzerland are therefore under no pressure from that direction. The House of Commons Culture, Media and Sport Select Committee urged the UK Government to lobby for a universal adoption of *droit de suite*.⁴⁴ The Government and the Mayor should argue the case for universal implementation on the basis that it is provided for in an international agreement and would provide artists with an ongoing source of income in line with other creative industries.
- 4.18 In New York there is an increasing political appetite to introduce *droit de suite*. The Visual Artist Rights Act, a copyright law to cover visual artists (rather than *droit de suite* legislation), became law in 1990. When the legislation was introduced, those opposing the introduction of such legislation stated constitutional arguments could be put forward to prohibit the extension of legislation already in place.⁴⁵ It was suggested that the proponents of *droit de suite* in the US have not demonstrated empirically that the Copyright Act treats fine artists less favourably than authors and composers who create numerous copies of their work. Constitutional lawyers have also argued that because of the inherent problems of integrating *droit de suite* into the domestic market in the US, even if it were shown that the Copyright Act was working against visual artists, the resale royalty right would not be an adequate means of rectifying the situation.
- 4.19 Sotheby's New York told this review of attempts by an Assemblyman, Richard Brodsky, who has sponsored a bill on an annual basis for the past 15 years in an attempt to introduce *droit de suite* in the New York market and thus bring it in line with both Europe and California. Unlike the European directive, this bill does not include a 70 year limit, but it has gained increasing political support. However, it has yet to pass through committee stage at the State Assembly. A clear attempt should be made by the British Government and the Mayor of London to support the introduction of this bill.

⁴³ Background briefing: *droit de suite*, British Art Market Federation, p. 1.

⁴⁴ The Market for Art, p. 14.

⁴⁵ Transcript of meeting with Sotheby's New York, 13th September 2005, p.3

- 4.20 The Swiss art market has been declining for the past few years, falling from sixth to eleventh largest auction location in the world between 2002 and 2005. Switzerland is nonetheless one of the UK's main competitors in the art market outside the EU. The Swiss Government has for the past 15 years been putting in place EU-compliant legislation. More recently there have been bilateral agreements between Switzerland and the EU on issues such as agriculture, trade, and the movement of people. This provides a context within which the EU could seek to negotiate for implementation of the *droit de suite* in Switzerland.

Recommendation 2

The UK Government and the Mayor should lobby for London's international competitors to introduce *droit de suite* in their countries, in line with the existing international agreement. In particular:

- (a) The Mayor and UK Government should support the efforts of Assemblyman Brodsky in New York to introduce legislation that would introduce a resale right in New York.**
- (b) The Mayor and UK Government should encourage the European Union to persuade Switzerland to adopt *droit de suite* through the bilateral negotiation process that has already been successfully used in relation to other EU law. These bilateral negotiations have demonstrated that the Swiss Government has been prepared to adopt EU-compliant legislation in return for access to the EU market.**

- 4.21 The value of the derogation in relation to deceased artists is that it provides some insurance against the diversion of sales at the upper end of the market to the US and Switzerland. It is vital that this derogation remains in place until such time as *droit de suite* is introduced in the US and Switzerland and there is therefore a level international playing field.
- 4.22 There are measures which London can profitably take to persuade European partners of the value of the UK's derogation, with roles for the Mayor and for representatives of the London art trade. The Mayor maintains a presence in Brussels, London House, to represent London's interests and lobby on the capital's behalf at a European level. It should be enjoined to make the case for London's art market and the preservation of the derogation through all available channels in Brussels. The Mayor of London is also well placed to lobby on behalf of London's art market and should use opportunities available to him to promote London's art market among, for instance, elected city and regional counterparts in other member states. There is also a role for the Mayor in continuing to ensure the UK government appreciates the national and European significance of the London art market and that it maintains pressure at a European level for Britain's derogation to continue.

Recommendations 3 and 4

In order to minimise the diversion of sales at the upper end of the art market to the US and Switzerland, the UK should seek to extend its derogation on the works of deceased artists until such time as the US and Switzerland implement *droit de suite* and thus create a level international playing field. Alternatively, the Government should argue for the derogation to be permanently written into the Directive at the point of the 2009 review, in order that our fellow member states may enjoy the same protection as the UK market currently enjoys.

The UK government, Mayor of London and London's art trade should endeavour to demonstrate how a vibrant art market in London is good for the rest of Europe and how this is compatible with a strong single market in Europe. The Mayor should take a lead in promoting London's art market in Europe and lobbying on its behalf.

- 4.23 Finding the right system for administering and collecting royalty payments in the UK is, of course, essential. The Patent Office announced in December that there will be a system of compulsory collective management of royalties payable under the *droit de suite*. This reflects what we consider to be a general consensus in favour of collective management of *droit de suite* in the UK as opposed to artists collecting their royalties individually. The House of Commons Culture, Media and Sport Committee recommended compulsory collective administration in its March 2005 report. It stated that 'this is the preferred model throughout the European Union. It is relatively efficient and better secures compliance, seeing that money reaches the artist'.⁴⁶ Indeed, collecting societies will be the norm in most other European states once the directive is implemented, including all those, which already operate the right.⁴⁷ Support for central management of collection has been voiced by both Arts Council England, based on study of royalty collection systems in Europe, and – unsurprisingly – the Design and Artists Copyright Society, which would be best-placed in the UK to manage the collection and distribution of artists' royalties.
- 4.24 In European countries already operating *droit de suite*, various models of collection systems for artists' royalties are in place. Article 6 of the directive allows for these variations to remain, stating that member states may decide whether collective central management of the royalty is compulsory or optional. Essentially, this permits flexibility between a system where single or multiple agencies collect royalty payments on artists' behalf or one which allows artists to collect their *droit de suite* payments themselves, either alongside or in place of collective management. In its report, 'Implementing *Droit de Suite* in England', Arts Council England studied collection systems in the European countries which already operate a *droit de suite*. The two largest art markets in continental Europe (although smaller and more domestically orientated than the British art market), France and Germany, both use a central agency to manage the royalty, along with Denmark, Finland and Sweden. Other member states have a number of societies involved in collecting royalties. To cover administration costs, collection agencies each take a cut of royalties. Commission payable to collection agencies range from 10 per cent of royalties in Germany to 25 per cent in Finland.⁴⁸

⁴⁶ The Market for Art, p. 15.

⁴⁷ Artists' Resale Right: getting it right first time, p. 8.

⁴⁸ Implementing Droit de Suite in England, p. 45

- 4.25 Arts Council England concluded in favour of central management: ‘it is easier to establish and maintain cooperation with artists and the art trade if one central agency has sole responsibility for collecting royalties. It is easier to maintain a register of artists and art sellers if they all have to subscribe or report to one central agency. This inevitably makes the job of matching the sale and the royalty to the artist more straightforward’.⁴⁹ Although the Design and Artists Copyright Society claims that the art trade itself supports compulsory collective management, many in the Art Market would dispute that. Despite this, it should be noted that compulsory collective management reduces the administrative burden on the trade because it achieves economies of scale, the sharing of reliable information and removes the cost of having to locate the artist from the seller. Compulsory management, it adds, would reduce the bureaucratic burden on the art trade, since much of the administration would be passed to the collecting agency.⁵⁰
- 4.26 Experience elsewhere of artists collecting their own royalties also points to the benefits of compulsory collective management. In California, the only US state to apply a resale right, the absence of a collection system and the onus on individual sellers and artists to make the scheme work has led to the legislation being used only twice in the fifteen years since its introduction. Overall, although some artists in the UK have suggested that they would want to collect royalties for themselves, it appears that collective management would be a simpler and more efficient option, with a better guarantee of compliance from sellers. Furthermore, the prospect of numerous legal battles involving both artists and businesses over the exact modalities of the payments is a bleak one. A compulsory collection mechanism will protect the artists, the galleries and auction houses from unnecessary arguments and law suits. **We welcome the plans to introduce a system of compulsory collective management for artists royalties. This will be the most efficient system for collecting *droit de suite* and the most cost-effective in delivering it to artists.**
- 4.27 As the Patent Office has indicated, it is important that collection of payments should not be monopolised by a single agency. The Design and Artists Copyright Society, established in 1984 to promote and protect the copyright of visual artists, appears best placed to administer the right – it already distributes around £2.5 million (€3.75 million) a year to artists through existing copyright licensing schemes.⁵¹ Competition between agencies, however, for instance through charging different rates of commission, would benefit both elements of the market – artists and dealers alike. The greatest beneficiaries of this competition would be artists. If a work of art were sold for €10,000, the artist would be entitled to 4 per cent of this sum, amounting to €400 in *droit de suite*. A collecting society charging a 25 per cent commission would receive €100 in administration fees; one charging 15 per cent would receive €60 in fees. Given the small margins on which many artists operate, the difference between the two amounts – €40 – could be a significant.

⁴⁹ *ibid*, p. 45

⁵⁰ Artists’ Resale Right: getting it right first time, p. 9

⁵¹ Artists’ Resale Right: getting it right first time, p. 10.

- 4.28 The need for transparency and accountability among collecting agencies is stressed in recital 28 of the *droit de suite* directive. The fear of profiteering by collection societies has prompted some in the art trade to argue against compulsory collective management.⁵² To overcome this distrust about collection agencies' costs, it is important that recital 28 be fully enforced. Collection agencies should be regulated, including scrutiny of their costs and the proportion taken from royalties to cover these. Ensuring that there is no monopoly in the collective management of artists' royalties should additionally help to suppress costs through market competition and allay some of the suspicions among art dealers and auctioneers. The Patent Office has responded to these concerns by stating that, 'no single agency would be permitted to manage the right to the exclusion of all others and there would be no laws preventing agencies setting up in competition with those currently existing'. **We welcome the Patent Office's commitment that there will be no barrier to potential competition among collection agencies.**

5. Monitoring the impact of *droit de suite*

- 5.1 Given the gravity of the fears expressed by the art market in London about the *droit de suite*, it is essential that there is effective monitoring of the impact once the directive comes into force in January. According to the directive's provisions, the EU's own review of *droit de suite* and its impact must take place by 1 January 2009. This gives London's art market, the collection agency, the Patent Office and other interested agencies – not least the Greater London Authority – three years to assess *droit de suite's* impact in London.
- 5.2 The Patent Office has undertaken to 'carefully monitor [the *droit de suite's*] effects over the first three years following its introduction ... we will commission further research to determine the true impact of resale right once the right has been in place for a number of years'. This assessment should be based on close study of the London art trade and its international competitiveness, turnover and profit margins among art businesses, employment within the art trade and other indicators of the market's overall health. It should also examine *droit de suite's* effects on artists, to see whether the hoped-for increases in artists' incomes materialise, and should evaluate the significance of this against the wider impact on the art market. **We welcome the intention to conduct research to evaluate the impact of the *droit de suite*. However, as yet the Patent Office has not published details of *how* it plans to measure its effects.** This is important because of the complexity of the task, given the numerous factors which are likely to have an impact on sales of art in the UK.

⁵² The Artist's Resale Right and its effect on the British Art Market, p. 11.

Recommendations 5 and 6

We recommend that the Patent Office publish details of how it intends to measure the impact of the *droit de suite* on the UK art market, including the evidence base it intends to use and the models it will use to assess its impact compared to other factors. In particular, it will be important to assess the impact of the levy on the sale of contemporary works of art and the diversion of the market to New York and Zurich, the impact of the levy on small businesses, and the balance between the costs of administering the levy and the benefits accruing to artists.

The impact assessment should include a full cost-benefit analysis of the application of the minimum price at which the directive applies, and its impact on dealers in London, and an analysis of the effect of the sliding scale of royalty payments and the maximum royalty payment of €12,500. This information will enable us properly to assess the effects of the UK's implementation of the Directive.

We recommend that the Patent Office undertake to publish in full the results of its research annually, with a final report being published well in advance of the European Commission's 2009 review of the *droit de suite*.

6. Promoting London's art market

- 6.1 Whatever the actual impact of *droit de suite* on London's art market, the Mayor of London and other stakeholders can make some interventions to support the sector and mitigate against *droit de suite's* potential negative impact. These might range from general promotional campaigns to specific events to publicise the capital's art market.
- 6.2 Both the fashion and film industries mount high profile events to showcase new work and to celebrate their contribution to London's economy – London Fashion Week and the British Film Institute London Film Festival. Each receives widespread media coverage and attracts many visitors to the city. A similar event could be used to celebrate and promote the place of art within London's civic and cultural life. London is already synonymous with high quality and accessible art – arguably much more so than it is with fashion or film. In addition to the art market and fairs such as the London Art Fair and the Frieze Art Fair, which draw international buyers to the capital, London is famous for the quality of its public and private collections, from the National Gallery and Tate Galleries in the heart of the city to Kenwood House in the north and Dulwich Picture Gallery in the south. Competitions such as the Turner Prize and Jerwood Painting Prize create a discernible media 'buzz', while the unveiling of new public works of art such as that on the fourth plinth in Trafalgar Square also generates considerable public interest and publicity.
- 6.3 The current vitality of London's art scene might suggest that it needs no further stimulus. A regular and planned celebration of the arts in London would, however, capitalise on the existing vibrancy. A week-long celebration of all aspects of art in London – public galleries and sculptures, the competitions for up-and-coming artists

and London's art trade could provide a regular spotlight on London's art scene and a planned focus of activity each year between the period peaks and troughs of public and media interest in art in the capital.

- 6.4 For instance, imagine 'ArtLondon': a week of events might combine a campaign celebrating the artistic traditions of London's many nationalities and ethnic groups, special art events in London's schools and a drive to promote London's public galleries, and could culminate in a prize ceremony to commission a new work of sculpture for a public site in London. Alternately, a 'Turner Art Week' could encompass all the above and conclude with the announcement of that year's Turner Prize winner. With the support of London's mayor, the Greater London Authority and other agencies, such as the London Development Agency, VisitLondon and Arts Council London, such an event is possible. It could also be timed to coincide with London's leading art fairs, such as the London Art Fair each January and the Frieze Art Fair, which takes place in October. Moreover, such campaigns and events, if properly marketed and publicised both in the UK and internationally, could give a welcome economic and psychological boost to London's art market as it comes to terms with *droit de suite* and other fiscal and administrative pressures. We would expect such events to be funded by businesses within the art sector, but we would like to see the Mayor playing a facilitating and coordinating role.

Recommendation 7

The Mayor of London, in partnership with other agencies, should facilitate a regular campaign and series of events to celebrate and publicise art in London. Like the London Fashion Week and British Film Institute London Film Festival in these fields, it should capitalise on the vitality of London's art scene and be used to stimulate interest in art and the London art market. It should be funded from within the art sector, with the Mayor playing a coordinating and facilitating role.

Appendix 1 - Minority Report by Peter Hulme Cross

The One London group agrees with the findings of the report but not its recommendations. We also feel that a certain amount of information is needed to put the legal aspect of the implementation of the *droit de suite* into perspective. The report correctly states the importance of the London art market, and that it is universally agreed that the introduction of partial *droit de suite* in January 2006 will damage this market and benefit its non-EU competitors, notably the USA and Switzerland. It also states correctly that the intended beneficiaries (the artists themselves) are likely to suffer from the unintended consequences of the *droit de suite*, at the early parts of their career. A diminution of the contemporary art market is unhelpful to artists trying to make their names.

The art market is of great importance to the UK economy and to London's economy, yet, as the report correctly states the legislation is not in the UK's control. Successive UK governments and all three main parties have consistently opposed the Directive but it was voted through in the Council of Ministers on Qualified Majority Vote, as it is a single market measure. (See Annexe 1)

The legislation is a *fait accompli* in more senses than one. The report does not make this sufficiently clear. Not only is it a legal requirement to transfer the Directive 2001/84/EC into British legislation, but the Draft Statutory Instrument (SI) has also been drawn up (See Annexe 2). Therefore, the substantive details of the legislation have already been agreed.

Comment on Recommendation 1

One London agrees that the 1000 Euro (£667) threshold is ridiculously low and that the 3000 Euro (£2000) threshold required by the directive should be re-instated. However, unlike Acts of Parliament, statutory instruments cannot be amended in Parliament. The entire SI would need to be rejected. The government would then have to consider whether or not to make this sensible amendment before laying the SI before both Houses again. Since the government has already decided to gold-plate the directive by reducing the threshold from 3000 Euros (£2000) to 1000 (£667) Euros, and the government is already in breach of EU law by delaying passage of the SI beyond January 1st 2006, this would seem to be an unrealistically optimistic aspiration.

Comment on Recommendation 2

One London cannot go along with the recommendation that the UK Government and, in particular from the point of view of the report, the Mayor of London, should waste time and resources in an attempt to lobby our competitors to handicap their markets in the same way that our art market has been handicapped. This would constitute political interference – such matters are for those countries or cities to decide – and an economic absurdity. New York or Zurich, who are being handed a commercial advantage over London, are not going to behave in such an irrational manner. Unlike the UK, they are not subject to controls that are external to their own legislature.

Our own Recommendation 2

That the Mayor and the Assembly highlight the impotence of the democratically elected British government to prevent the passage of EU legislation by Qualified Majority Vote. This legislation is clearly against the UK's national economic interest, and in this case in particular, against London's economic interest.

Comment on Recommendation 3

Under QMV rules extending a derogation, while it may be desirable from the UK's point of view, is an even more complicated business than preventing the passing of a directive.

The rules have been changed with the last round of enlargement and the voting intention of the East European countries is unpredictable. With ten new countries joining the EU in May 2004, the rules for Qualified Majority Vote were changed. There are now 321 votes (with the UK having 29) and in order for a proposal to pass the following three conditions have to be satisfied:

- It must be supported by at least 232 votes.

- It must be backed by a majority of the member states.

- The countries supporting the proposal must make up at least 62% of the population.

There is still a blocking minority, though it is becoming more difficult and complicated to block proposals. In any case, this does not apply to an extension of the derogation, since that is a new proposal.

If the UK wishes to extend the derogation beyond 2010, it will have to muster 232 votes from a majority of the member states that account for at least 62% of the population. This would require a very strong political will, and some "horse trading". Some states would only vote the way the UK wants for a "quid pro quo" in some other area, so we would lose something in order to gain something. Negotiations of this kind have to be conducted by central government, while lobbying would be done by the businesses and their organizations.

Comment on Recommendation 4

The contention that "a vibrant art market in London is good for the rest of Europe and [that this] is compatible with a strong single market in Europe" is not supported by the report, except to the extent that the loss of VAT revenue, in itself a dampener on the UK art market when it was introduced in two stages in 1995 and 1999, will impact directly on EU revenues if the market leaves London.

Comment on Recommendations 5 and 6

While we support the idea of a monitoring programme to assess the impact of the *droit de suite* on the UK and EU art market, the report does not make it clear whether the 2009 Commission assessment will have any legal force and whether it is likely to have any effect on either the Directive or the derogation if its conclusions should be negative.

Our own Recommendation 6

The 2009 EU review of *droit de suite* should include the cost-benefit analyses provided by the UK government (see Recommendations 5 and 6) and should have the option of changing the Directive, either recommending its abolition or permanent opt-outs for individual countries. Otherwise, a review is meaningless.

Comment on Recommendation 7

We do not think the Mayor should be involved in a futile attempt to repair damage done to the art market by EU legislation, which is beyond the control of the UK government, let alone the Mayor and the GLA. The London art market is quite capable of promoting itself, being one of the top art markets in the world, as this report points out. It is being handicapped by legislation, which cannot be altered, as the report also points out. If there is any promotion to be done, it should be done by the businesses and the business organizations themselves, and they do it very well. It is not a matter for the Mayor.

Annexes

Annex 1

Qualified Majority Vote was introduced into EC legislation to prevent the possibility of one member state vetoing legislation that most others support. Legislation to be decided by QMV has grown with every treaty. Single Market measures are decided on QMV. The system changed drastically in 2004 with the new and biggest wave of enlargement when 10 new countries joined the European Union.

However, in 2000/01 when Directive 2001/84/EC was finalized, the old system applied. There were 87 votes in the Council of Ministers, distributed according to the population of the member states but heavily weighted in favour of the smaller states. (The UK had 10 votes, as did France, Germany and Italy).

Legislation could be carried by 62 votes (or more), and it could be stopped by a blocking minority of 26. As it seems only the UK and Austria voted against the Directive, their votes together were 14 (Austria had 4 votes), far fewer than needed to block the proposal.

Annex 2

EU directives have to be implemented into member state legislation by their own legislatures. Regulations are directly applicable. By and large, directives do not need primary legislation and are implemented through Statutory Instruments, affirmative or negative.

Directive 2001/84/EC is to be implemented by an Affirmative Statutory Instrument. As an affirmative SI, it needs to be debated in both Houses, either in a Committee or by the full House. While minute changes to the SI can be made, it cannot be voted out or changed drastically, unless it has departed from the provisions of the Directive.

Implementing EU legislation is a legislative requirement and Parliament cannot go against it. In fact the SI was laid so late before Parliament – December 15, 2005 – that there was no time to debate it before the Christmas recess. The Regulations in the SI will, therefore, come into effect some time in the new year 2006 after approval in both Houses of Parliament.

Appendix 2: List of those who provided views and information to the review

The following people contributed views and information to this review.

Alan Cristea, Alan Cristea Gallery

Robert Sandelson Gallery

Sotheby's, London, Rena Neville – Compliance Director – 07/05

Sotheby's, New York:

- Michael J. McCullough, Vice President Associate Compliance Council
- Jonathan A Olsoff, Senior Vice President North American General Council

Thomas Lighton, Waddington's Gallery, 08/05

Kelly Wiffen, Arts Council England,

Mats Lindberg, BUS (Sweden), (written submission)

Kirsten Kierkegaard, COPY DAN Billedkunst (Denmark), (written submission)

Tania Spriggens & Joanna Cave, Design and Artists Copyright Society

Gill Edelson, General Council of Art Dealers of America, New York

Dominic Recchia Jr, New York City Council, Office of the Chair of Cultural Affairs

Ceri Witchard, Patent Office

David Heathcoat-Amory MP

We are grateful to Huw David, from Shared Intelligence, for his work in providing the first draft of the report.

Appendix 3: Principles of London Assembly Scrutiny

An aim for action

An Assembly scrutiny is not an end in itself. It aims for action to achieve improvement.

Independence

An Assembly scrutiny is conducted with objectivity; nothing should be done that could impair the independence of the process.

Holding the Mayor to account

The Assembly rigorously examines all aspects of the Mayor's strategies.

Inclusiveness

An Assembly scrutiny consults widely, having regard to issues of timeliness and cost.

Constructiveness

The Assembly conducts its scrutinies and investigations in a positive manner, recognising the need to work with stakeholders and the Mayor to achieve improvement.

Value for money

When conducting a scrutiny the Assembly is conscious of the need to spend public money effectively.

Appendix 4: Orders and Translations

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