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The Artists' Resale Right Directive 2001/84/EC: a Socially Orientated Reconceptualisation – Fomenting Social Inclusion and Remunerative Parity

Anthony O'Dwyer

Doctoral Thesis in Law (Ph.D, Law)

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Dean of the School of Law: Prof. Ursula Kilkelly

Supervisors of Research: Dr. Fidelma White & Dr. Louise Crowley

External Examiner: Mr. Simon Stokes

Internal Examiner: Prof. Steve Hedley

TABLE OF CONTENTS

Declaration of Non-Plagiarism vii

Acknowledgements …… viii

Abstract …….. ix

INTRODUCTION

Introduction …….. 1

CHAPTER 1 – The Evolution of EU Intellectual Property Rights

1.0 – Introduction ……. 20

1.1 – International Copyright Law and the Berne Convention …… 21

1.2 – *Droit de Suite* under the Berne Convention …… 28

1.3 – The Development of the European Union's Intellectual Property Rights Framework …… 36

1.4 – Background to EU Intellectual Property Harmonization ……. 37

1.5 – A Patchwork of Rights ……. 47

1.5.1 – Lack of EU Competence …….. 48

1.5.2 – EU Commission Activism …… 57

1.5.3 – Judicial Activism …….. 63

1.5.3.1 – *Casis de Dijon* ……. 63

1.5.3.2 – *The Phil Collins Case* …… 66

1.6 – Conclusion …… 74

CHAPTER 2 – The Artists' Resale Right Directive

2.0 – Introduction …… 78

2.1 – Context – Rationale …… 79

2.1.1 – *The Joseph Beuys Case* …….. 81

2.1.2 – *Société d'Auteurs S v. Hotel des Ventes Mosan* ……. 85

2.1.3 – *Sammlung Ahlers Case* …… 86

2.2 – The Solution? – EU ARR Directive 2001/84/EC …… 89

2.2.1 – Works Protected …… 90

2.2.2 – The Subject Matter of the Resale Right ……... 93

2.2.3 – Threshold & Rates …… 98

2.2.4 – Rights to Obtain Information …… 102

2.3 – The Directive: Developing and Perceived Problems – Case law and Commentary …….. 103

2.3.1 – *The Dalí Case* and Succession …….. 104

2.3.2 – *The Christies Case* and the Right to Assign Liability …….. 110

2.3.3 – Criticisms of the Artists' Resale Right ……. 117

2.3.4 – Beneficiaries: Actual Reward …….. 117

2.3.5 – Distribution of Royalties …….. 121

2.3.6 – Sales Displacement …….. 127

2.3.7 – Administrative Costs …… 130

2.4 – Conclusion …….. 132

CHAPTER 3 – The Nature of the *Droit de Suite* – from Antiquity to Modernity

3.0 – Introduction …… 136

3.1 – An Outline of the Social Position of Visual Artists in Society through the Ages ……. 138

3.2 – Moral Rights and the Origins of the *Droit de Suite* ……..... 147

3.3 – Outline of the Legislative Beginnings of the *Droit de Suite* in 20th Century France ……..… 151

3.4 – The Legal Nature of Artistic Copyright and the Historic *Droit de Suite* …….. 155

3.4.1 The Historic *Droit de Suite* as a Moral Right …… 156

3.4.2 The *Droit de Suite* as an Economic Right ……..…..…. 162

3.4.3 The Nature of Creative Works …… 162

3.4.4 The *Droit de Suite* and the Follow-Up Model ……. 165

3.5 – Reviewing the Social Security Function of the Historic *droit de suite* …….. 174

3.5.1 – The *Droit de Suite* and the Welfare State in 19th Century France ……. 176

3.6 – Conclusion ……. 183

CHAPTER 4 – Theoretical Framework

4.0 – Introduction ……. 187

4.1 – The *Droit de Suite* – An Instrument of Social Welfare? …….. 192

4.2 – Two Traditions of Thought: Civic Republicanism and Liberalism 194

4.3 – Communitarianism …….. 199

4.4 – Citizenship Theory/Social Citizenship …… 203

4.4.1 – Citizenship in Liberal Thought …… 205

4.4.2 – Citizenship in Communitarian Thought …….. 206

4.4.3 – Citizenship in Civic-Republician Thought …….. 207

4.5 – Citizenship as a Communitarian theory of Civic-Republicanism 209

4.6 – Market Failure: The Need for Intellectual Property Rights ……. 213

4.7 – Theoretical Justifications for Intellectual Property Rights …….. 216

4.7.1 – The Lockean Theory of Property Rights …… 217

4.7.1.1 – Locke's Theory of Legitimate Government …… 222

4.7.1.2 – Locke's Theory of Property Rights and the Artists' Resale Right …… 226

4.7.2 – Utilitarianism and the Artists' Resale Right …….. 232

4.7.3 – Hegel …….. 239

4.7.3.1 – The Hegelian Construct and the Artists' Resale Right …… 247

4.8 – Conclusion ……. 249

CHAPTER 5 – The ARR Directive: A Means of Targeted Intervention for Visual Artists

5.0 – Introduction …… 254

5.1 – EU Social Policy Framework ……. 255

5.2 – Social Citizenship and Social Inclusion ……. 273

5.2.1 – Welfare …… 275

5.2.2 – The Need Principle …….. 277

5.2.3 – European Models of Welfare ……... 281

5.2.4 – Poverty: Defining the Limits of Social Citizenship ……. 286

5.3 – The Socio Economic Conditions of Visual Artists ……... 293

5.4 – Germany: The Resale Right as a Social Welfare Right …… 303

5.5 – The Norwegian Social Model ……... 309

5.6 – Conclusion …… 312

Chapter 6 – Conclusions and Reform Proposals

6.0 Introduction …….. 315

6.1 Justification for a Socially Orientated ARR Directive ……..... 317

6.2 Recommendations …… 323

6.3 Proposed Reforms …….. 326

TABLE OF CASES ……..…….. 330

TABLE OF INSTRUMENTS …… 332

BIBLIOGRAPHY …… 336

APPENDICES ……..……..… 366

Declaration of Non-Plagiarism

This is to certify that the work I am submitting is my own and has not been submitted for another degree, either at University College Cork or elsewhere. All external references and sources are clearly acknowledged and identified within the contents. I have read an understood the regulations of University College Cork concerning plagiarism.

Student's Signature:

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Anthony O'Dwyer

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ABSTRACT

Due to the nature of their work visual artists enjoy a unique place within copyright law. Not only do these creators benefit in the main from the right of reproduction but also from the value attached to the original artefact embodying the protected work. Framed accordingly it might seem that visual artists are particularly well positioned to benefit from this remunerative duality, traditionally however, this has not proven to be the case. Throughout history visual artists have sold their work at a mere fraction of the work's inherent value, a value that would only later be realised by subsequent purchasers. Recognising this inequity the *droit de suite* developed with the objective of adequately rewarding visual artists for their exploits by connecting their recompense with the work's subsequent resale value. As the right spread through Europe it often embodied a social security function that distributed funds to benefit elderly, needy and emerging visual artists. Despite an express EU social mandate, today's EU equivalent, the Artists' Resale Right (ARR) Directive 2001/84/EC is shorn of any such social responsibility.

The question that this thesis addresses is whether visual artists would be better served under a resale rights rubric that reflects its original social function. This investigation brings to the fore the liminality of the resale right as part copyright, part income security; distributing royalties to successful visual artists while contemporaneously providing a social net to those less fortunate. In considering whether a theoretical justification exists to support this liminality the thesis investigates the dialectic of Hegel's personality theory and social citizenship. By

advancing the idea of citizens' duty to one another, social citizenship provides the theoretical basis upon which the aforementioned construction is justified, and in doing so excludes a strictly individualistic understanding of the artists' resale right that is largely economically orientated and copy-centric.

The primary conclusion of this thesis is that the ARR Directive would better serve visual artists at the margins of our society by adopting a redistributive, social function, redolent of the extant ARR models of Germany and Norway. It is concluded that a redistribution of funds, from wealthy visual artists to emerging visual artists reflects the liminality of the ARR, which in turn reduces experienced poverty and the social exclusion faced by many visual artists today. A key recommendation of the thesis is the inclusion of a social mandate within the Directive, which reflects the right's historic origins and the mandates of extant EU social policy.

Introduction

The construct of the 'starving artist' is as ingrained in society's consciousness as is the stereotype of the 'poor orphan', the 'corrupt politician', the 'peacemaker', the 'hero', the 'heroine' and the 'Good Samaritan.' Many of these constructs are somewhat didactic and normative; inspiring, warning and ultimately steering members of society toward and away from certain choices and modalities of being. The normative influence of these constructs cannot be under estimated, indeed the narratives that have evolved around these constructs often manifest as existentialist ideograms from which individuals understand and perceive 'otherness' and one's own perceived reality. The degree to which individuals and society are capable of empathising with others is often based on these ingrained and highly subjective understandings.

Similarly, the rhetoric surrounding the 'starving artist' at the early part of the 20th century evolved from the public's heightened awareness of the injustice faced by French visual artists as they returned from World War One. This awareness concerning the law's treatment of visual artists was concisely captured by Forain's caricature of an auction where an artist's painting sells for an over-inflated sum while the artist's impoverished children, effectively street urchins, looked on in disbelief.[1] Public outrage followed which in turn led to political and legal action; and while very few members of the public could comprehend how the French author's rights system discriminated against visual artists, they could

[1] See Appendix 1: Forain's Painting.

relate to the injustice of earning a derisory sum from their labours while others earned vast fortunes.

Accordingly, the evolution of the historic French *droit de suite* was a social, political and legal response to the injustice faced by visual artists who could not earn a livelihood from their profession. The right not only rewarded successful visual artists for the successive exploitation of their work, allowing them to participate in their work's sometimes astronomical increase in value but it also provided a form of income security for nascent career, struggling and retired visual artists. This duality of purpose positioned the *droit de suite* as not only a copyright in the contemporary sense but also as a form of social security. Today's EU manifestation, the Artists' Resale Right Directive 2001/84/EC is framed narrowly within the strictures of EU intellectual property law and as such is shorn of any social component. Shoe-horning the historic *droit de suite* into a largely copy-centric paradigm undermines its very *raison d'être*; to aid struggling visual artists. This raises several questions which this thesis addresses: firstly, whether the current EU manifestation is nothing more than a myopic capitulation to contemporary trends in copy-centrism; secondly, whether the apparent tension between copyright and social rights is an intractable challenge; and thirdly, whether the historic *droit de suite* can prove instrumental in presenting a counter dynamic to current copy-centric conceptions of the artists' resale right? In answering these questions a broader contextual overview of the creative arts is required. In the eloquent words of President Michael D. Higgins:

'Creativity and culture are about the articulation and vindication of rights, the right for everyone to participate fully in society. They are a social good which, if left to the vagaries of the marketplace, will either fail to survive or become so compromised and distorted that the public good will not be served. It is essential to have a national cultural policy, and to have one that recognises the fundamental role of cultural access in citizenship while respecting the integrity and independence of the personal artistic inspiration. Any balanced discussion about public funding for the arts must derive from that principle, rejecting as a starting point any uninformed populism which sees the arts as residual, as something we do when we can afford it.'[2]

Context

The foregoing encapsulates much of the rhetoric that surrounded the early 20th century pre-cursor to the Artists' Resale Right – the *droit de suite* – during its first legislative enactment in France. The historic *droit de suite* was designed to alleviate the plight of the 'starving artist' by allowing visual artists to share in the economic success of their work. The *droit de suite* required that subsequent to the first sale, each public resale resulted in a small but not inconsequential royalty payment to the artist or his/her legal heir. It is noteworthy that the *droit de suite* not only shared the characteristics of intellectual property rights, as we know them today, but also contained a social element, which manifested itself in the form of a social security payment for struggling artists. While this 'social

[2] President Michael D. Higgins address to the General Assembly of Aosdána 2015. <http://www.president.ie/en/media-library/speeches/speech-at-the-2015-aosdana-general-assembly>

character' was eventually removed from the *droit de suite* and placed squarely within the French social security system, neighbouring jurisdictions such as Germany and Norway continued the incorporation of this facility within their national resale rights rubrics. Both models continue to maintain a 'social character' by effectively taxing the Artists' Resale Right (ARR) royalty, albeit via alternative means, the benefit of which is used to support various social and cultural objectives. In the main however, this social character has been expunged and today's Artists' Resale Right Directive 2001/84/EC neither reflects its historical forebear nor the aforementioned European models.

Having provided some background context to the thesis, this introductory chapter continues by providing an overview of the central concepts of the thesis. First, the central research questions are discussed, with a view to clearly setting out the aims of the thesis. Secondly, the structure of the thesis is described. Thirdly, the methodological approaches adopted are outlined.

Research Questions and Scope of the Thesis

The overall aim of this thesis is to address whether the extant EU Artists' Resale Right's Directive 2001/84/EC serves the needs of visual artists and in the alternative whether visual artists would be better served under a resale rights rubric that reflects its original social function. To achieve this aim, the thesis adopts three primary research questions.

1) Is the ARR Directive fit for purpose and does it succeed in achieving its primary mandate to achieve remunerative parity between the creative classes and to harmonize EU law in this area?

In answering this question and in fulfilling the overall aim of this thesis, an analysis of the development of EU law in the sphere of intellectual property is conducted. Within the context of EU harmonization, the analysis in Chapter 1 provides an understanding in relation to the fragmented nature of EU intellectual property rights (IPRs) which in-turn legitimizes member states' divergent ARR rubrics. In addition the historic international origins of the artists' resale right under the Berne Convention are discussed before engaging in a thorough critique of the Artists' Resale Right Directive 2001/84/EC in Chapter 2.

2) Would visual artists be better served under a socially oriented ARR model and whether the apparent tension between copyright and social rights is resolvable?

The thesis adopts an historic analysis of the ARR Directive by performing an investigation and critique of its predecessor the French historic *droit de suite.* The analysis conducted in Chapter 3 and the latter sections of Chapter 5 respectively highlight the social origins of the historic *droit de suite* and other European models as a form of targeted intervention; these in turn form part of a wider nexus of national social security and welfare support structures. By highlighting the social origins of the artists' resale right the thesis reframes the normative purpose of the Directive to include a social component. In many ways

this reframing is in fact a refocusing on the intended, historic and contemporaneous use of the resale right as a form of targeted intervention which not only creates parity between the creative classes within the rights framework that is copyright but provides social security in the widest possible sense which in turn fosters social inclusion and participation.

3) Subject to the findings of research question 1 and 2: What reform measures are needed in the context of the ARR Directive to support visual artists?

In the concluding section, the thesis makes a number of recommendations for reform of the ARR Directive to include a socially orientated and targeted means of intervention for visual artists. Recommendations for reform are based on the aforementioned analysis of the historic *droit de suite,* the EU ARR Directive and European ARR models that encompass a social component. The aim of these recommendations is to create a resale rights rubric that recognises the discrete, differentiated and often unrecognised mode of creation and exploitation that is unique to visual artists. A socially orientated ARR Directive not only fulfils the right's *raison d'être* but creates an environment in which the pursuit of a career as a visual artist is increasingly more viable.

Thesis Structure

Chapter 1 begins by presenting an overview of the international origins of the artists' resale right: namely the Berne Convention. It is observed that within the

context of EU copyright law, the Berne Convention served as a semi-normative, broad based tool for harmonization rather than as an agreed upon mandate for the convergence of copyright law by signatory states. Accordingly, the 'soft law' approach allowed for by the Berne Convention proved wholly inadequate towards the process of EU copyright harmonization. The EU was therefore required to take more direct action than relying on international conventions alone. Subsequent to considering international developments the chapter progresses to consider the effect that the process of EU harmonization had both on creating a framework of EU IPRs as well as the nature and scope of the ARR Directive. The chapter ultimately provides background context to the development of the ARR Directive and in doing so serves the function of providing the basis for later proposed reforms of the Directive.

Chapter 2 provides an in-depth analysis of the form and content, as well as the objectives and aims of the ARR Directive while also questioning whether it achieves its intended purpose. Establishing whether the ARR Directive functions in practice and not just in principle is a necessary pre-requisite to answering this thesis's central research question; whether visual artists would be better served under a socially oriented ARR rubric. The chapter underscores that the benefits of the ARR Directive are not just limited to wealthy and successful artists but also includes emerging visual artists. Nevertheless, the research indicates that while emerging visual artists benefit to some degree from the ARR Directive they are marginal beneficiaries of a right that was historically a form of targeted intervention. Exposing the incongruous nature of the right the chapter builds support and grounds the argument for a socially orientated ARR Directive.

After identifying the aforementioned incongruity between the beneficiaries of the ARR Directive and those visual artists who are most in need of income security, Chapter 3 presents an historical overview of the nature of the *droit de suite*; the French 20th century pre-cursor to the artists' resale right. In this regard the chapter investigates the position of the visual artist within society throughout the ages. This analysis serves two purposes: firstly, it highlights the historic and prevailing precarious nature of the visual artist's profession; and secondly, presents the historic *droit de suite* as a response to copyright law's failure to adequately recompense visual artists. It becomes evident from this analysis that copyright's failure is not a product of modernity but reflects society's historical and prevailing attitude towards the visual arts. Accordingly, the chapter analyses the nature of the *droit de suite*, which in turn exposes the underlying social character of the right and the social security function that it served. Recognition of the underlying social character of the *droit de suite* is a keystone upon which the central argument of this thesis is based. This in turn grounds the analysis of Chapters 4 and 5 which consider whether there exists a theoretical, policy based and legal basis for a socially orientated ARR Directive.

Within the overall context of this thesis, Chapter 4, reflecting on the social history of the *droit de suite,* provides a theoretical basis for a non-copy-centric ARR that is socially orientated. This theoretical framework is based upon the theories of 'social citizenship' and Hegel's 'personality theory'. The dialectic provides the framework upon which the reform proposals of Chapter 6 are based. Building on the social premise espoused in Chapter 3, Chapter 4 proposes that

the socio-political ideologies of 19th and 20th century France imbued the *droit de suite* with social values that challenged free-market liberal individualism evident in common law copy-centric polices today. Accordingly the historic *droit de suite* supposes a legal and political environment that supports the use of intellectual property rights as a means of achieving social goals. In this way, social citizenship justifies a reinterpretation of the ARR Directive that reflects its historic social function. In doing so the thesis proposes a social construct upon which reforms of the ARR Directive may be based.

Chapter 5 firstly considers whether there is a legal basis within the current EU framework for a socially orientated ARR Directive. Having established a legal basis within EU law the chapter progresses to consider the concepts of welfare, poverty and need, within the over arching theory of social citizenship. Developing upon the conceptual framework set out in Chapter 4, Chapter 5 progresses the argument for a socially orientated ARR model. While these concepts are formulated and advanced at a certain level of abstraction, they nonetheless translate into concrete institutional practices evident in European welfare models and more pertinently the German and Norwegian ARR models. Thereafter the chapter considers whether the ARR is simply an out-dated response to a problem that no longer exists. In this regard an evaluation of the available empirical research concerning the socio-economic status of visual artists is conducted. It is concluded that visual artists earn less than the average worker and less than creative contemporaries such as writers and composers. Accordingly, the income maintenance ARR models of Germany and Norway are evaluated as responses to this problem. Finally, the chapter introduces many of

the themes discussed throughout this thesis and in doing so argues that the EU ARR Directive ought to be employed as a form of targeted intervention and include an income security component redolent of the German ARR model and in doing so provide visual artists with a much needed form of financial support.

Chapter 6 outlines recommendations for reform of the ARR Directive to include an income maintenance provision. The central conclusions of this thesis are three-fold; firstly, not just wealthy visual artists benefit from the Directive (which is a primary criticism of the Directive) but also emerging visual artists; secondly, the implementation of the ARR would be better served under a compulsory collective management schema; and thirdly, the ARR Directive would better serve its historic social purpose – alleviating the plight of visual artists – by including a redistributive social component redolent of the extant German and Norwegian models and the historic French *droit de suite*. The recommendations draw primarily from the *Kulturwerk* component of the German model, which aligns itself more closely with social citizenship, and Harris's tripartite compensation model of redistribution. The latter recommendation is undermined to a certain degree by the earlier conclusion that not just wealthy and successful visual artists benefit exclusively from the ARR Directive. Nevertheless, a disproportionate amount, by value, of ARR royalty payments go to a minority of visual artists and their heirs. This fact alone radically undermines the legitimacy of the extant ARR Directive. A redistribution of funds, through a social mechanism, from wealthy artists to emerging, struggling and retired artists has the potential to provide a more thorough-going justification for the current

Directive reflective of its historic origins, which in turn, has the capacity to reduce the social exclusion faced by many visual artists today.

Aim

Often within the discourse pertaining to the historic *droit de suite* and the current ARR Directive, the social origins of the resale right are largely referred to in merely anecdotal terms, an historic footnote to a largely misunderstood right. Therefore, with a specific focus on the resale right as an instrument of social policy, it is timely that the evolution of the resale right is considered and the questions asked; whether it fulfils its original mandate, to alleviate the plight of struggling visual artists. Focusing on the social rather than the economic components of the ARR recasts the right as a form of targeted intervention. Hence the tension between the right's historic social character and its current economic manifestation is examined.

Methodologies

a) Historical-Legal Research

The thesis synthesises a methodology, which is part historical criticism, part doctrinal, part socio-legal and part comparative. The historical-legal research methodology attempts to find the origins and trace the development of a particular principle or a branch of the law, it also considers developed rules and

questions why they are now as they are.[3] Historical-legal research can also be employed as a means of critiquing ideologies which support the status-quo and this is referred to as critical historicism.[4] Applying this methodology to the thesis's central research question – whether visual artists would benefit from a socially orientated Artists' Resale Right – the thesis traces the development of the historic *droit de suite* from its original French civil law origins in the late 19th century to the drafting of Directive 2001/84/EC. This methodology is particularly informative as it reveals the evolution of a right that was largely born out of a social need to protect visual artists by providing them with a form of income maintenance to a right – EU manifestation – that is now devoid of any such function. This in turn raises the question of why this evolution occurred and why the historic *droit de suite's* social function has been abrogated from the current discourse. Ultimately, it is concluded that the extremely contentious nature of the artists' resale right led to a prolonged drafting period – 16 years – which may never have reached completion had the issue of social security/social welfare been raised. Accordingly, the ARR Directive, by rigidly adhering to the strictures of extant EU IP law, emphasises 'form over function', placing greater importance on the character of the ARR Directive rather than focusing on the function that it ought to serve. This realisation informs much of the analysis pertaining to the development of the ARR and grounds the argument for a reform of the ARR Directive that challenges current orthodoxy.

[3] S.H. Amin, *Research Methods in Law*, (Glasgow: Royston Publishers, 1992), p. 54.
[4] R. Gordon, 'Foreword: The Arrival of Critical Historicism' (1997) 49 *Stanford Law Review* pp.1023 -1024.

b) Socio-Legal Methodology

The aforementioned social origins of the historic *droit de suite* supposes a legal context that was to some degree influenced by non-legal factors and therefore demands an analysis that reflects the influence of the social, political and cultural environment. In this regard the socio-legal methodology is employed. Socio-legal studies focuses on the question, '… of relating how the form and content of the law (as may be found in statements of law in legal textbooks), which are matters for intellectual comprehension and interpretation, move beyond such intellectual existence into social reality.'[5] For McCrudden, the benefits of the socio-legal methodology can only be understood when compared to the limitations of the doctrinal method. The doctrinal method of legal analyses adopts the 'internal approach', which involves the analysis of law from the perspective of an insider in the system.[6] The socio-legal methodology on the other hand analyses how the law operates in society.[7] The advantage of this type of research is that it allows the researcher to look at the law within its social context hence allowing for a more comprehensive understanding of the legal issues at play. As Morris and Murphy note, socio-legal methodology '… can uncover and expose the (previously unquestioned) political nature of laws, show whether laws have achieved their intended effect, assist in law reform proposals by linking law and policy goals and reveal how law actually operates in practice.[8] A discourse that is contextually led frames many of the themes and narratives that run throughout this thesis: whether that pertains to the historical

[5] C. McCrudden 'Legal research and the Social Sciences' (2006) 112 (4) *Law Quarterly Review* p. 632.
[6] *Ibid.*
[7] *Ibid.* pp. 640 - 641.
[8] C. Morris and C. Murphy *Getting a PhD in Law* (London: Hart Publishing, 2001) p. 35.

context in which the *droit de suite* developed, which includes the influence of national continental political ideologies; the influence of legal and political structures on extant EU IP policy; the progressive realisation of social rights within the EU; and the current economic and social realities experienced by visual artists. This method is utilised primarily in Chapters 3 and 5.

c) Comparative Methodology

The thesis also employs the comparative methodology in order to fully address the central research question. Kamba describes comparative law as 'the study of, and research in law by the systematic comparison of two or more legal systems; or of parts, branches or aspects of two or more legal systems.'[9] There are a number of reasons for employing the comparative methodology; comparative methodology allows one to 'critically illuminate' one's own legal system through comparison with other models;[10] it also allows the researcher to investigate the multiple modalities of form in a given area which ultimately informs the form and content of proposals to reform the law in a given area. In this context the research reviews the historic French position – the *droit de suite* – the extant EU manifestation – ARR Directive 2001/84/EC – and the German and Norwegian ARR models. An important aspect of the comparative methodology it that once nuances between systems have been identified and when these are further drawn

[9] W. J. Kamba 'Comparative Law: A Theoretical Framework' (1974) 23(3) *International and Comparative Law Quarterly* p. 486.
[10] P. Legrand 'Comparative Legal Studies and Commitment to Theory' (1995) 58(2) *Modern Law Review* p. 264, as cited by G. Samuel, *An Introduction to Comparative Law Theory and Method* (Oxford: Hart Publishing, 2015) p. 14 [hereinafter Samuel].

upon in making recommendations a consistent stand point needs to be adopted.[11] As noted by Samuel, it is important that '… the criteria that will act as the basis of a "best solution" are set out and reasons for their criteria are given.'[12] Accordingly, the thesis adopts the principle of social inclusion and participation as derived from Harris's theory of social citizenship. This approach therefore provides an objective basis upon which reform proposals can be made. Since the thesis aims to identify recommendations for legal reform, the Norwegian and German models provide a framework of legal responses that can be drawn from; and while the historic French *droit de suite* is useful as an historic comparator, the removal of a social function from the extant French regime curtails any reliance on that model.

When engaging in comparative research, it is also necessary to consider political, social, economic and cultural differences between countries.[13] As noted by Razi:

> 'The law and the institution of a country grow generally out of the history and national and social life of that country. Consequently, the knowledge of any system of law without the corresponding understanding of the national and social life from which that legal system grew up cannot be but utterly superficial.'[14]

Accordingly, Chapter 5, in addition to considering the concept of need and poverty within the over arching concept of social citizenship, considers various

[11] K. Zweigert and H. Kotz *Introduction to Comparative Law* 3rd ed. (trans. T. Weir) (Oxford: Clarendon Press, 1998), p. 4.
[12] Samuel, *supra* note 10, at p. 42.
[13] Kamba, *supra* note 9, at p. 511.
[14] G. M. Razi, 'Around the World's Legal Systems' [1959] *Howard Law Journal*, p. 11.

divergent typologies of welfarism. As well as providing context to the various typologies of welfare and the use of the *droit de suite* as a means of targeted intervention, this exposition delimits the extent to which a 'solution' or 'ideal model' can be uprooted from one jurisdiction and transplanted to another.

d) Doctrinal Research

Finally, doctrinal research, which can be described as 'critical reasoning based around authoritative texts',[15] is not only one of the main methodologies employed throughout this thesis but also represents the underlying method through which the aforementioned methodologies are conducted. Doctrinal legal research involves the systematic exposition of the legal concepts and principles governing a particular area of the law. As Morris and Murphy explain, this methodology '… focuses almost entirely on law's own language of statutes and case law to make sense of the legal world. Law is seen as a self-contained system which is politically neutral and independent of other academic disciples.'[16] This methodology attempts to establish legal coherency and consistency. The doctrinal legal methodology presents the 'internal' legal perspective. As McCrudden explains, the internal approach '… is the analysis of legal rules and principles taking the perspective of an insider in the system.'[17] Doctrinal methodology '… involves the close analysis of decisions by the higher judiciary, often at the appellate level, and legislation of various kinds.'[18] The sources are then supplemented with the critical commentary of academic and practicing

[15] McCrudden, *supra* note 5 at p. 632.
[16] C. Morris and C. Murphy *supra* note 8, at p. 31.
[17] McCrudden, *supra* note 5, at p. 633.
[18] *Ibid.* at p. 636.

lawyers.[19] McCrudden also proposes a wider engagement with the methodology and asserts that it also encompasses considerations of justice and utility as well as evidence from the social sciences, including the policy considerations of politicians and law-makers alike.[20] Accordingly, this thesis employs both primary and secondary sources of law – Treaties, Directives, Regulations, national legislation, case law etc. – in conjunction with academic commentary and preparatory materials relating to the formation of the EU ARR Directive, as well as empirical research from the social sciences relating to the socio-economic status of visual artists.

In addition to providing the basis for the aforementioned methodologies the doctrinal methodology is used in this thesis to present an exposition of the Artists' Resale Right Directive 2001/84/EC and to critique its nature and scope. The analysis includes an examination of the Directive itself, the relevant case law both before and after the enactment of the Directive, the Berne Convention and the national responses of EU member states to the enactment of the Directive. This analysis contributes to the purpose of answering the thesis's central research question.

Findings

The analysis undertaken in this thesis establishes that the ARR Directive would better serve visual artists at the margins of society by adopting a redistributive,

[19] See D. Ibbetson 'Historical Research in Law' in P. Cane and M. Tushnet, eds. *The Oxford Handbook of Legal Studies* (Oxford: OUP, 2003) p. 864 as cited by McCrudden *supra* note 5, at p. 633.
[20] McCrudden, *supra* note 5, at p. 635.

social function, redolent of the Germany ARR model. It is proposed that the Directive incorporate a provision based on the German *Kulterwerk* model, mandating that member states adopt a social redistributive mechanism, which takes a small percentage of ARR royalty earnings from all visual artist beneficiaries, and redistributing to needy visual artists. It is concluded that a redistribution of funds, from wealthy visual artists to emerging visual artists reflects the liminality of the ARR, which in turn reduces experienced poverty and the social exclusion faced by many visual artists today. A key recommendation of this thesis is that a social mandate be included within the Directive that reflects the right's historic origins, thereby satisfying its historic and contemporary *raison d'être.* In line with Article 11 of the ARR Directive, the Commission should take this recommendation on board in its periodic review concerning the implementation and effect of the Directive.[21]

[21] It is submitted that while Article 11 appears to limit proposals to issues relating to minimum threshold, rates of royalty and maximum amounts laid down in Article 4(1), the section also makes provision for 'any other proposal it may deem necessary in order to enhance the effectiveness of the Directive.'

Chapter 1 – The Evolution of EU Intellectual Property Rights

1.0 Introduction

The chapter provides context to the development of the Artists' Resale Directive by outlining international and EU developments in the field of copyright. International agreements such as the Berne Convention have considerably influenced EU copyright law. Recognising this important contribution, the chapter begins by providing an historical overview of the Berne Convention before considering the development of the *droit de suite* – artists' resale right – within that architecture. The chapter then progresses to consider the development of intellectual property rights in the EU with a particular focus on the process of harmonization. Here the commentary is divided into three parts, questioning firstly whether the EU enjoyed the requisite competence to legislate in the area of intellectual property rights and what effect if any this had. Secondly, the commentary questions whether EU Commission activism contributed to the EU's evolving patchwork of intellectual property rights. Thirdly, by drawing on the relevant law – *Casis de Dijon* and *Phil Collins* – the chapter examines the extent to which the jurisprudence of the European Court of Justice (CJEU) was influential in this regard. Conclusions drawn from this analysis explains much about today's EU copyright architecture, the legal environment that gave rise to the drafting of the ARR Directive 2001/84 and more specifically the nature and scope of the Directive. The content of this analysis is drawn upon throughout this thesis and informs many of the concluding recommendations.

1.1 International Copyright law and the Berne Convention

Historically, in the area of author's rights, the need for international conventions such as the Berne Convention grew out of developments in the 19th century where methods of communication and transportation increased in efficiency and reliability.[1] This affected publishers whose catalogues of work could now be exploited legally by non-rights holders in multiple territories.[2] Some publishing houses responded to this form of legal piracy by opening offices abroad or by signing private agreements with foreign publishing houses.[3] In the main however, authors and publishers alike called for international protection so that works could be protected in multiple territories.[4] Initially the mechanism suggested to ensure a convergence of laws in this area was the establishment of multilateral treaties.[5] However, the approach lacked momentum due to the perceived difficulties in developing common standards of protection across multiple and divergent legal regimes.[6] This was largely due to the nature of copyright and the varying degrees of rights conferred differing significantly from state to state. Accordingly, bilateral treaties between states became popular[7] and by the 1870s many of the most important publishing markets in Europe[8] were governed to some extent by a network of bilateral treaties.[9] These bilateral

[1] C. Seville *EU Intellectual Property Law and Policy* (Cheltenham: Elgar, 2009) p. 8.
[2] *Ibid.* at p. 8.
[3] *Ibid.*
[4] B. Sherman and L. Bently *The Making of Modern Intellectual Property Law* (Cambridge: Cambridge University Press, 2002) pp. 111 – 115.
[5] *Ibid.*
[6] *Ibid.* at p. 111, noting that these agreements started to develop in the 1840s and 1850s.
[7] *Supra* note 4.
[8] France, Belgium, Germany and Holland.
[9] Seville, *supra* note 1; Sherman and Bently, *supra* note 4.

agreements also impacted the domestic laws of contracting states,[10] it was therefore in the interests of both contracting states to ensure that a reasonable level of uniformity was in place before agreements were ratified. Accordingly, where states offered low levels of rights protection, the principle of reciprocity[11] encouraged contracting states to 'harmonise-up'. This avoided situations where 'host states' with low levels of rights protection were obliged, under treaty, to provide higher levels of rights protection to foreign authors than were available to their national authors. While bilateral agreements offered many advantages they often lacked uniformity and the resulting standards of protection were neither 'comprehensive nor systematic'.[12] In practice, multi-faceted bilateral agreements involving multiple state players provided for a convoluted and opaque international IP regulatory system. Each bilateral agreement provided an alternative standard of protection for rights holders and as such proved difficult to use. It became evident that a multi-lateral agreement involving multiple states, all adhering to one standard, was the best means of overcoming the difficulties presented by the bilateral system. However, given the diversity of the underlying national systems, achieving a consensus proved challenging. A binary debate developed between groups of states and vested interest groups on the one hand, who were willing to adopt a pragmatic approach to harmonisation and accept lesser levels of protection, and on the other hand, those who regarded copyright

[10] *Supra* note 4, at p. 115. 'This was the result of the fact that the negotiations proceeded on the "assumption that the expediency between two countries depends upon a *precise and minute equality* of advantage to be derived by each contracting party respectively."' In essence, equivalence based upon raising, rather than lowering, standards of protection.

[11] Reciprocity may either be 'formal' or 'material'. If it is 'formal' it simply requires the 'host' state to confer the same level of rights protection to foreign authors as it provides to national authors. If it is 'material' the extent of the protection conferred by the 'host' state will be limited or will be equivalent to the levels of protection available to the 'foreign author' in their home state.

[12] *Supra* note 1, at p. 9.

as a 'natural right'[13] and as such less inclined to accept a dilution of rights.[14] The first international efforts in this area came under the auspices of the Berne Convention.

The formation of the Berne Convention can be traced back to 1858 when a Congress on Literary and Artistic Property was held in Brussels.[15] Its 'Committee of Organisation' comprised a number of Belgian authors, artists, civil servants, and representatives of cultural organisations.[16] The agenda of the Congress was divided into five distinct categories: 'international questions', 'property in literary and artistic works in general', dramatic and musical works', 'artistic works' and 'economic questions'.[17] The debates of the Congress displayed a general consensus on the need for international copyright protection. The Congress's resolutions formed a basic outline for a universal copyright law.[18] Further congresses were held, notably the 1878 International Literary Congress, organised by the *Société des gens de letters* in Paris,[19] which passed a resolution insisting that an author's right was a form of property rather than a

[13] Author's rights systems such as the French and German systems placed authors at the centre of protection rather than the owner of the copyright as in the common law systems of Great Britain and Ireland. This ideological standpoint can be traced back to the writings of many continental philosophers such as Kant and Hegel, see generally E. Adeney, 'The Moral Rights of Authors and Performers – An International and Comparative Analysis' (New York: Oxford University Press, 2006).

[14] *Supra* note 1 at p. 9. In the main it was continental jurisdictions that applied higher standards of protection.

[15] See L. Riviére, *La Protection Internationale des Oeuvres Littéraires et Artistiques Étude de Législation Compare* (1897) p. 141, cited in S. Ricketson and J. Ginsburg *International Copyright and Neighbouring Rights, The Berne Convention and Beyond.* Vol 1. 2nd ed. (Oxford: OUP, 2006) p. 44. For a summary of the proceedings of the Congress, see *Annales de la Propríeté industrielle, Artistique et Littéraire* (1858) pp. 401- 463 ('Annales (1858)'). For the full proceedings and records of the Congress, see E. Romberg *Compte redu des travaux du Congés de la Propriété Littéraire et Artistique* (1858).

[16] See *Annales* (1858) p. 401, cited in Ricketson and Ginsburg *supra* note 15, at p. 45, 'It lasted for four days, and was attended by nearly 300 persons, including fifty-four delegates from learned societies, twenty-four artists, sixteen journalists, twenty-nine lawyers, twenty-nine publishers and printers, and forty other persons including officials, politicians, judges etc'.

[17] *Ibid.*

[18] *Ibid.* at pp. 45-46.

[19] See Ricketson and Ginsburg, *supra* note 17, at p. 49 and Seville *supra* note 1 at p. 9.

legal concession and that it was a perpetual right.[20] The Paris Congress also established the International Literary Association which was later expanded to include artists, thus becoming *l'Association Littéraire et Artistique Internationale* (ALAI). The main objective of the ALAI was to create an international agreement to protect literary and artistic copyright.[21] It held annual conferences throughout Europe and its members continued to press for universal copyright laws. These efforts eventually led to the 1886 Berne Convention on the Protection of Literary and Artistic Works, which created a 'union for the protection of the rights of authors over their literary and artistic works'.[22] The Convention was for the most part based on the principle of national treatment.[23] Ten states signed the Convention in September 1886, and it came into force the following year.[24] The signatories were largely European countries and excluded many important international players such as the United States,[25] which did not provide international copyright protection until 1891 and remained outside the

[20] *Supra* note 1, at p. 9.
[21] See ALAI <http://www.alai.org/en/information/history.html> (date accessed: 8 July 2017).
[22] See Berne Convention for The Protection of Literary and Artistic Works, July 24 1971, 1161 U.N.T.S. 3 [hereinafter Berne].
[23] The principle of national treatment or assimilation requires member states to confer the same level of protection upon non-national authors as is available to national authors. One important exception to this was the term of protection, which was subject to a rule of national/material reciprocity. The principle of national/material reciprocity requires a member state to offer non-national authors the same level of protection available to them in their home country.
[24] Those signing were Belgium, France, Germany, Great Britain, Haiti, Italy, Liberia, Spain, Switzerland and Tunisia. The French and British governments signed for their colonies and possessions also, whereas the Spanish government reserved its position until the exchange of ratifications one year later. The Convention came into force 5 December 1887, all the signatories except Liberia having ratified it.
[25] The U.S. opted out because of the high levels of protection and inclusion of additional rights mandated by Berne. In many ways this led to the Universal Copyright Convention U.N.T.S. 134 (1955). The Universal Copyright Convention (UCC) is not relevant to the current discussion and is not considered further. For more information on the UCC see S. von Lewinski 'The Role and Future of the Universal Copyright Convention' UNESCO E-Copyright Bulletin (Sept. – Dec. 2006)
<http://webcache.googleusercontent.com/search?q=cache:0F_Ic150ItsJ:unesdoc.unesco.org/images/0015/001578/157846e.pdf+&cd=1&hl=en&ct=clnk&gl=ie> (date accessed: 8 June 2017).

Berne Convention until 1988.[26] Given the differences in the legal traditions of the signatory states, the agreement was significant. Numa Droz, the Swiss politician who had been president of the Berne conferences to date, described the creation of the Union as a 'striking affirmation of the universal conscience in favour of copyright'.[27] Yet despite this, many issues of principle remained unresolved.[28]

The Berne Convention has been amended[29] several times since its inception and today has 172 members.[30] The Convention sets minimum standards for protection, which members of the Union have agreed to adhere to. The Convention is based on the principle of national treatment[31] and the 'enjoyment and exercise' of Berne Rights are not subject to any formality such as registration or notice.[32] Berne protection is also independent of the existence of protection in

[26] Berne Convention Implementation Act of 1988, Title 17 United States Code (USC) P.L. 100 - 568, 102 Statute 2853.
[27] *Actes de la Conferences Réunie Berne* (1885) p. 65.
[28] For instance, the recognition of 'moral rights' by civil law countries was something that many common law countries found unpalatable.
[29] The Berne Convention, concluded in 1886, was 'completed' at Paris in 1896, revised at Berlin in 1908, 'completed' in Berne in 1914, revised at Rome in 1928, at Brussels in 1948, at Stockholm in 1967 and at Paris in 1971, and was amended in 1979. It is administered by the World Intellectual Property Organisation (WIPO). For further information see <http://www.wipo.int/treaties/en/text.jsp?file_id=283698> (date accessed: 8 July 2017).
[30] As of 8 July 2017. See WIPO website: <http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15> (date accessed: 8 July 2017).
[31] *Supra* note 22, Berne, Art. 5(1) 'Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.' Art. 3 '(1) The protection of this Convention shall apply to:
(a) authors who are nationals of one of the countries of the Union, for their works, whether published or not;
(b) authors who are not nationals of one of the countries of the Union, for their works first published in one of those countries, or simultaneously in a country outside the Union and in a country of the Union.
(2) Authors who are not nationals of one of the countries of the Union but who have their habitual residence in one of them shall, for the purposes of this Convention, be assimilated to nationals of that country.'
[32] *Supra* note 22, Berne, Art. 5(2) 'The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this

the country of origin of the work,[33] therefore an author's rights and remedies are governed by the laws of the country where protection is claimed.[34] The main exception to this relates to the term of protection; where a Berne union state provides for a longer copyright term than the Berne minimum, protection may be denied once protection in the country of origin ceases.[35] The expression 'literary and artistic works' includes 'every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression.'[36] Authors and copyright owners enjoy a number of exclusive rights:

- The right to make reproductions of the work 'in any manner or form';[37]
- The right to perform/recite it in public;[38]
- The right to translate it;[39]
- The right to make adaptations and arrangements of the work;[40]
- The broadcasting right/right of communication to the public.[41]

The Convention provides for certain exceptions to these rights, for example for the purpose of criticism and review, for reporting, education etc. Exceptions to

Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.'

[33] There are however exceptions to this general rule.

[34] *Supra* note 22, Berne, Art. 5(3) 'Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.'

[35] *Supra* note 22, Berne, Art. 7(8) 'In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.'

[36] *Supra* note 22, Berne Art. 2 (1).

[37] *Ibid*. Berne, Art. 9 (3).

[38] *Ibid*. Berne, Art. 11 (1).

[39] *Ibid*. Berne, Art. 8.

[40] *Ibid*. Berne, Art. 12.

[41] *Ibid*. Berne, Art. 11*bis* (1).

the reproduction right are subject to a three-step test: they must be confined to 'special cases'[42]; the reproduction must not conflict with a normal exploitation of the work; and must not unreasonably prejudice the legitimate interests of the author.[43] The Convention also provides for certain 'moral rights'. The right of attribution and integrity which are defined as 'the right to claim authorship of the work and the right to object to any mutilation or deformation or other modification of, or other derogatory action in relation to the work which would be prejudicial to the author's honour or reputation'.[44] These rights are not transferable and are exclusive to the author alone.[45] Berne establishes a minimum period of protection for these rights – equal to that of their economic counterparts – which last for the life of the author plus 50 years.[46] In addition, and of most interest to this investigation, since 1947 Berne has provided for the *droit de suite* or as more commonly known, the artists' resale right.

Finally, the Berne Convention has sometimes been referred to as an 'ancient'[47] document with some commentators questioning its contemporary relevance: it is important to note that while revisions of Berne halted in 1971 the Convention continues to form the cornerstone of more recent international standardisation efforts in the area of copyright. Ricketson notes that when it came to the GATT

[42] Ricketson notes that the meaning of 'special cases' is open to interpretation depending upon whether a Union member state is party to later multilateral agreements such as TRIPs and the WCT (The WIPO Copyright Treaty). See S. Ricketson 'The Berne Convention: the continued relevance of an ancient text' in D. Vaver & L. Bently, eds., in *Intellectual Property in the New Millenium*, Essays in Honour of William R. Cornish, (Cambridge: Cambridge University Press, 2004) pp. 217 - 233.
[43] *Supra* note 22, Berne, Art. 9(2). See also Art. 10 (use of quotations from a work lawfully made available to the public; illustrations for teaching) and Art 10*bis* (news items; current events).
[44] *Ibid*. Berne, Art. 6*bis*.
[45] *Ibid*. Berne, Art. 6*bis*.
[46] *Ibid*. Berne, Art. 7(1) 'The term of protection granted by this Convention shall be the life of the author and fifty years after his death.'
[47] Ricketson, *supra* note 42, at p. 217.

(Uruguay Round) revisions beginning in 1986, ' … Berne provided negotiators with a ready-to-wear set of norms that could be incorporated into the new Agreement on Trade-Related Intellectual Property Rights (TRIPS)'.[48] In addition the WIPO Copyright Treaty (WCT) and the WIPO Performance and Phonogram Treaty (WPPT)[49] require full compliance with Berne norms.[50]

1.2 Droit de Suite under the Berne Convention

Prior to the development of the Artists' Resale Right Directive the EU Commission observed that '[t]he wide legislative diversity that reigns in the field of the artist's resale right is due among other things to the flexibility of the provisions of the Berne Convention … pursuant to which countries of the Berne Union are free to decide whether or not to introduce the right into their domestic law.'[51] The Commission viewed this diversity as a trade distortion and contrary to the functioning of the internal market. The following section outlines the international political debates surrounding the adoption of the *droit de suite* by the Berne Convention, thereby explaining, to some extent, the Berne Convention's 'loose' *droit de suite* formulation. This will in turn explicate why Berne allowed for such diversity and in turn explain why such an approach

[48] *Ibid*. p. 218 – referring to Article 9(1) of the Agreement on Trade Related Aspects of Intellectual Property, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994. [hereinafter TRIPS].

[49] These Treaties are considered 'associated agreements' under Article 20 of Berne 'The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable.'

[50] See Article 1(4) WIPO Copyright Treaty, adopted Dec. 20, 1996, WIPO Doc. CRNRIDC/94.

[51] See Commission of the European Communities 'Proposal for European Parliament and Council Directive on the resale right for the benefit of the author of an original work of art' COM(96) 97 final, 96/085 (COD) Brussels, 13 March 1996 p. 7 [hereinafter Proposal for a Resale Right Directive].

conflicted with the process of EU harmonization. Furthermore it will demonstrate that the contentious nature of the *droit de suite* is not just an EU phenomenon.

Beyond Berne and subsequent to the adoption of the *droit de suite* into French law in 1920[52], efforts to internationalise the right began.[53] By the time of the Rome Conference of the Berne Convention in 1928, Belgium[54] and Czechoslovakia[55] had already legislated for it. In addition, non-governmental organisations such as the *Association Litteráire et Artistique Internationale* (ALAI) and the International Institute for Intellectual Cooperation (the IIIC) began to advocate for the right internationally.[56] At the Rome Conference, the French Government proposed the following '*voeu'* or 'wish' which was based directly on an ALAI resolution:

> 'It is desirable that the inalienable droit de suite, established in France by the law of 20 May 1920 and in Belgium by that of 25 June 1921, to the profit of artists, in their original works which are publicly sold, should be the object of similar legislative dispositions in other countries, on

[52] Fr. Art 42 of Loi du 20 Mai 1920 (1957 JO 2723).
[53] See L. de Pierredon-Fawcett *The Droit De Suite in Literary and Artistic Property, A Comparative Law Study* (New York: Center for Law and the Arts, Columbia University School of Law, 1991) p. 93 citing efforts by the International Literary and Artistic Association (A.L.A.I.) in 1925, 1926 and 1928. See also Duchemin *Le droit de suite des artistes* (1948) (Thesis, Paris) p. 271, citing the resolutions adopted by the International Committee for Intellectual Cooperation in 1927 and those of the International Conference of Intellectual Workers in 1929.
[54] Be. Law of 25 June 1921.
[55] Cz. Art. 35, Law of 24 November 1926.
[56] See a report by the International Institute of Intellectual Co-operation, *La Protection Internationale du droit d'auteur* (1928) as cited by Ricketson and Ginsburg, *supra* note 15, at p. 673.

> condition of reciprocity, in each of them, between their nationals and those of countries which have already adopted this measure.'[57]

This was supported by the Belgian and Czech delegates[58] as well as by the IIIC (which was present at the conference as an observer), however several delegations including Britain and Norway questioned the place of the *droit de suite* within copyright law. A modified text was eventually adopted but many delegations including the UK, Hungary, the Netherlands, Norway and Switzerland abstained:

> 'The Conference expresses the desire that those countries of the Union which have not yet adopted legislative provisions guaranteeing to the benefit of artists an inalienable right to a share in the proceeds of successive public sales of their original works should take into account the possibility of considering such provisions.'[59]

Arguably, the 'modified text' on the *droit de suite* was no more than a token gesture, designed to appease the pro *droit de suite* Union states while simultaneously acknowledging the Union's un-readiness to adopt the proposal. However, as will be seen, the 'modified text', while tentative in nature, sowed the seed for the eventual international recognition of the *droit de suite.*[60] Following the Rome Conference, many non-governmental actors such as the

[57] See Duchemin *Le Droit de Suite des Artistes* (1948) p. xxx, as cited by Ricketson and Ginsburg, *supra* note 15.
[58] *Actes 1928* p. 103, as cited by Ricketson and Ginsburg, *supra* note 15, at p. 673.
[59] *Ibid.*
[60] Although, the right is not accepted internationally, it enjoys international recognition, if not acceptance. See the international campaign for the Resale Right http://www.resale-right.org/ (date accessed: 8 July 2017).

ALAI, the IIIC and the International Institute of Rome for the Unification of Private Law continued to study the implementation of the *droit de suite* on both a national and international level.[61] In 1934 in preparation for the Brussels Revision of the Berne Convention both the Belgian Government and the International Office of the Berne Convention[62] proposed a new article 14*bis* which provides for Convention recognition of the *droit de suite.* This formulation incorporated the work of visual artists as well as the manuscripts of writers and composers:

> 'As far as original works of art and the original manuscripts of writers and composers are concerned, the protection accorded by the present Convention includes equally for the author of the work and his heirs an inalienable right to an interest in any public sale of which the said work is the object after the first sale thereof has been made by the author.
>
> The method and amount of this collection are to be determined by national legislation.'[63]

[61] See J.L. Duchemin *Le Droit de Suite des Artistes* (Paris: Sirey, 1948) p. 243 as cited by Ricketson and Ginsburg, *supra* note 15, at p. 674.

[62] The International Office of the Berne Convention was the predecessor to the Worlds Intellectual Property Organisation. The World Intellectual Property Organization (WIPO) was established by a convention signed at Stockholm on July 14, 1967, and entitled 'Convention Establishing the World Intellectual Property Organization.' The WIPO Convention entered into force in 1970. The origins of what is now WIPO go back to 1883 when the Paris Convention for the Protection of Industrial Property was adopted and to 1886 when the Berne Convention for the Protection of Literary and Artistic Works was adopted. Both Conventions provided for the establishment of an 'International Bureau' or secretariat. The two Bureaus were united in 1893 and functioned under various names (i.e. BIRPI) until 1970 when they were replaced by the International Bureau of Intellectual Property (commonly designated as 'the International Bureau') by virtue of the WIPO Convention. WIPO became a specialized agency in the United Nations system of organisations in 1974. < http://www.wipo.int/about-wipo/en/history.html> (date accessed: 8 July 2017).

[63] See Duchemin *Le Droit de Suite des Artistes* (1948) p. 301 (for the text of this proposition) as cited by Ricketson and Ginsburg, *supra* note 15, at p. 674.

This expanded proposal received wide criticism from many Berne Union member states as it not only required the mandatory recognition of the right but also extended the right to include manuscripts. Other points of contention were its apparent inclusion of architectural works and works of applied art,[64] its limitation to heirs,[65] and the failure to link its duration to that of copyright.[66] The proposal allowed nationals of any Berne Union member state or any author who published his work for the first time in a Union member state to be treated like a national author in the country where protection was claimed. This did not allow for differences or a lack of equivalence between the laws of each state.[67] This element of the proposal met with resistance because of the limited number of countries that had incorporated the *droit de suite* into their legislative framework. Controversially, Austria proposed to subject the *droit de suite* to the principle of reciprocity.[68] This would result in authors being limited to benefiting from the right in other Union member states to the extent that the right was recognised under their national legislation.[69] In circumstances where there was no national recognition of the right an author could not claim it in another Union member state. This proposal meant abandoning the Berne Convention's principle of

[64] Indeed today there is a lack of consensus concerning the inclusion of architectural drawings and the types of works considered 'applied art' that fall under the rubric of the resale right.
[65] Accordingly, testamentary dispositions were limited to relatives/heirs rather than to other legatees.
[66] Ricketson and Ginsburg, *supra* note 15, at p. 674.
[67] *Supra* note 53, at p. 94.
[68] *Supra* note 57, the original proposal for the *droit de suite* was based on the principle of reciprocity.
[69] For example, if the level of protection of authors' right under the *droit de suite* could be graded on a scale of 1 to 3, 3 representing the highest international level of protection and 1 representing the lowest level of protection: where an author applies for protection in a Berne Union state, other than his/her home country and that Berne Union state offers the highest level of protection – ' level 3' – the author will only be able to claim that level of protection in that Berne Union state to the level of protection offered in his or her home state. So if the Author's home state only offers 'level 1' protection of rights, then that home level of protection will limit the protection available in the foreign Berne Union state. This is known as 'material reciprocity'.

assimilation/national treatment;[70] whereby all non-national authors would enjoy the same benefits and levels of protection as national authors in that state.[71] The proposal also removed the possibility of authors originating from non-Berne Convention states benefiting from the right where their work was published for the first time in the Union. Following the Austrian proposal, the criterion was therefore author's nationality – albeit qualified by the principle of reciprocity – and not place of residence or place of publication. The *droit de suite* would therefore be given a 'special status', one departing from the Berne Convention's principle of assimilation.[72] Given the number of exceptions under Berne to the principle of assimilation it is questionable whether the *droit de suite* continues to represent a 'special status' or exemption. Other exceptions to the principle of national treatment include: Article 7.8, the comparison of terms of protection; Article 2.7, phrase 2 – on models and designs; Article 6, the possible retaliation against back-door protection; Article 18, the application in time; and Article 30.2(b) part 2, the reservation of the ten-year periods regarding translations.[73]

In 1939 the Berne Convention brought together a panel of experts in Samaden (Switzerland)[74] to consider incorporating the *droit de suite* under a separate and related convention. Under this draft, each contracting state undertook to accord the authors of original artistic works 'realized in the domain of painting,

[70] *Supra* note 22, Berne Art. 4, as revised at Rome had a broad scope, it was directed at 'the rights [that] the respective laws currently grant or may later grant to nationals.'
[71] 'Assimilation' is also referred to as 'formal reciprocity'.
[72] The Berne Convention's principle of assimilation requires Berne Union member states to provide nationals of other Berne Union member states the same level of protection and rights as their own citizens. See also L. de Pierredon-Fawcett *supra* note 53, at p. 94.
[73] See I. Stamatoudi and P. Torremans *EU Copyright Law, A Commentary* (Cheltenham: Elgar, 2014) p. 27.
[74] The panel of experts included legal academics, practitioners, rights groups representatives, politicians etc. See Duchemin *Le Droit de Suite des Artistes* (1948) p. 255 as cited by Ricketson & Ginsburg *supra* note 15 at p. 674.

sculpture, engraving and drawings "*a droit de suite*" in the price of resale of their works'.[75] The right was personal, inalienable and transmissible to heirs only post mortem.[76] Other procedural elements were to be left to national legislators to determine, these included the duration of protection, the method of collection, the amount and the means of safeguarding the right.[77] Finally, the proposed convention was to be open to present and future Berne Union members.[78]

The Samaden project, as outlined above, was abandoned after the outbreak of World War II. In a renewed programme in 1948 – the Brussels Conference – the annexation of the *droit de suite* as a neighbouring right was replaced with the incorporation of the right as a copyright. This centring of the *droit de suite* within copyright rather than within 'neighbouring rights' was significant because it recognises the right as an author's right rather than as a related right of producers and performers. Indeed, the Berne Convention's ultimate recognition of the right as a copyright rather than as a related or neighbouring right arguably justifies the exclusive and inalienable nature of the right as it now exists. Had the right been recognised as a related right, the justification of its personal nature would have been problematic and potentially paradoxical. In any event, the right continued to face strident criticism from some Union member states,[79] accordingly a further paragraph was added to the Belgian proposal providing that the *droit de suite* could only be claimed in those countries whose legislation provided for it and

[75] *Ibid.* at p. 675.
[76] *Ibid.*
[77] *Ibid.* See 'Draft Text', Art. 6 & 7.
[78] *Ibid.* See 'Draft Text', Art. 9.
[79] Notably, Austria, Norway, Finland, Britain and the Netherlands. For further details see Ricketson and Ginsburg, *supra* note 15, see also de Pierredon-Fawcett, *supra* note 53, at p. 95.

this should be on the basis of reciprocity.[80] No objection was raised to this, and the final provision adopted by the Conference as article 14*bis* reads as follows:

> (1) The author, or after his death, the persons or institutions authorized by national legislation, shall, in respect of 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 disposal of the work by the author.
>
> (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 degree permitted by the country where this protection is claimed.
>
> (3) The procedure for collection and the amounts shall be a matter for determination by national legislation.

While the *droit de suite* was successfully incorporated as a copyright under the Berne Convention, it was only optional and at the time of the Brussels Conference it was clear that there was limited support for the right. In subsequent years there were no further proposals to amend Article 14 *bis*, and therefore apart for some minor technical changes the provision remains largely unchanged.[81] Finally, while the French *droit de suite* predominantly influenced this facet of the Berne Convention there was a noticeable absence in the discourse related to the social character of the *droit de suite.* The right was instead cast strictly as an

[80] See Berne Convention *Documents 1948* (1951) p. 367. <http://www.wipo.int/wipolex/en/details.jsp?id=12802> (date accessed: 8 July 2017).

[81] The minor technical changes include: a) the article is now renumbered as article 14*ter*, and b) the word 'transfer' was substituted for 'disposal' in paragraph (1) and 'extent' for 'degree' in paragraph (2).

economic right. This omission undoubtedly shaped the discourse concerning the nature of the *droit de suite* and the artists' resale right for decades to come.

1.3 The Development of the European Union's Intellectual Property Rights Framework

The EU's influence on member state's intellectual property (IP) regimes has been significant.[82] In amending their domestic laws, member states have conferred broad powers to EU institutions so that the Union's common objectives can be achieved.[83] This is particularly evident in the area of intellectual property where the EU has harmonised laws on trademarks,[84] design,[85] copyright[86] and neighbouring rights[87], database rights,[88] plant variety

[82] See G. Triton *Intellectual Property in Europe* 3rd ed. (London: Sweet & Maxwell, 2008) p. 7; and Seville *supra* note 1 at p. 23.

[83] See Article 1 of the Treaty on the European Union [hereinafter TEU] and the Treaty on the Functioning of the European Union [hereinafter TFEU] OJ C83/01.

[84] Trade Marks, Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community Trademark [1994] OJ L011; Directive No. 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to Trade Marks L336/1; Commission Implementing Regulation (EU) 2017/1431 of 18 May 2017 laying down detailed rules for implementing certain provisions of Council Regulation (EC) No. 207/2009 on the European Union Trade Mark, L205/39; Regulation (EU) 2015/2424 Of The European Parliament And Of The Council of 16 December 2015 amending Council Regulation (EC) No 207/2009 on the Community Trade Mark and Commission Regulation (EC) No. 2868/95 implementing Council Regulation (EC) No. 40/94 on the Community Trade Mark, and repealing Commission Regulation (EC) No. 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs)

[85] Community Designs, Council Regulation (EC) No. 6/2002 of 12 December 2001 on Community designs: [2002] OJ L3/1; Regulation (EU) 2015/2424 *supra* note 84.

[86] See for example; The Information Society Directive, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167 [hereinafter InfoSoc Directive].

[87] For example, Directive 2001/84/EC 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 L 272/32 [hereinafter Artists' Resale Right Directive]; Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L 248.

[88] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L 077.

rights,[89] and more recently the Unity Patent.[90] Despite this, many commentators have argued that the harmonization of EU IP law has been 'incoherent',[91] 'fragmented'[92] and 'reactionary'.[93] Section 1.5 analyses these criticisms, which in turn inform the understanding of how the Artists' Resale Right Directive came into existence and why it took its current form. Before considering these criticisms, the following section will outline the history of the EU's IP harmonization initiative. This will provide context for the forthcoming analysis.

1.4 Background to EU Intellectual Property Harmonization

The EU's original reliance on the internal market rationale as a legal basis for harmonization is key to understanding the scope and content of the current EU IP framework as well as understanding more recent developments.[94] This in turn informs the understanding of the legislative context in which the EU Artists' Resale Right Directive developed. This goes some way to explaining the nature and scope of the Artists' Resale Right Directive as well as providing a basis for further analysis.[95]

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[89] Council Regulations (EC) No. 2100/94 of 27 July 1994 on Community plant variety rights [1994] OJ L 227.

[90] EU Regulation No. 1257/2012 (OJ EPO 2013, 111) creates a 'European patent with unitary effect', commonly referred to as 'Unitary Patent' <http://www.epo.org/law-practice/unitary/unitary-patent.html> (date accessed: 8 July 2017).

[91] C. Geiger *Constructing European Intellectual Property* (Cheltenham: Elgar, 2013) p. 5 - 23.

[92] See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Single Market for Intellectual Property Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe COM (2011) 287 final, Brussels, 24.5.2011 p. 6.

[93] *Supra* note 91.

[94] See Article 118, which provides an IP 'legal basis' for EU harmonisation. The Lisbon Treaty 2001 OJ C 306 [hereinafter Lisbon Treaty] incorporated Article 118 into the Treaty. Prior to the introduction of Article 118, the preferred means of harmonising EU IP law was by means of the 'internal market' rationale - Article 26 (TFEU) (formerly Article 7(a) EEC).

[95] Directive 2001/84/EC 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 L 272/32.

The roots of EU IP harmonization can be traced back to the late 1950s when the six original member states, under the initiative of the Commission, began work on creating a European Patent;[96] followed in the 1960's by the development of a European Trade Mark[97] and the adoption of Conventions in both these areas in the 1970s.[98] Progress was slow primarily due to the fact that the economies of Europe at that time were strong and the benefits of integration were not fully realised.[99] However the 1970s threw the Community into a 'state of crisis';[100] the Community faced successive monetary crises, a rise in commodity prices and increases in energy costs. In addition, at this time the process of 'EU enlargement'[101] brought with it additional challenges[102] and it was feared that if member states did not coordinate their activities more fully the Community would be in jeopardy.[103] Not withstanding these myriad challenges, these events created an awareness among member states of the potential benefits of a united Europe.[104] In light of this growing awareness the Commission responded

[96] See European Parliament Resolution in the Seventh General Report of 30 of May 1974 on the activities of the Communities in 1973 [1974] OJ C 62 p. 146; see also EU Regulation No. 1257/2012 (OJ EPO 2013, 111) creating a 'European patent with unitary effect', commonly referred to as 'Unitary Patent' < http://www.epo.org/law-practice/unitary/unitary-patent.html> (date accessed: 8 July 2017).

[97] *Ibid.* European Parliament Resolution in the Seventh General Report at p. 147; see also the Trade Mark Directive and the Community Trade Mark Regulation. National trademark registration in the EU Member States has been harmonized for almost 20 years and the Community trademark was established 15 years ago. See Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks, [2008] OJ L 299, p. 25 and Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, [2009] OJ L78, p. 1 [hereinafter Trademark framework].

[98] *Ibid.* at p. 146.

[99] *Ibid.* see 'introduction' p. xvi – xxvi.

[100] *Ibid.* at p. xvi.

[101] EU Membership grew during the 1970s: Denmark, the United Kingdom and Ireland joined the EU in 1973.

[102] The addition of new Member States to the Community further challenged the EEC's institutional decision making and the overall operative structure of the EEC.

[103] *Supra* note 96, at p. xix.

[104] *Ibid.* at p. xxii, advantages in terms of market efficiency and trading with international partners as a unified trading bloc.

affirmatively,[105] adopting a number of 'common policies' in diverse areas including energy, economics, agriculture, competition, social and the environment.[106] As part of these 'common policies' and their focus on a convergence of law and policy the internal market and its objective of harmonization featured prominently. While it was originally thought that intellectual property rights did not directly affect the free movement of goods,[107] they were considered '… essential to the creation and maintenance of [the internal market]'.[108] In the 1970s the EU broadened its IP focus from IPRs that had a strictly industrial focus[109] to include IPRs relating to the cultural economy.[110] In 1975 the European Commission published a plan for 'priority action' which focused on the approximation of laws on copyright and neighbouring rights, including the resale right.[111] In 1976 a working document entitled 'Community Action in the Cultural Sector' highlighted the need to harmonise many areas of copyright law.[112] The Commission saw the Community's unique cultural heritage as being of intrinsic value and as such recognised the importance of supporting its cultural workers by providing 'just and adequate' reward for their endeavours. This would be achieved by creating a legal framework of rights which would in turn provide financial support for cultural workers: composers, authors, visual artists, performer etc. However the

[105] *Ibid.* at p. xvi. See address by Mr. Carlo Scarascia Mugnozz, Vice-President of the Commission of the European Communities, to the European Parliament on 12 February 1974.
[106] See Council Resolution of 22 March 1971 OJ C 28 p. 1. See also *supra* note 94, at p. 8 and p. 173 - 440, the Commission had set 1980 as the deadline for the development of a European Economic and Monetary Union.
[107] *Supra* note 96, at p. 146. The Commission is now of the view the IP directly affects the free movement of goods in the internal market. See Recital 6, of the InfoSoc Directive.
[108] *Supra* note 96, at p. 146.
[109] Such as trademarks and patents which directly affected industry and commerce.
[110] *Supra* note 96, at p. 5.
[111] European Commission, 'Community Action in the Cultural Sector', Bulletin of the European Communities Supplement 6/77 (1977) p. 24.
[112] See 'Community Action in the Cultural Sector' Commission Communication to the Council, 22 November 1977 COM (77) p. 560.

process of harmonizing this tranche Community copyright law would take nearly two decades.[113] A combination of legal, political and economic factors contributed to this rather protracted process; these factors will be discussed in section 1.6. In the 1980s and 1990s the EU saw further developments in areas such as trademark law,[114] the protection of plant varieties,[115] registered and unregistered designs[116] and once again specific areas of copyright law.[117] The Commission's renewed focus on copyright began in 1988 with a Green Paper entitled 'Copyright and the Challenge of Technology' [hereinafter Green Paper].[118] The Commission argued that the protection of artistic and literary works was of growing importance due to the shift in economic activities of industrialised countries away from the production of tangible goods to intangible goods of a creative and technical nature.[119] At a time when the 'knowledge economy' was only in its infancy this showed remarkable foresight on the part of the Commission. The Commission regarded such industries as particularly vulnerable to damage through unauthorised copying and as such required

[113] See InfoSoc Directive. Admittedly, this process of harmonization is ongoing. Furthermore, many 'first generation' IP harmonization proposals did not come to fruition until the mid 1990s and 2000s. The artists' resale right is a case in point. While it was first proposed in the 1970s it did not become a directive until 2001. Other examples include the Database Directive 96/9/EC of 11 March 1996, OJ L 77/20 [hereinafter Database Directive], Directive 92/100/EEC of 19 November 1992 on lending and rental rights, OJ L 346 , replaced by Directive 2006/115/EC of 12 December 2006, OJ L 376 28 [hereinafter Lending and Rental Rights Directive], Directive 93/83 EEC of 27 September 1993, OJ L 248/15 on Cable and Satellite [hereinafter Cable and Satellite Directive], Directive 93/98/EEC of 29 October 1993 on the term of protection OJ L 290, replaced by Directive 2011/77 of 27 September 2011 OJ l 265/1 [hereinafter Term Directive]. See further Stamatoudi and Torremans *supra* note 73, at p. 10.
[114] See Trademark framework*, supra* note 84.
[115] Council Regulation (EC) No. 2100/94 of 27 July 1994 on Community Plant Variety Rights [1994] OJ L 227/1.
[116] Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the Legal Protection of Designs [1998] OJ L 289/28, Council Regulation (EC) No 6/2002 of 12 December 2001 on Community Designs [2001] OJ L 3/1.
[117] See European Commission 'Follow-up to the Green Paper' COM (90) 584 Final, Brussels, 17 January 1991. [hereinafter Follow-Up Green Paper].
[118] Green Paper on Copyright and the Challenge of Technology Com (88) 172 final, Brussels, 7 June 1988. [hereinafter Green Paper]
[119] *Ibid.*

'immediate action'.[120] The first and arguably the most important Directive of this time was the Directive on Computer Programs.[121] Subsequent directives were based on the four primary concerns outlined in the Commission's 1988 Green Paper. First, the requirement of a single internal market meant that it was necessary to eliminate disparities in member states copyright laws.[122] Second, the Community had to develop policies that would improve the competitiveness of its economy in relation to its global trade partners; a high level of IP protection was perceived to be the means to achieve this.[123] Third, intellectual property resulting from creative efforts within the community needed to be protected from unfair exploitation from outside the Community.[124] Finally, it was noted that in areas such as industrial design and computer software, copyright protection could have a restrictive effect on the market.[125] The Commission accordingly identified certain issues that it regarded as requiring urgent attention at community level. These included: piracy, home copying of sound and audio-visual material; distribution and rental rights for certain classes of work (in particular, sound and video recordings); the protection of computer programs and databases; and the limitations on the protection available to Community right-holders in non-member states.[126] There was also a proposal[127] that member states adhere to the

[120] *Supra* note 82, at p. 487.
[121] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L 122/42, repealed by Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OL L 111/16. For commentary see A. Lucas-Schloetter 'Is there a Concept of European Copyright Law? History, Evolution, Policies and Politics and the *Aquis Communautaire*' in Stamatoudi and Torremans eds. *EU Copyright Law; A Commentary* (Cheltenham: Elgar, 2014) p. 10, "to protect computer programs as 'literary works' within the framework of copyright was a political decision in order to ensure the growth of a competitive and dynamic European software industry. Copyright as a whole lost thereby 'something of its cultural specificity, but it gained considerably in political awareness'" – citing Cornish, 'Copyright Across the Quarter-Century', (1995) *IIC,* p. 806.
[122] See Green Paper at paras, 1.3.1. - 1.3.6.
[123] *Ibid.*
[124] *Ibid.*
[125] *Ibid.*
[126] *Ibid.* at para 1.6.2.

Berne Convention.[128] As already noted, the primary aim of the Berne Convention was to create an international agreement on the protection of literary and artistic copyright. At this point in the evolution of the EU's IP framework, the Berne Convention was seen as an effective means of harmonizing EU copyright law, albeit to a modest standard. The Commission stated that its approach in this area was not to be one of 'wholesale' harmonization.[129] Furthermore it stated that Community legislation should be restricted to that which was necessary for the proper functioning of the Community and that it regarded many issues of copyright law as not requiring any specific action at Community level. The Green Paper therefore proposed the issuing of various directives on copyright law under Art 100a[130] of the EC Treaty, ('internal market' rationale) which permits Community action in relation to matters that directly affect the functioning of the internal market.

In 1990 the Commission published a subsequent Green Paper entitled 'Follow up to the Green Paper'[131] [hereinafter Follow-Up Paper] which built upon many of the issues highlighted in the previous Green Paper. Extensive consultations with the various industry stakeholders formed the basis of the Follow-Up Paper. [132] Several additional areas of possible Community action were identified, including the duration of legal protection, moral rights, reprographic rights, artists' resale

[127] *Ibid.* at paras, 1.3.1. - 1.3.6. Note that because certain provisions of the Berne Convention were optional (i.e. the *droit de suite*) it did not serve to harmonize the laws of EU Member States.
[128] See Berne Convention (as amended on September 28, 1979).
[129] See Follow-Up Green Paper *supra* note 117 at p. 39.
[130] See Treaty on the Function of the European Union (Consolidated Version: 2012) C 326/47, (then Article 100a EEC, later Article 95 EC, now Article 114 TFEU) <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E114&from=EN> (date accessed: 8 June 2017).
[131] See Follow-Up Green Paper *supra* note 117.
[132] *Ibid.* see 'introduction'.

rights, and broadcasting rights.[133] In an Appendix to the Follow-Up Paper a precise agenda of Community initiatives was set out. The agenda enumerated five proposals for Directives on rental rights, lending rights and certain neighbouring rights; on home copying, on database protection; on the term of protection; and on satellite and cable. It is important to note the omission of the resale right at this time; clearly the resale right was still not a priority for the Commission.

In the short period of time between the publications of both green papers there was a significant policy shift. In the 1988 Green Paper the Commission stated that 'Community legislation should be restricted to what is needed to carry out the tasks of the Community'[134] and that because 'all' member states adhere to the Berne Convention 'a certain level of convergence of laws had already occurred.'[135] It regarded remaining differences as having no significant effect on the internal market. This signalled a more tentative approach to the harmonization of EU IP law. However in the 1990 Follow-Up Paper the Commission reversed its position noting that '… it must not confine itself to a few salient points but must try to tackle all the main aspects which might have implications for the creation of the single market in cultural goods and services.'[136] In line with its more comprehensive policy approach the Commission revised its previous opinion on the suitability of the Berne Convention as an appropriate means of achieving copyright harmonisation within the EU Community. The Commission observed that not all member states had

[133] See generally Follow-Up Green Paper s*upra* note 117.
[134] Green *paper supra* note 118, at para 1.4.9.
[135] *Ibid.*
[136] Follow-Up to the Green Paper *supra* note 117, at para 1.7.

fully complied with and acceded to the Berne Convention.[137] In such circumstances the Commission concluded that the Berne Convention was insufficient as a means of harmonising member state's IP laws and therefore a parallel, multilateral[138] and Community effort was needed to secure the rights of copyright holders.[139] This approach was to be achieved through the use of multiple directives, in many discrete areas of IP, in effect giving rise to the first generation of IP directives.[140]

It is apparent that the Berne Convention was not an adequate tool for the harmonization of the EU's IP framework for three reasons. Firstly, not all EU member states had acceded to the most recent revisions of the Berne Convention,[141] creating an unequal legislative basis, with some signatory states agreeing to higher levels of protection than others. Secondly, the exceptions and limitation provided for by the Berne Convention allowed signatory state's considerable scope, resulting in varying procedural and substantive standards across signatory state's IP systems. For instance, in the case of the Artists' Resale Right, Article 14*ter* of the Berne Convention included original

[137] *Ibid.* at para 1.11.4 – 1.11.5 '… at present the majority of Member States are already party to the Berne Convention …' however, '[i]n order to eliminate the distortions which exist and to clear the way for the large single market … the Commission is presenting to Council a proposal for a decision which would require all Member States to have acceded to and comply with the provisions of the Berne Convention … .'
[138] Referring to an International effort.
[139] Follow-Up Green Paper *supra* note 117 at para 1.11.2.
[140] See Annex to Follow-Up Green, *supra* note 117 'Actions proposed in the field of copyright and neighbouring rights; Legislative action to be taken by 31 December 1992 (i) Proposal for a decision that the member States will, by 31 December 1992, ratify or adhere to as comply with the1971 Paris Act of the Berne Convention and the Rome Convention of 26th October 1961. (ii) Proposals for a directive on rental rights lending and certain neighbouring rights. (iii) Proposals for a directive on home copying of sound and audiovisual recordings. (v) Proposals for a directive on the harmonisation of the legal protection of databases. (vi) Proposals for a directive on the coordination of certain rules concerning copyright and neighbouring rights applicable to satellite and cable broadcasting."
[141] The 1971 Paris Conference of the Berne Convention. WIPO Publication No. 615(E).

manuscripts of author's and composers as well as original works of art. Article 14*ter* is also optional, so in the first instance there was no requirement for signatory states to provide for a resale right and in the second instance the scope of the right could vary considerably. Thirdly, the recognition of 'Berne rights' by signatory states was based on the principle of 'national treatment' however, many exceptions to this principle existed and rights such as the artists' resale right were based on the principle of reciprocity. For a national of one signatory state to benefit from the right in another signatory state, his or her home country would have to recognise the right before extra territorial applications could be made. In addition, an author – in the case of the resale right, a visual artist – could only claim protection in a Berne Union state to the level of protection provided for in his or her home state. The corollary being, that the rights of authors originating from states providing high standards of protection would be limited to the extent of the protection provided by states adhering to lower standards of protection. While reciprocity is useful as a device to encourage signatory states to raise their level of IP protection to a 'common standard' – so as to benefit national interests – it also creates further disparities in the convergence of laws. In effect, the Berne Convention served as a semi-normative, broad based tool for harmonization rather than as an agreed mandate towards a convergence of copyright law by signatory states. In such circumstances the 'soft law' approach permitted for by the Berne Convention proved wholly inadequate as the foundations for the process of EU copyright harmonization.

Much of the Commission's work programme as outlined in the 1988 Green Paper and the 1990 Follow-Up Paper has since come into effect. The 'first generation' of harmonization comprises six Directives including, computer programs[142] rental and lending rights[143] satellite broadcasting and cable transmission rights,[144] the duration of copyright and related rights[145], the protection of databases[146], and the artists' resale right.[147] The second generation of harmonization[148] began with the Information Society Directive[149] the Enforcement Directive[150], the Orphan Works Directive[151] and the Collective Rights Management Directive[152].

Triton notes that in all these areas the Commission's position on harmonization has been to 'harmonize up'.[153] This process results in rights holders being accorded additional rights that did not previously exist in their member state but existed in other member states. This is the opposite of 'harmonizing down' where an approximation of member states' laws is achieved by removing

[142] *Supra* note 121.
[143] Rental Rights Directive, *supra* note 113.
[144] Satellite and Broadcasting Directive, *supra* note 113.
[145] See Directive 93/98/EEC of the Council of 29 October 1993 harmonizing the term of protection of copyright and certain related rights [1998] OJ L 290/9 repealed by Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and certain related rights [2006] OJ 372/12, as amended by Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights [2011] OJ L 265/1 [hereinafter Term Directive].
[146] See Database Directive *supra* note 113.
[147] See Resale Rights' Directive *supra* note 87.
[148] On the distinction between first and second generation rights see Seville *supra* note 1, at p. 7 - 69.
[149] See InfoSoc Directive *supra* note 86.
[150] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 195/16 [hereinafter IPR Enforcement Directive].
[151] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works [2012] OJ L 299/5 [hereinafter Orphan Works Directive].
[152] Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84/72 [hereinafter Collective Management Directive].
[153] *Supra* note 82, at p. 488.

rights.[154] Jacob notes that '[i]t is much easier to harmonise intellectual property rights up than down. No one minds being given more rights than they had before, whereas people are apt to complain very seriously – raising cries of destruction of property without compensation – if their rights are cut down'.[155] Curiously however, the social provisions of the German ARR regime, which provided a form of social assistance for visual artists, were ignored.[156] The Directive instead provided a base line upon which member states could expand upon.

1.5 A Patchwork of Rights

As noted above, the EU's harmonization of copyright and more broadly intellectual property has been characterised as incoherent,[157] fragmented[158] and reactionary.[159] Often legislative action in this area took decades to come to fruition,[160] resulting in EU legislation that was limited in both scope and in its ability to achieve its stated policy objective.[161] Geiger, cites three underlying causes for these deficiencies: firstly, the EU lacked competence in the field of

[154] See L. J. R. Jacob 'Industrial Property – Industry's Enemy' (1997) 1 *Intellectual Property Quarterly* pp. 3 - 15.
[155] *Ibid.*
[156] For further see Chapter 5, Section 5.4, p. 303 - 308.
[157] *Supra* note 91, at p. 5 - 23.
[158] See also Montagnani and Borghi 'Promises and Pitfalls of the European Copyright Law Harmonization Process' in D. Ward's ed. *The European Union and the Culture Industries: Regulation and Public Interest* (Hampshire: Ashgate, 2008) p. 230; and B. Hugenholtz 'Copyright without Frontiers: the problem of territoriality in European copyright law' in E. Derclaye (eds.) *Research Handbook on the Future of EU Copyright* (Cheltenham: Elgar, 2009).
[159] *Supra* note 91, at p. 5 - 23.
[160] For instance, regarding the *droit de suite,* legislative action in this area was first recognised by the EU Commission (formerly the EC/EEC) *supra* note 111, at p. 16. It took just over three and half decades before the Artists' Resale Right Directive 2001/84/EC came into full effect.
[161] For instance, in the case of the Artists' Resale Right, Article 4 (1) of the Directive places a cap on the total amount of the royalty that can be earned. This is an exception in the area of copyright and related rights and brings into question whether the Directive achieves one of its primary aims – to create equivalence between visual artists and other creators, see Recital 3 of the Artists' Resale Right Directive.

intellectual property; [162] secondly, an excessively active European Commission proved reactionary and easily influenced by sectoral interest groups; and thirdly, a judicially active European Court of Justice (ECJ, now CJEU) continually pushed the boundaries of harmonization.[163] Geiger's explanation of how the EU's IP framework developed is useful because it incorporates social, political and legal factors in its analysis. This is not to say that Geiger's arguments fully explain the patchwork of EU IP rights evident today but these arguments prove useful in providing an analytical framework in which to view the development of the modern EU IP rights system and more specifically EU copyright law.

The following sections takes each of Geiger's criticisms in turn, assessing whether they contributed to the current framework of rights. It should be noted that while Geiger's criticisms focus on intellectual property rights broadly, they equally apply to the development of copyright and specifically to the artists' resale right.

1.5.1 Lack of EU Competence

Within the broader framework of IPRs the EU Commission's choice of 'legal basis' (internal market) undoubtedly influenced the nature and scope of the artists' resale right. Conceivably, a more general IP legal basis would have resulted in a more coherent framework of rights. Alternatively, the choice of

[162] Intellectual property rights were mentioned only in Article 36 of the European Community (E.C.) Treaty which provided an exception to the fundamental principle of free movement of goods. This was not changed by either the Single European Act (SEA)1986 OJ L 169 or the Maastricht Treaty on a European Union (TEU) 1992 OJ C 191. It was not until the Lisbon Treaty that a legal basis for IP became part of the Treaty, *supra* note 94.
[163] *Supra* note 91 at p. 5 - 23.

legal basis merely served as a formal hurdle – a threshold – that EU legislators were required to overcome before drafting began and therefore may not have defined the nature and scope of these rights. The following sections question whether the internal market rationale, as a legal basis for IP harmonization, affected the framework of rights that exist today, or on the contrary, merely reflected a tentative approach by EU legislators to the challenges presented by technological advances and the advent of the 'information age'.

On this point Geiger argues that until recently the EU lacked competence in the area of intellectual property, which in turn prevented the coherent development of an EU IP framework.[164] The EU is based on the rule of law,[165] in that its subject matter jurisdiction derives its authority from the founding Treaties of the EU.[166] Therefore, legislative intervention must be based on an authorising provision of the Treaty; this is known as the legislative 'legal basis' requirement. The Commission cannot legislate within a given policy area unless provided for in the Treaty.[167] Every EU treaty is approved voluntarily and democratically by each member state and thus represent the agreed upon capacities of the EU's interaction with member states' sovereign rights. Without such a mechanism and safeguards, the institutions of the EU could conceivably err in the performance of their duties. The treaties therefore ensure that member states adhere to their member state obligations whilst simultaneously preventing EU institutions from

[164] *Supra* note 91 at p. 213.
[165] See Consolidated Version of the Treaty on European Union [2012] OJ C 326/13 (TFEU)
[166] The Treaty of Rome, officially the Treaty establishing the European Economic Community (TEEC), 1957.
[167] See TFEU *supra* note 165, Article 5(1) 'The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.' And 5(2) 'Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.'

acting *ultra vires* their political and legislative mandate. Arguably the defining feature of the EU's supranational structure is this delicate balancing of EU and member state sovereignty.

The Treaty of Rome[168] – which established the European Economic Community in its original format – did not encompass a provision that explicitly conferred a competence on the European Economic Community (EEC) (as it then was) to deal with IP issues.[169] In fact there appeared to be little appetite for Community (EEC and EC) interference in the general national property systems of member states. For instance, Article 222 EEC (later Article 295 EC and now Article 345 TFEU)[170] states that the '… Treaty shall in no way prejudice the rules in member states governing the system of property ownership.'[171] While this is not in dispute, it is not clear whether Article 222 EEC applied more generally to intellectual property rights. Even if a broad interpretation was adopted, it did not prevent the Community from using other Treaty provisions to directly and indirectly affect Community IP policy. The primary Treaty provisions[172] used in this field were Articles 100a (later Article 95 EC, now Article 114 TFEU) and Article 235 (later Article 308 EC, now Article 352 EEC) of the European

[168] Treaty of Rome 1957, The Treaty of Rome, officially the Treaty establishing the European Economic Community (TEEC), is an international agreement that led to the founding of the European Economic Community (EEC) on 1 January 1958. It was signed on 25 March 1957 by Belgium, France, Italy, Luxembourg, the Netherlands and West Germany.
[169] See InfoSoc Directive, *supra* note 86.
[170] See B. Akkermans and E. Ramaekers 'Article 345 TFEU (ex Article 295 EC), Its Meanings and Interpretations' (2010) 16 (3) *European Law Journal: Review of European Law in Context* p. 292 <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-0386.2010.00509.x/abstract> (date accessed: 10 August 2017).
[171] Treaty establishing the European Community (Amsterdam consolidated version); now Article 345 TFEU.
[172] Other provisions included Article 37 ECT (now Article 43 TFEU on the Common Agricultural Policy which was used as the main legal basis in the field of geographical indications and appellations of origin, and Articles 47(2) and 55 ECT concerning the free movement of services. These articles amongst others served as an indirect legal basis for the harmonization of IPRs including copyright and neighbouring/related rights.

Community Treaty (EC Treaty).[173] Article 100a permitted the EC to act in order to approximate legislation where such action brought about the 'establishment and functioning of the internal market.'[174] As IPRs are recognised as having a direct impact on the functioning of the internal market,[175] Article 100a served as the primary 'legal basis' for the majority of directives in the field of IP and more specifically copyright.[176] However, Article 100a was limited in its application. Prior to the enactment of the Single European Act in 1986, the greatest difficulty in utilising Article 100a as a 'legal basis' was that it required unanimity from the Council before harmonizing directives could be implemented.[177]

The second Treaty provision to be used as a basis for harmonization was Article 235. Article 235 permits the EU to legislate where it is required to act in order to achieve one of its objectives but where no explicit power has been granted.[178] However, the application of Article 235 in this context was limited in three respects: firstly, as a 'legal basis of last resort'[179] Council unanimity was required, secondly; it was subject to a negative condition in that the existence of other legal bases precluded its use; and thirdly, a positive requirement that the

[173] Now Article 114 TEU and 352 TFEU.
[174] TFEU, Part three: Union Policies and Internal Actions - Title VII: Common Rules On Competition, Taxation and approximation of Laws - Chapter 3: Approximation of laws - Article 114 (ex Article 95 TEC) OJ 115.
[175] *Supra* note 118.
[176] See InfoSoc Directive *supra* note 86 and Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') OJ L 178.
[177] K. St. Clair Bradley 'Powers and Procedures in the EU Constitution: Legal Bases and the Court' in Craig & De Búrca 2nd eds. *The Evolution of EU Law* p. 95.
[178] Article 352 TFEU (ex Article 308 TEC) 'If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.'
[179] See P. Craig 'Institutions, Power, and Institutional Balance' in Craig and De Búrca 2nd ed. *The Evolution of EU Law* (Oxford: OUP, 2011). p. 53.

Council measure had to seek to attain a Community objective within the operation of the common market.[180]

During the 1970s and early 1980s the use of these two 'legal bases' resulted in the enactment of harmonization directives that were extremely limited in terms of their scope and application.[181] The Council tended to legislate for specific problems rather than employing a broader principle based approach.[182] The effects of such a narrow approach to harmonization were compounded by the fast pace of technological advances at this time.[183] As Craig and de Burca note, as soon as the Council had legislated for one technical problem another emerged.[184] Craig correctly points out that this narrow approach to harmonization reflected the limitations associated with EU institutional procedures; specifically the member states' right in Council to veto proposals.[185] Where legislative proposals had a wide application they were more likely to be subject to objections from individual member states whose national interests were negatively affected by the proposal. In such circumstances member states were more likely to utilise their right to veto.[186] This obstacle was removed by the introduction of the Single

[180] Under the Lisbon Treaty the latter 'common market' formulation has been replaced with the formulation: necessary within 'the framework of the Union's Policies'. This gives Article 352 (ex 308) much broader scope in terms of its application as a harmonization tool. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing The European Community, OJ 2007/C 306/01.
[181] Craig, *supra* note 179.
[182] Craig & De Búrca *EU Law Text, Cases and Materials* 5th ed. (Oxford: OUP, 2011) p. 583; e.g. Council Directive 87/54/EC of 16 December 1986 on the legal protection of topographies of semiconductor products OJ L24.
[183] Technological advances included copying/piracy devices, the internet, online databases, biotech advances etc. Indeed, the challenges presented by advances in technology are ever present, *supra* note 92, at p. 9 'Technology, the fast evolving nature of digital business models and the growing autonomy of online consumers, all call for a constant assessment as to whether current copyright rules set the right incentives and enable right holders, users of rights and consumers to take advantage of the opportunities that modern technologies provide.'
[184] Craig & De Búrca, *supra* note 182, at p. 583.
[185] *Ibid.*
[186] *Ibid.*

European Act 1986 (SEA),[187] and its 'internal market' legal basis[188] which loosened the Council's voting requirement to a qualified majority and brought the EU Parliament more fully into the legislative process.[189] However, while Article 100a EEC reduced the power of the individual member state's veto, thereby broadening the potential scope of proposed legislation,[190] it did not remove the continued limited role that EU legislators adopted in relation to the harmonization of EU IP law. EU legislators were still required under Article 100a to base harmonization initiatives within the narrow scope of eliminating trade distortion within the internal market. Furthermore, where national IP systems did not have the effect of distorting the internal market, national legislators were left to determine the shape and character of their national IP systems. However, where distortions arose EU legislators were required to intervene. Thus Geiger notes that, developing an EU IP framework based on the 'internal market' rationale directly contributed to the EU's fragmented and incoherent approach to IP harmonization because the EU was only required to legislate where market distortion arose. This resulted in certain IP areas requiring attention while others remained untouched,[191] hence the incoherent character of EU IP rights during this period.[192] Geiger's argument offers a compelling insight into the development of the EU's IP framework. However, these observations

[187] *Supra* note 162, the Single European Act (SEA) revises the Treaties of Rome in order to add new momentum to European integration and to complete the internal market. It amends the rules governing the operation of the European institutions and expands Community powers, notably in the field of research and development, the environment and common foreign policy.
[188] Previously Article 100a EEC, now Article 114 TFEU.
[189] Previous to the SEA the Parliament's legislative role was largely tokenistic. Subsequent to the SEA the Parliament became fully integrated into the legislative process.
[190] The reduced power of the veto allowed legislators to be bolder with the scope of subsequent directives.
[191] The artists' resale right is a case in point.
[192] *Infra* note 193, this period ended with the ECJ's decision in *Phil Collins v. Imtrat Handelsgesellschaft mbH* (Case C-92/92) which required a broader – horizontal – approach to harmonization.

must be viewed against such cases as *Rewe-Zenntral AG v Bundesmonopolverwaltung fur Branntwein* [hereinafter *Casis de Dijon*][193] and *Phil Collins v. Imtrat Handelsgesellschaft mbH* [hereinafter *Phil Collins*][194] which effectively raised the capacity for harmonization; requiring the Commission to act in a host of areas including the artists' resale right that it previously did not consider within its purview. Whether *Casis de Dijon and Phil Collins* actually compounded the fragmented IP framework or brought about a more unified approach to IP harmonization is considered in section 1.5.3. For now, it is submitted that harmonizing through the 'back-door' (internal market rationale) as it were, certainly limited the effectiveness of EU IP harmonization.

For an alternative viewpoint, Hugenholtz proffers another explanation for the Commission's minimalist and thereby inconsistent approach.[195] He notes that while the process of harmonization successfully removed many market distortions, the process left intact a much more serious obstacle to the creation of the internal market: the territorial nature of copyright and related rights.[196] Hugenholtz maintains that by '[b]asing its harmonization agenda primarily on

[193] *Rewe-Zenntral AG v Bundesmonopolverwaltung fur Branntwein* (Case 120/78) [1979] ECR 649. In this case the ECJ, relying on Article 258 TFEU[193] (failure to fulfil a Treaty obligation) and direct effect, interpreted the Treaty as to promote the internal market. Importantly the Court invalidated trade barriers that were not technically discriminatory in nature. By adopting a purposive approach the Court broadened its definition of requirements that amounted to a barrier to trade. In this case, the Member State's product specifications for the packaging of products, which could not be justified on limited grounds such as health and safety, were held to obstruct trade.

[194] *Phil Collins v. Imtrat Handelsgesellschaft mbH* (Case C-92/92) & *Patricia Im-und Export Verwaltungsgesellschaft mbH and Another v. EMI Electrola GmbH* (Case C-326/92). [hereinafter *Phil Collins* case] In this case the performer Phil Collins was prevented from exercising rights available to nationals of the member State in question on the grounds of his nationality. These discriminatory provisions were viewed by the ECJ as creating distortions to trade within the internal market and as such were contra the Treaties. The case adopted a purposive approach to what constituted 'discrimination' and as a result required the Commission to take action in a host of areas – including the artists resale right – which it did previously see as creating market distortions.

[195] Hugenholtz, *supra* note 158 at p. 18.

[196] *Ibid.*

disparities between national laws, the European legislature has been aiming, as it would seem, at the wrong target.'[197] Once the territorial nature of copyright and related rights were left intact, harmonization could achieve relatively little.[198] Hugenholtz highlights the paradoxical effect that eliminating trade distortions had on the internal market in circumstances where the territorial nature of copyright law was left in place. For instance, the approximation of member state's IP laws in the areas of trademark, patent and copyright is of limited effect in circumstances where substantive rights and procedures vary from member state to member state. Furthermore, the InfoSoc Directive allows members states up to twenty optional exceptions to their copyright regimes.[199] It may be observed that within the broader IP context, applying for patents and trademarks in each member state, with varying applicable registration procedures clearly created barriers to trade and distorted the internal market.[200]

While Geiger and Hugenholtz analysis of EU IP Harmonization is informative, they must be viewed against the historical and political context in which the EU's legislative basis developed. As Geiger notes, EU legislators lacked an express competence to legislate in this field and as a result, in terms of the level of harmonization that could be achieved, were limited by the confines of the 'internal market' rationale. Prior to the SEA, legislative proposals were further limited by the unanimity requirement, however subsequent to the SEA, legislation with a broader policy objective still required a qualified majority from

[197] *Ibid.*
[198] *Ibid.*
[199] *Supra* note 86.
[200] For example, the prolonged absence of a unified patent system in the EU increased users reliance on the European Patent Convention (EPC).

the Council to take effect.[201] Historically and more broadly, the harmonization of EU member states' law has been a slow and arduous process where multiple national interests are balanced in various policy areas in order to achieve agreement. Indeed, member state's historical reluctance to cede sovereignty to the EU, in many policy areas, abated the harmonization process.[202] Ultimately while Hugenholtz is correct in his contention that allowing copyright laws to be drawn along national borders created distortions within the internal market, the comprehensive unification of copyright laws at an EU level was until recently beyond the competency of the Union.[203]

The Lisbon Treaty has largely addressed this issue, Article 118 TFEU provides a specific 'legal basis' for the creation of European intellectual property rights:[204]

> 'In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.'[205]

[201] *Supra* note 179, at p. 95.
[202] See the failure of EU Member States to reach agreement on a Constitution for Europe. For comments see K. Tuori 'The failure of the EU's constitutional project' (June: 2007) *No Foundation Journal*, p. 39 <http://www.helsinki.fi/nofo/NoFo3Tuori.pdf> date accessed 8 July 2017).
[203] *Supra* note 94.
[204] *Ibid.*
[205] *Ibid.*

Indeed, Article 118 may present a solution to both Geiger and Hugenholtz critiques of the EU's approach to IP harmonization to date. Basing harmonization initiatives on Article 118 provides a more holistic approach to EU IP harmonization by removing the territorial nature of IP rights and by allowing EU legislators to escape the confines of the 'internal market' rationale as a tool for IP harmonization. Furthermore, member states willingness to employ Article 118 – thus removing the issue of territoriality – is evident from recent progress towards the completion of the Unity Patent and proposals for a unitary copyright.[206] In light of these moves towards EU IP unification it is submitted that Article 118, as a legal basis, may bring the EU one step closer to a fully harmonised single market thus resolving historical impediments.[207] Nevertheless, Article 118 may not present the necessary legal basis for a socially orientated ARR Directive, the issue of which will be returned to in Chapter 5.

1.5.2 EU Commission Activism

The following section presents an overview of the second part of Geiger's thesis: that an active and responsive Commission to sectoral interests directly resulted in an incoherent and fragmented EU IP framework.

Geiger characterises the EU Commission's legislative history in the area of IP as excessively active with a willingness to bow to pressure from sectoral interests.[208] Furthermore, he is of the opinion that the process of 'harmonizing

[206] *Supra* note 91, at p. 11.
[207] Unitery Patent, *supra* note 96, preamble 2 '[h]aving regard to the Treaty on the Functioning of the European Union and in particular the first paragraph of Article 118 thereof, …'
[208] *Supra* note 91, at p. 12.

up' has far exceeded the minimum level of protection required by international agreements such as the Berne and Rome Conventions.[209] Indeed this triumvirate of activism, harmonizing rights above internationally agreed standards and responding too easily to sectoral interests has the potential to create an incoherent legislative framework of rights. These criticisms could be easily allayed in circumstances where legislation is based upon sound preliminary empirical research that objectively challenges the necessity and utility of the proposed legislation. However, Geiger purports that '… little economic analysis is done by the European legislator…' to support legislative action.[210] He contends that priority was given to '… quantity over quality without checking the usefulness of the legislative activity.'[211] Geiger substantiates his claim regarding a lack of economic analysis with three examples. Firstly, he makes reference to the legal protection of databases, which resulted in legislation which by the Commission's own admission had '… no proven impact … .' [212] Secondly, regarding copyright and specifically the Information Society Directive,[213] Geiger suggests that '… rapid action was taken in order to protect exclusive rights and technical protection measures, without taking sufficient account of exceptions and limitations to those right … .'[214] Thirdly, he argues that the Directive extending the term of neighbouring rights from 50 to 70

[209] *Ibid.*
[210] *Ibid.*
[211] *Ibid.*
[212] See the Commission's evaluation of Directive 96/9/EC on the legal protection of databases published by the European Commission on 12 December 2005. DG Internal Market and Services Working Paper First evaluation of Directive 96/9/EC on the legal protection of databases, p. 5 'The economic impact of the "sui generis" right on database production is unproven. Introduced to stimulate the production of databases in Europe, the new instrument has had no proven impact on the production of databases.' <http://ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report_en.pdf> (date accessed: 9 June 2017).
[213] InfoSoc Directive *supra* note 86.
[214] *Supra* note 91, at p. 12.

years[215] was not based on any independent economic study.[216] Arguably, in the context of the ARR Directive, Geiger's observations are equally relevant. Prior to the enactment of the ARR Directive, the Commission carried out a number of consultation exercises based on questionnaires and public hearings.[217] In addition it conducted studies into the economic and legal aspects of the international art market.[218] However, despite this, the Commission vastly over estimated the number of artists who would benefit from the resale right at 250,000.[219] Based on current figures the artists' resale right benefits less than a tenth of that estimated.[220] This would appear to substantiate Geiger's criticism that the Commission repeatedly drafted IP legislation without performing 'serious' economic research of the requisite quality.

[215] InfoSoc Directive *supra* note 86.
[216] *Supra* note 91, at p. 12, see also A.C. Emilianides 'The author revived: harmonisation without justification' European Intellectual Property Review (2004) 26 (12), 538 - 541 'The Term Directive is, undeniably, an important step forward in the harmonisation process of intellectual property laws in the European Union. However, it failed to pursue the significant policy issue of the justification of copyright duration in a convincing manner. A 20-year increase of copyright protection and the revival of copyright protection were considered as a "self-evident good that needed little explanation."' Citing S. Ricketson, "The Copyright Term" (1992) 6 IIC. p. 778.
[217] Proposal for a Resale Right Directive, *supra* note 51, at p. 3.
[218] *Ibid.*
[219] See Commission MEMO/99/68 'Proposed Directive on artists' resale right – clarification' Brussels, 14 December 1999. <http://europa.eu/rapid/press-release_MEMO-99-68_en.htm?locale=en> (date accessed 9 July 2017).
[220] See Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee 'Report on the Implementation and Effect of the Resale Right Directive (2001/84/EC)' Brussels, 14.12.2011 COM(2011) 878 final p. 9 'The Commission sought information from the collecting societies responsible for the collection and distribution of the resale right royalty on (a) the number of artists benefiting from the right annually between 2005 and 2010; and (b) the amount distributed. Ten collecting societies were able to provide this information i.e. covering 10 out of 27 Member States … In these 10 Member States, some €14 million royalties were distributed in 2010, among 6,631 artists and their heirs, a rather stable figure compared to €14,4 million royalties distributed to 7,107 artists and their heirs in 2007. Around half of the royalties were collected in France alone. Collecting societies in four Member States (Belgium, Denmark, France, and Slovakia) were able to provide a breakdown of distributions between living and deceased artists for 2006-2010. In these four Member States 22% of royalties by value and 41% of royalties by volume were distributed to living artists over the period.'; see also Kusin and McAndrew report to The European Fine Art Foundation *TEFAF Art Market Study 2005* (London: TEFAF, 2005); R. Towse *A handbook of cultural economics* (Cheltenham: Elgar Publishing, 2011) p. 396.

There also appears to be some support for Geiger's point concerning the influence of sectoral interests on the Commission's legislative output. Montagnani & Borghi question the degree to which the EU policy towards a 'progressive empowering of rights holders' was the result of informed political choice or the effect of lobbying by interest groups.[221] Furthermore, the UK's Hargreaves Report states that the development of IP systems ought to be driven as far as possible by 'objective evidence'[222] and not, by implication, by the stated positions of various interest groups. In addition, former EU Commissioner Fritz Bolkenstein when commenting on the European Parliament's approval of the Information Society Directive, recalled the 'unprecedented lobbying onslaught' to which the Parliament was subjected during these negotiations.[223] Finally on this point and in relation to the artists' resale right it has been said that the impetus for that Directive came from a group of wealthy French artists and their heirs who petitioned the Commission to introduce an EU wide resale right so that they could benefit from the resale of works in foreign markets.[224] Whether the formation of the Directive was so influenced is difficult to substantiate, however it is evident from the foregoing that EU legislators do not operate in a vacuum

[221] *Supra* note 158 at pp. 233 - 234.
[222] P. Ward, 'The Hargreaves Review of Intellectual Property' (2011) Library: House of Commons SN/HA/6430 <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06430#fullreport> (date accessed: 9 July 2017).
[223] E-Policy News (March 2001) as cited in Montagnani and Borghi, *supra* note 158, at p. 234.
[224] See comments by the artist Dominic Penny on Dr. Darius Whelan's blog post 'EU Artists' Resale Right (or "Droit de Suite") Directive' in the Irish Law Blog, June 27th 2006 'This obnoxious Directive was forced on the European Union because of lobbying by a group of extremely wealthy French families who are heirs to the fortunes of artists long dead and gone. These families were unable to collect royalties from paintings sold in London and elsewhere. Because paintings offered for sale in France were subject to the levy, many vendors opted to sell overseas. This led to a drain on the French auction houses who also lobbied for the implementation of Droit de Suite.' http://irishlawblog.blogspot.ie/2006/06/eu-artists-resale-right-or-droit-de.html (date accessed: 9 July 2017). See also Commission MEMO/99/68 'Proposed Directive on artists' resale right – clarification' Brussels, 14 December 1999 p.1 'Any suggestion that the resale right would benefit only eight rich families (e.g. Picasso's heirs) is therefore inaccurate.' And again the Commission were relying on the estimate that 250,000 visual artists would benefit from the Directive.

and are as susceptible to lobbying as national legislators. If and where EU legislators are responding to sectorial interests, the legislative output may lack a sufficiently objective and comprehensive character thus proving to be largely reactionary; resulting in an incoherent and fragmented system of rights.[225] However, it should be noted that the Commission does not operate in isolation. While the Commission is tasked with proposing and drafting legislation, it is the Council and the Parliament who temper the 'quality and quantity' of that legislation. Prior to the SEA, if member states did not agree with the Commission that there was a need for harmonization in a given policy area they could invoke their veto. Post SEA, a qualified majority from Council is required to pass legislation. It is submitted that Geiger's assertion concerning over-activism must be viewed against the required consent of member state's representatives in Council and Parliament on the need for such legislative measures. Notwithstanding this oversight, the focus of such 'activism' whether warranted or not, has the potential to significantly affect the development of a coherent or incoherent framework of rights. Furthermore, a Commission influenced by sectoral interests, combined with a lack of economic analysis into the effects of legislation in a given policy area, has the potential to undermine the integrity and transparency of EU harmonization. Indeed, relating to the artists' resale right, there was a lack of debate on the merits of the resale right by EU legislators and as highlighted above the Commission's economic research into

[225] Compare B. Hugenholtz *et al* 'The Recasting of Copyright & Related Rights for the Knowledge Economy' <http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf> (date accessed: 9 July 2017) p. 16 'Copyright and related rights harmonisation on the basis of article 95 EC Treaty suggests that the Community legislature first observes a potential or actual obstacle to the establishment or functioning of the internal market, caused by an aspect of copyright which is regulated in different ways by the Member States, and then takes action to harmonise that specific aspect. The Community's 'piecemeal' approach corresponds with this notion: the Community legislature acts only where the internal market clearly demands so.'

the potential number of beneficiaries is questionable. It was generally assumed that the right was 'a good thing' and that the primary challenge was in determining the scope and character of the right. This lack of debate and analytical rigour has resulted in a resale right that is an anomaly within the field of copyright and related rights. The extent of this anomaly is the subject of Chapters 2 and 3.

If Geiger's argument regarding sectorial influence on the Commission is expanded to include other actors such as the Parliament and Council that enjoy an indirect right of legislative initiative (Article 225 and 241 TFEU), then his argument gains some momentum. As noted often by Noam Chomsky, wealthy and organised business interest groups continually and effectively exert influence throughout the political system.[226] Indeed, it is clear from Fritz Bolkenstein's comments on the drafting of the InfoSoc Directive, lobbying at the supranational level is a reality. Nevertheless, it is not the only means of exerting influence on EU institutions. While influence at the supranational level embodies a 'top down' approach, EU policy can be driven by the national policy preferences of member states, which in turn lobby their counterparts in Parliament and Council to achieve a qualified majority, thus representing a 'bottom-up' approach. Concluding on this point, the effects of sectorial interests may be ingrained throughout the EU's institutional architecture and not just limited to the Commission.

[226] See P. D. Hutchison 'Requiem for an American Dream' [Documentary] (2015) < https://archive.org/details/Requiem-for-the-American-Dream-720p-WEBDL-x264-AC3> (date accessed: 9 July 2017).

1.5.3 Judicial Activism

Geiger's third point outlines the contributory effect of a judicially active CJEU on the formation of a fragmented EU IP framework. Geiger states that the CJEU's creative interpretation of the *acquis communautaire,* in the field of intellectual property, significantly contributed to its lack of coherency. Under Article 267 TFEU (preliminary rulings), where national courts refer a question regarding the interpretation of EU law to the CJEU, they are subsequently bound by this interpretation.[227] Broadly speaking, this has allowed the CJEU aid the approximation of member state's laws and ensure insofar as is possible, a harmonised interpretation of EU provisions. In many cases this '… pushe[d] the dynamics of harmonization, the CJEU being able to succeed in areas where the Union's legislature ha[d] failed.'[228]

1.5.3.1 *Casis de Dijon*

Arguably, the CJEU's most seminal contribution in this area was its ruling in *Cassis de Dijon.*[229] The ECJ (as it then was), relying on Article 258 TFEU[230] (failure to fulfil a Treaty obligation) and the principle of direct effect, interpreted

[227] Article 267 TFEU; see also Europa 'Summaries of EU Legislation' http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l14552_en.htm (date accessed: 9 July 2017) Scope of preliminary rulings: 'The Court of Justice Decision has the force of res judicata. It is, furthermore, binding not only on the national court on whose initiative the reference for a preliminary ruling was made but also on all of the national courts of the Member States.'
[228] *Supra* note 91 at p. 13.
[229] *Casis de Dijon, supra* note 193.
[230] Article 258 TFEU (ex Article 226 of the Treaty establishing the European Community - TEC) 'If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union'

the Treaty as a means to promote the internal market.[231] Importantly the Court invalidated trade barriers that were not technically discriminatory in nature.[232] By adopting a purposive approach – mutual recognition of standards in different EU countries – the Court broadened its interpretation of what might be perceived as constituting state measures that amount to barriers to trade.

In that case, the plaintiff, a French producer of liqueur, applied to the German authority[233] for an import licence. The German authority refused permission on the grounds that for the product to be marketed as a liqueur in Germany, it required a minimum alcohol content of 25%. The French liqueur had an alcohol content of 16%. The plaintiff was of the view that rules such as this constituted a restriction on the free movement of goods; amounting to a measure having an effect equivalent to a quantitative restriction on imports contrary to Article 30 EEC (free movement of goods). The Court was of the opinion that:

> '… obstacles to movement within the community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy *mandatory requirements* relating in particular to the effectiveness of fiscal

[231] *Supra* note 182 at p. 583.
[232] Previously, the Court's Jurisprudence had focused on trade restrictions which were quantitative in effect, placing restrictions on the quantity of goods that could be imported, or were direct taxes on imports.
[233] The Bundesmonopolverwaltung (Federal Monopoly Administration for Spirits)

supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.'[234] (Emphasis added)

The Court continued that:

'It is clear from the foregoing that the requirements relating to the minimum alcohol content of alcoholic beverages do not serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the community.'[235]

Evidently, member state's product specifications for the packaging of products, which could not be justified on limited grounds, i.e., mandatory requirements such as health and safety, were held to obstruct trade.[236] In this context, the Court unilaterally developed the doctrines of mutual recognition and equivalence of national regulations and standards. These doctrines take as a starting point that member state's regulations and standards pursue the same objectives albeit by differing means, the rationale being that member states will pursue regulatory objectives in a given policy area that are largely equivalent to the standards set by other member states in that area. It provides that member states could however object to the import of goods subject to certain exceptions known as 'mandatory requirements.' These mandatory requirements included amongst

[234] Judgment of the Court of 20 February 1979. - *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*. - Reference for a preliminary ruling: Hessisches Finanzgericht - Germany. - Measures heaving an effect equivalent to quantitative restrictions. - Case 120/78.
[235] *Ibid.*
[236] *Supra* note 182, at p. 583.

others, public health, safety, consumer protection and the environment. Where member states determine that identified goods conflict with national policies concerning issues such as public safety, it can objectively and legitimately justify a ban on the importation of those goods. However, where the ban cannot be so objectively justifiable, such action would contravene internal market rules and thus be vulnerable to a legal challenge. On balance these mandatory requirement provide an adequate balance between the needs of member states to protect national interests on identified grounds with the EU's aim to create a single internal market without barriers.

Craig notes that the *Casis de Dijon* decision 'evinces [the Court's] determination to catch discriminatory state action, in whatever form, which impeded the free movement of goods … .'[237] The decision in *Casis de Dijon* laid the foundations for what Geiger describes as the Court's creative interpretation of the *acquis communautaire* and its subsequent activism. Indeed, it may be observed that the case proved pivotal in harmonizing member state's IP laws as it made possible future rulings such as the *Phil Collins & Ors* case, which prevented discriminatory treatment based on the grounds of nationality.[238]

1.5.3.2 *The Phil Collins Case*

Previous to the *Phil Collins & Ors* case it was not clear whether the principle of non-discrimination also applied to copyright in the EU territory.[239] The case brought sharply into focus the differing levels of IP protection offered by

[237] *Supra* note 179 at p. 8.
[238] *Phil Collins* case, *supra* note 194.
[239] *Ibid.*

member states to the enlarged EU citizenry. This decision and subsequent cases[240] enabled the CJEU to state unequivocally that discrimination on grounds of nationality, irrespective of the providence of the legal dispute, was contrary to EU law. The decision considerably widened the scope of national treatment as defined by Article 7 (now Article 6) of the Treaty. More precisely, it removed the ability of member states to rely on reciprocity clauses to deny nationals of other member states rights conferred on national authors.[241]

While the joined cases of *Phil Collins* C-92/92 and *EMI v. Patricia Im-und* C-326/92[242] were not directly concerned with the resale right the significance of these cases in relation to the Commission's decision to harmonise the resale right is clear. In both the Commission's 1996[243] and 1998[244] proposals for a Directive on the resale right, Article 7a of the EC Treaty (now Article 26 TFEU), Article 100a (now Article 114 TFEU) and the *Phil Collins* case are cited as the grounds for harmonising the resale right.[245] Considering the impact of these cases, the following section explores both cases.

In the *Phil Collins* case[246] (Case C-92/92) the questions submitted by the *Landgericht Munchen* (Regional Court, Munich) had arisen during proceedings

[240] Case C-360/00 *Land Hessen and G. Ricordi & Co v. Buhnen-und Musikverlag GmbH, Propriété Intellectuelles* 2002, p. 62; Case C-28/04, *Tod's SpA v Heyraud SA,* in *Propriétés Intellectuaalles* 2005 242. For further commentary see Stamatoudi and Torremans *supra* note 73 at p. 27.
[241] *Supra* note 73, at p. 35.
[242] *Phil Collins case*, *supra* note 194. Article 7a [Establishment of an Internal Market] became Article 14 after the Amsterdam Treaty, now Article 26 TFEU.
[243] Proposal for a Resale Right Directive, *supra* note 51, at p. 21.
[244] 'Amended proposal for a European Parliament and Council Directive on the resale right for the benefit of the author of an original work of art' COM (1998) 78 final 96/085 (COD) Brussels, 12 March 1998.
[245] Proposal for a Resale Right Directive, *supra* note 53.
[246] *Phil Collins* case, *supra* note 194.

between Phil Collins, a singer and composer of British nationality and Imtrat, a producer and distributor of phonograms, relating to the distribution in Germany of a 'live' US concert recording without the consent of the singer.[247] Under the relevant provisions of the *Urheberrechtsgesetz* (law on copyright and related rights) [hereinafter UrhG][248] non-German artists could not rely on provisions that prohibited the distribution of unauthorised reproductions of performances given outside Germany. Collins argued that by virtue of Article 7a he was entitled to the same protection as a German national.

In the joined case of *Patricia Im* (Case C-326/92) questions had arisen during litigation between EMI Electrola GmbH, which held exclusive rights for the distribution in Germany of recordings of performances by Cliff Richard, a British singer, and the defendant company and its manager in relation to the distribution in Germany of phonograms containing recordings of performances given by Cliff Richard in Great Britain during 1958 and 1959.[249] On appeal, the *Bundesgerichtshof* (Federal Supreme Court), which was aware of the questions submitted to the CJEU by the *Landgericht Munchen* (*Phil Collins* case), expressed the view that copyright and related rights did not appear to it to fall within the scope of application of Community law and, more particularly of Article 7 of the EEC Treaty.[250]

[247] See IPPT Case Report, IPPT19931020, ECJ, Phil Collins, < http://www.ippt.eu/files/1993/IPPT19931020_ECJ_Phil_Collins.pdf> (date accessed: 9 July 2017); see also *Phil Collins* case, *supra* note 194.
[248] German Copyright Law - Urheberrechtsgesetz ("UrhG") (BGB 1965 I, p1273),
[249] *Phil Collins* case, *supra* note 194*,* 'Grounds' at para 7.
[250] *Ibid.* at para 10.

The question referred to the CJEU therefore concerned the interpretation of Article 7 of the EEC Treaty. In response to the question referred by the German Courts in the joined cases of *Phil Collins* & *Patricia Im* the European Court of Justice held as follows: In proceedings under Article 234 EC (formerly article 177 EEC Treaty – now Article 267 TFEU), the Court cannot rule on the interpretation of national laws and regulations or on the conformity of such measures with Community law.[251] Consequently, it could not interpret the provisions of the UrhG. The Court could however provide the national court with the criteria for interpretation based on Community law which would enable that court to solve the legal problem with which it was faced.[252]

Firstly the Court was required to deal with the question of whether copyright and related rights fell within the scope of Article 7a of the EEC Treaty and whether the general principle of non-discrimination was applicable to those rights. The specific subject-matter of those rights, as governed by national legislation, was to ensure the protection of moral and economic rights for their holders. The Court held that:

> Like other industrial or commercial property rights, exclusive rights conferred by literary and artistic property were likely to affect trade in goods and services as well as competitive relationships within the Community. For that reason those rights, although governed by national legislation, were subject to the requirements of the Treaty and therefore fell within its scope. It followed that copyright and related rights, which,

[251] *Ibid.* at para 13.
[252] *Ibid.*

> because of their effect on intra-Community trade in goods and services, fell within the scope of application of the Treaty, were necessarily subject to the general principle of non-discrimination laid down in the first paragraph of article 7 of the Treaty, without it being necessary to make specific references to articles 30, 36, 59 and 66 of the Treaty.[253]

It was then necessary to determine whether Article 7 prevented member states from discriminating in such matters on the ground of nationality. The Court was of the view that member states were precluded from discriminating on the grounds of nationality. [254]

Finally it was necessary for the Court to consider whether Article 7 was directly applicable by citizens of a member states before their national court. The Court held that the right to equal treatment laid down by Article 7a of the Treaty was conferred directly by Community law:

> 'That right may, therefore, be relied upon before a national court as the basis for a request that it disapply the discriminatory provisions of a national law which denies to nationals of other Member States the protection which they accord to nationals of the State concerned.' [255]

Within the sphere of copyright the repercussions of the decision were felt widely, resulting directly and indirectly in the first generation of harmonization directives. In relation to the artists' resale right the Commission viewed the

[253] *Ibid*. at para 27.
[254] *Ibid.* at para 33.
[255] *Ibid.* at para 34.

outcome as inescapable,[256] in effect leaving EU legislators with little choice other than to begin harmonising EU copyright law. In its 1996 proposal for a Directive on the resale right[257] the Commission concluded that the *Phil Collins & Ors* judgment, with its application of non-discrimination on grounds of nationality, when coupled with the prohibition on applying the principle of reciprocity, would have a significant impact on the European Union. Subsequent to this decision the Commission opined that '[h]enceforth, private or public art dealers will have to pay royalties on works by nationals of certain Member States even if the Countries concerned do not recognize the artist's resale right.'[258] As a solution to this problem, the Commission proposed that member states could repeal their laws introducing the artists' resale right.[259] However a majority of member states were unwilling to contemplate this option and concluded '… that a generalized application of the artist's resale right would put an end to the inequality of treatment of contemporary artists in the various member states while promoting a harmonious development of the art market.[260] The Commission observed in its report that '[most] Member States therefore came out in favour of a Commission initiative aimed at harmonizing the right.'[261]

Dreier notes that the *Phil Collins* decision was '… a decisive and determined step forward in the process of 'rounding up' the body of Community law regulating copyright and of integrating the common market.[262] Indeed the

[256] Proposal for a Resale Right Directive, *supra* note 51, at p. 19, section B(2).
[257] *Ibid.*
[258] *Ibid.* at p. 19.
[259] *Ibid.*
[260] *Ibid.*
[261] *Ibid.* at p 21.
[262] T. Dreier 'The Role of the ECJ for the Development of Copyright in the European Communities' (draft version) <http://www.zar.kit.edu/DATA/veranstaltungen/PDF-Dokument_%28Entwurf%29_e8e3b10.pdf> (date accessed: 9 July, 2017).

decision proved to be the basis of many subsequent and sometimes unexpected reforms in the area of EU Copyright law.[263] However, Geiger's characterisation of the decisions in *Casis de Dijon* and *Phil Collins & Ors* as representing excessive judicial activism must be viewed against their historical context. As previously noted, the 1970s and early 1980s were a period of 'legislative malaise'[264] in which member states right to veto proposals significantly undermined the Council's ability to legislate.[265] In addition, prior to the Single European Act (SEA), the member states capacity to veto resulted in detailed Directives of limited scope and repeatedly raised questions concerning the Community's ability to fulfil its primary objective; of creating a single 'internal market'. Characterised as the 'dark ages' of the Community,[266] it was against this background of legislative 'immobility'[267] that the CJEU, through the doctrines of direct effect and supremacy, ensured the continued development of Community law and indeed maintained the relevance and strength of the Community.[268] In this light it can be argued that the CJEU's activism was simply a necessary response to the existing EU institutional shortcomings and a creative interpretation of the *acquis communautaire* was justified in order to protect the Community from atrophy. In addition to the 'legislative malaise' at this time there was also a palpable fear that the EU as a union would regress if action was not taken. As noted in Section 1.4 above, the Commission responded to these fears by adopting a number of 'common policies' in diverse areas. However, as

[263] A.C. Emilianides *supra* note 216, at pp. 538 - 541.
[264] K. St. Clair Bradley, *supra* note 177, at p. 95.
[265] P. Craig, *supra* note 179, at p. 51.
[266] J. Caporaso and J. Keeler 'The European Union and Regional Integration Theory' in C. Rhodes and S. Mazey (eds), *The State of the European Union, building a European polity?* (Boulder, Colorado: Reinner and Longman, 1995) p. 37.
[267] K. Middlemas, *Orchestrating Europe, the Informal Politics of the European Union 1973-1995* (London: Fontana, 1995) p. 90.
[268] P. Craig, *supra* note 179 at p. 51.

already stated, the existing institutional shortcomings hampered the required legislative action to bring these policies to fruition. Furthermore, legislation that did pass under 'the shadow of the veto'[269] proved to be of very narrow application,[270] whereas principles of law derived from the jurisprudence of the CJEU had a much broader application. Principles such as 'mutual recognition' as espoused in *Casis de Dijon* permeated the EU's legal architecture, affecting diverse policy areas such as the environment, consumer protection and the internal market. This was therefore more effective as an instrument of harmonization than legislative measures at this time. While Geiger notes that not all the Court's rulings were as clear and useful as the *Casis de Dijon* decision and were in some cases contradictory,[271] in the main the process gradually brought about a certain level of coherence.[272] Thus while the CJEU's preliminary reference rulings may ostensibly appear limited in application – due to the fact specific nature of the question referred – the principles derived from these cases have had broad application and were on reflection more effective in approximating the laws of member states than legislative measures alone. In fact, it is telling that many of the principles derived from cases such as *Casis de Dijon* were later enshrined in the Treaty articles.[273] In addition, these cases mandated member state's courts to apply EU law above national rules. Concluding on this point, Geiger's thesis that the preliminary reference procedure brought about

[269] St. Clair Bradley, *supra* note 177, at p. 109.
[270] *Ibid.*
[271] *Supra* note 91 at p. 13.
[272] For instance, the criteria for an abuse of a dominant position as applied to intellectual property law were refined between the *Magill* decision in 1995 and the *Microsoft* decision in 2007. See joined cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. (ITP) v Commission of the European Communities,* Judgment of the Court of 6 April 1995, ECR 1995 p. I-00743, and Case T-201/04, *Microsoft Corp. v Commission of the European Communities,* Judgment of the Court of First Instance (Grand Chamber) of 17 September 2007, ECR 2007 p. II-03601.
[273] See Article 100a, now Article 114, which incorporated many elements of the *Casis de Dijon* ruling.

more incoherence than coherence in the area of IP is open to challenge. Rather, the Court developed principles of mutual recognition and direct effect had a more cohesive effect on the EU's legal framework and played a pivotal role in the harmonization EU IP law.

1.6 Conclusion

The chapter began by presenting an overview of the international origins of the artists' resale right: namely the Berne Convention. It was observed that within the context of EU copyright law, the Berne Convention served as a semi-normative, broad based tool for harmonization rather than as an agreed upon mandate for the convergence of copyright law by signatory states. Accordingly, the 'soft law' approach allowed for by the Berne Convention proved wholly inadequate towards the process of EU copyright harmonization. This required the EU to take more direct action than relying on international conventions alone, and as noted it was the CJEU rather than EU legislators who took up the mantle in this regard. Nonetheless, this resulted in a more comprehensive approach to EU IP harmonization by the Commission and brought into being many 'first generation' directives including the Artists' Resale Right Directive.

Subsequent to considering international developments the chapter progressed to consider the effect that the process of EU harmonization had on creating a framework of EU IP rights. This chapter analysed three factors which Geiger purports affected the process of harmonization. These include, an EU constitutional and legislative vacuum (lack of 'legal basis'), an easily influenced

and reactionary EU Commission and finally a judicially active CJEU. While these observations provided a useful point of analysis, they were not always entirely persuasive or complete and as such the author was able to build upon these observations in certain respects.

Regarding the legislative vacuum, section 1.5.1 concluded that while historically the EU lacked a legal basis from which to harmonise effectively in the broad area of IP, the Lisbon Treaty, via Article 118, remedied this situation. Article 118 provides EU legislators with an effective means of creating a unified EU IP framework – and by default a unified copyright framework – by providing legislators with a firm IP 'legal basis' from which to legislate. This in turn remedies the EU's historically 'piecemeal' and territorial approach to IP harmonization.

Section 1.5.2 then accessed whether the EU Commission contributed to the fragmented process of EU IP harmonization by responding too easily to sectoral interests, which in turn resulted in needless harmonization initiatives. On this point it was concluded that the influence of sectoral interest groups is exerted throughout the EU and not just at an institutional level. Furthermore, to view the Commission as being more responsive to sectoral interests than national and supranational actors is to take too narrow a view. Therefore such a view ignores the intricate and complex interrelationships of individual state and institutional actors throughout the legislative process.

Section 1.5.3 questioned the degree to which the jurisprudence of the CJEU compounded the fragmented nature of EU IP law. On this point the author concluded that the jurisprudence of the CJEU had the opposite effect of that purported by Geiger and in fact had the widest and most significant impact on EU IP harmonization. CJEU case law effectively filled the vacuum left by EU institutional and legislative shortcomings. Principles derived from individual cases were not limited to the facts of individual cases but to the contrary were of broad application in multiple policy areas.

In conclusion the EU's 'internal market' rationale as developed by the CJEU had the greatest impact on the harmonization of EU IPRs and by default the Artists' Resale Right Directive.[274] Whether an alternative choice of 'legal basis' would have changed the nature and scope of the Artists' Resale Right Directive is difficult to gauge but basing the right on the 'internal market' rationale squarely framed the right as an economic right and prevented any social elements from being incorporated. Indeed, while the Commission was aware that a 'resale right welfare model' existed historically in France, and currently in Germany and Norway, the inclusion of a welfare element into the EU model was seldom discussed and never in detail. Arguably the already protracted drafting and enactment of the Directive – almost 16 years – would have been further exacerbated by the inclusion of a welfare entitlement for struggling artists. Most probably, this would have rung the death knell for an already contentious right.

[274] For arguments against the use of Article 114 (ex. Art. 95 EC and 101a EEC) to harmonise the *droit de suite* see J. Wuenschel 'Article 95 EC revisited: is the Artist's Resale Right Directive a Community Act beyond EC competence' (2009) 4(2) *Journal of Intellectual Property Law & Practice*; D. L. Booton 'A Critical Analysis of the European Commission's Proposal for a Directive Harmonising the Droit de Suite' (1998) 2 *Intellectual Property Quarterly.*

Finally, this chapter provides background context to the development of the ARR Directive and in doing so serves the function of providing the basis for later claims relating to the reform of the Directive.

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Chapter 2 – The Artists' Resale Right Directive

2.0 Introduction

The purpose of this chapter is to outline the form and content of the ARR Directive while also questioning whether it achieves its intended purpose. Establishing whether the ARR Directive functions in practice and not just in principle is a necessary pre-requisite to answering this thesis's central research question; whether visual artists would be better served under a socially oriented ARR rubric. This chapter begins by discussing the central objectives of the Artists' Resale Right Directive 2001/84/EC; namely the removal of sales displacement, market distortion, and the provision of financial parity for visual artists. In this regard three pre-directive cases are considered: *The Joseph Beuys Case, Société d'auteurs S v. Hotel des Ventes Mosan* and the *Sammlung Ahlers Case*. Before questioning whether the aforementioned objectives have been realised, the constituent elements of the ARR Directive are outlined. In doing so, a thorough understanding of the ARR Directive and its working is achieved. The analysis progresses to consider recent CJEU rulings (*Dalí and Christies Cases*) and academic commentary providing an important critique of the ARR Directive. Accordingly, two primary conclusions emerge; firstly, sales displacement continues, although at the international level; and secondly, a wider dispersion of visual artists benefit from the ARR Directive than previously supposed. These observations validate the efficacy of the ARR Directive, which in turn supports calls for the development of an international ARR framework. While the latter finding is not relevant to the current thesis the former observation, regarding the

efficacy of the right, has some interesting implications for Chapter 6, which proposes the inclusion of a social provision in the form of an income maintenance provision within the Directive.

2.1 Context – Rationale

The ARR Directive is based on two primary objectives: firstly, that visual artists may share in the economic success of their work to the same extent as other creators; and secondly, to eliminate anti-competitive practices and market distortions that result in the displacement of sales to member states that did not previously recognise the right.[1] One of the most high profile instances of sales displacement involved the Rene Gaffe collection in 2002. A collection of impressionist and contemporary works, valued at around €50 million, was auctioned in New York at the request of the beneficiary, UNICEF – allegedly to avoid resale charges in Paris.[2] The works were sold in New York to the loss of the EU art market and the estates of artists covered by the ARR. While some commentators argue that this evidences a reduction in the competitiveness of the

[1] Directive 2001/84/EC 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 L 272/32, Recital 9 [hereinafter ARR Directive]. See also EU Commission Report 'Proposal for A European Parliament and Council Directive on the resale right for the benefit of the author of an original work of art' COM (96) 97 final 96/085 (COD) p. 4 [hereinafter Proposal for an ARR Directive] citing OECD statistics on data concerning imports/exports of paintings, drawings, engravings and sculptures for 1992; works of art originating in the Belgian, French, German and Spanish markets were sold mainly in Switzerland, the United Kingdom and the United States (Table 1); Study entitled "*Le droit de suite dans L'Union Européenne, Analysis Juridique, Elements Economiques",* Brussels 1995, p. 112 (Study carried out by the Commission).

[2] K. Graddy, N. Horowitz and S. Szymanski 'A Study into the effect on the UK Art Market of the introduction of the Artist's Resale Right' (London: IP Instititues, 2008) p. 49 citing V. Ginsburg 2005; K. Graddy, and S. Szymanski 'Scoping study: Artist's resale right.' Prepared by the Intellectual Property Institute on behalf of the UK Patent Office. (London: Intellectual Property Institute, 2005); See also W. Bennett 2001 'EU Art Levy helps New York to land sale of the century', *The Telegraph* July 25th 2001.

EU art market,[3] others recognise the complexity of such decisions which cannot simply be explained with reference to the ARR.[4] Amongst the many factors that a seller may consider when choosing the location of a sale include: the implications from VAT, corporation taxes, capital acquisition taxes and concessions, shipping costs, insurance, currency exchange rates, the ARR and above all the location in which the sale will achieve the highest price.[5] In support, Collins contends that a rational seller will also take non-fiscal factors into account, including the number of potential customers, time constraints and the expertise of art market intermediaries in a given market.[6]

As already noted, the EU Commission, cognitive of the threat of sales displacement, implemented a tapered percentage rate to discourage vendors from selling works outside of the EU.[7] Previously, jurisdictions that recognised the right often applied a 5% blanket rate, which resulted in the displacement of sales away from these countries to neighbouring jurisdiction that did not recognise the

[3] See Anthony Browne of BAMF as cited by Susan Adams for *Forbes* 20/06/2005 and 'Bad for all Art Markets – and the Artist it is meant to help,' The *Art Newspaper*, no.157, April 2006 p. 30 as cited by Graddy *et al, supra* note 2.
[4] *Ibid.* at p. 49.
[5] See L. Becker, P. Huber and E. Kronjager (Project Leader: Marlies Hummel) *The Droit de Suite* Report Commissioned by the French Authors' Society ADAGP, The German Authors' BILD-Kunst and the Groupement Européen des Sociétés d'Auteiurs et Compositeurs (GESAC) (Munich: IFO Institut, 1995) p. 17. Furthermore, McAndrew and Dallas-Conte found that a EU seller who wished to sell in New York would only benefit where the sale price fetched over €500,000. C. McAndrew and L. Dallas-Conte 'Implementing Droit de Suite (artists' resale right) in England' Report prepared for the Arts Council of England, (London: The Arts Council of England, 2002), p. 23, <http://www.artscouncil.org.uk/media/uploads/documents/publications/325.pdf.> (date accessed: 10 July 2017); see also J. Van Haeften *Briefing Document: Droit de Suite* (London: British Art market Federation, 2000) p. 2, C. Murphy 'How the French killed their art market' (1999) 140 (12) *Fortune*, p. 63.
[6] J. Collins 'Droit de suite: an artistic stroke of genius? A critical exploration of the European Directive and its resultant effects' (2012) 34 (5) *European Intellectual Property Review*, p. 6.
[7] See 'Proposal for an ARR Directive' *supra* note 1, at p. 14, 'At Community level, there is a noticeable shifting of sales of works of art towards countries where no royalties are collected or where taxes are lower. … [t]he available data show that works of art coming from the Belgian, French, German and Spanish markets are sold primarily in the United Kingdom, the United States and Switzerland.'

right.[8] It was the intention of legislators to limit, if not eradicate the financial benefits derived from this practice. However, within the context of the global art market, the UK Collective Management Organisation (hereinafter CMO), The Design and Copyright Society [hereinafter DACS] have questioned the effectiveness of this measure, and contend that international auction houses and on-line art markets are particularly well placed and resourced to propagate further sales displacement from ARR compliant jurisdictions to non-ARR jurisdictions.[9] In light of these practices, Ricketson's 2015 proposal for a global ARR is both necessary and timely.[10] A global solution is however not the focus of this thesis, the focus here relates to the question of whether the EU ARR Directive can encompass a social objective redolent of the German and Norwegian models.

The following section, in an effort to evaluate the degree to which market distortion and sales displacement occurred in the EU prior to the implementation of the Directive, reviews some of the primary reported decisions of national courts across the EU.

[8] Details of the tapered percentage rate can be found below, in section 2.2.3 p. 99.
[9] DACS Report *Ten Years of the Artist's Resale Right Giving Artists their Fair Share* (2016) p. 15, [hereinafter DACS Report (2016)]; See also Becker *et al* p. 116 – 117. The authors also note that at the time of writing the report, interviews held by the IFO institute 'showed that a large international auction house [had] recently stopped holding auctions of 20th – century art in Germany, whereas the relevant exports (1993: approx. 8 million DM) from Germany have in the meantime clearly exceeded the figure reached by auction in Germany at the beginning of the nineties (1989/90: an average of 6 million DM in each case).' The EU Commission was also aware of this practice, see 'Proposal for an ARR Directive' *supra* note 1, at p.15, para. 8.
[10] S. Ricketson 'Proposed international treaty on droit de suite/resale royalty rights for visual artists' (2015) SG15-0565, see also DACS Report (2016) *supra* note 9, at p. 16; A. Schten, 'No More Starving Artists: Why the Art Market Needs a Universal Artist Resale Royalty Right.' (2017) 7 (1) *Notre Dame Journal of International & Comparative Law.*

2.1.1 *The Joseph Beuys Case*

In the *Joseph Beuys* case the *Bundesgerichtshof* (German Supreme Court)[11] applied the principle of territoriality in deciding that works by deceased German artist Joseph Beuys were not subject to the German resale right in circumstances where they were auctioned in London. Here a series of works by Joseph Beuys were sold through an art gallery in the UK. The plaintiff, the performing rights society *Bild-Kunst*, sought a 5 percent share in the proceeds of the sale.[12] The plaintiff argued that the defendant, a German national resident in Germany, and the owner of three of Beuys works, was liable for the German resale royalty irrespective of where the auction took place.[13] It was alleged that the works had been brought to the UK with the intention of avoiding the 5% resale royalty under German Law, which in this case amounted to €64,000.[14] In deciding that the action was unfounded the Court relied on section 26, as it then was, of the German Copyright Act, which provided that where an original artistic work is resold and where an art market intermediary is involved as purchaser, vendor or agent, the vendor must pay 5 per cent of the sale proceeds to the author.[15] Section 26 of the Copyright Act applied where the sale took place at least partly within

[11] Joseph Beuys, BGH Judgment of June 16, 1991 I ZR 24/92 [1994] GRUR 798, < https://www.jurion.de/Urteile/BGH/1994-06-16/I-ZR-24_92> (date accessed: 10 July 2017). See also 'Proposal for an ARR Directive' *supra* note 1, at p. 14.

[12] Marcel Schulze, Federal Court Judgment of 16 June 1994 on Resale Rights (droit de suite) in respect of a German Artist's Work Auctioned in the UK, IRIS 1995-8:8/19. < http://merlin.obs.coe.int/iris/1995/8/article19.en.html> (date accessed: 10 July 2017) The collecting society was appointed by the widow and heiress of Joseph Beuys, who died on 23 January 1986. The Collecting Society was to collect all royalties due from the sale and licensing of the artist's work.

[13] The Auction was held in London on the 29th of June 1989.

[14] See J. Erauw Conflict of Laws with 'Folgerecht' ('Droit de suite') on the Sale of Works of Art in and Out of Europe – After the EC Directive No 2001/84, in L. Amicorum K. Siehr, K. Boele-Woelki, T. Einhorn, D. Girsberger & S. Symeonides eds., *Convergence and Divergence in Private International Law* (Netherlands: Eleven International Publishing, 2010).

[15] K. Pilny 'Germany: copyright – application of the droit de suite of an artist against the vendor requires that the sale took place at least partly in Germany' Case Comment (1995) 17(4) *European Intellectual Property Review*, pp. 94 - 95.

its geographical area of application. This requirement was not met since the sale, according to the *Bundesgerichtshof*, was entirely executed in the United Kingdom. The Court held that copyright is guided by the principle of territoriality and that the protection of rights can only be claimed where rights have been breached within the relevant jurisdiction.[16] Therefore, under this interpretation, section 26 of the German Copyright Act, as it then was, could only be violated by a resale taking place at least partially in Germany. The Court observed that not only was the sale concluded in the UK but that the disputed works were also located in a foreign jurisdiction.[17] In addition, the Court stated that the resale rights were not recognised in all EU member states and that, in the absence of harmonisation, the international legal rules on incorporeal rights applied.[18] This interpretation of section 26 meant that the effects of national law were restricted to the country concerned. As a result, the *Bundesgerichtshof* held that the German resale right (*Folgerecht*) did not apply.[19] Pilny notes that '[t]he concentration of the Supreme Court on the final act of the auction, disregarding preparatory actions like the delivery of the artistic works and negotiations with the local subsidiary of an international auction house, can be seen as appropriate in coming to the right decision.'[20] However, in the circumstances it is submitted that the Court adopted too narrow a focus in determining the constituent elements of the final sale. Had the Court applied the principles of contract formation, in particular offer and acceptance, they may have found that the contract was concluded on German soil, thereby coming under the auspices of section 26. Indeed, the signing of contracts by the seller in German could have

[16] *Ibid.*
[17] See Erauw, *supra* note 14, at p. 787.
[18] The Principle of Territoriality. See. Pilny, *supra* note 15, at p. 94 - 95.
[19] See Erauw, *supra* note 14, at p. 787.
[20] Pilny, *supra* note 15, at p. 94 - 95.

been interpreted by the court as forming part of the sale. Interestingly, the works in question had been with a German collector since the 1950s and subsequently returned to a private collection in Germany.[21] Furthermore, it appears that the avoidance of the resale right by large auction houses is not isolated to the works of individual artists. In May of 1993 Christies held a 'German' auction in London, the auction house recorded sales of almost €12,000,000; had the sales occurred in Germany, a blanket royalty of 5% would have applied to all contemporary works,[22] possibly creating an additional financial burden of €600,000.[23] It is clear from the foregoing that the pre-Directive blanket 5% royalty in France and Germany almost certainly incentivised the placement of high value art sales in jurisdictions that not only enjoyed experienced and reputable art market professionals (hereinafter AMPs), but lacked an artists' resale rights regime.[24]

[21] Becker *et al*, *supra* note 5, at p. 117; EU Commission, 'Report on the Implementation and Effect of the Resale Right Directive (2001/84/EC)', COM (2011) 878 final. p. 10, [hereinafter Report on the Implementation and Effect of the ARR Directive].

[22] *Ibid.* at p. 117, Becker notes that Germany enjoys one of the most buoyant contemporary art markets in Europe largely because older works were destroyed in World War II. The EU Commission defines contemporary works as works of living artists and deceased artists within 70 years of sale.

[23] Assuming that the ARR applied to all works sold, see Report on the Implementation and Effect of the ARR Directive p. 4, para. 2.2.

[24] L. Becker *et al, supra* note 5 at p. 118, Table 28, report that '… German and French dealers and auctioneers observed clear indications when talking to sellers, mediators and collectors of art that works or art are brought especially to England because of the droit de suite. This particularly concerned works of art that fetched high prices. They estimated that between ten and twenty percent of the turnover on the French and German art markets is affected by this movement.' While this is nothing more than anecdotal the estimation is supported by an analysis carried out by the French author's society. It examined the London auction catalogue of Sotheby's and Christie's and found that most of the works sold in 1993 were created by primarily French and secondly German artists. There is however a problem with this assertion, the fact that more French art is sold in England than in France does not automatically mean that the owners of that art are also French. As indicated previously in Becker's report, wealthy French families have been moving and selling art by French artists to Britain since the aristocracy's escape from France following the French Revolution. Belgian auctioneers report a similar experience.

2.1.2 *Société d'Auteurs S v. Hotel des Ventes Mosan*

In the case of *Société d'auteurs S v Hotel des Ventes Mosan*,[25] a Belgian firm of auctioneers held an auction in Liége, Belgium, of three paintings which were located at the time of the auction in Luxembourg. The works of art were broadcast and displayed on a television screen to the audience attending the auction in Liége. 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'.[26] In this instance the court followed a 'place of sale' test rather than a test based solely on the location of the goods. Valentin notes that when courts are asked to determine the territoriality of a sale, issues such as where the offer and acceptance took place, the effect of the postal rule, conveyance, transfer of title, transfer of property and payment all impact upon a court's final decision.[27] The issue becomes increasingly more complicated when the multiple parties involved in the sales contract – seller, buyer, and intermediary – reside in different jurisdictions and the aforementioned factors or stages in the sales process are spread across these jurisdictions. While the case was heard almost two decades ago, the issue has not yet been conclusively determined. In its 2016 report DACS note that there continues to be '… a lack of clarity over what factors are required for the law to apply, and

[25] Société d'Auteurs S v Hotel des Ventes Mosan, Be. Civ. Brussels, April 30, 1999.
[26] See P. Valentin 'The Droit de Suite' 2006 (28) *European Intellectual Property Review* p. 271 - 275.
[27] *Ibid.* at p. 271 - 275. However, it is not clear from the *Société d'auteurs S v. Hotel des Ventes Mosan* case report that this level of analysis formed part of the judgment.

whether location of the goods or one of the parties can give rise to ARR liability.'[28]

2.1.3 *The Sammlung Ahlers Case*

More recently,[29] the *Bundesgerichtshof* was asked to resolve a conflict of law issue resulting from a section of the German resale right provisions that was in force prior to the enactment of ARR Directive.[30] Here, Alfred Ahlers Aktiengesellschaft, a public limited company incorporated under German law, amassed a substantial collection of works by German expressionists including several works by Ernst Ludwig Kirchner[31] and Franz Marc.[32] In 2001, the company decided to sell the collection of more than 100 works.[33] The collection was bought by a joint venture involving a former managing director of Sotheby's Germany and art market consultant, Chris Douglas, and a former manager with Sotheby's USA, Davis Nash.[34] The Douglas-Nash partnership was incorporated in New York and it has been alleged by Weller that the partnership purchased the collection privately rather than by auction to avoid publicity, pricing transparency and ultimately the resale royalty.[35] In addition, the works were

[28] DACS Report (2016) *supra* note 9, at p. 15. Furthermore the problem may not be limited to works of art and may represent a broader jurisdictional issue arising in cross boarder cases generally. Further investigation into this point is beyond the scope of this thesis.
[29] 17 July 2008, see J. Erauw, *supra* note 14, at p. 787.
[30] *Ibid.*
[31] Kirchner died in 1938 therefore the term of the resale right, as defined by the Term Directive 93/98/EEC would have expired in 2008.
[32] Christian Herchenršder, Die Sammlung Ahlers steht zum Verkauf - Marktdiskretion statt Publizitþt, Handelsblatt, 2. February 2001[hereinafter *Sammlung Ahlers Case*], case citation from M. Weller 'The Applicable Law in Cross-Border Resales of Works of Art under Directive 2001/84/EC' (2007) 12 *Uniform law Review* p. 335.
[33] *Ibid.*
[34] *Ibid.*
[35] *Ibid.*, citing U. Hansen, Capital 9/2001, S. 98. Interestingly, at that time in Germany, and unlike the current ARR Directive, both public and private sales were subject to the *Folgerecht.* See K. Lubina, H.E.G.S. Schneider, B. Demarsin, E.J.H. Schrage, B. Tilleman, A. Verbeke, 'One

stored in a warehouse in Switzerland, a jurisdiction that does not recognise the ARR. The German collecting society – *Bild-Kunst* – learned about this deal from the media and initiated legal proceedings under the then applicable sections of the German Copyright Act – section 26(3) and 26(4).[36] The society requested the provision of information regarding any resale in 2001 in which the buyers were involved and secondly, for the disclosure of the name and address of subsequent buyers, as well as the resale price, of any transaction identified under the first claim. The defendants argued that there was not a close and sufficient connection between the seller's signature in Germany and the extraterritorial sale. Employing conflict of law rules, the claimant argued that the German resale right was applicable as soon as a significant part of the resale transaction took place in Germany and that the relevant resale transaction should be understood as comprising both the conclusion of the sales contract as well as the transfer of title.[37] The *Bundesgerichtshof* held that there was an obligation on the defendants to provide information, having found sufficient connection with Germany.[38] In the Court's opinion, the obligation to inform is based on the principle of territoriality meaning that for it to arise at least part of the sale had to have taken place in Germany.[39] The Court found the 'requisite in-land

Year and Millions of Euros Later: Taking Stock of the Implementation of the European Directive 2001/84/EC on Droit de Suite, in B. Demarsin, E. Schrage, B. Tilleman and A. Verbeke (eds.), *Art & Law* (Oxford: Hart Publishing, 2008), p. 307.

[36] (DE) Copyright Act of 9 September 1965 (Federal Law Gazette I, p. 1273), as last amended by Article 1 of the Act of 20 December 2016 (Federal Law Gazette I, p. 3037) Under the new implementation legislation, now section 26 (4) and (5) of the German Copyright Act: '[s](4) The author is entitled, vis-à-vis any art dealer or auctioneer, to obtain information on whether, and if so, which works of art by the author had been sold under participation of the dealer or auctioneer within the last three years prior to the raising of the claim for information. (5) The author is entitled to obtain, if necessary for the enforcement of his claim for resale royalty, from the art dealer or auctioneer the name and the address of the seller as well as the resale price. The dealer or auctioneer may refuse to disclose name and address if he himself pays the resale royalty due according the resale price.'

[37] Erauw, *supra* note 14, at p. 788.

[38] *Ibid.* at p. 788, citing paras. 17 - 26 of the *Ahlers* Judgment.

[39] *Ibid.* at p. 788, citing para. 29 of the *Ahlers* Judgment.

connection' in the transfer of the Ahlers Collection to satisfy the principle of territoriality.[40] As to the contract to sell the artwork, the Court noted that the claimant had alleged that the parties' consensus concerning the transfer of title was present when the agreement was signed in Germany; and it found that the defendant had the secondary burden to disprove this allegation and did not do so adequately.[41] The Court therefore found that the conclusion of the contract had occurred on German soil and it did not matter that the artworks were located at the pertinent time in Switzerland.[42] The Court concluded that where either the completion of the sales contract or the transfer of title occurred in Germany, German law applied.[43] The *Sammlung Ahlers* case arguably demonstrates an evolution in the German court's understanding of the resale right and the willingness of reluctant sellers to avoid paying the resale royalty. Subsequent to the introduction and implementation of the ARR Directive these jurisdictional issues, at least within the EU, have been removed. That is not to ignore member states' discretion concerning certain aspects of the ARR. Nevertheless, as the above cases indicate, determined market professionals need only conduct the sale in its entirety outside of the EU to avoid paying the resale royalty.[44] In contrast

[40] *Ibid.* at p. 788, para. 32 of the *Ahlers* Judgment. 'This was the development: German law knows a dual system for the transfer of title in property, with a conceptual split between a personal contractual obligation to deliver title in property (as '*Kausalgeschaft'*) and the *in rem* transaction that conveys a proprietary right ('*dinglicheVerfugugsgeschaft'*). The Court held with support in doctrine, that the notion of 'resale' in the terms that impose *folgerecht* comprise both of these legal aspects [para. 31]. It covers the contractual obligation and the property right. The Court reasoned that neither of those elements alone constituted the 'resale' that was taxed in the law. But then, seeing that the notion covers the one aspect as well as the other aspect of duality, one can have in-land connection when either has a link with Germany.

[41] *Ibid.* at p. 788.

[42] *Ibid.* See also J. A. L. Sterling *World Copyright Law* 3rd ed. (Sweet & Maxwell, 2009) Ch. 3; M. Gaber, 'The Resale Right Directive: A Comparative Analysis of Its Implementation in Germany and the United Kingdom' p. 303, in V. Vadi and H.E.G.S. Schneider (eds.), *Art, Cultural Heritage and the Market* (Maastricht: Springer, 2014).

[43] Erauw, *supra* note 14, at p. 788.

[44] The EU Commission adopted this view in their 1996 proposal for an ARR Directive. See Proposal for an ARR Directive *supra* note 1, at p. 22 para. 11, 'Some interests concerned have accordingly proposed that royalties be imposed on exports to non-Community countries to

where AMPs both have their place-of-business and conduct preliminary contractual relations within the EU, the CJEU may in future cases follow the German court's ruling and apply the principle of territoriality. While there is certainly scope within the Directive for the inclusion of such an interpretation, it is not clear that the Directive represents the most appropriate forum for such direction. Guidance may be better sought from the private international law arena.[45] Be that as it may, an analysis of private international law is beyond the remit of the thesis.[46]

2.2 The Solution? – EU ARR Directive 2001/84/EC

Having come into effect in 2006 the ARR Directive sets out the legal framework to which EU member state's national regimes must comply. The following

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prevent people from evading payment when a work is sold. Apart from the practical problems involved in policing exports, such an approach conflicts with the principle of the territoriality of the artist's resale right. Royalties cannot therefore be charged on sales in third countries.'

[45] See for example Hague Conference on Private International Law 'Hague Principles on Choice of Law in International Commercial Contracts' (2015) < https://www.hcch.net/en/instruments/conventions/full-text/?cid=135> (date accessed: 13 February 2017).

[46] See further S. Ricketson and J. C. Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* VII (Oxford: OUP 2015) p. 1297 - 1327; G. Dinwoodie 'New Copyright Order: Why National Courts Should Create Global Norms' (2000) 149 *University of Pennsylvania Law Review* p. 469 – 580; J. C. Ginsburg, *Private International law Aspects of the protection of Works and objects of Related Rights transmitted Through Digital Networks* 39, WIPO Doc. GCPIC/2 (1998). Professor Ginsburg has implied that in light of the purpose of the Berne Convention (articulating the purpose of the Convention as 'to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works.), choice of law determination in treaty countries 'should be guided by the principle of *favor auctoris*: when in doubt, follow the conflicts analysis that will yield an author-favourable outcome.' See also Regulation (EC) No. 593/2008 of The European Parliament And of The Council of 17 June 2008 on the law applicable to contractual obligations, L177/6 (Rome I); (includes uniform conflict of laws rules dealing with cross-border contracts) and Regulation (EC) No. 864/2007 of The European Parliament and of the Council of 11 July 2007, on the law applicable to non-contractual obligations L199/40 (Rome II), (includes uniform conflict of laws rules dealing with cross-border liability cases.) European private international law offer the advantage of uniformity in that the relevant rules are identical in all member states. Hence, in principle, a situation having links with two or more member states will be treated exactly the same way in those two states. However in practice, and specifically in the area of IPRs this is not always borne out. For further see P. Wautelet 'Private International law: An Overview' <http://orbi.ulg.ac.be/handle/2268/204641> (date accessed: 1 September 2017).

section describes the substance of the EU ARR Directive. The Directive encompasses 14 Articles concerning issues such as subject matter, works protected, threshold and rates, basis of calculating the royalty, persons entitled to receive royalties, third-country nationals entitled to receive royalties, the term of protection, the right to obtain information, application in time, a revision and review clause, member state implementation and entry into force.

2.2.1 Works protected

Article 2 provides a non-exhaustive list of protected works which includes '… 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.'[47] The criteria for determining whether works not listed fall within the remit of the Directive is determined by the originality requirement. Under the Directive the term 'original' has a very specific meaning and relates to works of graphic or plastic art such as pictures, collages, paintings, drawings, engravings, prints etc. The French CMO ADAGP notes that the Directive's originality requirement is not the same as the one on which copyright protection is dependent.[48] In this context 'original' refers to specific classes of work and not the creativity or effort expended by the author in creating the work.[49] 'Originality', in the traditional sense, refers to the test that courts apply in determining whether a work is

[47] Article 2, ARR Directive.
[48] The originality requirement, as per Article 2 of the Directive is transposed into French Copyright law by Article L. 122-8 Amended by Act No. 2006-961 of August 1, 2006 - art. 48 JORF August 3, 2006. As per article L. 122-8 [3], original works are 'the works created by the artist him/herself and the copies produced in a limited quantity by the artist him/herself or under his/her control.'
[49] Regarding Copyright Law see *Infopaq Int. v. Danske Dagblades Forenings* C-5/08 (2009) [hereinafter *Infopaq Case*].

protected by copyright. While traditionally the common law test was one of 'labour, skill, judgment and effort',[50] the current EU test requires the 'author's own intellectual creation'.[51] Slavishly reproducing another's work will not confer copyright protection. In the context of the ARR Directive, a visual artist might breach another's copyright by meticulously replicating the work and continue to be eligible for a resale royalty.[52] Gravells makes a similar point in relation to the recording of speeches in that while the owner of the record of the speech may exercise the full range of exclusive rights under copyright law, '… in practice he would be unable to exploit those rights without the licence of the owner of copyright in the speech.'[53] Article 2 lists what appears to be a non-exhaustive list of such works,[54] subsection 2 goes further by broadening the scope of the originality definition to include copies of the artist's work which have been made

[50] Football *Dataco Ltd and others v. Yahoo! UK Ltd and others*, 1 March 2012 (Case C-604/10); *Ladbroke v. William Hill* [1964] 1 *All ER*465, 469 *per* lord Reid; *University of London press v. University Tutorial Press* [1916] 2 ch 601; see also A. Rahmatian, 'Originality in UK copyright law: The old 'skill and labour' doctrine under pressure' [2013] *International Review of Intellectual Property and Competition Law*.

[51] The copyright protection of 'works' has been harmonized by The Information Society Directive, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167 [hereinafter InfoSoc Directive]. Copyright is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation. See also *Infopaq Case* where the court notes at para. 51 that what constitutes the expression of the intellectual creation of the author is for national courts to decide.

[52] The question is whether a court might consider the creation of an original work of art under EU Copyright Law (which demands a 'creative act' and not just 'sweat of the brow') as a prerequisite to claiming the benefit of original works as defined by the ARR Directive.

[53] N. P. Gravells 'Authorship and Originality: the Persistent Influence of *Water v Lane' Intellectual Property Quarterly* (2007) 3 p. 292.

[54] ARR Directive, *supra* note 1, Article 2 uses the phrase 'such as' before listing various types of works including photos, sculptures, paintings etc. This would appear to infer that other types of graphic and plastic art such as architectural drawings, serigraphy, calligraphy, typography, computer graphics (created by graphic designers as opposed to computer programs) etc., would also be covered by the provision. Whether jewellery, furniture and other such examples of applied art (art with an aesthetic as well as practical function) come within the definition will be a matter of classification For a more general reflection on the definition of works of art from a legal point of view see Case 7/68 *(Re Arts Treasures)* [1968] ECR 42 [1969] CMLR 1. P. Gerstenblith *Art Cultural Heritage, and the law, Cases and Materials* 3rd ed. (Carolina: Carolina Academic Press 2012).

in limited numbers, signed or duly authorised by the artist.[55] EU legislators debated the issue of whether the number of 'original copies' should be limited, ultimately; the matter fell to be determined by standards of professional usage,[56] the result being that the authors of graphic and plastic art can create 'original copies' – to which the resale right would apply – numbering in the hundreds, if not thousands.[57] Given the foregoing a case might be made out against any further expansion of the scope of Article 2. During the drafting of the Directive there was however a further option open to the Commission when considering the types of works protected. Under Article *14ter* of the Berne Convention – which sets out an international framework for the ARR – member states are provided with the option of including manuscripts of composers and writers in its definition.[58] During the Directive's drafting process it was decided to exclude these types of works because they were considered to be a *means-to-an-end* rather than an *end* in themselves.[59] This exclusion was further justified on the basis that '[t]he resale right helps to redress the balance between the economic situation of authors of graphic and plastic works of art and that of other creators

[55] ARR Directive, *supra* note 1, Article 2(2) 'Copies of works of art covered by this Directive, which have been made in limited numbers by the artist himself or under his authority, shall be considered to be original works of art for the purposes of this Directive. Such copies will normally have been numbered, signed or otherwise duly authorised by the artist.'
[56] 'Proposal for an ARR Directive' *supra* note 1, at p. 3.
[57] See R. Plaisant, French law on Proceeds Right, ss 26 - 32 1967 (UCLA Unpublished Article) as cited by M. E. Price 'Government Policy and Economic Security for Artists: The Case of the Droit de Suite' (1968) 77 (7) *Yale Law Journal* p. 1339. He notes that a copy of a painting can itself be a work of art; for sculpture, the *droit de suite* is assessed not only on the original work, but on bronze reproductions when they are signed and numbered (there seems to be a limitation based on some informal sense of the proper size of an edition).
[58] Article 14 *ter,* Berne Convention for The Protection of Literary and Artistic Works, July 24 1971, 1161 U.N.T.S. 3 [hereinafter Berne].
[59] See Committee on Legal Affairs Report ***I A4-0030/97 PE217.568/fin, Justification of the main Amendments, p. 19. The Committee on Legal Affairs observed '… that manuscripts are intended for subsequent use via reproduction; they are, in reality, simply the original support for a work which, by its very nature, is to be published or performed, unlike those works of art which are intended to be contemplated, and which therefore embody the essence of uniqueness.'

who benefit from successive exploitations of their works.'[60] Accordingly, the Commission viewed the inclusion of manuscripts as antithetical to the very nature of the resale right – contradicting its very *raison d'être*.[61] Indeed it is difficult to justify a resale royalty for literary authors on the same grounds as visual artists in circumstances where the work enjoys a healthy primary market and continued exploitation. In light of these arguments it is submitted that the Commission determined the matter appropriately.

2.2.2 The subject matter of the resale right – who pays/receives?

Sub-section 1 of Article 1 defines the subject matter as a resale right that is inalienable and cannot be waived. Recital 2 also describes the subject matter as the physical work, '… the medium in which the protected work is incorporated.'[62] This apparent contradiction is an unfortunate drafting error but not detrimental. Given the precedence that an article naturally takes over a recital, the subject matter of the Directive is therefore a resale right for the benefit of authors of original works of art. Arguably, Recital 2 merely builds upon this, specifying the subject matter of the resale right – the physical work – a list of which is provided in Article 2. The Directive progresses to define the

[60] ***III REPORT on the joint text approved by the Conciliation Committee for a European Parliament and Council directive on the resale right for the benefit of the author of an original work of art (C5-0220/2001 - 1996/0085(COD)) European Parliament delegation to the Conciliation Committee Rapporteur: Jürgen Zimmerling. A5-0235/2001 final, 22nd June 2001.
[61] See Committee on Legal Affairs Report ***I A4-0030/97, *supra* note 59, justification for the main Amendments, p. 20 – 'The exclusion of manuscripts from resale right also follows from the concept of this right itself. The justification for resale right is not the possibility of speculation in an artist's works, but, rather, the need to compensate the author of works intended for contemplation which, by the way in which they are created, do not qualify for protection under the better-known forms of author's rights (reproduction and performance rights).'
[62] ARR Directive *supra* note 1, Recital 2.

scope of the resale right. Article 6(1) of the Directive states that; 'The royalty ... shall be payable to the author of the work and, subject to Article 8(2), after his death to those entitled under him/her.'[63] The term of protection corresponds to the term laid down in Article 1 of Directive 93/98/EEC: life plus 70 years.[64] The right is inalienable and cannot be waived, even in lieu of an advance payment.[65] The right applies to all public sales of the work conducted through an art market professional whether acting as a buyer, seller or intermediary.[66] Accordingly, private sales have been excluded from the remit of the legislation.[67] There are a number of exceptions to the application of the right: firstly, the right does not apply to the first sale of the work,[68] it only applies to subsequent sales; secondly,

[63] *Ibid.* Art 6(1). Furthermore Article 8(2) states that those member states which did not allow for the resale right at the time of implementation of the Directive, '... shall not be required, for a period expiring not later than 1 January 2010, to apply the resale right for the benefit of those entitled under the artist after his/her death.' Article 8(3) extends this period for a further two years where such time is needed for reasons of 'economic viability' and to allow the Member State '... adapt gradually to the resale right.' In Ireland SI 312/2006 – European Communities (Artist's Resale Right) Regulations 2006, enforced the right for living artists, and on the 1st of January 2012, the Regulations were amended by SI 709/2011 which extended the right to the estates of deceased artists. Ireland took the longest time possible to fulfil its requirements but did not limit the transmission of the right solely for the benefit of the heirs of the artist. The resale right is for the life-time of the artist plus 70 years.

[64] While the ARR Directive was signed in September 2001, implementation followed in January of 2002. Member states had a further 4 years to implement the right and where member states did not previously recognise the right, they could optionally limit the application of the right to living artists – ie. excluding their heirs – until January of 2010. States could further apply for an additional two years where necessary; it was January 1st 2012 before Ireland fully implemented the ARR Directive.

[65] Directive 2001/84, Article 1(1). See Proposed Directive 96/0085, Proposal for a European Parliament and Council Directive on the resale right for the benefit of the author of an original work of art Section V 'Particular Provisions' (3) p 21. Here the Commission stated that '[t]he effectiveness of the artist's resale right [was] necessarily conditional on the right's inalienability and the impossibility of waiving it.'

[66] ARR Directive *supra* note 1, Article 1(2) 'The right referred to in paragraph 1 shall apply to all acts of resale involving as sellers, buyers or intermediaries art market professionals, such as salesrooms, art galleries and, in general, any dealers in works of art.' Italy represents one of the few countries which tried to implement the right against private sales (pre-directive), however the abject failure to implement this served as a warning to the EU in attempting a similar approach. For further see Proposal for an ARR Directive, *supra* note 1, p. 8.

[67] *Ibid.* Recital 18. See also Lubina *et al, supra* note 35 at p. 296, noting that 'Only a sale between two private parties without any professional third party intervention is excluded from the application of the *droit de suite* regime. The reason for this exception is pragmatic: sales between private parties are too difficult to monitor.'

[68] ARR Directive *supra* note 1, this exception underlines the rationale of the AAR Directive in that the royalty derives from subsequent exploitation of the work (re-sales) and not the first sale where the visual artists has in the main been remunerated.

acts of resale by persons acting in their private capacity to museums which are not for profit and which are open to the public are excluded;[69] thirdly, member states may exclude acts of resale where the seller has acquired the work directly from the author in the previous three years and where the work is sold for less than €10,000.[70] The latter exception is however optional. According to Lubina *et al*:

> '[t]he rationale for this exemption is to allow artists to consign their work to an art dealer or gallery who then acts as agent on their behalf for the purposes of exhibition and sale. The sale of newly created works of art under consignment agreements is one of the predominant means of making artists' newly created works available to the primary market.'[71]

The exception relating to museums is less easily justified in circumstances where the seller benefits from the sale. Why a distinction is drawn based upon the nature of the buyer is not clear. Perhaps the Commission, mindful that these museums are publicly funded did not wish to create an additional burden on the exchequer in circumstances where museums accepted liability to pay.

In principle the ARR royalty is payable by the seller but member states may provide that any other art market professional involved in the transaction may be liable solely or severally with the seller.[72] While the majority of member states

[69] *Ibid.* Recital 18.
[70] *Ibid.* Article 1(3).
[71] Lubina *et al, supra* note 35 at p. 297.
[72] ARR Directive *supra* note 1, Article 1(4) 'The royalty shall be payable by the seller. Member States may provide that one of the natural or legal persons referred to in paragraph 2 other than the seller shall alone be liable or shall share liability with the seller for payment of the royalty.'

have applied the former construction, in that the seller pays, the UK has allowed for the latter construction[73] thus in certain situations, creating some unintended anomalies such as the 'cascade effect'.[74] The cascade effect, which will be discussed subsequently, results in some art market intermediaries being liable for the ARR royalty both at the time of purchase and at the point of sale. This occurs where AMPs use contractual provisions to transfer liability to pay the ARR royalty to buyers in circumstances where national implementation measures provide for such an option or create a default situation of seller liability.[75] It was not contemplated by the Commission that the royalty would be payable twice by the same person on the same work or art.[76] The Commission released a Communication in 2014 outlining their awareness of the practice but did not comment on the practice or propose amendments to the Directive to deter this practice.[77] Instead the report recommended that the Commission study the effect

[73] See UK Artists' Resale Right Regulations 2006, No. 346, Regulation 13, 'Liability to pay resale royalty' '13(1) The following shall be jointly and severally liable to pay the resale royalty due in respect of a sale— (a) the seller; and (b) the relevant person (within the meaning of paragraph (2)).
(2) The relevant person is a person who satisfies the condition mentioned in regulation 12(3)(a) [art market professional] and who is—(a) the agent of the seller; or (b)where there is no such agent, the agent of the buyer; or (c) where there are no such agents, the buyer. (3) Liability shall arise on the completion of the sale; however, a person who is liable may withhold payment until evidence of entitlement to be paid the royalty is produced. (4) Any liability to pay resale royalty in respect of a resale right which belongs to two or more persons as owners in common is discharged by a payment of the total amount of royalty to one of those persons.'

[74] See EU Commission 'Key Principles and Recommendations on the management of the Author Resale Right' p. 5. <http://ec.europa.eu/internal_market/copyright/docs/resale/140214-resale-right-key-principles-and-recommendations_en.pdf> (date accessed: 10 July 2017) [hereinafter Key Principles and Recommendations Report]. 'For example if an Art Market Professional [hereinafter AMP] buys at a UK auction (where the buyer usually pays) and sells at a French auction (where the seller usually pays) he would be obliged to pay the resale right twice because of the different approach to who is liable to pay the resale right in the two countries.

[75] The latter situation can be circumvented via contract. The legality of such clauses was confirmed by the CJEU in *Christie's France SNC v Syndicat National des Antiquaires* (Case C-41/14) [hereinafter *Christies* case]. The following is an outline of the 'cascade effect' by the EU Commission in its 2011 Report: 'In Member States where not only the seller but also the buyer can be obliged to pay the royalty, an art dealer involved in two consecutive transactions may pay the royalty two times in a row for the same work of art (first as a buyer and then as a seller).'

[76] This fact was stated by the EU Commission in its 'Key Principles and Recommendations Report', *supra* note 74.

[77] The Key Principle and Recommendations Report was the result of a Stakeholder Dialogue (hereinafter "the Dialogue") which was launched at the beginning of 2013. Four one-day

of the phenomenon and report on it in its 2015 report pertaining to the implementation and effectiveness of the artists' resale right.[78] The report by the Commission is still pending.

The provisions of the ARR Directive are not limited to just EU visual artists: for non-EU visual artists to qualify the third country in question must provide for the artists' resale right in their national legislation and operate a system of reciprocity.[79] The wording of Article 7 also makes clear that where a third country provides for a limited form of resale right – that for example does not make the right available to author's successors in title – the rights made available to third country visual artists in member states will be correspondingly limited.[80] To support this objective, the Commission is obliged, on the basis of information supplied by member states, to publish a list of qualifying third countries.[81] In addition, member states may deem third country nationals, who have their habitual residence in that member state, as qualifying for the resale right.[82]

meetings took place in Brussels on 30 January, 2 May, 1 July and 6 November during 2013. The Dialogue brought together representatives of CMOs and visual artists (rightholders' community) as well as representatives of art market professionals (dealers and auctioneers). The aim of the Dialogue was to discuss practical solutions to problems faced by those involved in the payment and the administration of the resale right. < http://ec.europa.eu/internal_market/copyright/docs/resale/140214-resale-right-key-principles-and-recommendations_en.pdf> (date accessed: 10 July 2017).

[78] 'Key Principles and Recommendations Report', *supra* note 74 at p. 6.

[79] ARR Directive *supra* note 1, Recital 29 and Article 7. For signatory states of the Berne Convention the system of reciprocity is governed by Article 14*ter* of the Convention.

[80] *Ibid.* Article 7(1) Member States shall provide that authors who are nationals of third countries and, subject to Article 8(2), their successors in title shall enjoy the resale right in accordance with this Directive and the legislation of the Member State concerned only if legislation in the country of which the author **or** his/her successor in title is a national permits resale right protection in that country for authors from the Member States and their successors in title [emphasis added].

[81] *Ibid.* Article 7(2).

[82] This is non-mandatory and at the discretion of each member state.

2.2.3 Threshold & Rates

Regarding the threshold at which the ARR becomes active, the Directive allows member states to set a minimum sale price after which the royalty shall apply, providing however that amount does not exceed €3,000.[83] During the drafting process various threshold amounts were proposed with the debates focusing on the effect of too high and too low a threshold. Too high a threshold and nascent career artists would be excluded,[84] too low and the royalty yield would be miniscule or worse, consumed by the costs of administering the right.[85] Arguably member states such as Ireland, which adopted the highest possible threshold of €3,000, now exclude many visual artists from the royalty schema, whereas jurisdictions such as France and Germany, which initially set a token threshold amount – €15 and €51 respectively – created an administrative burden rather than any real economic benefit for visual artists whose work does not command substantial resale royalties.[86] Since the introduction of the Directive both France and Germany have revised their threshold amount upwards to €750 and €400 respectively.[87] Clearly, there is a delicate balance to be struck between setting a threshold that, on the one hand, benefits the greatest number of artists, and on the other, results in a valuable and not inconsequential royalty for the artist.

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[83] *Ibid.* Article 3(2).

[84] Rapporteur Zimmerling, during Parliamentary debates stated that most sales in Europe took place in the price band below this amount [€4,000 as proposed by Parliament] and therefore such a high threshold would have an unduly prejudicial effect on the market. See Debate in Parliament 12/12/2000.

[85] Committee on Legal Affairs Report ***I *supra* note 59, pp. 18 - 19 '… it must be set at a level at which exercise of the right is viable, since otherwise, in extreme cases, the fixed costs of administering the right could exceed the sum payable.'

[86] €15 and €51 respectively, see Report on the Implementation and Effect of the ARR Directive, *supra* note 21, p. 8.

[87] See S. 26 of the German Author Rights Act (Urheberrechtgesetz), amended by the fifth Authors Rights Act Amendment Act (Funftes Gesetz zur Anderung des Urheberrechtgesetzes) of 10 November 2006, official Journal (Bundesgesetzblatt, 2006 I, S. 2487), entered into force on 16 November 2006. As for France, see (FR) Intellectual Property Code Article R122-5 as amended by Decree No. 2008-1391 of 19 December 2008 - s. 2.

Article 4 establishes a tapered royalty percentage rate; as the value of the sale increases in price, the applicable percentage rate decreases. During the drafting process this provision proved to be most contentious.[88] Legislators faced two significant challenges: firstly, they were obliged to provide adequate remuneration for visual artists; and secondly, they were required to balance this against the challenge that too high a royalty would displace sales to jurisdictions outside of the EU.[89] The agreed upon scheme is as follows:

(a) 4 % for the portion of the sale price up to €50,000;

(b) 3 % for the portion of the sale price from €50,000.01 to €200,000;

(c) 1 % for the portion of the sale price from €200,000.01 to €350,000;

(d) 0.5 % for the portion of the sale €350,000,01 to €500,000;

(e) 0.25 % for the portion of the sale price exceeding €500,000.

[88] See EU Parliament Minutes of proceedings of the sitting of Wednesday, 9 April 1997 (97/C 132/03) OJ C 132/65 p. 25 and Council's Common Position adopted by the council with a view to the adoption of a Directive of the European Parliament and of the Council on the resale right for the benefit of the author of an original work of art, draft statement of the Council's reasons. 5 June 2000, (PI 21 Culture 19 Codec 245) p. 6. See also Amended proposal for A Resale Right COM(1998) 78 final p 3. Explanatory Memorandum S4(d). See also Council's Common Position adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council on the resale right for the benefit of the author of an original work of art, statement of the Council's reasons. 5 June (draft) & 26th September 2000, (PI 21 Culture 19 Codec 245) p. 6.

[89] See Debate in Parliament 12/12/2000 - During debates in Parliament, MEP McCarthy questioned how the Commission arrived at such an arbitrary threshold of €1,000. See also Committee on Legal Affairs Report ***I *supra* note 60, p. 18 & 19 - The Committee on Legal Affairs were concerned that where the resale right threshold was set too high by Member States, it would have the effect of excluding new and lesser-known artists. See Proposal for an ARR Directive, *supra* note 1, Section V 'Particular Provisions', p. 22 paras. 9 - 10.

To help determine the appropriate price bands to be applied the Commission analysed the cost of transporting works of art to other jurisdictions, factoring in transportation costs, insurance, import levies, sales tax etc.[90] Given that the Commission overestimated the total amount of ARR beneficiaries in its preliminary reports[91] and given the difficulties that other researchers have observed in collecting reliable art-market data,[92] the accuracy of the Commission's findings, regarding the determined price bands, are somewhat questionable. Indeed, the UNESCO Copyright Committee consider the prescribed royalty rate as not constituting a model of best practice due to the relative lack of reliable data upon which the supporting research was based.[93]

In addition to the rates outlined above, the Directive allows member states a discretion regarding the first royalty band; instead of a 4% percentage rate, member states may raise the percentage rate to 5%.[94] The rates are net of tax[95]

[90] See Proposal for an ARR Directive *supra* note 1, pp. 16 - 18. Again, the Commission were not of the opinion that the blanket rate of 5% applied in France and Germany represented a model of best practice. In fact they were of the view that the blanket rate increased the likelihood of sales displacement.

[91] See EU Commission MEMO 99/68 which estimated the number of EU artists that would benefit from the EU ARR Directive at 250,000.

[92] See Committee on Legal Affairs Report ***I A4-0030/97 *supra* note 59, p. 21. See also N. Kawashima 'The Artist's Resale Right Revisited: A New Perspective' (2008) *International Journal of Cultural Policy* p. 303, Kawashima notes that there has traditionally been a lack of empirical research and therefore reliable data concerning the beneficiaries of the *droit de suite* and its successor the ARR.

[93] See UNESCO Copyright Committee 'Practical aspects of the exercise of the droit de suite, including in the digital environment, and its effects on developments in the international art market and on the improvement of the protection of visual artists' IGC(1971)/XII/6 Paris, 27 March 2001, section 5.4 - arguing that the EU's tapered price band structure was in no way a model of best practice. See Committee on Legal Affairs Report ***I A4-0030/97 *supra* note 59, p. 21 - The Committee on Legal Affairs were of the view that to effectively determine the appropriate resale rate, a study, 'based on unassailable data', should have been carried out on the art market over a relatively long period of time. It was also the rapporteur's [Committee on Legal Affairs] impression that no reliable harmonised data existed at that time.

[94] Reasons for percentage variance: See Gaber, *supra* note 42, p. 303 - The Council also proposed allowing member states the option of altering the percentage rate of 4% at the first band to 5%. This was justified on the basis that firstly, the higher rate of 5% would reflect the resale amount implemented by member states who previously recognised the right. See also Council's Common Position adopted by the council with a view to the adoption of a directive of the European parliament and of the council on the resale right for the benefit of the author of an original work

and are applied on a cumulative basis so where a work of art, for example, sells for €1,000,000, the final royalty is made up of all the above royalty rates. If on the other hand the sale's value amounts to €200,000 then the final royalty is comprised of band (a) and (b) only.[96] It is also important to note that the threshold amount does not affect the royalty calculation. For example, where a work of art is sold for €50,000 the percentage royalty rate of 4% is paid on the full amount and not just the amount that exceeds the threshold.[97] Previous to the introduction of the Directive, countries such as France and Germany that had already recognised the resale right did not cap the royalty amount; the higher the sales value, the higher the royalty amount.[98] However, EU Legislators were of the opinion that an uncapped amount would displace sales to outside of the EU; as a result the Directive sets a ceiling of €12,500.[99] It is noteworthy that this cap is unique within copyright law.[100]

The final sub-section of Article 4 appears to allow for a further discretion; where a member state sets the minimum sale price below €3,000, thereby creating a new and separate price band, member states may alter the royalty rate for this

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of art, statement of the council's reasons. 5 June (draft) & 26th September 2000, (PI 21 Culture 19 Codec 245) p. 7; a 1% variance at this lower price band would not substantially distort the market.

[95] ARR Directive, *supra* note 1, Article 5. Neither the Directive nor the Irish Regulations say whether the basis of calculation includes art market intermediaries' commission. In the UK, the patent office suggests that the basis of calculation should be the hammer price or ticket price however that interpretation is not binding. See Valentin, *supra* note 26, p. 269.

[96] i.e. 4% on the amount from €0 to €50,0000 and 3% on the amount €50,000.01 - €200,000.

[97] i.e. not just the difference - €47,000. Also member states may set this threshold below €3,000.

[98] See L. de Pierredon-Fawcett, *The Droit de Suite in Literary and Artistic Property,* A Comparative Law Study (Louise-Martin Valiquette Translation), (New York: Columbia University, 1991) pp. 115 - 118.

[99] ARR Directive, *supra* note 1, Article 4(1) – 'However, the total amount of the royalty may not exceed EUR 12 500.'

[100] J. Gaster, 'The Resale Right Directive' in I. Stamatoudi and P. Torremans (eds.) *EU Copyright Law, A Commentary* (Cheltenham: Elgar Publishings, 2014) pp. 355 - 394.

new price band.[101] For instance, a member state could in theory set the threshold at €1,000 and simultaneously create a novel royalty price band between the new threshold of €1,000 and the highest allowed threshold of €3,000. Under Article 4(3) of the Directive, the resale royalty rate for the portion of the sale between €1,000 and €3,000 could be set at any percentage rate. The only condition is that the rate may not be lower than 4%.[102] Therefore, in principle, there is no limit to how high this percentage rate may be set thus presenting the possibility for member states to create a generous royalty band for visual artists who's work sells at the lower end of the price spectrum. Member states such as Ireland, which adopted the highest threshold amount of €3,000 are bound to apply the rate adopted at band (a).[103]

2.2.4 Right to obtain information.

Article 9 obliges AMPs to supply authors and their heirs[104] with information pertaining to the resale for a period of three years after said sale.[105] Lubina *et al* describe this provision as 'crucial' to the effective enforcement of the resale right, noting that '… knowledge of the resale of a modern or contemporary work of art is a necessary condition for the collection of the royalty.'[106] The Directive

[101] ARR Directive, *supra* note 1, Article 4 'If the minimum sale price set should be lower than EUR 3 000, the Member State shall also determine the rate applicable to the portion of the sale price up to EUR 3 000; this rate may not be lower than 4%.'
[102] *Ibid.* Article 4(3) If the minimum sale price set should be lower than EUR 3 000, the Member State shall also determine the rate applicable to the portion of the sale price up to EUR 3 000; this rate may not be lower than 4 %.
[103] Whether that be 4% or 5% as required by Article 4.
[104] ARR Directive, *supra* note 1, Article 9 (1).
[105] *Ibid.* – 'Member States shall provide for a period of there years after the resale that the person entitled under Article 6 may require from any art market professional mentioned in Article 1(2) to furnish any information that may be necessary in order to secure payment of royalties in respect of the resale.'
[106] Lubina *et al., supra* note 35, at p. 298.

states that access to information is predicated upon the information being 'necessary' to securing a royalty payment and not a general request for information.[107] In this way the requirement balances the privacy rights of buyers and sellers with the rights of authors to receive payment, while preventing nuisance enquiries.[108] Lubina *et al* are of the opinion that ' … it will cost the art market professional much less time and administrative effort to inform a default collecting society of the details of a resale than it costs a collecting society (or worse still, the artists) to monitor the art market for relevant transaction.'[109] The authors endorse a close and synergistic relationship between AMPS and CMOs. How member states apply this right not only affects the distribution of costs in retrieving this information but also how effective the right is in practice.

2.3 The Directive – Developing and Perceived Problems – Case Law and Commentary

The following section analyses relevant case law and academic commentary concerning the ARR Directive and in doing so presents a critique of the Directive which analyses the merits of the Directive, its failings and whether there is room within the current model for a social component reflective of the right's origins.

Following the implementation of the Directive two primary questions arose through the case law of the CJEU: the first concerned the effect of the Directive

[107] ARR Directive, *supra* note 1, Recital 30.
[108] ARR Directive, *supra* note 1, Recital 30 states that: 'Appropriate procedures for monitoring transactions should be effectively applied by Member States. This implies also a right on the part of the author or his authorised representative to obtain any necessary information from the natural or legal person liable for payment of royalties. Member States which provide for collective management of the resale right may also provide that the bodies responsible for that collective management should alone be entitled to obtain information.'
[109] Lubina *et al., supra* note 35, at p. 299.

on member states' laws of succession – *the Dali Case* – while the second concerned the effect of a contractual clause which purported to over-ride member state's national implementation measurements – *the Christies Case*. It is to these questions that the analysis now turns.

2.3.1 The Dali Case and Succession

Salvador Dalí died in Figueras, Spain in 1989 leaving behind five heirs at law,[110] however in his will he appointed the Spanish State as sole legatee.[111] Accordingly the *Fundación Gala-Salvador Dalí* [hereinafter the Dalí Foundation] administers all rights associated with the intellectual property in his estate.[112]

In 1997 the Dalí Foundation granted the Spanish collecting society, *Visual Entidad de Gestión de Artistas Plásticos* [hereinafter VEGAP], an exclusive worldwide mandate to manage and exercise copyright over the works of Salvador Dalí.[113] VEGAP in turn licensed the French collecting society, *Auteurs dans les Arts Graphiques et Plastiques* [hereinafter ADAGP] to manage the

[110] Fundación Gala-Salvador Dalí and VEGAP, Judgment of The Court (Third Chamber) 15 April 2010. Case C-518/08, REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal de grande instance de Paris (France), made by decision of 29 October 2008, received at the Court on 27 November 2008, in the proceedings Fundación Gala-Salvador Dalí, Visual Entidad de Gestión de Artistas Plásticos (VEGAP) Société des auteurs dans les arts graphiques et plastiques (ADAGP) [hereinafter *Dali* case]. Note that recently Dali's body was exhumed for DNA tests to verify the legitimacy of a claim by a potential heir. <http://www.bbc.com/news/world-europe-40677828> (date accessed: 12 August 2017).
[111] *Ibid.* at paras. 13 - 14.
[112] *Dali* case, *supra* note 110, para. 13, Dalí established the foundation under Spanish law in 1983.
[113] *Ibid.* at para. 14.

estate's copyright in France.[114] ADAGP collected amounts in respect of the exploitation of Salvador Dalí's works, which were transferred by VEGAP to the Fundación Gala-Salvador Dalí.[115] However those amounts in relation to the resale right were retained by ADAGP. Under French law and pursuant to the provisions of Article L. 123-7 FIPC, the benefit of the resale right divests to the heirs of the visual artists alone.[116] Non-familial legatees and successors in title are not legally entitled to receive the resale royalty. Contrary to the artist's will, ADAGP paid all collected resale royalties directly to Salvador Dalí's heirs and not to the Dalí Foundation.[117]

VEGAP summonsed ADAGP before the *Tribunale de grande instance de Paris* [hereinafter the Paris Regional Court] on 28 December 2005 to secure an order for payment of those royalties. In light of the conflict of laws and the lack of guidance on this issue within the Directive, the Paris Regional Court stayed the proceedings and referred the following questions to the European Court of Justice for a preliminary ruling:

> 1) Can [the French Republic], subsequent to Directive [2001/84], retain a resale right allowed only to heirs to the exclusion of legatees or successors in title?[118]
>
> 2) Do the transitional provisions of Article 8(2) and (3) of Directive [2001/84] allow [the French Republic] to have a derogation?'[119]

[114] *Ibid.* at para. 15.
[115] *Ibid.* at para. 16.
[116] *Ibid.* at para. 16.
[117] *Ibid.* at para. 16.
[118] *Ibid.* at para. 18.

As to the first question the French court asked whether Article 6(1) of the Directive must be interpreted as precluding a provision of national law, such as Article L. 123-7 of the FIPC, which reserves the benefit of the resale right to the artist's heirs at law alone, to the exclusion of testamentary legatees. The ECJ, as it then was, noted that according to its settled case law, [120] in interpreting a provision of Community law it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the legislation of which it is part.[121] Regarding the context and the objectives to be pursued the wording of the Directive gives no guidance as to the intended meaning of 'those entitled' under Article 6(1).[122] The Court concluded that '[i]n the absence of any express definition of that concept, the objectives which governed the adoption of Directive 2001/84 must be examined.'[123]

The ARR Directive is based on two primary objectives: firstly, that visual artists may share in the economic success of their work to the same extent as other creators;[124] and secondly, to eliminate anti-competitive practices and market distortions that result in the displacement of sales to member states that did not previously recognise the right.[125] The first objective seeks to ensure a certain level of remuneration for visual artists. For that reason, Article 1(1) of Directive 2001/84 provides that the resale right is to be defined as inalienable and not to be

[119] *Ibid.* at para. 18.
[120] See Case 292/82 Merck [1983] ECR 3781, at para. 12; Case C-223/98 Adidas [1999] ECR I-7081, at para. 23; Case C-17/03 VEMW and Others [2005] ECR I-4983, at para. 41; and Case C-199/08 Eschig [2009] ECR I-8295, at para. 38.
[121] *Dali* case, *supra* note 110, at para. 25.
[122] *Ibid.* at para. 26.
[123] *Ibid.* at para. 26.
[124] Directive 2001/84/EC, Recital 3 - 4.
[125] Directive 2001/84/EC, Recital 9 - 10. This was confirmed in the *Christies* case.

subject to an advance waiver. The Court determined that the attainment of the first objective was in no way achieved by the transfer of the royalty post mortem to heirs and legatees alike as this was merely 'ancillary' to the broader objective.[126] The second objective focuses on the harmonisation of the artists' resale right across EU member states. Recital 13 of the Directive mandates that existing differences between the laws of member states '… should be eliminated where they have a distorting effect on the functioning of the internal market'.[127] Recitals 13 and 15 go further and place a qualification on this objective, stating that 'there is no need to eliminate differences between national laws which cannot be expected to affect the functioning of the internal market … .'[128] Furthermore the Court was of the opinion that Recital 27 of the Directive supported this analysis as it makes clear that in accordance with the principle of subsidiarity, member states' laws of succession should not be affected by the Directive.[129] The Court's opinion clearly reflects the Commission's intention to avoid law reform for its own sake.[130] The Court concluded that as such it was up to member states to determine to whom the resale right would divest post mortem.[131]

In addition and relating to the conflict of laws question the Court concluded that:

[126] *Dali* case, *supra* note 110, para., 29.
[127] AAR Directive, Recital 13.
[128] *Ibid.*
[129] *Dali* case, *supra* note 110, at para. 32.
[130] Commission of the European Communities Com (88) 172 Final Brussels 7 June 1988, Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Attention (Communication from the Commission) Chapter 1, Section 4, Para 9 (1.4.9), p. 8 para., 1.4.10.
[131] *Dali* case, *supra* note 110, at para. 23.

> '… there is nothing in the Directive 2001/84 to indicate that the European Union legislature intended to rule out the application of rules governing coordination between the various national laws relating to succession, in particular those of private international law which are intended to govern a conflict of laws such as that arising in the dispute in the main proceedings.'[132]

The Court also concluded that it was up to the national court to take account of all the relevant rules for the resolution of conflicts of laws relating to the transfer on succession of the resale right.[133] The Court held that there was nothing precluding a provision of national law that qualified the remit of those benefiting under the resale right.[134] However, it was up to the national court to apply the '… relevant rules for the resolution of conflicts of laws relating to the transfer on succession of the resale right.'[135] Based on the preceding analysis the Court did not consider it necessary to reply to the second question.

In light of the CJEU ruling, the *Tribunal de Grande Instance* reconvened on July 8, 2011.[136] The first issue before the French Court was a matter of classification; whether the beneficiaries of the resale right post mortem was a matter of

[132] *Ibid.* at para. 34.
[133] *Ibid.* See also, S. Stokes '*Artists Resale Right (Droit de Suite): UK Law and Practice* (3rd ed.) (Builth Wells: Institute of Art and Law, 2017) pp. 54 - 55.
[134] *Dali* case, *supra* note 110, at para. 36. 'In those circumstances, the answer to the first question is that Article 6(1) of Directive 2001/84 must be interpreted as not precluding a provision of national law, such as the provision at issue in the main proceedings, which reserves the benefit of the resale right to the artist's heirs at law alone, to the exclusion of testamentary legatees.'
[135] *Ibid.*, 'That being so, it is for the referring court, for the purposes of applying the national provision transposing Article 6(1) of Directive 2001/84, to take due account of all the relevant rules for the resolution of conflicts of laws relating to the transfer on succession of the resale right.'
[136] Fundació Gala-Salvador Dalí v ADAGP No. RG:10/11343, Jugement du Tribunal de Grande Instance de Paris, p. 8 as cited and translated by A. Cukier, Case Comment 'Dali gives greater clarity to the Resale Directive' (2013) 35 (11) *European Intellectual Property Review*, p. 8.

copyright law or the law of succession.[137] If the court found that the question fell within the purview of copyright law then it is likely the law of the member state where the work was sold would apply.[138] On the other hand if the French Court adjudicated the matter to be governed by the law of succession, the applicable law – whether French or Spanish succession law – ought to be determined by the private international law rules governing succession.[139] In the view of the court, the governing law was one of succession: the resale right is established – in relation to legatees and heirs – 'on the day that succession begins', and the law governing that succession will determine the right holders, 'irrespective of any country where the works might one day be resold, which is unknown at the moment that succession commences.'[140]

Looking then to French choice-of-law rules, and noting that France had not ratified the Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons,[141] the court stated that the law governing the succession of movable property is that of the last domicile of the deceased – in this case Spanish law.[142] In accordance with Article 1 of L. 22/1987 of the Spanish intellectual property code,[143] the Dalí Foundation was deemed

[137] *Ibid.*
[138] *Ibid.*
[139] See The EU Succession Regulation (Regulation (EU) No.650/2012), also known as Brussels IV, Official Journal of the European Union L. 201/107. 27/07/2012, REGULATION (EU) No 650/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.
[140] Cukier, *supra* note 136 at, p. 8.
[141] *Ibid.* p. 8. 'This convention is one of many operating under the umbrella of the Hague Conference on Private International Law, which seeks to progressively harmonise the rules of private international law. There are currently 71 members of the Hague Conference. Since France was not a signatory to this particular Convention, the court was obliged to look to French law governing the succession of movable property.'
[142] Cukier, *supra* note 136, p. 8.
[143] *Ibid.*

beneficiary of all resale royalties issuing from the resale of his works in France.[144] The French Court ordered ADAGP to pay to VEGAP all moneys issuing from the sale of works by Dalí realised in France since October 17, 1997.[145] It is submitted that in light of Recital 27 and in the absence of EU harmonization on the laws of succession the Court determined the matter appropriately. Importantly, subsequent to the *Dalí* case the EU Parliament and Council introduced an EU Regulation on jurisdiction, applicable law, recognition and enforcement of authentic instruments in matter of succession and on the creation of a European Certificate of Succession. [146] These rules are applicable to the succession of persons deceased on or after 17 August 2015. Denmark, Ireland and the UK have an option to participate in the Regulation. [147]

2.3.2 The Christie's Case and the Right to Assign Liability

In 2014 the French Supreme Court referred a question to the CJEU regarding the legality of a contractual clause that transfers the burden to pay the resale royalty from the seller of a work of art to the buyer even where national legislation mandates the former. The issue presented itself in two cases and resulted in the Paris Court of Appeal reaching opposing decisions in both cases. In the first case, *Syndicat National des Antiquaires* (SNA) *v. Christie's France SNC* (2012),[148] a trade association representing French antique dealers took an action against the

[144] *Ibid.*
[145] *Ibid.*
[146] Regulation (EU) No. 650/2012 of the European Parliament and of the Council of July 2012.
[147] *Ibid.*
[148] *Syndicat National des Antiquaires* (SNA) *v. Christie's France SNC* (2012) (Fr) Court of Appeal of Paris 4th Chamber 12 December 2012, Case No. 11/11606 [hereinafter *SNA v. Christies*] ; see also SNA Press Release, December 14, 2012 <http://www.sna-france.com/Droit-de-suite-procs-contre-Christies-N=c1721977-f080-4964-9570-a240d042e09b-L=FR.aspx> (date accessed: 8 July 2017).

French division of the UK auction house Christies.[149] While the SNA were not party to the dispute they were allowed to bring the claim on public policy grounds and specifically in respect of the functioning of the internal market. At dispute was the inclusion by the auction house of a term in its conditions of sale requiring the buyer to pay an 'amount equal to the resale right'.[150] The SNA claimed that such clauses were unenforceable because they were in conflict with the wording of the Directive and national implementation measures.[151] At first instance the Paris Regional Court declared the action as inadmissible and dismissed the SNA's claim because it did not consider such contractual clauses to impinge upon national implementation measures. The SNA appealed the decision to the Paris Court of Appeal whereupon the decision of the court of first instance was reversed.[152] The Court found the clause to derogate from the provisions of Article L.122-8 of the French Intellectual Property Code (FIPC) thereby infringing it.[153] Christie's France conditions of sale clause[154] was accordingly declared null and void.[155]

[149] The action followed the sale of the Saint-Laurent-Bergé collection.
[150] See Christies terms of sale – 'Each time you bid on a lot covered by the ARR, you agree to pay an amount equal to the resale royalty, if you are the successful bidder. This amount will be added to your invoice.' <http://www.christies.com/home/features/guides/buying-guide/related-information/droit-de-suite/introduction> (date accessed: 10 July 2017) & <http://www.christies.com/features/guides/buying-guide/related-information/droit-de-suite/faq/?sc_lang=en> (date accessed: 10 July 2017).
[151] *Supra* note 148.
[152] *Ibid.*
[153] Article L.122-8 of the French intellectual Property code defines the resale right as 'a non-transferable right to participate in the proceeds of any sale of a work after the first sale by the artist or his/her beneficiaries, when an art market professional is involved as seller, buyer or broker.'
[154] See <http://www.christies.com/home/features/guides/buying-guide/related-information/droit-de-suite/introduction> (date accessed: 10 July 2017) & <http://www.christies.com/features/guides/buying-guide/related-information/droit-de-suite/faq/?sc_lang=en> (date accessed: 10 July 2017).
[155] *Supra* note 148.

In the second case, *Comite Professionel des Galeries d'art* (CPGA) *v Christie's France SNC*,[156] another trade association representing art dealers claimed that Christie's practices – regarding the burden to pay – were anti-competitive and therefore interfered with the functioning of the internal market.[157] In this case however the Court held that there was nothing in French law that prevented such an agreement between parties.[158] The Court relied on Article 1 of the Directive which states that, with regard to payment of the resale right, member states may provide that sellers, buyers, and/or AMPs are liable severally or jointly.[159] The Court observed that in practice, while the seller may be liable to pay, it is often the AMP as agent who 'actually pays'.[160] It was noted that in practice AMPs receive payment for the work of art from the buyer, subsequent to which they transfer an amount, less the resale royalty amount, to the seller with the remaining royalty amount going to the artist, or his/her heir or an intermediary collecting society.[161] Valentin describes this distinction as the seller's 'burden to pay' as against the AMP's 'liability to pay'. Or in other words, contracting parties decide upon the mechanics of payment – who pays – and at whose expense. Based on this distinction the Court concluded that the seller and buyer could contractually 'agree' to whom liability to pay would fall.[162]

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[156] *Comite Professionel des Galeries d'art* (CPGA) *v Christie's France SNC*, (Fr) Paris Court of Appeal, 5th Pole, 4th Chamber, 3 July 2013, Case No. 11/20697 [hereinafter CPGA v. Christies]. See also Brad Spitz 'Artist's Resale Rights: French preliminary question to the ECJ' Kluwer Copyright Blog 17 March 2014. <http://kluwercopyrightblog.com/2014/03/17/artists-resale-rights-french-preliminary-question-to-the-ecj/> (date accessed: 10 July 2017), see also Brad Spitz 'ECJ: Auction houses may transfer cost of artist's resale royalties to the buyer' <http://kluwercopyrightblog.com/2015/02/27/ecj-auction-houses-may-transfer-cost-of-artists-resale-royalties-to-the-buyer/> (date accessed: 10 July 2017).

[157] P. Valentin 'Artist's Resale Right In France: The Economic Burden Revisited' Art@Law 21/02/2014 <http://www.artatlaw.com/archives/archives-2014-jan-dec/artists-resale-right-in-france-the-economic-burden-revisited> (date accessed: 10 July 2017).

[158] *Ibid.*

[159] *Ibid.*

[160] *Ibid.*

[161] *Ibid.*

[162] *Ibid.*

Within the context of both these cases Christie's France appealed the Court's decision in the former case[163] whereupon the French Supreme Court referred the following preliminary question to the CJEU:

> 'Must the rule laid down by Article 1(4) of Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art, which makes the seller responsible for payment of the royalty, be interpreted as meaning that the seller is required definitively to bear the cost thereof without any derogation by agreement being possible?'[164]

The preliminary reference under Article 267 TFEU was delivered on the 26th of February 2015.[165] The CJEU held that Article 1(4) does allow for such an agreement as the provision in question:

> '… must be interpreted as not precluding the person by whom the resale royally is payable, designated as such by national law, whether that is the seller or an art market professional involved in the transaction, from agreeing with any other person, including

[163] (Fr) Supreme Court, Civil, Civil Division 1 22 January 2014, Case No. 13-12675. < https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000028514344&fastReqId=184391313&fastPos=1> (date accessed: 10 July 2017).

[164] *Christie's France SNC v Syndicat National des Antiquaires* (Case C-41/14) (2014/C 102/28) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CN0041&from=EN> (date accessed: 10 July 2017).

[165] See Request for a preliminary ruling from the Cour de Cassation (France) lodged on 27 January 2014 — *Christie's France SNC v Syndicat National des Antiquaires* (Case C-41/14) <http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d5c53b5665d2d0417193e0d3e78ce36f20.e34KaxiLc3qMb40Rch0SaxyKax50?text=&docid=162539&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=814143> (date accessed: 10 July 2017). See also EU Law Radar - Monitoring References to the Court of Justice of the European Union <http://eulawradar.com/case-c-4114-christies-france-the-single-market-in-reselling-art-works-going-going-gone/> (date accessed: 10 July 2017).

> the buyer, that that other person will definitely bear, in whole or in part, the cost of the royalty, provided that a contractual arrangement of that kind does not affect the obligations and liability which the person by whom the royalty is payable has towards the author.'[166]

The Court supported its finding with reference to the primary objectives of the ARR Directive, firstly, '… to ensure that authors of graphic and plastic works of art share in the economic success of their original works of art.'[167], secondly to '… eliminate differences between laws which lead, inter alia, to unequal treatment between artists depending on where their works are sold.'[168] The Court continued that this is why Article 1(1) of Directive 2001/84 provides for an inalienable right for artists to receive a certain level of remuneration,[169] which must actually be paid.[170] Accordingly it is for member states alone to decide who is responsible for payment of the royalty to the author.[171] This would suggest that AMPs are precluded from unilaterally amending the default position. However, the Court noted that some language versions of Article 1(4) could be understood as drawing a distinction between, on the one hand, the person who is liable for payment to the author and, on the other, the person who must definitively bear the cost of the royalty, while other versions do not.[172] The Court noted that where there is such a divergence a teleological approach must to be adopted.[173] In this

[166] *Christie's France SNC v Syndicat National des Antiquaires* (Case C-41/14) para. 33.
[167] *Ibid.* at para. 15, citing ARR Directive Recitals 3 and 4. In this regard the Court referenced its previous decision in the *Fundación Gala-Salvador Dalí and VEGAP* C-518/08, para. 27.
[168] *Ibid.* at para. 15, citing ARR Directive Recitals 13 and 14.
[169] *Ibid.* at para. 17.
[170] *Ibid.* at para. 18.
[171] *Ibid.* at paras. 19 and 24.
[172] *Ibid.* at para. 25.
[173] *Ibid.* at para. 26.

regard the Court, relying on recitals 9, 10 and 25 of the ARR Directive, stated that:

> '… although the Directive makes provision about certain matters relating to the works covered, the persons entitled to receive royalties, the rates applied, the transactions subject to payment of a royalty, and the basis of calculation, as well as about certain matters relating to the person to whom the royalty is payable, it is silent about the identity of the person who must definitively bear the cost of the royalty due to the author in respect of the resale right.'[174]

In light of this apparent 'silence' the Court was left with the task of identifying the parties liable. Relying on recitals 13 and 15, which circumscribe the extent of market harmonisation, the Court found that '… there is no need to eliminate differences between national laws which cannot be expected to affect the functioning of the internal market and that, in order to leave as much scope for national decision as possible, it is sufficient to limit the harmonisation exercise to those domestic provisions that have the most direct impact on the functioning of the internal market.'[175] Continuing, the Court stated that:

> '[f]or the purpose of achieving the aforementioned objective, thus circumscribed, it is necessary that provision be made as to the person liable for payment of the royalty vis-à-vis the author and as to the rules

[174] *Ibid.* at para. 27.
[175] *Ibid.* at para. 29.

> for establishing the amount of the royalty. However, such provision is not necessary with regard to the question as to who, definitively, will bear the cost of the royalty.'[176]

Again the distinction rests upon the 'liability to pay' as defined by national implementation measures and who will ultimately accept the 'burden to pay', the latter of which the Court found to be inconsequential to the functioning of the ARR Directive and the internal market. Admittedly the Court recognised that the aforementioned '… may to some extent have a distorting effect on the functioning of the internal market …' but concluded that such an effect was only indirect '… since it arises as a result of contractual arrangements that are independent of the payment of the royalty to the author, for which the person by whom the royalty is payable remains liable.'[177]

From the foregoing it would appear that in each case both claimants (the SNA & the CPGA) had a legitimate case to make out, namely that Christie's France practice of allocating liability to pay the resale right by contract distorted the functioning of the internal market. However, that effect was found to be indirect and as such not significant enough to warrant intervention. In light of the purposive interpretation that the Court adopted here and evidenced in the *Casis de Dijon Case* – relating to measures having an effect equivalent to a quantitative restriction – it is not entirely clear from the Court's reasoning when a measure that indirectly affects the functioning of the internal market will be significant enough to warrant intervention. The EU Commission is currently investigating

[176] *Ibid.* at para. 30.
[177] *Ibid.* at para. 31.

the effect of this market distortion, otherwise known as the 'cascade effect'. In the current context if the Commission were to find significant market distortion resulting from this practice then that fact would undoubtedly have some interesting results for the above CJEU line of authority. In addition, the Court's reasoning implies that both parties to an agreement to transfer the burden to pay the ARR royalty operate from a symmetrical bargaining position.

2.3.3 Criticism of the Artists' Resale Right

While the previous section outlined two legal issues that have come before the courts since the introduction of the ARR Directive, the developing literature on the topic has identified a number of regulatory and principle based concerns that bring the validity and functioning of the ARR Directive into question. These concerns revolve around the beneficiaries of the Directive, the distribution of royalties, sales displacement and the administration of the right. While many of these issues have been discussed at length in the related literature, the full implementation of the ARR Directive provides fresh insight into the validity and extent of these concerns. It is to this that the following section now turns.

2.3.4 Beneficiaries: Actual Reward

A pertinent question specific to the ARR Directive is whether it provides actual rewards for visual artists? McAndrew and Dallas-Conte contend that the ARR '… discourages artistic production and does not support needy (rising) artists

but rather increases the incomes of already established artists.'[178] In practice, royalties collected by national CMO's from the ARR are not insignificant. The EU Commission in its 2011 'Report on the Implementation and Effect of the Artists' Resale Right Directive'[179] states that in 2010, €14 million in royalties were distributed to 6,631 artists and their heirs within the EU.[180] This compared less favourably to figures collected by CMOs in 2007 which show royalties of €14.4 million distributed to 7,107 artists.[181] Conceivably the global financial crisis in 2008 contributed to this reduction.[182] These figures can be broken down further for select individual member states: France, in 2010 collected €6,848,000 and distributed to 2054 artists/heirs; Germany, for the same year collected €3,427,000, distributing to 1021 artists/heirs; while the UK, collected €2,696,000 distributing to 966 artists. Interestingly the UK, which at that time had not yet extended the right to the heirs of deceased artists, collected amounts similar to that of Germany for the same period.[183] These figures can be compared to more recent research conducted by Ricketson who reports that in France, in 2013, the collecting society ADAGP collected €12,433,901 from 24,293 transactions affecting 1,938 artists of whom 45% were still living.[184] In the UK in 2013, DACS collects and distributed almost €10,000,000[185] in ARR Royalties to over 1,400 artists and their estates.[186] Assuming the veracity of these figures,

[178] C. McAndrew and L. Dallas-Conte *supra* note 5, at p. 19.
[179] *Supra* note 21.
[180] *Ibid.* at p. 14 Table 3.
[181] *Ibid.*
[182] *The Economist* 'Investing in Art: A study in red and black' 4 April 2015 < http://www.economist.com/news/finance-and-economics/21647633-global-art-market-booming-treacherous-study-red-and-black> (date accessed: 10 July 2017).
[183] Presumably this reflects the comparative size of the UK and German markets – the UK being significantly greater than Germany.
[184] Ricketson *supra* note 10, at p. 20; see Also C. McAndrew and L. Dallas-Conte, *supra* note 5, valuing the French resale royalty market in 1998 at €2,300,000.
[185] The figure cited by Ricketson is in sterling rather than euro - £8.4 million.
[186] Design and Artists Copyright Society (DACS), *Annual Review 2013* p. 10 & 13. The figure is greater when distributed royalties by ACS (Artists Collecting Society) are included: a reported

significant growth in EU ARR royalties may be observed despite the depressed economic climate of this period.[187] A possible contributing factor to this growth may be related to the cessation of the Directive's exemption period in 2012 for member states that did not previously extend the ARR to the estates of deceased artists.[188] This fact alone might explain the significant growth in UK ARR royalties but presumably not in France and Germany where the exemption period did not apply.[189] Considering the consistent growth in ARR royalties across all three jurisdictions the impact of the exemption period's cessation is perhaps not as significant a factor as one might have first thought.

More significantly, there is evidence to suggest that wider macro economic factors were at play and that investors at this time began to diversify investment portfolios away from riskier asset classes such as equities and unsecured bonds towards traditionally more secure asset classes, such as commodities but also fine-art which suggest that art is a relatively quantifiable and predictable investment.[190] This can be corroborated by reports from industry analysts who report increased sales since the financial crises.[191] This diversification in asset class may explain the significant growth in art sales and related ARR royalties during this period, however both the EU Commission and Ricketson's reports

£1,144,895.69 for 2013 (See ACS Annual Report 2014 p. 5). Italy collected €6,088, 771 in 2013; see also Societa Italiana degli Autore ed Editori *Report on Transparency – 2013* p. 13.

[187] It ought to be borne in mind that ADAGP are not the only collecting society in France, although it is the largest, therefore a comparison of Frances's total market – as compiled by the EU Commission – and that of a single collecting society (ADAGP) – Ricketson's report – is informative but not conclusive.

[188] ARR Directive, supra 1, Article 8(2) & 8(3).

[189] It will be remembered that the exemption period only applied to member states that did not previously recognise the ARR.

[190] *Supra* note 182.

[191] *Ibid.* See also ArtTactic website: <http://arttactic.com/product/global-art-market-outlook-2016/> (date accessed: 10 July 2017) and <http://arttactic.com/product/latin-america-auction-analysis-july-2016/> (date accessed: 10 July 2017).

indicate a significant gap in knowledge/data relating to the EU's art market and therefore the effects of the ARR Directive. In support of this observation, McAndrew and Dallas-Conte note that art market sales data is on the whole 'plagued by inconsistencies'.[192] This is largely due to the fact that there is no standardised category of 'art sales', some reports include antique furniture, jewellery, multi-media, to which the ARR typically does not apply, while others do not.[193] Furthermore, reported figures may be net of tax, sales premiums, the ARR and vice versa.[194] Accordingly, it is impossible to ascertain the full size and scale of the EU's art market to which the ARR Directive applies. Therefore the follow-up report by the EU Commission on the implementation and effect of the ARR, which was due in 2015 (but not yet published), is imperative to this discussion and any further analysis.[195] When this report is eventually published it will represent the Commission's first opportunity to assess the effects of the ARR since its full implementation.[196] On this point, Lubina *et al* question the meaningfulness of the Commission's 2011 report on the implementation and

[192] C. McAndrew and L. Dallas-Conte *supra* note 5: 'It is worth noting here that the data on art sales are plagued by inconsistencies. The primary source of data in this report are Market Tracking International Company (MTIC) (2000) estimates which are the only estimates available for dealer sales and are regarded as the best available by experts in the art market. Using MTIC estimates, however a 78% fall would imply a drop of just under £3,000 million, rather than £60 million as reported above in the BAMF statement. The differences in reporting stem from what each source classifies as a 'work of fine art'. MTI (2000) classify 'fine art' as: paintings, works on paper, decorative art, antiques and others. The Art Sales Index (ASI) and other sources use a narrower classification in reporting auction sales; for example ASI (2000) refer only to: paintings, works on paper, prints, sculptures/miniatures and photographs). Another important difference is that ASI data do not include buy-ins, yet these are included as part of auction-house turnover in the MTIC estimates. Although these may explain some of difference it is unlikely to be the sole attributable cause and inconsistencies in reporting sales do exist. The problems of art-trade data are discussed in detail in McAndrew (2001).'

[193] C. McAndrew and L. Dallas-Conte *supra* note 5; see also *supra* note 5, at p. 4, the Report conflates the size of the global fine-art and antiques market, 'The global art and antiques market, including both fine and decorative art, was worth €43 billion in 2010… .'

[194] C. McAndrew and L. Dallas-Conte *supra* note 5.

[195] *Supra* note 21, it is perhaps worth noting that the Commission recommended in its 2011 report that this follow-up report be conducted in 2014. As of the time of thesis submission the report remained outstanding.

[196] It will be remembered that the EU Commission's last report in 2011 was conducted at a time when member states such as Ireland and UK had not extended the right to estates of deceased artists.

effect of the artists' resale right.[197] While it is clear from the foregoing that the ARR provides real financial rewards for visuals artists, McAndrew and Dallas-Conte's assertions regarding the distribution of these royalties to a privileged few has not been disproved. It is to this question that the following sub-section refers.[198]

2.3.5 Distribution of Royalties

A further long standing criticism of the ARR is that it only benefits wealthy and successful artists and not the modern day 'starving artist'.[199] This has been largely corroborated by two studies, which found that in France between 1993 and 1995, just 2 – 3% of artists received 43% of the *droit de suite*[200] and that in the UK between 2006 and 2007 just 14% of sales accounted for 69% of payments by value.[201] While these reports are not directly comparable, they do

[197] Lubina *et al*, *supra* note 35, at p. 313.
[198] *Supra* note 5, at p. 19.
[199] See for example B. W. Bolch, W.W. Damon and C. E. Hinshaw 'Visual Artists Rights Act of 1987: A Case of Misguided Legislation' (1988) 8 *Cato Journal*; J. H. Merryman 'The Wrath of Robert Rauschenberg' (1993) 41 *American Journal of Comparative Law*; J. D. Tepper 'Le Droit de Suite: An Unartistic Approach to Law (2007) ExpressO - Selected Works <http://works.bepress.com/jonathan_tepper/1> (date accessed: 10 July 2017); J. C. Wu 'Art Resale Rights and the Art Resale Market: A follow-Up Study' (1999) 46 *Journal of the Copyright Society*; A. Bussey 'The Incompatibility of Droit de Suite with Common Law Theories of Copyright' (2013) 23(3) *Fordham Intellectual Property, Media & Entertainment Law Journal*.
[200] *Supra* note 5, at p. 34, the authors derived these figures from a report by Deputé Douyere to the Assembleé Nationale in late 1999.
[201] *Supra* note 2, at p. 47, 'In the period 15 February 2006 - 31 July 2007 surveyed in our research, 86% of ARR [Artist Resale Right] liable sales commanded just 31% of ARR payments by value; the remaining 14% of sales accounted for 69% of payments by value. Indeed, this distribution is even more extreme if one considers that while close to one third of all ARR eligible art occurred in the lowest price band (€1,000 – €3,000), this represented only approximately 1% of all eligible art by value; in stark contrast to this, 47% of ARR eligible sales by value were accounted for in only 72 artworks, or 2% of eligible art by volume.' See also T. Froschauer *The Impact of the Artists Resale Right in the United Kingdom* (London: UK Antiques Trade Gazette, 2008) 'In the first 19 months since the implementation of ARR in the UK just over 1,000 artists benefited from royalty payments. Of these only half were British. Just under one third of all artists benefited exclusively from lowering the qualifying threshold from €3,000

indicate that high value sales emanate from a small number of artists and their work. It will be remembered that for some of the early proponents of the resale right it was its maintenance function that defined it.[202] However, Abel Ferry '… made clear that he founded the proposed droit de suite on the rationale that the artist was ill-protected under general copyright law simply because of the nature of his product … .'[203] The maintenance element for Ferry was accordingly less 'alms for the poor' and more an attempt to create parity between the creative classes. That being said, Ferry and his contemporaries were not attempting to provide a boon for already wealthy artists but rather those who faced economic uncertainty.[204] The pressing question in this regard is to what degree Ferry and later legislators achieved this result? Since its inception commentators have been divided on this issue.[205] Hudson & Waller describe the resale right and its supposed equalisation of the creative classes, at least in financial terms, as a 'pyrrhic victory' with most artists receiving no economic benefit from the right.[206] Reddy on the other hand argues that the ARR should not be discounted on the basis that those who are the most successful benefit the most.[207]

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to €1,000. Of all the British artists who benefited, only 41% did so by lowering the threshold, less than half of those suggested by supporters of the levy. 20% by number and 40% by value of royalty payments were paid to the top 20 artists, 12 of which are British. The estimated cost to the British art market to administer ARR is between 3% and 5% of the overall royalties collected.'

[202] R. Plaisant – 'The Droit de Suite' *General Studies - Copyright* (1969)*: Monthly Review of the United Bureaux for the Protection of Intellectual Property* (BIRPI) pp. 159 - 160. For a further discussion see Chapter 3, Section 3.6, p. 183.

[203] R. Hauser 'The French Droit de Suite The Problem of Protection for the Underprivileged Artist under the Copyright Law' (1962) 11 *Copyright Law Symposium*, p. 4.

[204] *Supra* note 98, at p. 1 - 6.

[205] For a selection of proponents see: R. Hauser (1962), R. Plaisant (1962 & 1969) L. de Pierredon-Fawcett (1991). For a selection of opponents see: Price (1968), J.H. Merryman (1993), B. W. Bolch, W. W. Damon and C. E Hinshaw (1978), R.K. Filer (1984), L.S. Karp and J.M. Perloff (1993), V. Ginsburgh (2005), the latter providing economic models, the merit of which are in this author's opinion open to challenge.

[206] E. Hudson and S. Waller 'Droit de Suite Down Under: Should Australia Introduce a Resale Royalties Scheme for Visual Artists?' (2004) *Melbourne Law School Legal Studies Research Paper* No. 115. p. 25; Bussey, *supra* note 199, at p. 1088, contends that the ARR fails to protect video artists and performance artists.

[207] M.B. Reddy 'The Droit de Suite: Why American Fine Artists should have the right to a Resale

Merryman, describes this allocation of royalties to wealthy artists as the right's greatest failing; [208] a 'Robin hood in reverse'; taking from the poor and giving to the rich.[209] Ricketson, disagreeing with Merryman, contends that the resale right performs just like any other reproduction right in that it rewards those creators which society deems to be of value.[210] However, the 'Robin Hood' analogy is not quite right; the ARR and its French predecessor the *droit de suite* 'take' from art market professionals and distribute royalties to artists, irrespective of their social or financial position. As a further challenge to Merryman's position, Kawashima recognises that while it is reasonable to assume that the majority of artists do not enjoy a secondary market for their work, it is inappropriate to assume that 'big name' artists dominate the secondary market.[211] Merryman's objection to the then-current proposal for a EU ARR is largely based on a study conducted by Camp in 1980.[212] This study focused on the sales record of Sotheby's (New York) between 1973 and 1977. Camp found that during this period sales of contemporary art were highly concentrated with the top five artists enjoying one-third of the sale value of all works.[213] A follow-up study by Wu in 1999 reached similar conclusions.[214] Kawashima is critical of these studies noting that the

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Royalty (1995) 15 *Loyola of Los Angeles Entertainment Law Journal* p. 531.

[208] J. H. Merryman, The Proposed Generalisation of the droit de suite in the European Communities (1997) *Intellectual Property Quarterly* p. 20.

[209] Merryman, *supra* note 199, at p. 253.

[210] Ricketson, *supra* note 10, at p. 5; '… this is the case for all categories of literary and artistic work: the grant of exclusive rights provides no guarantee of reward or continuing income, but simply the prospect of receiving some share of the proceeds of the exploitation of the work if it subsequently receives public recognition and demand. In this regard, the [ARR] simply reflects the particular character of visual works of art and their form of exploitation, but it does not differ in kind from the reproduction right which will only be of benefit to the struggling author in the event that his or her manuscript is chosen for publication out of thousands that cross the desk of the publisher daily.'

[211] Kawashima, *supra* note 93, at p. 303.

[212] T. R. Camp 'Art Resale Rights and the Art Resale Market: An Empirical Study' (1980) 28 *The Bulletin of the Copyright Society of the USA*.

[213] *Ibid.* p. 152 - 153.

[214] *Ibid.*; see also J. H. Merryman, and A. E Elsen, *Law, Ethics and the Visual Arts* 4th eds. (London: Kluwer Law International, 2002) p. 484, fn 48; Kawashima *supra* note 92, p. 303.

Camp study in particular, focused on high end contemporary sales in New York during the 1970s, and is therefore not representative of the art market and only represents '… one aspect of the market, which has other layers at international, national, and regional/local levels'.[215] Based on two comparatively broader studies by Graddy & Szymanski (2005) and Kusin & Co. (2005), Kawashima presents a challenge to Merryman's assumptions regarding the beneficiaries of the ARR and concludes that a larger number of artists ought to benefit from the ARR albeit to a lesser value. Kawashima's analysis focuses predominantly on the Kusin & Co. report which grounds its findings solely on auction-house data collected before the ARR Directive came into effect. Therefore much of Kawashima's argument is based on 'hypothetical calculations' that assume that the ARR is universal and not limited in application.[216] Nevertheless, Kawashima, by extrapolating from these 'hypothetical calculations' and drawing on studies conducted in jurisdictions with established ARR regimes, concludes that not just wealthy artists benefit from the ARR but many nascent career artists.[217] In addition, Kawashima contends that if the ARR enjoyed universal application then the lower ARR royalty price bands – up to €50,000 and €50,000 to €200,000 – would capture nearly 8,000 artists globally and amount to '… over half of the value of the global market.'[218] This number increases further when thresholds of less than €3,000 are applied and the analysis incorporates sales by not just auction houses but all AMPs, as is the case with the EU ARR Directive.[219] Kawashima further supports these findings with reference to

[215] For further see I. Robertson 'International Art Markets' in I. Robertson, eds., *Understanding International Art Markets and Management*. (London: Routledge, 2005) p. 26.
[216] *Ibid.* p. 304.
[217] *Ibid.*
[218] *Ibid*.
[219] *Ibid.*

Ramonbordes' reporting of ADAGP's distribution of *droit de suite* royalties in 1997.[220] In that year ADAGP distributed *droit de suite* royalties to 2,650 recipients, of whom 39 beneficiaries shared 30% of the royalties by value, 270 beneficiaries shared the next 30% by value between them with the remaining 2341 recipients sharing 40% by value. These figures represent a far wider dispersion of *droit de suite* royalties than proffered by Merryman and others. Furthermore, in 2016 DACS reported that on average between 2011 and 2013 (UK), 43% of all artists receiving ARR royalties sold work in the price category of €1,000 - €3,000. This indicates that not only established and successful artists benefit from the ARR but also nascent career artist whose works sell for lesser amounts.[221] In determining whether burgeoning talent benefited from the ARR, DACS report that on average it paid out royalties to 21 new artists each month in 2015.[222] This study highlights the benefits that a low ARR threshold has for visual artists at the early stages of their career.

In addition to the challenge that the ARR only benefits wealthy visual artists there is also the contention that the distribution of royalties to the estates of deceased artists far outweighs the benefits accruing to living artists. Ginsburgh contends that 85% of *droit de suite* payments collected in France in 2003 went to the heirs of deceased artists and that this number increases to 95.2% when the analysis focuses on the top fifty visual artists.[223] Kawashima, while acknowledging that the majority of sales by value relate to the estates of

[220] C. Ramonbordes 'Economic Impact of the European Directive on the Artist's Resale Right or *Droit de Suite*' (2000) xxxiv(2), *Copyright Bulletin,* p. 28 - 29. <http://unesdoc.unesco.org/images/0012/001225/122513eo.pdf> (date accessed: 10 July 2017).
[221] *Supra* note 9, at p. 11; 'It is fair to assume that a lot of works in this category are by less-established and emerging artists.'
[222] *Ibid.*
[223] V. Ginsburgh 'The Economic Consequences of the *droit de suite*' (2005) 35(1&2) *Economic Analysis & Policy*, p. 66.

deceased artists[224] notes that in France in 1997,[225] 80% of the royalties collected by volume went to living artists rather than their estates.[226] More recently, in 2011 the EU Commission conducted a similar survey and found that in four member states – Belgium, Denmark, France and Slovakia – between 2006 and 2010, 78% of royalties by value and 59% of royalties by volume were distributed to the estates of deceased artist over that period.[227] This leaves living artists with 22% of royalties by value and 41% by volume. A comparison of these findings – Kawashima v. EU Commission – reveals a clear symmetry between the distribution of royalties by value but not the distribution of royalties by volume.[228] Nevertheless, the data does indicate that not just the estates of deceased artists benefit from the ARR.

As noted throughout this thesis, the Commission's pending report on the implementation and effect of the ARR is long over due. Perhaps, the single most important contribution from Kawashima's analysis is that a higher proportion of nascent career artists benefit from the ARR than previously recognised.[229] When the analysis moves away from the value of ARR transactions to the volume of ARR transactions the efficacy of the ARR is less in dispute. This point is further strengthened if the proposition can be accepted that at least some low value work

[224] Kawashima, *supra* note 92, at p. 304, citing the Kusin and Co. Report (2005) at p. 12, 'Admittedly, the majority of sales eligible for the resale right by value (80% in 2003, Kusin & Co. 2005, p. 12) relates to deceased artists … .'

[225] See C. Ramonbordes 'Economic Impact of the European Directive on the Artist's Resale Right or *Droit de Suite*' (2000) xxxiv(2), *Copyright Bulletin,* p. 28 – 29. <http://unesdoc.unesco.org/images/0012/001225/122513eo.pdf> (date accessed: 10 July 2017).

[226] Kawashima, *supra* note 92, at p. 305. This figure is supported by the testimony of ADAGP's General Manager, Mr. Gutton, in the New York hearing for the US Copyright Office in 1990.

[227] *Supra* note 21, at p. 10.

[228] For example, the percentage of royalties benefiting living artists: 80% (Kawashima) versus 41% (EU Commission). Furthermore, this discrepancy may result from regional divergence. Indeed, comparing the data of one jurisdiction to that of four jurisdictions is unlikely to withstand any empirical scrutiny and is not representative of best practice in data analysis. Accordingly an analysis of all EU member-states ARR systems is necessitated.

[229] Indeed the DACS 2016 Report, *supra* note 9, supports this position.

matures into the high value category over time. A longitudinal study into the application of the ARR will be possible when the Directive is in place for a significant period of time, until then it will remain somewhat speculative.

2.3.6 Sales Displacement

A further concern with the introduction of the ARR across the EU is that it would result in sales displacement to jurisdictions outside of the EU which do not recognise the ARR.[230] In 2011, the European Commission's report on the ARR concluded that '… no clear patterns can be established to link the loss of the EU's share in the global market for modern and contemporary art with the harmonisation of provisions relating to the application of the resale right in the EU on 1 January 2006.'[231] Similarly, in their 2016 report, DACS purport that there is no evidence to suggest that the ARR has resulted in the diversion of sales to non-ARR markets.[232] However, as previously noted, the sale of the Rene Gaffe collection in New York points to a contrary conclusion. The ARR contributes to higher sales costs in the EU than in jurisdictions that do not recognise the ARR, a factor that must motivate at least some sellers to sell in jurisdictions that are less costly.[233] Furthermore, subsequent to the implementation of the Directive in 2006, the Commission observed a decrease in the EU's share of global fine art auction sales while China's share increased.[234]

[230] V. Ginsburgh, *supra* note 223, at pp. 9 -10; and EU Com. *supra* note 21, at p. 6.
[231] *Supra* note 21.
[232] *Supra* note 9, at p. 8
[233] *Supra* note 21, at pp. 6 - 7. Indeed the Commission recognises that '… sellers will rationally move to do business in those markets where the transaction will be most beneficial, and the resale right is one in a number of factors that play a role in the choice of location.'
[234] *Ibid. at* p. 5. Other sources suggest that the value of the Chinese market is over inflated and that between half and two thirds of high end sales are never completed: see G. Bowley and D. Barboza 'A Culture of Bidding*:* An Art Power Rises in China, Posing Issue for Reform' *The New*

Whether this can be directly attributed to the introduction of the ARR in the EU or represents a complex of unrelated issues may be answered by the fact that the US, where there is no ARR, experienced a similar decrease for the same period.[235] If the displacement of sales was a significant factor in the fall of the EU's market share then it would be reasonable to presume that jurisdictions bordering the EU, which did not recognise the ARR, would have seen a similar or greater increase in their market share.[236] Switzerland which borders the EU, and does not recognise the ARR, is a likely beneficiary, however, the EU Commission observed in its 2011 report that Switzerland experienced an increase in auction sales of just 0.2% between the period 2005 – 2010,[237] perhaps indicating that the introduction of the ARR during this period did not in fact result in the displacement of auction sales. Commentators including Collins[238] and Ricketson,[239] among others come to a similar conclusion.[240] There is however one obvious flaw with the Commission's analysis; it focuses specifically and narrowly upon auction house sales only and not the full gambit of art market professionals. Ignoring the impact of sales conducted through AMPs such as galleries and dealers brings into question the value of these findings and the degree to which jurisdictions such as Switzerland benefit from works of art originating from within the EU. For instance, there is anecdotal evidence to suggest that UK investment funds in art are locating to

York Times December 16th 2013. <http://www.nytimes.com/projects/2013/china-poly-auction/> (date accessed: 2 April 2017); and B. Pollock 'China's Growing Auction Giant' *ArtNews* 21 October 2013. <http://www.artnews.com/2013/10/21/chinas-growing-auction-giant/> (date accessed: 2 April 2017).

[235] *Supra* note 21, at p. 5.

[236] This assumption is based on the fact that transportation costs to neighbouring jurisdictions such as Switzerland would be significantly lower than to the US or China.

[237] *Ibid.* at p. 5.

[238] *Supra* note 6, at p. 6.

[239] *Supra* note 10, at p. 20, para. 18.

[240] C. Banternghansa and K. Graddy 'The Impact of the *Droit de Suite* in the UK: An Empirical Analysis' (2011) 35 *Journal of Cultural Economics,* p. 81 -100.

Switzerland.[241] Jean-Rene Saillard, sales director for the British Art Fund Group, which is a UK based art investment partnership, reports that most of the art owned by the fund is located in Switzerland.[242] The art is located in what are known as 'free-ports', which allow investors to defer payment of VAT, excise duties, as well as excluding the ARR entirely,[243] until works of art find a final destination outside the jurisdiction. In practice the art in these free-ports may be bought and sold multiple times before the final buyer takes possession of the art and pays the attendant duties. However, the duties are only paid on the final transaction. Where art is bought and sold regularly, the lack of taxes and resale royalties is of significant value to investors.[244] The apparent popularity of these free-ports with investors and their attendant savings bring into question Ricketson's observation that the Swiss art-market is not benefiting from the introduction of the EU ARR Directive.[245] In this light Ginsburgh's observation that the introduction of the ARR would merely shift internal EU trade distortions to the international market were perhaps prescient.[246]

[241] M. Laird 'Booming Art Market Bolstered by Swiss Free Ports' in SWI article, available at http://www.swissinfo.ch/eng/warehouse-turnstiles-_booming-art-market-bolstered-by-swiss-free-ports/33088718 (date accessed: 10 July 2017).
[242] *Ibid.*
[243] Switzerland is a non-compliant ARR jurisdiction.
[244] Becker *et al. supra* note 5, at p. 62, noting that '[i]n Switzerland, generous import and export regulations have supported the development of the art trade – in both legal and illegal ways. Switzerland therefore often acts as a country of transit for works of art. Many works do not enter the country's internal art trade.'
[245] *Supra* note 10, at p. 21 para. 18.
[246] *Supra* note 223. See also A. O'Dwyer, A. 'The *Droit de suite,* an analysis across two jurisdictions: Cross fertilisation towards inclusivity' 2013 (12) *Cork On-Line Law Review*.

2.3.7 Administrative Costs

Another concern with the ARR is that there are significant administrative costs and burdens attached in collecting and distributing these royalties.[247] Becker *et al*'s analysis indicates that before the implementation of the ARR Directive, administration costs varied across Europe, from 40% of collected royalties in Denmark to 20% in France, 10% in Germany and just 7.5% in Belgium.[248] This is the case with all royalty systems and the ARR is no exception. The EU Commission's 2011 report indicates that collecting societies in France and Germany and now the UK have built up considerable experience in collecting and distributing ARR royalties.[249] The Commission reported that the costs of administering the ARR have been estimated by AMPs to be up to €50 per transaction.[250] Considering that eligible sales in the price bracket below €3,000 attract a royalty of up to €150, the aforementioned transaction costs are significant.[251] By contrast Ireland does not have a designated Collection Management Organisation (CMO) and as such Irish visual artists face greater challenges in obtaining sales related information. This creates an information gap that is costly and time consuming for individual visual artists to overcome. Furthermore, DACS, commenting 10 years after the implementation of the ARR Directive, highlight the issue of non-compliance and contend that some AMPs do not declare sales, thereby depriving artists of their royalties, and accordingly

[247] *Supra* note 201, Froschauer contends that the estimated cost to the British art market to administer the ARR is between 3% and 5% of the overall royalties collected. Ricketson, *supra* note 10, at p. 46.
[248] Becker *et al. supra* note 5, at pp. 33 and 125.
[249] *Supra* note 21.
[250] *Ibid.* at p. 8.
[251] *Ibid.* at p. 10.

recommend the creation of a UK Compliance Ombudsman.[252] It is proposed that the Ombudsman would in effect create a power of referral for CMOs in respect of non-compliant art market professionals. While this proposal represents one option the other would be to include this procedure within the implementation regulations of the Collective Rights Management Directive 2014/26/EU. Nevertheless, the EU Commission has observed that the experience in other jurisdictions indicates that CMOs present a cost efficient and timely method for collecting and distributing resale royalties.[253] Ginsburgh and others however are less optimistic, citing several instances of fraud by French CMOs and high administrative costs.[254] For instance the French copyright society SPADEM faced a financial crisis in 1996 and was placed under court-ordered administration in circumstances where the society's administration costs could only be paid for if money was drawn from funds collected on behalf of its members.[255] Accordingly the EU Commission has recommended that '… collecting societies should operate to a high standard of governance and transparency with regard to their members and to commercial users … .'[256] No doubt the EU Collective Rights Management Directive 2014/26/EU will provide much needed governance in this area.[257] Regarding the ARR Directive's over arching aim of ensuring visual artists a share in the economic success of their

[252] *Supra* note 9.
[253] *Supra* note 21, at p. 8.
[254] *Supra* note 222, at p. 65.
[255] *Ibid.*
[256] *Supra* note 21, at p. 10. In this regard the Commission was due to publish a list of recommendations in 2012.
[257] In Ireland The European Union (Collective Rights Management) (Directive 2014/26/EU) Regulations S.I. 156 of 2016 as amended by S.I. 616 2016 were signed into law by Minister Richard Bruton TD on 8 April 2016, coming into effect on 10 April 2016. Regarding the UK Regulations see; S. Stokes '*Artists Resale Right (Droit de Suite): UK Law and Practice* (3rd ed.) (Builth Wells: Institute of Art and Law, 2017) pp. 32 – 33. Directive 2014/26/EU provides guidance on issues such as membership, transparency, governance, distribution, licensing, enforcement, complaints procedure, alternative dispute resolution procedures and non-compliance.

work, where member states do not recognise a national CMO, it is questionable whether their Directive obligations have been satisfied.[258] Where member states neglect to provide and implement the necessary regulatory architecture the ARR lacks the necessary mechanisms to ensure its adequate and proper functioning. Accordingly, visual artists lose out on a valuable and much needed source of income. In this regard there is a need for legal equivalence *vis-a-vis* the rights of visual artists and other creators. Similarly to writers and composers, visual artists ought to be able to avail of the extant legal architecture in a meaningful way. Accordingly, the inclusion of a mandatory state CMO to the text of the ARR Directive would ensure that the rights available under the Directive are not inconsequential.

2.4 Conclusion

Since the full implementation of the Directive in 2012 two cases have come before the CJEU: the *Dalí* case and the *Christies* case. While the former resolved the issue of the ARR and member state's law of succession, the latter left the issue of the 'cascade effect' unanswered. It will be remembered that in the *Christies* case the Court considered whether a contractual clause could be employed by AMPs to transfer the burden to pay the resale royalty from the seller to the buyer even where national legislation mandated the former. While the court found no obstacle to such arrangements the effect is that where AMPs buy works of art in jurisdictions where the buyer is liable and sell in jurisdictions where the seller is liable (and *vice versa*) they must pay the incumbent royalty on

[258] ARR Directive, *supra* note 1, Recital 3.

both transactions. The 'cascade effect' is not limited to cross border transactions and can affect parties based in the same member state but where contractual clauses vary between the sale and purchase of the work in question. This 'double-exposure' may result in AMPs avoiding cross-jurisdictional sales thereby creating further market distortions. In circumstances where the cascade effect becomes more concentrated, it is foreseeable that affected AMPs will intensify efforts to subvert the proper functioning of the Directive. The issue was brought to the attention of the EU Commission during 'Stakeholder Dialogues' in 2013.[259] The Commission subsequently considered the issue in its 2014 report 'Key Principles and Recommendations on the Management of the Author Resale Right'.[260] At that time trade association representatives informed the EU Commission that the issue affected 'a significant number of dealers' transactions … .'[261] The report recommended that in the Commission's subsequent report on the implementation and the effect of the Directive, to be published in 2015, the Commission studies the extent to which successive sales occur between AMPs and the frequency with which AMPs pay the resale right twice in respect of the same art work and the amounts of the resale right paid. The report has not yet been published, therefore, the extent of the problem is largely unknown.

Perhaps the most concerning development that the foregoing analysis has revealed is the growing use of Swiss free-ports by EU AMPs.[262] Accordingly Ginsburgh's observation that the ARR Directive would merely shift internal EU

[259] See 'the Dialogue' *supra* note 77.
[260] 'Key Principles' *supra* note 74.
[261] *Ibid*. at p. 5 - 6.
[262] *Supra* note 241.

trade distortions to the international market was perhaps prescient.[263] It is now clear that rather than resolving the problem of sales displacement the ARR Directive has instead elevated it to the international arena and now, more than ever, an international approach is necessitated. However, until such time as an international approach comes to bear, the CJEU will be required to determine when international sales with a EU connection are subject to the ARR Directive. In circumstances where preliminary contractual relations take place within the EU or where either party's place of business is located within the EU, the CJEU may follow the *Ahlers* precedent and apply the principle of territoriality. Alternatively, the CJEU may determine some other more appropriate criterion of jurisdiction. While there is certainly scope within the Directive for the inclusion of a criterion of jurisdiction, it is not clear that the Directive represents the most appropriate forum for such direction. Guidance may be better placed in the private international law arena.[264] Be that as it may, an analysis of private international law is beyond the remit of the thesis.

Regarding the question of whether the ARR Directive primarily benefits wealthy and established artists, it is encouraging to note that a higher proportion of emerging visual artists benefit from the ARR than previously recognised.[265] When the analysis moves away from the value of ARR transactions to the volume of ARR transactions the efficacy of the ARR is less in dispute. As previously noted, this point is further strengthened if the proposition can be accepted that at least some low value work matures into the high value category over time. That being said, the foregoing analysis is limited by the fact that the

[263] Ginsburgh, s*upra* note 223.
[264] *Supra* note 45.
[265] Indeed the DACS 2016 Report, *supra* note 9, supports this position.

EU Commission has yet to conduct an in-depth analysis into the effects and the implementation of the ARR Directive since it came into full effect in 2012. Without reliable and unassailable data such as this, detailed analysis of the ARR Directive is impossible.

Finally, when comparing the success of the ARR Directive in member states that recognise a national CMO, to member-states that do not, it is clear that visual artists are more likely to benefit from ARR royalties where a statutorily recognised CMO is in place.

Chapter 3 – The Nature of the *droit de suite* – from Antiquity to Modernity

3.0 Introduction

Having presented a critique of the ARR Directive the thesis now considers the artists' resale right within an historical context and in doing so considers the social origins as well as the legal nature of the ARR Directive's predecessor, the historic *droit de suite.* When the resale right was first legislated for in early 20th Century France it was as much a social right as it was an economic right, rewarding not only successful visual artists but also the proverbial 'starving artist'. The liminality of the historic *droit de suite* as both a social and economic right reflects the collective and communitarian socio-political culture from which the right evolved. The French republican brand of communitarianism that influenced social, political and legal actors to campaign for an exception to the French Author-rights system in the late 19th and early 20th century is explored in Chapter 5. A combination of the theoretical development in Chapter 4 and the social policy considerations explored in Chapter 5 serves to inform the nature of the reform proposals of Chapter 6.

A central theme that this chapter explores is the notion that society values art but not necessarily the creator of that art. This has been evidenced throughout history by the manner in which society has tended to treat its visual artists. In ancient times, the visual artist was nothing more than a slave, fulfilling the aesthetic desires of his master, and while this relationship evolved over several millennia,

it was not until the Renaissance that society began to appreciate the importance of visual artists as a source of culture. Up until then, society valued the work created by visual artists but not necessarily the person creating the work, accordingly visual artists largely remained anonymous.

Another related theme in the literature centres upon the observation that the vast majority of visual artists are unable to make an adequate living from their profession. This point has been evidenced by the findings of a number of studies which indicate that the majority of visual artists must supplement their income by engaging in non-art related endeavours or leave the profession.[1] For many commentators this problem stems from two separate issues: firstly, visual artists cannot benefit from copyright protection to the same degree and manner as other creators; and secondly, at the point of sale they are unable to exact the true value inherent in their work.[2]

A third theme focuses upon the binary and dependent relationship between the artist and his society. Historically, society has depended upon the artist to produce great works of beauty as a source of culture and in turn the artist has

[1] See C. McAndrew & L. Dallas-Conte 'Implementing Droit de Suite (artists' resale right) in England' (London: The Arts Council of England, 2002); C. McAndrew & C. McKimm 'The Living and working conditions of artists in the Republic of Ireland and Northern Ireland (ROI Version) (Dublin: The Arts Council of Ireland, 2010), <http://www.artscouncil.ie/uploadedFiles/LWCA_Study_-_Final_2010.pdf> (date accessed: 10 July 2017); Arts Council of Ireland Report (Prepared by Leigh-Doyle & Associates) 'Joint Research Project into the living and Working Conditions of Artists in Ireland (2008); IGBK 'The value of artistic work: Working Conditions, Rights and Demands of Visual Artists in Europe' (Berlin: IGBK, 2012); see also D. Throsby and A. Zednik *Do you really expect to be paid? An Economic Study of Professional Artists in Australia* (Sydney: Australia Council for the Arts, 2010); S. Ricketson *Proposed International Treaty on Droit de Suite/Resale Royalty Right for Visual Artists* (2015) CISAC Report SG 15-0565 p. 12; US Copyright Report: *Resale Rights an Updated Analysis* (2013) p. 31 - 36; for further analysis of these studies see Chapter 5, Section 5.3, p. 293 - 303.

[2] It has been said that this situation results from the fact that art market intermediaries enjoy a stronger bargaining position than visual artists. This issue is explored below in sections 3.3 and 3.4.

relied upon society to sustain him financially. However, this relationship has not always been fairly balanced. Even today, society's apparently insatiable appetite for interesting and compelling 'experiences' – cultural goods – often leaves the creators of these experiences with little or no financial reward.[3] This chapter explores these themes, questioning whether traditional copyright architecture disadvantages visual artists as compared to writers and composers, and if so, whether the introduction of the historic *droit de suite* and today's ARR Directive effectively readjusts this imbalance thereby recognising the importance of the artist in society and the need for society to support these creators of culture.

Within the context of the overall thesis, the chapter ultimately considers whether the ARR Directive has the capacity to perform a social function by analysing the nature and character of the *droit de suite.*

3.1 An Outline of the Social Position of Visual Artists in Society Through the Ages

Whether attention is focused on the artist of ancient antiquity, the middle ages, the Renaissance or modernity, one theme perpetuates throughout, and that is the binary and dependent relationship between the artist and his society. Historically, society supported art through the patronage of wealthy merchants, the aristocracy and the church. Today, however, patrons take the form of art market intermediaries, the state and more generally the free market. For Arnold Hauser

[3] See generally, R. Levine *Free Ride: How the Internet is destroying the culture business and how it can fight back* (London: Vintage Books, 2011).

it is axiomatic to the creation of great art that society supports its artists, without this financial support the artist's exploits would be inevitably confined to that of the dilettante.[4]

Throughout history, society has valued art but not always its creator.[5] Indeed the artists' talents have been used as much as a socio-political tool[6] as they have been for aesthetic pleasure.[7] Visual artists were merely servants and therefore their artistic aspirations were suppressed by the aesthetic desires of their patron.[8] These works venerated the gods or served nobles in elevating their status among the plebiscite.[9] The artist's individuality and desire for self-expression was subordinate to that of the work.[10] Arnold Hauser notes that unlike the poet, who

[4] A. Hauser *The Social History of Art* Vol. 1 (New York: Vintage Books, 1957) p. 22; see also, H. Read *Art and Society* 2nd ed. (London: Faber & Faber, 1967), Chapters 1 & 2; A.P. Elkin 'The Secret Life of the Australian Aborigines' (1932) 3 (2) *Oceana* p. 210; T.E. Scrutton *The Laws of Literary Property – An examination of the principles which should regulate literary and artistic property in England and other countries* (London: John Murray, 1882) (London: Clowes & Sons, 1884) p. 11.

[5] A. Hauser *supra* note 4, at p. 15. From an economic standpoint the same could be said of composer, writers and musicians.

[6] Often used as an agent for change or to maintain the status quo. For instance Bansky's graffiti is arguably the greatest use of art as a political tool. See T. Adorno *Minima Moralia Reflections on a Damaged Life* (1951) p. 110 - 111 '… every work of art is an uncommitted crime'.

[7] A. Hauser *supra* note 4, at p. 31 notes that '… it is highly probable that the priests were the first regular employers of artists, the first to give them commissions; the kings will have merely followed their example … the priests allowed the kings to be regarded as gods so as to draw them into their own sphere of authority, and the kings allowed temples to be built for the gods and priests so as to increase their own fame. Each wanted to profit from the prestige of the other; each sought to enlist the help of the artist in the fight for preservation of royal and priestly power. Under such circumstances there could be no more question of an autonomous art, created from purely aesthetic motives and for purely aesthetic purposes … .'

[8] L. de Pierredon-Fawcett, *The Droit de Suite in Literary and Artistic Property,* A Comparative Law Study (Louise-Martin Valiquette Translation), (New York: Columbia University, 1991) p. 1. See also A. Hauser *supra* note 4, at p. 31.

[9] See generally A. Hauser *supra* note 4, Vol. 1 and 2.

[10] A. Hauser *supra* note 4, at p. 31, This phenomenon can be traced back to the Egyptians where despite the clear value placed on art as a means of honouring the gods, '… the person of the artist himself disappears almost entirely behind his work. The painter and sculptor remained anonymous craftsmen, in no way obtruding their own personalities.' J.H. Breasted *A History of Egypt* (1909) p. 102 and A. Erman *Life in Ancient Egypt* (1894) p. 414; P. Frank *Prebles' Artforms* 11th ed. (NY: Pearson, 2013), pp. 256 and 280.

enjoyed elevated social status throughout history,[11] the visual artist was not held in the same esteem despite the grandeur and symbolic significance of his work.[12] An unusual separation existed in the minds of the public in respect of the value that they placed on art and the creator of that art. The incongruity of this system of values – valuing the work of art but not the artist – can be traced back to ancient Greece and the ruling classes distaste for manual labour.[13] Hauser observes that in the ancient world, manual labourers, including artists[14] were slaves and therefore the link between slavery and manual labour significantly influenced societies view of these workers.[15] While literary men could create their work without employing their physical attributes, the artist could not and was therefore relegated to the status of the common labourer.[16] Ancient society's distaste for manual labour did not fully carry through to the middle-ages, indeed the Romans did not share these views with their Greek forefathers.[17] From the early middle-ages on, manual labour was viewed in a more positive light by the

[11] A. Hauser *supra* note 4, Vol. 1 at p. 113. During the Greco-Roman epoch the poet enjoyed ' … a quite peculiar esteem as seer and prophet, bestower of fame and interpreter of myths; the plastic or graphic artist is and remains a banausic artisan who, with his wage, gets all that he is entitled to get.'

[12] 'In classical Athens … [a]rt was still looked upon as a mere handicraft, and the artist as an ordinary artisan with no part or lot in the spiritual value of knowledge or education.' A. Hauser *supra* note 4, Vol. 1 at p. 116, citing B. Schweitzer *Der bildende Kuenstler* p. 47. For a further insight into the observed disparity between visual and art and poetry in the 18th Century see J. Reynolds *Discourses on Art* (1778) (Discourse VIII) 'Poetry, having a more extensive power than our art, exerts its influence over almost all the passions; … [t]he painter's art is more confined, and has nothing that corresponds … [w]hat is done by painting must be done at one blow; curiosity has received at once all the satisfaction it can ever have.'

[13] See A. Hauser *supra* note 4, Vol. 1 at pp. 113 - 120. Hauser notes that: 'For the Greek ruling class and its philosophers, fullness of leisure is the precondition of all that is good and beautiful – it is the priceless possession which alone makes life worth living. See Th. Veblen *The Theory of the Leisure Class* (1899). <moglen.law.columbia.edu/LCS/theoryleisureclass.pdf> (date accessed: 11, July 2017).

[14] P. Frank *Prebles' Artforms* 11th ed. (2013) pp. 279 - 302.

[15] A. Hauser *supra* note 4, Vol. 1 at. p. 54.

[16] Ludwig Borchardt *Der Portraetkopf der Koenigin Teje,* (1911), as cited by A. Hauser *The Social History of Art* Vol. 1 (New York: Vintage Books, 1957) p. 32 Fn. 5.

[17] A. Hauser *supra* note 4, Vol. 1 at p. 118.

bourgeoisie,[18] this was initially evidenced by the production of art in medieval monasteries where the monks themselves were members of the aristocracy.[19] This however did not emancipate the artist from a life of servitude and arguably the acceptance of the monastic artist had more to do with its religious rather than artistic provenance. Indeed, the work performed by monks in the monasteries was regarded as 'a penance and a punishment.'[20] Furthermore, the middle-ages '…did not lay the emphasis on the personal genius of the artist but on the craftsmanship involved in artistic creation… .'[21] Art was the product of the collective rather than a product of a single intellectual genius.[22]

It was not until the rise of an intellectual elite[23] in Europe during the 15th century that visual artists gained recognition as a class of intellectual worker.[24] These literati viewed the visual artist as their contemporaries and used their social

[18] *Ibid.* at pp. 116 and 169 '… the contempt for manual labour still remains widespread even in the Middle Ages, and the idea of power still continues to be associated with that of an idle existence, but it is unmistakably evident that now, in contrast to classical antiquity, alongside the life of the seigneur, which is associated with unlimited leisure, the industrious life acquires a more positive evaluation and this new relationship to work is connected, amongst other things, with the popularity of monastic life.'

[19] *Ibid.* at p. 168 citing A. Schulte *Der Adel und die deutsche Kirche im Mittelalter* (1910) notes that aristocrats were in the majority in the early medieval monasteries, and certain monasteries were in fact almost exclusively reserved for them.

[20] *Ibid*. at p. 169, citing E. Troeltsch *Die Soziallehren der christl. Kirchen und Gruppen* (1912) p. 118.

[21] *Ibid.* at p. 267.

[22] R. Baldwin 'History Painting as an Artistic System: The Legacy of Renaissance Art' p.1 < http://www.socialhistoryofart.com/essaysthematicphdthesis.htm> (date accessed: 11 July 2017).

[23] A. Hauser *supra* note 4, Vol. 2 at p. 62; see also E. Zilsel 'The Methods of Humanism' in D. Raven, W. Krohn, R. Cohen and S. Robert (eds.) *Social Origins of Modern Science* (London: Spinger, 2003) <http://www.compilerpress.ca/Competitiveness/Anno/Anno%20Zilsel%20Humanism.htm> (date accessed: 11 July 2017); L. Martines *The Social World of the Florintine Humanist 1390 – 1460* (Toronto: University of Toronto Press, 2011); J.V. Field and Frank A. J. L. James eds. *Renaissance and Revolution: Humanists, Scholars, Craftsmen, and Natural Philosophers in Early Modern Europe* (New York: Cambridge University Press, 1993); Baldwin 'An Outline of Renaissance Humanism (1400-1700)' Social History of Art <http://www.socialhistoryofart.com/essaysbyperiod.htm> (date accessed: 11 July 2017)

[24] *Supra* note 22, at p. 1; In the 15th Century the artist gained recognition as an 'original thinker.' < http://www.socialhistoryofart.com/essaysthematicphdthesis.htm> (date accessed: 5 March 2016). A. Hauser *supra* note 4, Vol. 2 at p. 62, notes that the relationship between the literati or humanists and artist of this period was equally beneficial, each raising the status of the other.

position to elevate the status of the artist from that of the common labourer.[25] In conjunction the assent of a wealthy merchant class across Europe aided this process of recognition.[26] This merchant class valued the artist's exploits as a means of validating their own prestige and self-importance.[27] However, despite this growing recognition, visual artists were still subject to the control of their guild. Guilds were associations of craftsmen within a specific craft; each occupational group having their own guild.[28] The guilds controlled the output and quantity of masters and thereby regulated the market in what would now be considered an anti-competitive manner. In addition the guilds also performed a social function in that they took care of sick members, provided education for fatherless children and helped widows who were not able to support themselves.[29] By the late 16th Century artists began to break free from the confines of the guild system,[30] and its anonymity.[31] This resulted in visual artists signing their work which in turn increased their notoriety and prestige. De Pierredon-Fawcett observes that 'the Renaissance restored the importance of Man as an individual and thus completely transformed the artist's status.'[32] Great works were for the first time associated with the name of the artist who produced

[25] A. Hauser *supra* note 4, Vol. 2 at p. 62.
[26] D. Rosen 'Artists' Moral Rights: A European Evolution. An American Revolution' (1983) 2 *Cardozo Arts & Entertainment Law Journal,* p. 181 notes that while Europeans had a long tradition of art and artisans, England did not which in turn altered the 'cultural fabric of society ' and its resulting laws.
[27] A. Hauser *supra* note 4, Vol. 2 at p. 62.
[28] T. M. Sichelman and S. M. O' Connor 'Patents as Promoters of Competition: The Guild Origins of Patent Law in the Venetian Republic' (2012) 49 *San Diego Law Review* pp. 1267 - 1282. The guild system can be traced back to the Venetian Republic of the 12th century where guilds such as the *arti* were granted a state monopoly on 'mechanical trades' such as wool-working, glass making, ship building etc.
[29] *Ibid.*
[30] *Ibid.*
[31] *Supra* note 22 at p. 1; Baldwin notes that this was '… in contrast to the Middle Ages where anonymous, humble craftsman produced objects glorifying religious, moral, and courtly themes, < http://www.socialhistoryofart.com/essaysthematicphdthesis.htm> (date accessed: 11 July 2017).
[32] *Supra* note 8, at p 1. See also A. Hauser *supra* note 4, Vol. 2 at pp. 56 - 57; G. Duby *Art and Society in the middle Ages* J. Birrell trans. (Cambridge: Polity Press, 2000).

them.[33] Wealthy merchants and princes alike, intent on increasing their own social status and reputation, sought out and commissioned these artists. The artist had in many ways usurped the guilds,[34] it was now the artist's name and not that of the guild which society recognised and valued.

Over time this transformation resulted in the adoption of new legal rules which recognised and protected the artist's personality through his work.[35] Throughout Europe, these legal rules initially came in the form of state privileges.[36] The privilege offered trade protection for the publishers[37] and a right of censorship.[38]

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[33] B. Sherman & L. Bently *The Making of Modern Intellectual Property law: The British Experience 1760 – 1911* (Cambridge: Cambridge University Press, 2003) p. 38; While there was a shift in the 18th century towards the recognition of the importance of the individuality of the author, this did not mean that the author was seen a genius creating in isolation, the interpersonal or 'intertextuality of creation' was used as argument against perpetual copyright.

[34] See A. Hauser *supra* note 4, Vol. 1 at p. 116, citing A. Dresdner *Die Entstehung der Kunstkritik* (1915) pp. 86 - 87. Referring to the case of Giovanni Battista Poggi: 'The year 1590, in which this case took place and which brought the fundamental decision that the guild statutes were not binding on artists who did not keep an open shop, brings to a close a development of nearly two hundred years.'

[35] *Supra* note 8, at p 1. See also Michaélides-Nouaros: *Le droit moral de L'auteur*. (Paris: 1935), p. 3, cited by Z. Radojkovic 'The Historical Developments of Moral Rights' (1966) 2 Copyright (Series), p. 169 – noting that the lawyer Marion spoke passionately to the French Parliament in 1586 in relation to the right of paternity. 'He stressed the fact that any creator or inventor must be the master of what he does, invents and creates.' See also, F. Rideau 'Nineteenth Century Controversies Relating to the Protection of Artistic property in France' in R. Deazley, M. Kretschmer and L. Bently eds. *Privilege and Property Essays on the History of Copyright* (Cambridge: Open Book Publishers, 2010) pp. 241 - 242; A. Moore *Intellectual Property & Information Control: Philosophic Foundations and Contemporary Issues* (London: Transaction Publishers, 2001) p. 12; noting that until the Statute of Anne (1709), there were few true copyrights granted – most were grants, privileges, and monopolies conferred upon individuals rather than on a class of creator. However Bugbee notes that in Venice '… a crude form of copyright law …' existed in the decree of 1544-1545, see B. Bugbee *Genesis of American Patent and Copyright Law* (Washington, DC: Public Affairs Press, 1967). Moore at p. 13 also notes that cases such as *Miller v. Taylor* (1769) and *Donaldson v. Beckett* (1774) mark the beginning of authors' right being recognised.

[36] For more of state privileges throughout Europe see E. Armstrong, *Before Copyright: The French Book-Privilege System, 1498-1526* (Cambridge: Cambridge University Press, 1990) and S. Teilman *British and French Copyright: A Historical Study of Aesthetic Implications* (Thesis: University of Southern Denmark, 2004) pp. 15 - 27 available at < http://static.sdu.dk/mediafiles//Files/Om_SDU/Fakulteterne/Humaniora/Phd/afhandlinger/2005/0_teilmann%20pdf.pdf> (date accessed: 10 July 2017); J. Loewenstein, *The Author's Due: Printing and the Prehistory of Copyright* (Chicago: The University of Chicago Press, 2002).

[37] M. Rose 'The Author as Proprietor: *Donaldson v. Becket* and the Genealogy of Modern Authorship' (1988) 23 *Representations* p. 31; The idea of the author was primarily used to further the interests of the London booksellers.

[38] See E. Adeney, *'The Moral Rights of Authors and Performers – An International and Comparative Analysis'* (New York: Oxford University Press, 2006) p. 13, see also E. Armstrong,

Later these privileges were replaced with statutes,[39] which conferred limited rights upon a broad class of creator.[40] Privileges continued to exist in Britain until the second half of the 18th century,[41] in France until 1789[42] and in Germany until 1870.[43] Britain recognised a copyright in literary works in 1709[44] and to a limited degree in the visual arts in 1735[45] whereas in Europe, the French revolutionary laws of 1791[46] and 1793[47] signalled the beginning of a European copyright regime.[48]

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supra note 36, at pp. 2 - 11 citing the first instance of a European book privilege as deriving from Germany in 1479, then Italy in 1488, followed by France and Spain in 1498, Portugal in 1501, Poland in 1505, Scotland in 1507, Sweden in 1510, England in 1518 and Denmark in 1519. B. Zorina Khan' An Economic History of Copyright in Europe and the United States' available at <https://eh.net/encyclopedia/an-economic-history-of-copyright-in-europe-and-the-united-states/> (date accessed 11 July 2017).

[39] See F. Kawohl, 'Commentary on Leopold Josef Neustetel, *The Reprinting of Books* (Heidelberg, 1824), in L. Bently and M. Kretschmer (eds.) *Primary Sources on Copyright (1450-1900)*, < http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_d_1824> (date accessed: 12 July 2017). Kawohl states that the decline of the privilege system was largely due to the fact that a privilege was granted by a state sovereign and as such protection did not extend past state boundaries. In addition the idea of natural rights inhering in the author as opposed to rights emanating from the state began to gain acceptance.

[40] In the UK the first of these acts came in the form of the Engraving Copyright Act 1734. In France, the rights of the artist was recognised by Royal Decree in 1777. 'Royal Decree on Sculpture and Painting (1777), as cited in L. Bently and M. Kretschmer (eds.) Primary Sources of Copyright (1450 – 1900), available at < http://www.copyrighthistory.org/cam/index.php> (date accessed: 11 July 2017).

[41] Rose notes that '… in 1775 the Court of Common Please decided in *Stationers v Caravan* that the crown did not have the authority to grant the Stationers' company the exclusive right to print almanacs'. M. Rose, *Authors and Owners* (Cambridge, Massachusetts: Harvard University Press, 1993) p. 25.

[42] Adeney, *supra* note 38, at p. 14.

[43] Deazley *et al, supra* note 35.

[44] 'An Act for the Encouragement of Learning' 8 Anne c. 19 (1710) otherwise known as the Statute of Anne 1709.

[45] See, An Act for the Encouragement of the Arts of Designing, Engraving and Etchings Historical and Other Prints, by vesting the Properties thereof in Inventors and Engravers during the Time therein Mentioned 8 Geo. II c. 13, otherwise known as the The Engravers Act (1735). See also the 1742 Act for Securing to John Byrom, Master of Arts, the Sole Right of Publishing for a Certain Term of Years the Art and Method of Shorthand as cited in J. Hancox *The Queens Chameleon: The Life of John Byron* (London: Jonathan Cape, 1994), ch. 10. See also the Sculpture Copyright Act (1798) An Act for Encouraging the Art of Making New Models and Casts of Busts, and other Things therein Mentioned, 38 Geo. III c. 71 (1798), cited in Sherman & Bently *supra* note 33, at p. 17.

[46] French Literary and Artistic Property Act, Paris (1793) in L. Bently and M. Kretschmer (eds.) *Primary Sources on Copyright (1450-1900),* < http://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_f_1793> (date accessed: 11 July 2017) Source: Archives nationales : BB/34/1/46 (document conservé aux Archives nationales, Paris). The French Decree of 13-19 January 1791 was repealed by the 1793 Act.

Despite this cultural shift towards the recognition of the importance of the intellectual worker, the visual artist was still at a distinct disadvantage to his contemporaries. This was primarily due to his mode of exploitation, while other creators could exploit the intangible element of their work *ad infinitum*, the visual artist was limited to the first sale of their work.[49] At a time when the patronage system had long since disappeared visual artists relied upon the free-market to provide them with a source of income. However, due to their weak bargaining position visual artists were often forced to sell their works for very little money. The literature is full of such examples: Degas reportedly sold a painting for 500 francs, which later sold for 436,000 francs.[50] Millet's *Angelus* purchased for 70,000 francs was resold only a few years later for over a million francs[51] and a portrait by Duval De l'Epinay, bought for 5,210 francs in 1903, subsequently sold for 660,000 francs in 1912.[52] De Pierredon-Fawcett notes that

[47] Prior to the enactment of the Revolutionary Laws of 1791 and 1793 French law protected the rights of artists and sculptors by royal decree - see for example *Decree of the Council containing prohibitions on the copying and casting of works of sculpture from the Academy* (1676), see also the 1714 Decree on Fine Arts and the 1777 Royal Declaration on sculpture and Painting - these decrees however were in fact limited privileges conferred upon national guilds. See further: 'Decree on Sculptures, Paris (1676)' in L. Bently and M. Kretschmer (eds.) *Primary Sources on Copyright (1450-1900)* <www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_f_1676> (date accessed: 11 July 2017).

[48] Bugbee, *supra* note 35 at p. 47. For other works tracing the historical foundations of intellectual property see, N. S. Shaler, *Thoughts on the Nature of Intellectual Property and Its Importance to the State* (Cambridge, MA: Welch Bigelow, and Company, 1877); F. D. Prager, 'A History of Intellectual Property from 1545 to 1787' *Journal of the Patent Office Society,* XXVI (November 1944) and 'The Early Growth and Influence of Intellectual Property' *Journal of the Patent Office Society,*
XXVII (February 1952); W. S. Holdsworth *A History of English Law* (London, Methuen Company, 1903).

[49] *Infra.* Section 3.4. The concept of the nature of the work and the manner in which it may be economically exploited will be discussed in detail therein.

[50] See L. de Pierredon-Fawcett p. 149 fn 4. See also the Max-Planck-Institut 'The Droit de Suite in German Law' in M. Nimmer eds. *Legal Rights of the Artists* (California: Nimmer, 1971) chapter VI p. 6 - 12.

[51] *Supra* note 8, at p. 149 fn 4.

[52] See A. Vaunois, 'La Loi Francaise du Mai 1920 et le droit des artistes sur les ventes publique de leurs oeuvres' (1920) 33 *Droit d'Auteur* pp. 101 - 102, as cited by de Pierredon-Fawcett, supra

at this time, the work of art underwent a transformation in terms of social utility, being transformed from an object of aesthetic pleasure to an object of speculation.[53] Indeed, today the value of art, as a commodity to be invested in and traded has grown exponentially[54] which in many ways reinforces the view that society values art but not the artist. Even in circumstances where the artist makes the 'big money' sale, it is questionable whether the buyer is in fact rewarding the artist for his exploits or merely securing a valuable investment.

A repeating narrative which continues to emerge from the literature describes the artist's absence from this equation; he toils and labours only to be forced by economic circumstance to sell at a mere pittance.[55] This resulted in a movement in France during the latter part of the 19th Century which aimed to provide visual artists with the opportunity to participate in the increased value of their art.[56] This movement recognised that visual artists were unable to make a living from their art and that copyright generally favoured authors and composers over visual artists. This was because traditional rights of reproduction, performance and distribution did not provide visual artists with adequate compensation.[57] Colombet captured this perfectly:

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note 8 p. 149 fn. 4. The Author also cites F. Jourdain, *Feuilles mortes et fleurs fancées* (1931) for examples of the miserable condition which the heirs of famous French artists lived.

[53] *Supra* note 8, p. 2.

[54] In 1980 Robert Hughes wondered at how a 'spiralling market' had made for 'a brutalized culture of unfulfillable desire,' producing auction prices that had seen 'a mediocre Picasso from 1923' sell for $3 million (US) in 1977. In June of 2015 that same 'mediocre Picasso' sold for $179 million. See Adam Gopnik 'Art and Money' June 1st 2015 issue, *The New Yorker.* 'The intertwining of art and money has even been part of the positive character of the modern age, when artists fought free of princely and church commissions, and began to paint pictures intended for sale in a free market of collectors.'

[55] M. E. Price 'Government Policy and Economic Security for Artists: The case for the Droit de Suite' (1967 – 1968) 77 *Yale Law Journal*, p. 1335.

[56] *Supra* note 8, at pp. 1 - 4.

[57] C. Colombet *Major Principles of Copyright and Neighbouring Rights in the World: A Comparative Law Approach* (Paris: UNESCO, 1987) UNESCO/PRS/CPY/CME.I/4 p. 59.

> 'The fact is that a literary or musical work will often be exploited by the reproduction of copies or public performances which will be a substantial source of profit to the author, but there is no such system as regards works of fine art, and a painter, for example, can only be remunerated for his labour on selling his works. Artists will often sell cheaply, especially at the beginning of their careers, and when they become better known their works often greatly increases in value. It is only fair that not just art collectors and dealers but creators, too, should have their share of the increased value; whence (sic) the idea of associating them with the profits derived from the price in crease by creating a right which take effect one works are resold (sic).'

Before exploring the first legislative enactment of the *droit de suite* in France, the following section will consider the legal landscape which provided the basis for this evolution in artists rights.

3.2 Moral rights and the Origins of the *Droit de Suite*

As previously noted the Renaissance changed the perception and status of the artist by recognising the importance of the individual creative spirit.[58] Artists began to sign their work and the law began to develop rules which protected

[58] *Supra* note 8, at pp. 1 - 4, see also Adeney, *supra* note 38, at p. 22; In 1741 Hanov distinguished between '*iura personalia'* (non-transferable rights*) and 'iura communicablica'* (rights capable of being transferred to others in whole or in part). Within *'iura personalia',* Hanov, identified rights that we know today as attribution/paternity and integrity and thought of these rights as personal to the author and therefore non-transferable. Adeney regards this as a clear foreshadowing of moral rights based on property concepts as they were to develop late in the 19th century.

artistic expression.[59] The French revolutionary laws of 1791[60] and 1793[61] signalled the beginning of the French system of author's rights.[62] In the years to follow the French courts expanded upon these economic rights by recognising rights that were non-economic in nature,[63] thereby proving valuable to artists in terms of protecting their work and their reputation.[64] These rights recognised that creative works were fundamentally different from other forms of property because they embodied the artist's personality.[65] Works of art and literature therefore possessed a 'special character' which differentiated them from

[59] *Supra* note 8, at pp. 1 - 4, see also Radojkovic *supra* note 35; citing the lawyer Marion '… any creator or inventor must be the master of what he does, invents and creates.' At p. 174 Radojkovic notes that almost two hundred years after Marion's passionate plea, Hell (1791) presented the principle of the protection of personal (moral) rights to the French Constituent Assembly. 'In this he stressed the principle of property in scientific and literary works. Although counterfeiters had deformed and altered the precision and the meaning of literary works, he declared, they had deprived authors of their honour.' But like Marion, Hell's principle was not legislated for and it was the courts that pioneered these rights until legislative enactment in 1957

[60] (Fr.) The Decree of January 13 – 19, 1791 *reprinted in* de Pierredon-Fawcett, *supra* note 8, at p.1 - fn. 1.

[61] (Fr.) The Decree of January 19, 1793 *reprinted in* de Pierredon-Fawcett, *supra* note 8, at p.1 - fn. 1

[62] Copyright Act of March 11, 1957 (Fr.). R. J. Dasilva 'Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States, 1980-1981 28 *Bull. Copyright Society U.S.A.*) p. 3 '[t]he French *droit d'auteur* is a concept far broader than American copyright, so broad, in fact that French scholars dispute whether it really can be called a property right at all [see e.g. Debois, Cours de Propriete Litteraire, Artistique et Industrielle (1961)] While United States copyright seeks to protect primarily the author's pecuniary and exploitative interests, as well. The French law of *droit d'auteur,* therefore protects not only the artist's pecuniary rights (*droits patrimoniaux*), but also his moral right (*droit moral*).'

[63] M. Biagioli 'Genius Against Copyright: Revisiting Fichte's Proof of The Illegality of Printing' (2011) 86(5) *Notre Dame Law Review* p. 1855, in 1793 Fichte made distinctions between the physical work of the author and its intellectual contents. Instead of justifying the work by analogy to real property, he asked the question whether there was something inalienable in the work and if this existed, then it was to be considered property, perpetual in nature. Furthermore, Biagioli noted that for Fichte 'what mattered … was that such property be inalienable, not whether it was tangible or intangible, nor how it might have been produced. His argument was structured like a test: *if* there is something in a book that could not be in any way alienated from its owner, *then that something* must qualify as property—perpetual property—no matter what kind of thing it may turn out to be.'

[64] Radojkovic, supra note 35, at p. 174, see also Adeney *supra* note 38, at p. 27.

[65] R. Hauser 'The French Droit de Suite: The Problem of Protection for the Underprivileged Artist under the Copyright Law' (1962) 11 *Copyright Law Symposium,* p. 14, see Adeney *supra* note 38, at p. 27. See also I. Kant, Von der Unrechtmabigkeit des Buchernachdruckes' in Arthur Buchenau and Ernst Cassirers (eds), *Immanual Kants Werke* (Hildensheim Gerstenberg, 1973) vol 4, p. 213. F. Kawohl 'Commentary on Kant's essay On the Injustice of Reprinting Books (1785)', (2008) in *Primary Sources on Copyright (1450 - 1900)*, eds. L. Bently & M. Kretschmer <www.copyrighthistory.org> (date accessed: 11 July 2018). Kawohl notes that for Kant the author has '… an inherent right in his own person, namely a right to prevent another making him address the public without his consent.'

industrial products.[66] The work of art was not merely an object but 'the embodiment of the creator's thoughts and personality.[67] Accordingly, the French courts recognised the permanent relationship between the artist and his work,[68] which in turn provided the legal basis for moral rights.

Moral rights allow creators to control works no longer in their possession and therefore represent an exception to the concept of exclusive ownership and the transferability of rights.[69] These moral rights included the right of paternity,[70] the right of integrity,[71] the right of disclosure[72] and the right of withdrawal.[73] The right of paternity gives an author the right to be recognised as the creator of the work.[74] The right of integrity protects the author from modifications and

[66] See L. Becker, P. Huber and E. Kronjager (Project Leader: Marlies Hummel) *The Droit de Suite* Report Commissioned by the French Authors' Society ADAGP, The German Authors' BILD-Kunst and the Groupement Européen des Sociétés d'Auteiurs et Compositeurs (GESAC) (Munich: IFO Institut, 1995) p. 31.

[67] M. Reddy 'The Droit de Suite: Why American Fine Artists Should have the right to a resale royalty' *Loyola of Los Angeles Entertainment law Review*, p. 513. See also R. Hauser *supra* note 65, at p. 14; 'It bears his spirit, embodies his reputation, and reflects his views; the personality of the creator remains permanently a part of the work.'

[68] R. Hauser *supra* note 65.

[69] *Ibid.* at p. 15 '… moral right permits the creator to survey, control, and even suppress the use of his product *no longer in his ownership.* It is, thus correctly characterized as a complete derogation from the basic rules of exclusive ownership of property, and for this reason several French jurists have suggested the dropping of the rubric "property" to denominate intellectual creations.'

[70] *Ibid.* at p. 14 citing *Fortin v. Prevost-Blondel*, Cour de Paris, July 4, 1865 (1865), Dalloz Periodique 2, at p. 243.

[71] *Ibid.* at p. 14 citing *Sorel v. Fayard Freres*, Tribunal civil de la Seine, March 20, 1895 (1898), Dalloz Periodique 2. 465; *aff'd,* Cour de Paris, Dec. 2, 1897, Cour de Cassation, March 14, 1900.

[72] The right of disclosure allows the creator of the work to decide when the work is released and to withhold the work from release or publication until completion. *Supra* note 62, DaSilva describes it as '… the right of the author to have complete authority over the decision to publish, sell, unveil, or by any other means make his work public.' See also R. Sarraute 'Current Theory on the Moral Rights of Authors and Artists under French Law' (1968) 16(4) *The American Journal of Comparative Law* p. 477 - 'Since the promulgation of the French law of 1957 no one has ever exercised the right.' Further, see the French cases of *Camion et Syndicate de la Propriete artistique v. Francis Carco, Aubry, Belattre et Zborowski*, Trib. Civ.de la Seine, 15 November 1927, DP.1928.2.89. Confirmed in *Carco et autres v. Camoin et Syndicat de la propriété artistique*, Cour d'appel de Paris 6 March 1931, *D.P.1931.2.88*, cited by Sarraute at p. 468.

[73] *Pourchet v. Rosa Bonheur*, Cour de Paris, July 4, 1865 (1865), Dalloz Periodique 2, p. 201.

[74] See C. Chinni 'Droit D'Auteur Versus the Economics of Copyright: Implications for American Law of Accession to the Berne Convention' (1992) 14(2) *Western New England Law Review*, pp. 153 - 154.

distortions that are prejudicial to his honour and reputation. And the right of disclosure grants creators the right to determine when a work may be made public. The right of withdrawal, which arguably represent the greatest infringement to the property rights of subsequent purchasers,[75] grants creators the right to take back or retract their work.[76]

Moral rights enjoy some international recognition under Article 6*bis* of the Berne Convention (1971)[77] however, as of the four rights mentioned,[78] the Convention only recognises the right of paternity and integrity. Accordingly the right of disclosure and withdrawal are not recognised by the Berne Convention.[79] Furthermore, the Berne Convention's moral rights provisions are specifically excluded under Article 9 of the TRIPS agreement.[80] Historically, the civil law tradition viewed these rights as personal and perpetual[81] and therefore could not be waived. Today, the Berne Convention allows member states to shape these

[75] DaSilva, *supra* note 62, at p. 24, notes that these rights place '… tremendous practical difficulties, and readily could place an unrealistic burden on publishers and distributors of literary and artistic works.'

[76] However, it must be noted that in France the application of the right of withdrawal has proved extremely limited. In addition it is not recognised under Article 6*bis* of the Berne Convention. For further see Sarraute *supra* note 72; 'Since the promulgation of the French law of 1957 no one has ever exercised the right.'

[77] Berne Convention for The Protection of Literary and Artistic Works, July 24 1971, 1161 U.N.T.S. 3.

[78] In Ireland under the Copyright and Related Rights Act 2000 s. 107 – 119, moral rights also include the right of privacy in photographic works – s. 114, and the right of false attribution – s. 113. Other EU Member States including the UK also recognise such rights.

[79] Moral rights are set in Article 6*bis* of the Berne Convention. The right of paternity and integrity are recognised only: 'Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor (sic)or reputation.'

[80] TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement]. Article 9 ' … Members shall not have rights or obligations under this agreement in respect of the rights conferred under art 6*bis* of that convention or of the rights derived therefrom.'

[81] See Z. Radojkovic 'Article 6 of the Berne Convention (Moral Rights)' (1966) *General Studies - Copyright,* p. 14 - 15.

rights to reflect the nuances of their legal traditions.[82] Accordingly, the majority of jurisdictions that recognise these rights allow them to be waived and limit the term of protection to that of copyright – life of the author plus 70 years. [83]

Moral rights, while not providing a direct economic return for artists[84], evidenced a change in societal attitudes towards the creative classes by recognising the 'special character' of their work. While today, the *droit de suite* and moral rights are not seen as one and the same,[85] historically these rights were perceived to be strongly connected. This in turn foreshadowed a legal and socio-political landscape in which the *droit de suite* could not only be suggested but be legislated for.

3.3 Outline of the Legislative Beginnings of the *Droit de Suite* in 20th Century France

The *droit de suite* was mentioned for the first time in an article published by Albert Vaunois in 1893.[86] The term *droit de suite* derives from mortgages and

[82] See Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167 [hereinafter InfoSoc Directive]. Recital 19 - 'The moral rights of rightholders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention. The Berne Convention as amended (Paris) 1971, Article 6*bis* (3) 'The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.'

[83] For instance in Ireland, moral rights may be waived. See s. 116 of the Copyright and Related Rights Act 2000. A similar provision exists in the UK, under section 87 of the Copyright, Design and Patent Act 1988. The only expression of moral rights in US legislation is contained in the Visual Artists Rights Act 1990, which introduced a section to the Copyright Act. (Copyright Act [USA] s. 106A).

[84] Arguably these rights provide indirect economic gains for creators by ensuring that the creator is identified.

[85] Ricketson, *supra* note 1, at p. 17.

[86] J. L. Duchemin *Le Droit de suite des Artistes* (1948) (Thesis, Paris) p. 35. The term ' droit de suite' is used widely to describe the artists' resale right but other nation references to the right include 'Folgerecht' (Germany), 'Direito de Sequencia' (Portugal), with Italy using a much more

real property rights; 'it is one of the prerogatives attached to the enjoyment of real property, enabling the holder of the right to seize the property which is the object of the right, even in the hands of a third party.'[87] The application of this right in the context of artists' rights is noticeably dissimilar; the ARR is designed to allow the artist to participate in the increase in value of his work but not to allow the artist to dispossess the current owner of his property, as allowed under the 'real property' right. Indeed, the first draft proposals by Ibels and Théry in 1903 and 1904 did not attempt to include a right to any degree composite of the literal translation.[88] Instead the *droit de suite* and the artist's participation in the sale price of the work of art was justified as a means of authentication. The draft legislation envisaged a resale right that compensated the artist for authenticating their work and by providing the purchaser with a certificate of authenticity. The system, which was in the main premised upon the assumption that purchasers would value a certificate of authentication would have also required an official register of sales, which would have proved difficult and expensive to maintain, accordingly it was quickly abandoned.[89]

In 1903, the *Société des Amis du Luxemburg*[90] joined the campaign for a resale right. This was followed in 1905 by a public campaign to generate awareness among the French public concerning the importance of the rights of artists. The

descriptive phraseology 'Diritti dell'autore sull'aumento di valore delle opere delle arti figurative' which means the author's right to the increase in value of his works, See Fawcett at p. 151.

[87] L. de Pierredon-Fawcett, *supra* note 8, at p. 3.

[88] *Ibid.*

[89] *Ibid.*

[90] The Société, which is a Non-Governmental Organisation, was founded in 1903 for a number of purposes: 1) to obtain the reconstruction of the Luxemburg Museum; 2) to support modern art; and 3) to promote the recognition of the droit de suite. The Société continues to operate today as a charity and was renamed in 1947: Law Société des Amis du Musée national d'art Moderne. For further see <http://amisdumusee.centrepompidou.fr/fr/page/historical> (date accessed: 10 July 2017).

campaign, which itself centred around a particular drawing, featured the sale of a painting by the artist Forain.[91] The drawing depicts an auctioneer bringing down the hammer while saying '100,000' francs! In the foreground are two children in rags, one exclaims to the other 'look, one of Papa's paintings!'[92] Such a poignant insight into the plight of the visual artist galvanised French public opinion on the matter: '…the public conscience was aroused by the shocking disparity between the poverty of the creators of genius and the enrichment of those who traded in their works…'[93] By 1909 the campaign had built momentum and after a protest in Paris by a thousand artists, the French Government created a 'Permanent Committee on Authors' Rights for Artists' to investigate the issue.[94] Subsequently, André Hesse drafted a Bill which called for the granting of a right to artists that would guarantee them a share of subsequent sales. The Bill was submitted to the Chambre des Députés in 1914 and Abel Ferry was appointed the lead legislator. The advent of WWI however interrupted the debates and the proposal was not addressed again until 1918. Abel Ferry, who had been killed during the war, was replaced by Léon Bérard who successfully oversaw the

[91] See lithograph by Jean-Louis Forain on the opening page of J. Farchy *Le droit de suite est-il soluble dans le analyse économique?* March 2011. See further C. M. Vickers 'The Applicability of the *Droit de Suite* in the United States' (1980) 3 Boston College International & Comparative Law Review, p. 438.

[92] De Pierredon-Fawcett, *supra* note 8, at p. 3, fn. 14. A similar, but not identical, story about Millet's granddaughter is recounted by Price *supra* note 55, at pp. 1333 - 1366. For similar stories see D.B. Schuler 'Art Proceeds Act: A Study of the Droit de Suite and a Proposed Enactment for the United States' *Northwestern University Law Review* (1967) 61 pp. 19 - 45, S. Hochfield 'Legislating Royalties for Artists.' ARTnews (1976) 75, pp. 52 - 54, and R. K. Filer 'A Theoretical Analysis of the Economic Impact of Artists' Resale Royalties Legislation.' *Journal of Cultural Economics* (1984) 8 pp. 1 - 28.

[93] L. de Pierredon-Fawcett, *supra* note 8, at p 3.

[94] 'Commission permanente du droit d'auteur aux artistes' L. de Pierredon-Fawcett *supra* note 8, at p. 4. 'Another society named *Le Droit d'Auteur aux artistes* (Author's Rights for Artists) was organised in 1909, under the presidency of the painter Willette, for a similar purpose.

passing of the Bill through parliament, the Bill was entitled: 'a law granting artists a right of participation in public sales of works of art.[95]

France thus became the first country to recognise the *droit de suite.* The right entitled visual artists to a percentage of the sale price of their work which was to be paid by the seller, the right applied to public auctions only.[96] De Pierredon-Fawcett notes that the legal recognition of the *droit de suite* was a product of changing social and cultural attitudes rather than as a product of judicial evolution.[97] This change in public opinion also created an awareness of the important contributions that visual artists made to French culture and society. This in turn created an environment in which advocacy for a *droit de suite* became possible. The kernel of this movement centred upon remedying two economic inequalities; firstly, between that of the artist and other intellectual workers (writers & composers) and secondly; between the artist and subsequent purchasers of art. The *droit de suite* was therefore premised upon the idea that artists had been unfairly treated; the corollary being that writers and composers enjoyed preferential treatment, both in terms of the protection and rewards offered by copyright law, and their social status within society. Arguably this signalled an evolution in society's estimation of the artist. However, the victory

[95] *Supra* note 8, at p. 4 citing A. Vaunois, 'La Loi Francaise du Mai 1920 et le droit des artistes sur les ventes publique de leurs oeuvres' (1920) 33 *Droit d'Auteur*, p. 103 'The bill was adopted by the Chambre des Députés on September 19, 1919 and by the Sénat, without debate and after declaration of an emergency, during the session of April 30th 1920. The statute was signed by the Président of the Republique on May 20, 1920.

[96] This limitation was said to reflect the practical difficulties of monitoring private sales.

[97] L. de Pierredon-Fawcett *supra* note 8, at p. 4, fn 21.

was short lived as commentators immediately questioned the rigour of the right[98] and art market professions resisted its practical implementation.[99]

3.4 The legal Nature of Artistic Copyright and the Historic *Droit de Suite*

In order to fully understand the nature of the ARR, it is important to view the ARR within the wider context of copyright and the types of rights that this rubric allows. Prior to its incorporation into the Berne Convention the *droit de suite* was not considered internationally to be an 'author's right' as it did not relate to the exploitation of a work.[100] Indeed today the artist's resale right is often described as a related or neighbouring right,[101] a *sui generis* right,[102] a moral right,[103] and

[98] See US Register of Copyright Report '*Droit de Suite:* The Artist's Resale Royalty' (1992) pp. 10 - 29.
[99] *Ibid.*
[100] De Pierredon-Fawcett, *supra* note 8, at p. 27; citing the opinion of the British delegation at the Rome Conference [to revise the Berne Convention] in 1928. Actes, Confrence de Rome, No. 282. See also L. de Pierredon-Fawcett *supra* note 8, at p. 25; citing 'le Projet de Loi Austro-Allemand sur le droit d'auteur at la critique (1933) 46 *Droit d'Auteur* p. 57, in 1933 the International Bureau of Berne debated whether or not the droit de suite was an author's right, they concluded that the droit de suite and authors' rights were mutually exclusive. The two primary arguments that were employed to support this conclusion were firstly; that the droit de suite merely concerned the sale price of the tangible object embodying the work; and secondly, it was not employed in the exploitation of the work in a similar manner to the right of production or performance.
[101] *Supra* note 98, at p. 92; Regarding the Kennedy-Markey Proposal for a US resale right, Frederick Woolworth [US Art Dealers Association representative] described the right as a sui generis tax: 'While it will provide additional income to the very small group of already highly successful artists who have a secondary market, it is ultimately harmful to the interests of most artists. It is also unfair ... and a disincentive to collectors of art by living artists who are willing to support those artists by taking the risks involved in buying their works.'
[102] *Ibid.* See also De Pierredon-Fawcett *supra* note 8, at p. 25; K. Lubina and H. Schneider 'One Year and Milllions of Euros Later: Taking Stock of the Implementation of the European Directive 2001/84/EC on Droit de Suite' in B. Demarsin, E.J.H. Schrage, B. Tilleman & A. Verbeke (Eds.) *Art & Law* (Brugge: die Keure, 2008), p. 293.
[103] A. Schten, 'No More Starving Artists: Why the Art Market Needs a Universal Artist Resale Royalty Right.' (2017) 7(1) *Notre Dame Journal of International & Comparative Law*; see also J. Pasharikov 'Edvard Munch's "The Scream" Screams for Droit de Suite: Why Congress Should enact a Federal Droit de Suite Statute Governing Artists' Resale Rights in the United States' (2015) 26 *University of Florida Journal of Law and Public Policy*, p. 387; S. B. Turner 'The Artist's Resale Royalty Right: Overcoming the Information Problem' (2012) 19 *UCLA Entertainment Law Review,* p. 335.

as a tax.[104] While the *droit de suite* undoubtedly grew out of a legal culture immersed in moral rights doctrine it is questionable whether the right is itself a moral right as opposed to merely sharing certain characteristics. Recognising the true nature of the *droit de suite* has some important implications for two central research question of this thesis; firstly, whether the resale right can perform a social security function and secondly, if it is amenable to such a function, are there public policy grounds for the inclusion of a social welfare/income maintenance function under the current EU schema? The following section compares and contrasts the legal characteristics that define both moral and economic rights before concluding that the *droit de suite* is a form of economic right. Section 3.5 goes on to consider whether the right might be better framed as a tax and therefore perform a welfare function.

3.4.1 The Historic *Droit de Suite* as a Moral Right

Rita Hauser perhaps provides the most succinct exposition of the qualitative divergence between moral and economic rights:

[104] J. Merryman 'The Wrath of Robert Rauschenberg' *Journal of the Copyright Society of the USA* (1992 -1993) p. 257; M. Asimow 'Economic Aspects of the Droit de Suite, in M. Nimmer (ed.) *Legal Rights of the Artist* (1971) Chapter III pp. 1 - 41; G. Rub 'The Unconvincing Case for Resale Royalties (2014) 123 *Yale Law Journal*, p 5; G. S. Edelson 'The Case Against an American Droit de suite' (1989) 7 *Cardozo Arts & Entertainment Law Journal*, p. 263; describing the classification of the right as an IPR as an '… Orwelian misuse of language… .'. See generally Lord Macaulay's observations on copyright: 'The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers. The Tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures … .' Macaulay, *Copyright* (Speech in the House of Commons, 1841), in 8 works 195, 201 (Trevelyan ed., 1879); Ricketson *supra* note 1, at p. 17; '… under the "increase in value" approach … the RRR [resale royalty right] moves away from authors' rights, whether economic or moral, and assumes more of the character of a tax or levy that is levied on resales of artistic works. The appropriate legal resting place for RRR on this approach would therefore be within the national tax or even social welfare regime.'

> '*Les Droits moraux* primarily protect what may be termed the spirit rather than the pocketbook of the creator. They permit the designation and perpetuation of the creator's personality as embodied in the work, prohibit its distortion, and perhaps even its destruction. On the contrary, economic or pecuniary rights in an artistic product look to the protection of exploitation, give the author the power to prevent the use of the product without his consent, and … assure him some participation in the gain when he does so consent.'[105]

For some commentators the *droit de suite* is an outgrowth of moral rights doctrine[106] while for others it is strictly an economic right.[107] For Ferry the *droit de suite* recognises the 'invisible bonds' in statute that exist between the artist and his work.[108] While recognising this dichotomy, Plaisant defines it '… as a particular application of the copyright principle to works which cannot substantially exploit reproduction or performance rights.'[109] Recht is critical of the view that the *droit de suite* is a moral right;[110] moral rights are said to protect the 'creative personality'[111] – the spirit – whereas the *droit de suite* provides an economic reward for the artist – the pocketbook. However, Quadri takes the view

[105] R. Hauser, *supra* note 65, at p.15.
[106] Pasharikov, *supra* note, at p. 387.
[107] V. Ginsburgh 'The Economic Consequences of the *droit de suite*' (2005) 35(1&2) *Economic Analysis & Policy*, p. 62; D. Schulder 'Art Proceeds Act: A study of the droit de suite and a proposed enactment for the United States' (1966 – 1967) *North Western University Law Review*, p. 22; '… though like the moral right in that it is inalienable, the droit de suite is more closely allied with the reproduction right in that it is a "pecuniary" right and is part of the author's copyright.'
[108] A. Ferry, Report, 1914 J.O. Chambre des Députés, Doc. Parl., annexe 3423, at 150 et seq., 2d Sess. of Jan 23, 1914; see also M. Clough 'Legal Protection for the Moral Right of Visual Artists: A Growing Trend in State Legislation' (1986) 36 *US Copyright Law Symposium*, p.108.
[109] R. Plaisant 'The French Law on Proceeds Right, Analysis and Critic' in M. Nimmer (ed.) *Legal Rights of the Artist* (1971) Chapter IV, p. 27.
[110] P. Recht 'Le droit de suite est-il un droit d'auteur?' (1950) 3 *Bulletin du Droit d'Auteur* [Copyright Bulletin] (UNESCO) p. 65, [English Translation]. p. 66.
[111] De Pierredon-Fawcett, *supra* note 8, at p. 32.

that the *droit de suite* shares both moral and economic features in that it secures an economic return for artists while maintaining a moral rights dimension in that it is inalienable.[112] Arguably Ruffini's definition provides the most comprehensive encapsulation of the multi faceted nature of the *droit de suite*: '… a right in which personal, economic, moral and purely material elements intertwine and merge indissolubly, making up a unique whole.'[113]

For those writers who view the *droit de suite* as a moral right, the kernel of their argument rests upon the analogy between the inalienability[114] of both these rights.[115] And while parallels can be easily drawn between the two, nevertheless, in the Irish and British[116] context this argument has lost some of it potency because moral rights may be waived.[117] A similar application of these rights can

[112] S. Quadri 'The Droit de suite in Latin America' (1979) 102 R.I.D.A. p. 82. As cited by De Pierredon-Fawcett, *supra* note 8, at p. 32.
[113] F. Ruffini, De la protection international des droits sur les oeuvres litéraires et artistique, (1926) 12 *Recueil de Cours de L'Académie de Droit International de La Haye,* p. 56, cited by De Pierredon-Fawcett, *supra* note 8, at p. 30 - fn 141 (L. de Pierredon-Fawcett Trans.).
[114] Inalienability simply means that the right cannot be transferred. In the context of the *droit de suite*, the right is not transferable but it is transmissible to an heir, according to the rules of succession, upon the death of the artist. Moral rights, cannot be transferred but they may be waived. Waiver is effectively an abandonment of these rights and under Irish law this does not allow a third party to take up these rights and enforce them. In relation to moral rights see s. 118 and 119 of the Copyright and Related Rights Act 2000 [hereinafter CRRA]. Within the EU context, Recital 19 of the InfoSoc Directive states that moral rights remain outside the scope of the Directive and moral rights should be exercised according to the legislation of Member States and the provisions of the Berne Convention, the WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty. In the context of the moral rights of visual artists, 6*bis*(2) of the Berne Convention states that: 'The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed.' In relation to the Artists' Resale Right, in Ireland, S.I. 312/2006 European Communities (Artist's Resale Right) Regulations 2006 No. 28 of 2000, states: s. 4(1) Resale right is an inalienable right and is not assignable, s. 4(2) A charge on a resale right is void, s. 4(3) A waiver of a resale right has no effect, s.4(4) An agreement to share or repay resale royalties is void.
[115] See generally Recht, *supra* note 110, at p. 65, [English Translation]; Hauser, *supra* note 65; Price, *supra* note 55.
[116] See UK Copyright, Design and Patents Act 1988 Chapter IV. In the Irish context see Article 116 CRRA 2000.
[117] See CRRA 2000, Article 116 (waiver).

be seen across Europe, thus diluting the 'inalienability' based analogy between moral rights and the *droit de suite.*[118]

Furthermore, the focus on the inalienability of the *droit de suite* and moral rights ignores the divergent aims of both these legal institutions. Moral rights protect the author's 'honour and reputation' – or for Hauser 'the spirit' of the creator – by preventing others from modifying the work without the author's permission and by ensuring recognition of authorship.[119] The *droit de suite* on the other hand is purely economic in nature – protecting the 'pocketbook' of the artist. The inalienability of the right does nothing to protect 'the spirit' of the artist or ensure the 'designation' or 'perpetuation' of the artist's personality. Accordingly, Schulder views the *droit de suite* as more 'closely allied' with the reproduction right than moral rights.[120] In fact the Artists' Resale Right Directive acknowledges that were the right not inalienable it would be of little use to artists who would inevitably waive the right in lieu of recompense.[121] The Directive therefore redefines the 'inalienability' characteristic as something other than a moral right.

[118] For instance in France, where the moral rights are inalienable [Fr. Code de la propriété intellectuelle, art L121-1)3)] waiver clauses are in principle prohibited but in practice precise and limited clauses have been accepted by the courts. See J. Rocherieux 'The Future of Moral Rights' (Dissertation 2002) p. 5, citing Cass 1er Civ, 17/03/1958: JCP 61 1998,II,10148.

[119] Berne Convention, Article 6*bis* (1).

[120] Schulder, *supra* note 107, at p. 22. '… though like the moral right in that it is inalienable, the droit de suite is more closely allied with the reproduction right in that it is a "pecuniary" right and is part of the author's copyright.'

[121] In the US, in the 1970's, a New York lawyer, Bob Projansky drafted an agreement for artists to secure a *droit de suite* royalty by contract. However there is little evidence to suggest that the contract proved popular. This perhaps reflects the weak bargaining position of artists as against art market intermediaries. For an example of the agreement see:< http://www.primaryinformation.org/the-artists-reserved-rights-transfer-and-sale-agreement-1971/> (date accessed: 12 July 2017).

It may be observed that the inalienability of a legal right and it being a moral right are mutually exclusive: for instance, state welfare payments cannot be assigned to other individuals but that does not give them a moral rights dimension as understood in this context.[122] Nevertheless, this is exactly the argument that some commentators forward.[123] More accurately, the inalienability of the *droit de suite* simply guarantees the objective of the legislation – to provide artists, by virtue of their status as creator, with an additional source of income. This raises the important question of why visual artists would waive this right and potentially forego a future source of income?

Bérard answers this question with the astute observation that '…the reason why artists occasionally sell their works at ridiculous prices could very well induce them to surrender the very right which is intended to enable them to remedy these disastrous transactions.'[124] Bérard's point highlights the potential circuity of the situation.[125] It also brings to the fore the idea that visual artists have a right to receive fair-market-value for their work but for various reasons[126] surrender this right and accept prices below market value. This leads Bérard to the conclusion that were the right not inalienable, visual artists would be equally as likely to surrender the *droit de suite* for immediate remuneration. Vaunois shares

[122] Hauser *supra* note 65, at p. 17.
[123] Quadri, *supra* note 112, at p. 82. For a general analysis of this argument see De Pierredon-Fawcett, *supra* note 8, at pp. 31 - 35.
[124] See F. Floquet, Le droit de suite en Europe (Paris: Thesis, 1971) p. 38, as cited by De Pierredon-Fawcett *supra* note 8, at p. 159.
[125] Bérard's point appears to be this; firstly, the artist has surrendered his right to receive the full value of his work, secondly, the *droit de suite* attempts to remedy this situation by providing future royalties based upon the resale of the work, thirdly, if the *droit de suite* could be waived or transferred then the artist is as likely to forego the right as he is to accept a below market value offer for his work.
[126] There are a whole host of reasons for this phenomenon including a lack of bargaining power, low self-esteem, the effects of continual poverty, an inability to identify the true market value of the work and so on.

this sentiment; '[f]reedom of contract would have given the advantage to the dealers.'[127] De Pierredon-Fawcett concludes that the protection guaranteed by legislators reflected the 'character of the person' holding the right, that being their weakness in economic bargaining power.[128]

From the above analysis it is clear that the *droit de suite* does not align itself with moral rights for two reasons: firstly, moral rights are, in the main, capable of being waived; secondly, the inalienability of the *droit de suite* is a reflection of the weak bargaining position that artists find themselves in and not a wish by legislators to protect the personality of the artist.

Therefore the *droit de suite* does not fit with Hauser's description of moral rights as its primary focus is to provide an economic reward for the artist and not to protect his/her personality. Accordingly, it must be concluded that the *droit de suite* and its modern day equivalent – the Artists Resale Right – is an economic right, reshaped to take account of the artist's weakness in economic bargaining. If the right was not inalienable then the situation which the original proponents of the *droit de suite* sought to correct would have perpetuated. To provide visual artists with the means to earn a living requires novel approaches to copyright law, which reflect the unique nature of visual art.

[127] Vaunois, *supra* note 52. at pp. 101 – 102.
[128] De Pierredon-Fawcett, *supra* note 8, at p. 33.

3.4.2 The Historic *Droit de Suite* as an Economic Right

This section tests Goetzl and Sutton's thesis that the *droit de suite*, as an economic right, is more closely aligned with copyright's right of performance than the right of reproduction. Again, determining the actual legal nature of the *droit de suite* – artists resale right – has important consequences for any reform proposals that this thesis might suggest. Before engaging with the author's analysis it is necessary first to outline the nature of creative works.

3.4.3 The Nature of Creative Works

For Sherman a 'creative work' contains two elements, the original means of expression of the idea and the tangible medium through which it is communicated:[129]

> 'An author first communicates through a manuscript. The physical embodiment of the expression is the written word, and the intellectual process through which this is perceived is that of reading. The concept may be communicated as easily through the printed page as through the typewritten or handwritten page. Because of this fact, the physical object by means of which the author communicates ordinarily has little or no commercial value. The situation is different in respect to an artistic creation. Here, the idea within the means of expression is originally

[129] See R. Sherman 'Incorporation of the Droit de Suite into United States Copyright Law' (1970) 18 *Copyright Law Symposium* (ASCAP) p. 82.

> communicated through a canvas or other medium. The intellectual process through which the creator's contribution is perceived is that of viewing. In the present state of art reproduction, the concept may not be communicated as easily or desirably through a photograph or other-machine-made reproduction. As a result, it is the physical object by means of which the artist shows his form of expression that is of the greatest commercial value. [130]

Sherman's analysis posits two important conceptual points. Firstly, unlike works of literature and musical compositions where the tangible and intangible elements of the work can be separated and exploited accordingly, the tangible and intangible elements of the artistic work are forever intertwined. This in turn limits the degree to which these works are susceptible to traditional modes of exploitation such as reproduction and performance. Secondly, the internalisation of these works by the public occurs through two very different mediums; for the art lover, the internalisation occurs through the viewing of the work in its original form of expression while for the literary lover, through the process of reading. Schmoll[131] agrees that the act of viewing fine art is the equivalent of reading a novel, attending a theatrical performance or hearing a musical score. Therefore it is said that regardless of technical perfection, reproductions of works of art – i.e. copies – can never fully convey the visual artist's message perfectly,[132] accordingly the viewer's internalisation of the artist's message is

[130] *Ibid. at* p. 82 and p. 57.
[131] As cited by De Pierredon-Fawcett, *supra* note 8, at p. 28. Schmoll is first cited by J.L. Duchemin, *supra* note 86, at p. 126.
[132] De Pierredon-Fawcett, *supra* note 8, at p. 28.

incomplete and unsatisfactory. Creators of literature and music on the other hand suffer no such impediment because the copy is capable of conveying the author's full creative expression.[133] The original work of art has an intrinsic value for the public that the original manuscript of the author and composer does not.[134]

Returning to the resulting and divergent means of exploiting such works, Hauser notes that '[s]ales of the work constitute an exploitation … for which the *droit de suite* ensures a participation for the artist.'[135] Vaunois wrote that 'each public resale of the work is a pecuniary exploitation of the creation.'[136] For these commentators the *droit de suite* is an author's right that allows for an exploitation peculiar and unique to artistic work which is similar to the exploitation that writers and performers enjoy when their work is performed or reproduced. Plaisant is not convinced by this assessment and asserts that for the *droit de suite* to be an author's right, there must be some element of consent.[137] While the writer and playwright are entitled to a royalty from the exploitation of their work, their consent presupposes any and all reproductions and performances. The *droit de suite* on the other hand does not require the consent

[133] It may be observed that literature can be enjoyed equally through the auditory process of hearing the spoken word, whether read aloud in the manner of a live performance or an audio recording.
[134] De Pierredon-Fawcett, *supra* note 8, at p. 28. However, that does not ignore the fact that original manuscripts have a value in their own right but this value does not represent the primary means of exploitation for the writer or composer. Interesting, Article 14*ter* of the Berne Convention provides a resale right for authiors.
[135] Hauser , *supra* note 65 at p. 18.
[136] Vaunois, *supra* note 52, at 102.
[137] The *droit de suite* is not a form of exploitation of the work resulting from the will of the author; it is a purely pecuniary ancillary right exercised by the author on the occurrence of actions of which the work is the object, but independent of the creator's will – a public sale at the request of a third party owning the material object in which the work is embodied.' See Floquet, *supra* note 124, at p. 285, (quoting R. Plaisant) as cited by De Pierredon-Fawcett p. 28 - 29.

of the author. For Plaisant, this distinguishes the *droit de suite* from other author rights.[138]

3.4.4 The *Droit de Suite* and the Follow-Up Model

Interestingly, the above analysis presents the *droit de suite* as a right separate and distinguishable from the right of performance and reproduction. Goetzl & Sutton, in their critique, develop upon the public's process of internalising art and accordingly focus on the performative nature of the *droit de suite*.[139] In their critique they succinctly outline the divergence between performance and reproduction rights, evidencing how the *droit de suite* has traditionally been more closely associated with the reproduction right than the performance right and that this may have resulted in certain doctrinal anomalies.

The authors propose that both the reproduction and performance right fall under separate legal models, each conferring very distinctive modes of operation. The 'Gutenburg Model'[140] is proposed to be the basis of the reproduction right while the performance right falls under the 'Follow Up Model'.[141] They contend that the failure to recognise these two distinct models has resulted in some confusion

[138] While this is correct, Plaisant's position ignores the case of compulsory licences and the doctrine of 'fair dealing' which allow users to utilise the work, albeit in a limited manner, free from the author's express consent. See Article 5 of the Information Society Directive.
[139] T. Goetzl and S. Sutton 'Copyright and The Visual Artist's Display Right: A New Doctrinal Analysis' (1984 – 1985) 9 *Columbia VLA Journal of Law and Arts.*
[140] See P. Goldstein *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (California: Stanford University Press, 2003) Goldstein contends that copyright law is a direct response to Gutenberg's invention of the printing press in 1450 which made it possible for many copies of written works to be reproduced. A. Moore *Intellectual Property & Information Control: Philosophic Foundations and Contemporary Issues* (London: Transaction Publishers, 2001) p. 1. Moore equates the invention of the Gutenberg press with Darwin's theory of evolution and Pasteur's germ theory of disease.
[141] Goetzl and. Sutton, *supra* note 139.

concerning the *droit de suite.* Goetzl & Sutton state that the purpose of the 'Gutenberg Model' was to protect the print industry by allowing publishers protect the revenues derived from print copies. The 'Follow Up Model' on the other hand protects the use of the 'expression embodied in the work', therefore attaching an economic value to the display and performance right. The authors note that:

> '[d]istinct collateral bodies of law have evolved for each model as a result of the differing requirements, functions, and policy consideration of the two models. When these collateral principles are removed from the context of one model and are applied to the other model, disastrous consequences result.'

In the context of the *droit de suite* the authors assert that by focusing on the resale of the original copy, commentators have inadvertently framed the resale of the work as a function of the Gutenberg Model, which has resulted in opponents concluding that the principle of exhaustion forecloses such a right.[142] Instead the authors conceive of the *droit de suite* as a private display of a work of visual art and therefore a function of the Follow-Up Model.[143] Before critically evaluating this proposition it is useful to understand the historical legal development of both these rights models.

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[142] See A. Bussey 'The Incompatibility of Droit de Suite with Common Law Theories of Copyright' *Fordham Intellectual Property*, *Media and Entertainment Law Journal* (2013) 23, p. 1089; G. Robinson 'Explaining Contingent Rights: The Puzzle of "Obsolete" Covenants (1991) *Columbia Law Review* p. 568; Price, *supra* note 55; See also J. D. Stanford 'Economic Analysis of the Droit de Suite – The Artist's Resale Royalty' (2003) 42 (4) *Blackwell Australian Economic Papers*, p. 389, 'Whether the right creates an anomaly in copyright or is a *use* 'proper', changing the source of the royalty from a *use*/exploitation to a substitution in ownership '… extends copyright for visual artists well beyond anything available to other creators of copyrightable works.'

[143] Goetzl and Sutton, *supra* note 139, at p. 19.

From the formal inception of copyright under the charter of the Stationers' Company in 1557[144] until 1833[145] when the UK[146] granted playwrights a right of public performance, the nature of copyright was exclusively a publisher's right to print. The system was designed to stabilize the English book trade and to guard against unfair competition.[147] Its primary concern was to protect book publishers from the unauthorised reproduction of a manuscript to which they had acquired the rights.[148] This focus on the protection of the 'copy' continued even after the author was granted copyright protection under the Statute of Anne in 1709.[149]

The model was primarily influenced by the interests of publishers, which in turn limited the scope of rights afforded to authors. For example, the publisher was not concerned with abridgements or translations[150] of the work because these did not interfere with their exploitation of the 'copy'. Protecting the publisher from

[144] See C. Blagden *The Stationers Company: A History, 1403 – 1959* (London: Allen & Unwin, 1960).
[145] See Dramatic Literary Property Act, 1833, 3 & 4 Will.IV, c.15 'This piece of legislation marks the first occasion on which the legislature provided the author of a work, in this case the dramatic manuscript, with two exclusive economic rights - the reproduction right (conferred by previous legislation such as the Copyright Act 1814) and the public performance right (conferred by the 1833 Act). The Act also illustrates the influence of continental models for protecting dramatic performances, in particular French and Belgian, on developments in Britain. After the Act was passed, the first British copyright licensing agency, the Dramatic Authors Society, was established.' See R. Deazley 'Commentary on Dramatic Literary Property Act 1833' (2008) in L. Bently and M. Kretschmer eds. *Primary Sources on Copyright (1450-1900)* www.copyrighthistory.org <http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_uk_1833> (date accessed: 11 July 2017).
[146] The Act of Union 1801.
[147] Goetzl and Sutton, *supra* note 139, at p. 22.
[148] *Ibid.*
[149] Statute of Anne 1709, also known as the Copyright Act 1710, The act is numbered as 8 Ann. c. 21 in The Statutes of the Realm (published 1810–25), based on the original Parliament Rolls; but as 8 Ann. c. 19 in Ruffhead's Statutes at Large (published 1763–65; and later editions), based on the copies of acts enrolled in Chancery.
[150] For a brief discussion of early English cases that refused to extend protection to abridgements and translations see C. Wallace 'Overlapping Interests in Derivative Works and Complilations' (1984) 35 (1) *Case Western Reserve Law Review* p. 109 fn. 50; see also L. R. Patterson, 'Private Copyright and Public Communication: Free Speech Endangered' (1975) 28 Vanderbilt Law Review, p. 1188.

unfair competition only required protection of the form which the original work took – the book – and not the content of the work; i.e. the expression of the author's ideas in a set form.[151] Therefore the author did not enjoy an exclusive right to control the exploitation of the work in all its forms. Since the publisher's interest in the 'copy' was secured through the protection of its sale, the publisher's interest naturally terminated upon sale.[152] Control over the work after the first sale could not be justified within traditional notions of property law.[153] Exhausting the publisher's interest after the first sale provided an adequate balance between the property rights of publishers and that of the public. Had the doctrine of 'first sale' or 'exhaustion'[154] not developed it would have proved impossible to effectively balance the competing rights of authors and society. Nimmer notes that '[a]t this point the policy favouring a copyright monopoly for authors gives way to the policy opposing restraint of trade and restraints on alienation.'[155] The doctrine of exhaustion therefore had a significant influence on the application of the reproduction right to a wide variety of subject matter that fell under the copyright umbrella.

For instance, the doctrine historically prevented many creators such as playwrights and composers from benefiting from the economic value that lay in

[151] See for example Justice Aston in *Millar v. Taylor*, Eng. Rep. 44 [1769] at 226: '… I am of the opinion that the publication of a composition does not give away the property in the words; but the right of copy still remains in the author: and that no more passes to the public, from the free will and consent of the author, than an unlimited use of every advantage that the purchaser can reap from the doctrine and sentiments which the work contains. He may improve upon it, imitate it, translate it; oppose its sentiments: but he buys no right to publish the *identical work.* (emphasis added).
[152] Goetzl and Sutton, *supra* note 139, at p. 24.
[153] Bussey, *supra* note 142, at p. 1089.
[154] The principle of exhaustion is an established international legal doctrine. It provides that a copyright owner's right to control copies of their work 'exhausts' on its first sale by the copyright owner or with their consent. For further see Article 4, InfoSoc Directive.
[155] 2 Nimmer on Copyright § 8.12[A] (1980).

the performance of their work. [156] In the theatrical arts when a playwright wrote a play, it was generally purchased outright by an acting company and became its exclusive property.[157] Publication of the play in multiple copies for distribution was considered 'bad box office' by the companies and therefore an event to be avoided.[158] At that time publishers registered works with the Stationer's Company in order to secure an exclusive right of reproduction. Conversely, the theatre company's registration of plays was not to reproduce and sell copies but to prevent others from distributing pirated copies that would adversely affect ticket sales.[159] The first legislative enactment in Europe to protect a dramatic composition can be seen in the French Revolutionary laws of 1793 and in the UK and Ireland in 1833 under the *Dramatic Literary Property Act*.[160] These Acts represented the first moves within copyright to protect the performance right. Goetzl & Sutton define the performance right as 'the right to exploit the aesthetic use of the expression embodied in a work… .' [161] In the UK and Ireland these rights of performance were extended to musical compositions in 1842.[162]

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[156] Goetzl and Sutton, *supra* note 139, at pp. 25 - 26. 'Gutenberg Model ill-served the theatrical and visual arts … while particularly suited to the literary arts, (and to a lesser extent the musical arts) [it] proved either useless or of minimal value to those art forms whose economic potential lay in performance, or display or which adapt poorly to multiple reproduction.'

[157] H. Gibson, *The Shakespeare Claimants: A Critical Survey of the Four Principal Theories Concerning the Authorship of the Shakespearean Plays* (London: Routledge, 1962) p. 265. A playwright could expect to be paid approximately six pounds for the manuscript of a new play. M. Marchette, Shakespeare of London (Canada: Dutton, 1949) p. 118.

[158] G. Harrison *Introduction to Shakespeare* (Harmondsworth, Middlesex, England: Pelican Books, 1939) p. 205 - 206, see also A.W. Pollard and J. Dover Wilson *Shakespeare Problems* (Cambridge: Cambridge University Press, 1967) p 36 – 37.

[159] A.W. Pollard and J. Dover Wilson *Shakespeare Problems* (Cambridge: Cambridge University Press, 1967) p. 35.

[160] See Deazley, *supra* note 145. 'This piece of legislation marks the first occasion on which the legislature provided the author of a work, in this case the dramatic manuscript, with two exclusive economic rights - the reproduction right (conferred by previous legislation such as the Copyright Act 1814) and the public performance right (conferred by the 1833 Act). The Act also illustrates the influence of continental models for protecting dramatic performances, in particular French and Belgian, on developments in Britain.

[161] Goetzl and Sutton, *supra* note 139, at p. 27.

[162] See the Literary Copyright Act 1842. For further information see R. Clark and S. Smyth *Intellectual Property Law in Ireland* 3rd ed. (West Sussex: Tottel Publishing, 2005) p. 225.

This new departure from the 'Gutenberg Model' represented a significant shift in the scope of rights afforded to authors:

> 'From its beginning, the new follow-up right had one aspect that marked a total departure from the Gutenberg Model. The first sale doctrine was not applicable. The new right to exploit the use of the expression embodied in a specific copy of a work survived the sale of the copy. Thus, the economic value of the aesthetic use of the expression was effectively separated from the economic value of an individual copy in which that expression was embodied.'[163]

It is evident from the foregoing that like the playwright of old, the reproduction right fails to provide visual artists with adequate reimbursement for their work. This is because, for this mode of expression, the intangible and tangible elements of the work are indissolubly linked. Goetzl & Sutton, posit that rather than viewing the *droit de suite* as a reproduction right, it should be viewed as a follow-up right which follows the display of the work to new audiences, similar to the performance of a play or musical composition.

The authors distinguish the *droit de suite* as an exception to the Gutenberg Model and instead draw an analogy between it, as a display right, and the right of public performance. Similarly Katzenberg views the *droit de suite* as an exploitation of the work because 'a new circle of users' are provided with a 'perfect enjoyment'

[163] Goetzl and Sutton, *supra* note 139, at p. 28.

of the work which can only be accomplished through the resale.[164] Sky contends that the transfer of ownership is a *use* in itself because a new audience is exposed to the work.[165] Hauser also alludes to this distinction when she refers to the inherent value in the *droit de suite* lying in the process of perception and viewing rather than in the act of resale. By refocusing on the subsequent display of the work to new audiences rather than on the act of re-sale to a new buyer, Goetzl & Sutton have presented an alternative theoretical underpinning for the *droit de suite* which has the potential to present a more doctrinally sound link between theory and practice. The *droit de suite* is therefore a response to the nature of the use.

Goetzl & Sutton contend that many of the criticisms of the *droit de suite* are in fact based on a misconception of the right's doctrinal basis:

> 'While the *droit de suite* is phrased in terms of the resale of the material copy, it is, in actuality, the private display of the work to a new purchaser, his or her family, and social acquaintances that is the commensurable event. The resale is merely a convenient measure of that event. As such, it both signals a new private display has begun and quantifies the value of that new experiential event. Thus, under the *droit de suite*, the purchaser of a work of visual art obtains two interests in the work: (1) absolute possession of the material object, and (2) a license for its private display. At the first sale, the license can be thought of as

[164] P. Katzenberg 'The Droit de Suite in Copyright Law' (1973) 4 *International Law Review of Industrial Property & Copyright*, pp. 365 - 368.
[165] C. Sky 'Report of the Register of Copyrights Concerning Droit de suite, the Artist's Resale Royalty: a Response (1993) 40 *Journal of the Copyright Society U.S.A.* pp. 315 - 316.

> "implied" since the licensing fee is included in the purchase price. At the time of subsequent transfers, renewal of the display licence fee becomes due.[166]

Conceptualising the *droit de suite* as a performance right does not generally fit with conventional performance based modes of expression – dance, theatre, film, opera etc. and contradicts many commentators who have traditionally viewed the *droit de suite* as an exception to the right of reproduction or performance, nevertheless conceptualising it as a private display right under the follow-up model is arguably more justifiable. The *droit de suite* simply 'follows' subsequent exploitations of the work similar to the performance right for playwrights. Conceiving of the right as such corresponds with Sherman's view that the public comprehend and appreciate the visual arts through the medium of viewing as opposed to reading or listening. The public's mode of internalisation is therefore the event that author's rights ought to exploit. In a similar fashion to how authors and composers exploit the inherent value in their mode of expression, visual artists ought to be able to exploit the display of their work. Conceptualising the *droit de suite* as an economic right within the follow-up model certainly answers many of the criticisms faced by the *droit de suite*.[167] In support of this view, De Pierredon-Fawcett argues that '… just as author's rights enable a writer to exploit economically the process by which his work is most effectively communicated, i.e. reading, … the droit de suite, will allow the artist to exploit the best process for communicating his work, i.e. viewing.'[168] De

[166] Goetzl and Sutton, *supra* note 139, at p. 51.
[167] See generally Chapter 3, Section 3.4, p. 155 - 173.
[168] De Pierredon-Fawcett *supra* note 8, at 157 also recognises that this argument militates in favour of an exhibition fee. Quoting Schmoll: 'It should be pointed out that there are basic differences between authors and artists. The right of the playwright is concerned with the hearing

Pierredon-Fawcett therefore concludes that '… the transfer of ownership of an original work of art is an exploitation of the work from the standpoint of author's rights.'[169] The transfer of the original work allows new audiences to experience the work in '…its most perfect expression'.[170]

In addition, Goetzl and Sutton's view that the *droit de suite* acts as a sort of implied licence presents an answer to Plaisant's opinion that the *droit de suite* is unlike other authors' rights in that it negates author consent which pre-disposes most acts of exploitation. Conceiving of the right as an implied licence, granted at the point of first sale, provides a novel form of limited consent for future acts of resale. Furthermore, future royalties may be justified on the grounds that such a licence has been implicitly granted. The implicit grant of a licence is not unknown within EU copyright law, and for that matter exists in many other jurisdictions.[171] For instance, private levies exist where it is understood that users will make private copies of the work for personal use. Similarly, under the display conceptualisation, the resale right acknowledges a private right to display the work and to allow others to view it. These licensing levies are an exception to the right of reproduction but from a policy perspective balance the rights of creators, to control the subsequent *use* of their work, with the rights of users to

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or performance of his work and not with successive sales of the object conveying the idea. Authors of dramatic or lyric works delight the mind through the sense of hearing while painters and sculptors give pleasure through the sense of sight. An artist's right, which corresponds exactly with an author's right, would therefore be a right concerned exclusively with the viewing of the works, just as the authors have a right to the performance of their works. It could take the form of a percentage of the receipts at exhibitions.' (De Pierredon-Fawcett Translation).

[169] *Ibid.* at p. 28.

[170] On this point, see J. Batta, Legal Director of the Artistic Fund of Hungary, Le droit de suite en Hongrie, CISAC Document, CJL/80/139 (Mar. 1980).

[171] See M. Kretschmer *Private Copying and Fair Compensation: An empirical study of copyright levies in Europe* (UK IPO Report) <https://www.gov.uk/government/publications/private-copying-and-fair-compensation> (date accessed: 12 July 2017).

fully enjoy these works, and society's right to access such works for purposes of education and criticism.[172]

Concluding on this point, conceiving of the *droit de suite* – artists resale right – as a display right with an attached implied licence acknowledges the unique nature of art. Because the tangible and intangible elements of the work are indissolubly linked it is only logical that future users ought to seek consent from the artist for the *use* of his expression as embodied in the work. The resale right as an implied licence provides this consent. In this manner, Plaisant's criticism that the *droit de suite* lacks the consent element of other author's rights is answered. This results in a conceptual migration from tradition doctrine which views the resale right as a reproduction 'type' right which follows the physical work rather than the exploitation of the creative work. Under the follow-up model the resale right follows the *use* of the artist's artistic expression – i.e. its display. From this perspective, the resale right enjoys a stronger legal basis than previous conceptions based on the reproduction model and clarifies the true exploitative nature of the resale right.

3.5 Reviewing the Social Security Function of the Historic *Droit de Suite*

As previously noted, a primary question that this thesis attempts to answer is whether a contemporary artists' resale rights model is capable of performing a social welfare function?

[172] *Ibid.*

At the 'crux of the debate' surrounding the *droit de suite* is the idea that it is a form of welfare.[173] Becker is of the opinion that '… the *droit de suite* does not lend itself to being an instrument of social security …' and '... is not suited to the function of wealth redistribution …'[174] whereas for others, the resale right is defined by its 'social character'.[175] During the early 20th century proponents for the *droit de suite,* such as Hess and Ferry, were at pains to express that it was not 'alms for the poor' that they sought but fair compensation.[176] Nevertheless, the notion of the 'starving artist'[177] became forever entwined with the concept of the *droit de suite,* thus resulting in an implicit narrative within the discourse that suggests a right, which is part author's right, part charity.[178] Such a characterisation has provoked stringent criticisms from commentators[179] who

[173] Goetzl and Sutton, *supra* note 139, at p. 41. See also Ricketson *supra* note 1, at p. 12, 'Much of the early argument in favour of RRR was presented simply in terms of a humanitarian concern for the plight of poor starving artists, seeing it as a means of securing for them and their families some form of social security during and after the artists' lifetime.'

[174] Becker *et* al, *supra* note 66, at p. 32; E. Hudson and S. Waller 'Droit de Suite Down Under: Should Australia Introduce a Resale Royalties Scheme for Visual Artists?' (2004) 115 *University of Melbourne Law School, Legal Studies Research Paper, Media & Arts Law Review* (2005) 1(10) p. 15; Noting that copyright '… was never intended to act as a vehicle for the equitable redistribution of wealth.' See also N. Kawashima 'The droit de suite controversy revisited: context, effects and the price of art' (2006) 3 *Intellectual Property Quarterly* p. 226; citing the opponents of the right – 'copyright law is … primarily concerned with the provision of economic incentives for the creation and dissemination of works, but not to serve as a social security measure for artists.'

[175] Becker *et* al, *supra* note 66, at p. 32.

[176] De Pierredon-Fawcett *supra* note 8, at p. 19; citing Hess and A. Ferry Journal Officiel, Parliamentary Documents, Chamber of Deputies, Ordinary Session, second sitting of January 23, 1914, Annex 3423 at 150. 'It is not alms we seek, but a property right.'

[177] For an alternative take on the concept of the starving artist see J. Goins *Real Artists Don't Starve: Timeless Strategies for Thriving in the New Creative Age* (Nashville: Harper Collins, 2017).

[178] See R. Plaisant – 'The Droit de Suite' *General Studies - Copyright* (1969)*: Monthly Review of the United Bureaux for the Protection of Intellectual Property* (BIRPI) pp. 159 – 160; Plaisant admits that the resale right may be 'an historical phenomenon' with no apparent justification in copyright theory. It was enacted to satisfy a specific need – the starving artist – and the resulting maintenance element of the right is perhaps its trump card and most legitimate *raison d'être*. And hence why it should be restricted to the author and his imminent relations.

[179] *Ibid.* at p. 169; '… the theoretical grounds for this right are debatable and its maintenance aspect is in the abstract, a disturbing factor.' At p. 159 'The ambiguity embodied in the droit de suite arises out of the fact that on the one hand it is one aspect of the droit de d'Autuer and on the other hand it has traditionally provided a form of maintenance which explains its inalienability.' E. Alderman 'Resale Royalties in the United States for Fine Visual Artists: An Alien Concept' (1992 – 1993) 40 J. *Copyright Society U.S.A.*, p. 279; noting that royalties are an inappropriate mechanism to reallocate wealth to struggling artists. Goetzl and Sutton, *supra* note 139, at p. 258;

note that in situations where the right provides a welfare entitlement it functions more like a tax on property rights than as an author's right.[180] This in turn, has to some extent, undermined the legitimacy of the right.[181]

Before questioning whether the artists' resale right ought to provide some form of social security for visual artists it is instructive to review the French *droit de suite* which encompassed such a welfare function. Interestingly, France, the historical home of the *droit de suite*, has removed any welfare ideations from their resale rights model, transferring responsibility of this function to the national social security system. This evidences a complete evolution in the ideology and application of a right that was borne out of a social desire to aid needy artists. The removal of a welfare function from the French model supports Becker's contention that the *droit de suite* is ill suited to this duality of purpose.

3.5.1 The *Droit de Suite* and the Welfare State in 19th Century France

As previously noted in section 3.3, the latter part of the 19th and early 20th century saw repeated attempts by advocates of the *droit de suite* to secure the enactment of the right into French Law. One such advocate, the *Société des Amis du Luxemburg* described the *droit de suite* as an 'additional fee' which would be levied against the sales of fine art.[182] At that time both Schmoll[183] and Bérard[184]

states that the droit de suite was never intended as welfare legislation. Kawashima *supra* note 174; citing the opponents of the right – 'copyright law is … primarily concerned with the provision of economic incentives for the creation and dissemination of works, but not to serve as a social security measure for artists,' Ricketson, *supra* note 1; proffers that the right may be nothing more than 'sentimentalism'.

[180] Price *supra* note 55, at p. 1336.

[181] *Ibid.* at p. 1335.

[182] Article 1 of that draft referred to the then pre-existing 10% levy, see France Avant-Projets de loi, Droit d'Author (1907), as cited by De Pierredon-Fawcett, *supra* note 8, at p. 21 fn. 91.

characterised this 'additional fee' as a tax on sales and notably this characterisation has been a recurring theme in the literature.[185] However it is questionable whether the tax analogy fully fits the form that the *droit de suite* took under the 1920 Act. De Pierredon-Fawcett is critical of the tax characterisation and notes that early references to the *droit de suite* as a tax confuse the right with the old French 'levy for the poor' which taxed the ticket price of theatre seats.[186]

To assess whether the *droit de suite* and the old French 'levy for the poor' fit the tax analogy it is useful to compare both to the characteristics of a tax. According to Recht, a tax is defined by the fact that it is '… collected by authority of the state and allocated to a public service.'[187] In the case of the old French 'Levy for the poor', after the levy had been collected it was allocated specifically to charities established to benefit artists. The fundamental difference between the 'levy for the poor' and the *droit de suite* is that the levy was used to form a social fund, which subsequently distributed funds to needy artists/entertainers.[188] The *droit de suite* on the other hand was initially collected from auction house sales

[183] M. Schmoll 'la Lanterne' August 8 (1909) as cited by L. de Pierredon-Fawcett, *supra* note 8, at p. 21, fn. 92.
[184] Bérard, 1919 J.O Chambre des Députés, Doc. Parl., NO. 2, annexe 6764, Session of September 2, 1919, '… if you sell that work in a public sale, and since you are giving a share to the State and another to the auctioneer, you will also provide a modest wage to the one who created the wealth that is in your hands. The artist will collect in the same fashion as the tax authorities.' Cited by L. Malaplate, Le Droit d'Auteur 63 et seq (1931) (Thesis, Paris), Duchemin, *supra* note 86, at p. 126 'the law of 1920, under the head of the droit de suite, imposes a special tax on public sales of works of art', cited by Pierredon-Fawcett, *supra* note 8, at p. 21 - 22.
[185] Price, *supra* note 55, at p. 1336; Merryman *supra* note 104, at p. 256. Asimow, *supra* note 104, goes further calling it a 'bad tax' '… it interferes seriously with the market, produces negligible revenue, [and] is costly to administer … .'
[186] De Pierredon-Fawcett, *supra* note 8, at p. 22 citing the French Law of '7 Frimaire V'.
[187] Recht, *supra* note 110, p. 65; See Also V. Ginsburgh 'What is wrong with droit de suite: The economic arguments' *Universite Libre de Bruxelles and Center for Operations Research and Econometrics*, Louvain August (1996) p. 3, Price, *supra* note 55, at p. 1336; Rub, *supra* note 104, at p. 5, Edelson, *supra* note 104, at p. 260.
[188] See De Pierredon-Fawcett, *supra* note 8, at p. 22.

and distributed to individual artists or their estate. Based on this definition the 'levy for the poor' clearly operated as a tax, in that it served a public service by creating a social fund to benefit artists. The *droit de suite* on the other hand served a private function, sharing many of the characteristics of a royalty.[189] This direct link between the exploitation of the work and the channelling of royalties back to the artist places the *droit de suite* squarely within the author's rights rubric. Nevertheless, if the *droit de suite* was to be administered in such a manner that it served a public function – similar to the 'levy for the poor' – then that fact would certainly challenge this presumption.

In 1957 the French legislature extended the *droit de suite* to include gallery sales,[190] the market for which was estimated to be four times larger than that of auction sales.[191] Despite this apparent victory for visual artists an implementation decree never followed and accordingly the *droit de suite* was never extended to gallery sales.[192] Previously, these sales had been excluded because it was thought that their inclusion created 'administrative challenges' and presented a 'risk of non-compliance'.[193] Nimmer, to the contrary asserts that this failure was politically orientated and '… that the real difficulty [lay] not in administration

[189] In that there being a direct link between the exploitation of the work and the artist's reward.
[190] Fr. Copyright Statute: Law Number 57 - 298 of March 11, 1957, as amended by law Number 85 - 660 of July 3, 1985, reprinted in L. de Pierredon-Fawcett, *supra* note 8, at p. 225.
[191] The Register of Copyrights of the United States of America 'The Droit de Suite: The Artist's Resale Royalty' (A Report of the Register of Copyrights), p. 22 citing a letter from Gérard Champin, President, Chambre Nationale des Comissaires Priseurs (September 30, 1992).
[192] *Ibid.* at p. 22 - 23; Plaisant, *supra* note 109, at p. 21. Plaisant notes that it was a deadlock between the French Parliament and Administration which prevented an implementation decree from being enacted. Apparently, the authors' societies exerted influence, on this matter, over the Parliament while the 'merchants' representatives had influence over the Administration. This clearly shows just how political, rather than legal, the issue was for France.
[193] The Register of Copyrights of the United States of America, *supra* note 191. See also J. Merryman and A.E. Elsen *Law Ethics and the Visual Arts* 4th ed. (London: Kluwer Law International, 1987) p. 214 - 'It has also been asserted that the French Executive opposes extension to dealer sales, and therefore refuses to issue regulations, while parliament favours authors and will not abrogate the extension.'

but rather in the persuasiveness of the art dealers' lobby.'[194] If that were the end of the matter then the debate around the nature of the *droit de suite*, at least in this current context, may have quietened. However, subsequent to the signing into law of the 1957 bill a compromise was reached between the artists' collecting societies and the art gallery representatives.[195] This agreement stipulated that French galleries would pay an employer's 'social security subscription' to the artist's branch of the national social security fund[196] – even though artists were not gallery employees. The subscription was not based upon qualifying *droit de suite* sales but instead upon a percentage of the gallery's gross income.[197] This represented a new departure for the *droit de suite.* While previously the right attached to the exploitation or *use* of a work, much like the right of reproduction or performance, this novel application moved the right ever closer to Recht's description of a tax: '… collected by authority of the state and allocated to a public service.' In this instance, the provision of funds to 'needy artists' represented a form of welfare entitlement and therefore satisfies Recht's public service criterion. Despite this, Gutton, cautioned against confusing author's rights with social security mechanisms, the ' … *droit de suite* is not a welfare measure, but a means of enabling artists to obtain their rightful share in the proceeds of resale.'[198] This proposition however is open to challenge. Firstly, a welfare entitlement is generally characterised by a redistribution of resources from one section of society to another in order to address certain socio-economic

[194] Nimmer*, supra* note 50, at p. 3.
[195] The Register of Copyrights of the United States of America, *supra* note 191, at p. 23. Note that McAndrew and Dallas-Conte 'Implementing Droit de Suite (artists' resale right) in England' p. 33, state that this agreement was reached in 1954.
[196] The Register of Copyrights of the United States of America, *supra* note 191, at p. 23.
[197] *Ibid.* at p. 23 - fn 86, citing a telephone interview with Jean-Marc Gutton, Director General of ADAGP (Association for the Defence of Graphic and Plastic Arts) July 30, 1992.
[198] *Ibid.* at p. 23 - fn 87 (statement of Jean-Marc Gutton at a public hearing in New York, March 6 1992, of the US Registry for Copyrights) 'Droit de suite should not be considered as a capital gains tax, but as an artist's right which it is normal for them to receive.'

inequalities.[199] The redistribution of resources is usually performed via the mechanism of taxation. Much like 'the levy for the poor', the functioning of the *droit de suite*, as it related to gallery sales, served this redistributive function perfectly by taking a percentage of revenues from wealthy art market professionals (AMPs) trading in fine art – galleries – and redistributing these revenues to needy artists. In this limited context, the uncoupling of the exploitation of the work, from the derived financial reward of the artist, placed the *droit de suite* outside the strictures of the French authors' rights system. The *droit de suite* as it applied to gallery sales, during this period, therefore fell squarely within Recht's 'public service' criterion and accordingly acted as a form of social welfare.

Ginsburgh notes that in such circumstances where the right provides any form of social security, it should no longer be classed as an intellectual property right. The levy enforced by resale rights systems '… may be socially desirable and its implementation loaded with good intentions, but it is no longer an intellectual [property] right, and intellectual [property] rights should not be taken as an excuse for social security contributions … .' [200]

Nevertheless, it is not wholly clear whether the *droit de suite* as it applied to gallery sales at that time fully satisfies Recht's first criterion; 'collected by authority of the state.' Arguably, this arrangement between the French collective

[199] Although according to the US Supreme Court, '[a] tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the government [and] has never been thought to connote the expropriation of money from one group for the benefit of another. See *United States v. Butler* U.S. 1, 61 (1936). In *Bus v. Sebelius* 132 Supreme Court 2566, 2594 (2012) it was said that the 'essential feature of any tax' is that 'it produce some revenues for the Government.' These views do not necessarily reflect a European conception of tax.

[200] V. Ginsburgh, *supra* note 107, at p. 68.

management organisations (CMOs) and the art dealer's association was nothing more than a 'gentleman's agreement.'[201] In circumstances where implementation measures had not been enacted the galleries were in effect making these contributions of their own volition. However, it must be remembered that the 1957 amendment to the 'French Copyright Act' extended the application of the *droit de suite* to gallery sales.[202] While the galleries *de jure* obligations were *in utero*, the galleries representatives seized the opportunity to negotiate a scheme of arrangement that appeased the CMO's while securing terms for their members that were potentially less onerous than those about to come to fruition. It could be argued that the CMO's compromise was a tacit acknowledgment of the 'states authority' and in this regard completes Recht's concept of a tax.

In any case, this analysis is perhaps moot because in 1965 the arrangement was enshrined in Law. Funds collected from the galleries were now recognised under legislation as forming a social security fund, management of which passed, under legislative authority, to *Maison des Artistes.*[203] The *Maison des Artistes*, which is a social security society, continues to collect this welfare entitlement on behalf of qualifying artists.[204] One important observation concerning the French system is that the visual artists' welfare entitlement – which originated as a 'tax' on gallery sales in lieu of the *droit de suite* – is no longer connected to the French *droit de*

[201] See Oxford Dictionary of English, Angus Stevenson ed. 3rd ed. (Oxford: Oxford University Press, 2010) p. 722 ' An arrangement or understanding which is based upon the trust of both or all parties, rather than being legally binding.'
[202] *Supra* note 190.
[203] In 1965 a decree was passed by French legislators to allow the *Maison des Artistes* to manage the social security fund. See decree dated September 23, 1965 and March 30, 1978. The organisation was established in 1952. See <http://www.lamaisondesartistes.fr/site/la-maison-des-artistes-2/> (date accessed: 12 July 2017).
[204] CPAM (Caisse Primaire d'Assurance Maladie) The primary French health insurer then distributes this money to visual arts. See author's correspondence with *Maison des Artistes* February 2016.

suite, instead this entitlement is administered under the French social insurance system.[205] The clear separation of the welfare function, from the IP function in France today is telling in that it may reflect over a century of steadfast opposition to the classification of the resale right as a tax,[206] or perhaps in the alternative, the separation was simply a matter of practical convenience.[207] Nevertheless, the policy choice to separate these divergent functions reflects Becker's view that '… the droit de suite does not lend itself to being an instrument of social security', and that this function is the proper remit of social security systems.[208] On a related note, Ginsburgh questions whether the resale right is an 'equitable' means of redistributing income, and asks if there are other more viable and less disruptive alternatives?[209] Indeed this separation perhaps comprises a more satisfactory and efficient realisation of the aims of the original proponents of the *droit de suite.* Perhaps the *droit de suite* was never capable of providing a social welfare net for visual artists and that this objective is correctly placed outside of authors' rights circles and firmly within the purview of national social security institutions? A review of the German and Norwegian systems in Chapter 5 will inform this analysis.

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[205] Author's correspondence with ADAGP and *Maison des Artistes.*

[206] Duchemin, *supra* note 86, at p. 271 as cited by De Pierredon-Fawcett, *supra* note 8 at p. 149 - fn 5. J. Gutton as cited by US Register of Copyright Report (1992), *supra* note 1, at p. 24.

[207] Plaisant, *supra* note 109, writing in 1971, notes that the use of the *droit de suite* as a form of welfare was not a novel conception under French law: 'The proceeds right (although quite different from the legal view point) can be compared with a new institution, the Caisse National des Lettres, or CNL (National fund for literature). The CNL has been established by a law of 25 Feb. 1956. The most important revenue of the CNL is a tax, paid according to the rules applicable to fiscal taxes (purchase taxe, taxe a la valeur ajoutée). The rate is 10, 20%. This tax is paid by any editor whose turnover is over 100,000 frs. Most of this money is spent on paying old age pensions to writers, their husbands and widows, and their children. The law of 1920 was enacted when the general tendency was to protect people as individuals and not by collective means. It is possible to envisage a proceeds right in which monies are paid not to the individual artists but to a collective fund, which would disperse pensions, etc.'

[208] Becker *et al*. *supra* note 66, at p. 32; Plaisant, *supra* note 109, at p. 3.

[209] V. Ginsburgh, *supra* note 107, at p. 3.

Today, French galleries continue to pay a percentage of their revenues to the *Maison des Artistes.*[210] Under the Artists' Resale Right Directive all re-sales involving '… sellers, buyers or intermediaries art market professionals, such as salesrooms, art galleries and, in general, any dealers in works of art' are liable to pay. Accordingly, gallery sales in France are now subjected to a form of double taxation in the form of a social security contribution and an artists' resale royalty. A review of EU member states social security systems is beyond the scope of this thesis however assuming that this is not the norm in other EU member states, this double taxation places French galleries at a distinct disadvantage in comparison to other art market intermediaries, while admittedly greatly enhancing the position of qualifying artists.

3.6 Conclusion

It can be concluded from the foregoing that when compared to writers and composers, copyright law traditionally disadvantages visual artists because of the nature of their work: the tangible and intangible elements being indissoluble. One of the purposes of the ARR Directive is to redress this imbalance. All things being equal – regarding member states implementation measures – the ARR Directive has the capacity to reduce the earnings disparity between these creators. However the current ARR Directive predominantly rewards successful artists and not emerging or struggling artists.[211] While this concern, regarding who or what class of creator copyright rewards, does not form part of the

[210] Author's correspondence with the *Maison des Artistes*, 3 February 2016.
[211] See Chapter 2, p. 132.

accepted discourse on copyright law and policy it does form part of the underlying historical justification for the artists' resale right.[212]

A central question that this thesis addresses is whether the social security character engendered in the historic *droit de suite* has a place within the extant ARR Directive. Plaisant observed that the resale right was never at ease within traditional copyright rubrics; that it was a 'historical phenomenon' enacted to satisfy a specific need – the starving artist – and that its 'maintenance element' represented its most legitimate *raison d'être.*[213] It is this social element that historically underpinned the right's legitimacy and it is to this social focus that the ARR Directive ought to embody.

Under a strict utilitarian interpretation of IPRs there is clearly no room for such an approach. IPRs reward those creators that society deems valuable and not the contrary. However, Waldron offers a less dogmatic approach and suggests that '… in our legal culture, the defense (sic) of intellectual property is seldom cast in purely individualistic terms. Officially the justification is supposed to have more to do with the *social good* than with the individual natural rights of authors …' (emphasis added).[214] Arguably, by adhering to the strictures of extant EU IP law, the ARR Directive, places greater emphasis on 'form over function' and in doing so places greater importance on the character of the ARR Directive rather than focusing on the function that it ought to serve. The distinctly individualistic

[212] On the historical justification see Price *supra* note 55.
[213] Plaisant, *supra* note 178, at pp. 159 -160.
[214] J. Waldron 'From Authors to Copiers: Individual Rights and Social Values in Intellectual Property (1993) 68 (2) Symposium on Intellectual Property Law Theory, *Chicago-Kent Law Review* p. 849. Here the author cites cases such as *Millar v. Taylor*, 4 Burrows 2302, 98 Eng. Rep. 201 (1769) and *Donaldson v. Beckett*, 4 Burrows 2408, 98 Eng. Rep. 257 (1774) as authority for this statement.

character of the ARR Directive implicitly undermines the social basis of the historic *droit de suite* and in doing so undermines its *raison d'être.* If a social interpretation reflective of the historic *droit de suite* is adopted then there are potentially legitimate grounds for a social welfare, social security or income maintenance component with the extant ARR Directive. Under such a rubric the potential liminality of the ARR Directive is brought to the fore and the right may be understood as much a social right as an economic right. Framed accordingly the ARR Directive is capable of performing a redistributive function, channelling a portion of ARR royalties collected into a social fund which could in turn be distributed to less successful visual artists. Importantly, this form of redistribution is not the 'Robin Hood in reverse' that Price conceived of but an actual distribution of wealth from visual artists that society values, and therefore benefit from the ARR Directive, to visual artists that society has not yet had the opportunity to appreciate and arguably may never appreciate.

Nevertheless, the current chapter presents a compelling counter argument to a socially oriented, redistributive ARR rubric. It will be remembered that while established and often wealthy visual artists receive the greatest share of ARR royalties by value, a modest coterie of visual artist benefit from the ARR by volume. This finding suggests that the ARR Directive functions efficiently and is not in need of reform.[215] However, to leave the matter there would ignore the vast inequality in terms of distribution between established and nascent career visual artists. Again, a socially oriented ARR Directive with an ancillary redistributive element may 'cure' this shortcoming. Although a pertinent

[215] For further see Chapter 2.

question in this regard is whether a concern for marginalised and potentially 'talentless' visual artists is a function of the traditional copyright paradigm? After all, copyright is not social welfare. Nevertheless, it is this limited and contemporary view of copyright that this thesis challenges. Accordingly, Chapter 4 provides a theoretical basis that supports a socially oriented ARR Directive that reflects a less individualistic and historic understanding of the role of copyright.

As to the initial question of whether society values the creators of great works of art, it is proposed that an ARR regime that incorporates a social security function acknowledges the binary and dependent relationship between visual artists and society. The question of whether the inclusion of a social function under the current EU schema is possible is addressed in Chapter 5.[216]

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[216] The majority of themes and arguments within this chapter have been published in: A. O'Dwyer, 'The Nature of the Artists' Resale Right – from antiquity to modernity' (2017) 1 *Intellectual Property Quarterly.*

Chapter 4 – Theoretical Framework

4.0 Introduction

The content of a society's law is the product of its political,[1] social,[2] cultural[3] and economic institutions.[4] Brierly asserts that the law '… is only a means to an end, and that end is to assist the problems of the society in and for which it exists.[5] For Dias '[t]o understand a rule one has to see which social interest gave rise to it

[1] T. Hobbes *Leviathan* (1651) Richard Tuck ed. (Cambridge: Cambridge University Press, 1996) Hobbes viewed law as an instrument of political sovereignty; According to Cotterell, 'An *instrumentalist* approach would argue that the determinants of judicial creativity derive from outside law or legal doctrine as such – in a variety of policy considerations, social pressures, political factors or economic imperatives.' Here the author is drawing from R. Pound's distinction between sociological and analytical jurisprudence. R. Cotterrell *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (London: Butterworths, 1989) p. 156. Furthermore, Cotterell at p. 166 links the work of Pound and Dworkin, noting that for these authors the 'hard cases' (that is, one for which an answer is not given merely by logical application of existing rules) are decided by non-legal factors; S. Law 'Legislation and Politics' in D. Feldman ed. *Law in Politics, Politics in Law* (Oxford: Hart, 2013) p. 87; the author also notes at p. 94 that '… most legislation is only passed because those who promote it wish it to achieve an objective that has been set for political purposes and promoted in the political arena.' G. Halisi, P. Kaiser and S. Ndegwam 'Introduction: the multiple meanings of citizenship – rights, identity and social justice in Africa' (1998) 45 (3-4) pp. 337 - 350, '… civil society creates pressures for political choices and legislatures.' For Joseph Raz '… at the highest philosophical abstraction, the doctrine of the nature of law can and should be concerned with explaining law within the wider context of social and political institutions.' See J. Raz *Ethics in the Public Domain: Essays in the Morality of law and Politics* (revised ed.) (Oxford: Clarendon Press, 1996) p. 208.

[2] See generally, E. A. Posner *Law and Social Norms* (London: Harvard University Press, 2002); A. Marmor & A. Sarch 'The Nature of Law' (2015) Fall ed. *Stanford Encyclopedia of Philosophy* < http://plato.stanford.edu/archives/fall2015/entries/lawphil-nature/ > (date accessed: 12 June, 2017); See also Von Ihering *Law as a Means to an End*, I. Husik translation (Boston: Boston Book Company, 1968) p. 67. For Ihering, law was but an instrument to serve the needs of society. 'Our whole life … [is] a working together for common purposes, in which everyone in acting for others acts also for himself, and in acting for himself acts also for other. … Human life and social life are synonymous' See also S. L. Roach Anleu *Law and Social Change* 2nd ed. (London: Sage, 2010) p. 9; Dias notes that '[t]o understand a rule one has to see which social interest gave rise to it and how they were adjusted by the rule. Its interpretation and application should seek to ensure that those interests, which the law-maker preferred, shall prevail' see Dias on the Tübingen School of legal philosophy. R.W.M. Dias *Jurisprudence* 4th ed. (London: Buttersworth, 1976) p. 595.

[3] R. Byrne and J.P. McCutcheon *The Irish Legal System* 4th ed. (Dublin: Tottel Publishing, 2007) p. 21.

[4] See generally R. A. Posner *Economic Analysis of Law* 1st ed. (Boston: Little Brown, 1973).

[5] J. L. Brierly *The Basis of Obligation in International Law: And Other Papers* H. Lauterpacht and C. H. M. Waldock eds. (Oxford: Scientia, 1977) p. 72.

… .'[6] The *droit de suite,* as it developed in 19th and 20th century France, is symptomatic of this interdependence; political impetus to legislate derived from a social concern for the plight of the 'starving artist'.[7] Arguably, the marginalization of these cultural creators not only threatened the principles of *Liberté, Egalité and Fraternité,* upon which the French Republic and French republicanism is built,[8] but also the quality and character of French culture itself.[9] Indeed at the heart of French republicanism lies a communitarian ideal that recognises societys obligation to protect its weakest members.[10] In a society that adopts a more inclusive understanding of citizenship and community, visual artists undoubtedly faired better than contemporaries in neighbouring liberal jurisdictions where social inclusion was not a political aspiration.

In the general field of copyright one of the most interesting points of analysis concerns the contrastive nature of common law copyright and civil law authors' rights. Of specific interest is how these parallel systems developed such radically divergent concepts of the author. An example of this divergence is the development of moral rights in civil law countries such as France and Germany with no apparent historic corollary in common law countries such as Ireland and

[6] Dias, *supra* note 2, at p. 595.
[7] R. Hauser 'The French Droit de Suite: The Problem of Protection for the Underprivileged Artist under the Copyright Law' (1962) 11 *Copyright Law Symposium,* p. 1; R. Plaisant – 'The Droit de Suite' *General Studies - Copyright* (1969)*: Monthly Review of the United Bureaux for the Protection of Intellectual Property* (BIRPI) pp. 150 - 160 'an historical phenomenon'. For an alternative view challenging the idea of the 'starving artist' see R. Filer 'A Theoretical Analysis of the Economic Impact of Artists' Resale Royalties Legislation' (1994) 8(1) *Journal of Cultural Economics*, p. 1 - 28.
[8] I. Honohan 'Freedom as Citizenship: The Republican Tradition in Political Theory' (2001) 2 *The Republic – A Journal of Contemporary and Historical Debate*: *'The Common Good'* p.7.
[9] R. Filer 'The 'Starving Artist' - Myth or Reality? Earnings of Artists in the United States Author(s)' *Journal of Political Economy* (1986) 94(1) p. 57. Filer notes, albeit in a contemporary context, a general concern that without adequate income, artists might leave the market, thereby resulting in the overall impoverishment of society.
[10] H. Dean *Social Rights and Human Welfare* (London: Routledge, 2015) p. 10.

the UK.[11] Indeed, it has long been observed that common law copyright primarily developed to protect the publisher whereas civil law author's right developed to protect the author first and foremost.[12] In this regard, a pertinent question concerns the *why* of this conceptual antithesis. Surely the author ought to form the basis of any system that purports to concern itself with the plight of the creator?[13] This chapter investigates this divergence by looking at the political and social environment in which these systems developed: specifically the political traditions of liberalism and civic-republicanism.

The chapter suggests that the concept and prominence of the author in civil law countries derived directly from the social and political environment in which it was conceived. It is proposed that in France the communitarian hue of civic-republicanism and its apparently competing demands of individualism and community brought about rights that both protected the personality of the author as well as guaranteeing his place within society. This is in stark contra-distinction to copy-centric systems borne out of free-market liberalism where the

[11] Although the case of *Prince Albert v. Strange* (1849) EWHC Ch J20, would suggest otherwise. In this case the British courts recognised the right of disclosure in circumstances where the private letter of Prince Albert had been acquired and published by a publishing house. The Court held that the author of such letters had a right to determine if and when they might be published.

[12] See E. Adeney in *The Moral Rights of Authors and Performers – An International and Comparative Analysis* (Oxford: Oxford University Press, 2006); see also L. R. Patterson *Copyright in Historical Perspective'* (Nashville: Vanderbilt University Press, 1968) p. 228.

[13] Gómez-Arostegui states that history sets the 'default basis' for copyright – in relation to authors he notes that if copyright originated as a common law right, this suggests that 'the principal purpose was to protect authors', whereas if it originated as a privilege created by statute, this indicates that copyright should principally benefit the public.' See H. T. Gómez-Arostegu 'Copyright at Common Law in 1774' *CREATe Working Paper* 2014/16 p. 1, originally published in *Connecticut Law Review as Copyright at Common Law in 1774*, (2014) 47 (1) *Conneticut Law Review*; See also B. Sherman and L. Bently *The Making of Modern Intellectual Property Law: The British Experience 1760 - 1911* (Cambridge: Cambridge University Press, 2003) p. 35 - 37, here the authors discuss the idea of the individual as creator and the use of this idea by London book sellers to further their ends – i.e. to extend copyright protection for their own benefit. In this way the author was portrayed as central to the burgeoning copyright paradigm but ultimately played second fiddle. Arguably, what is good for the goose is good for the gander and authors were not disadvantaged by the lobby influence of wealthy London publishers, irrespective of the limits this placed on their individual agency.

protection afforded creators is largely a by-product of commercialism and the lobby influence of market actors.[14] In the context of creator rights, and specifically copyright, where industry actors influence the political and legal agenda the voice of the author is almost inevitably lost. This in turn creates a legal rights framework where commercialism is placed at the pinnacle of the creative rights rubric to the detriment of cultural workers. An underlying theme of this thesis is that the extant copyright framework of EU common law jurisdictions – such as Ireland and the UK – inadvertently marginalised creators, depriving them of the social protection available in other EU member states.

In support of the aforementioned this chapter develops the link between, civic-republicanism, communitarianism and social citizenship. The common thread that these political theories share is that individuals do not exist in isolation and are not wholly autonomous but must be seen as members of a socially and politically connected community that protects all its members from marginalisation. This theme of community, which is a recurring theme of this chapter, is explored in sections 4.2 and 4.3.

Section 4.4 considers social citizenship which in turn provides a theoretical framework through which to analyse the subject matter of section 4.7. That section explores three primary justifications for intellectual property rights (IPRs)[15] as espoused by Locke, Bentham and Hegel. Section 4.6 provides a background to these justifications by considering the market failure that copyright law attempts to correct. In the context of the artists' resale right the

[14] See Sherman and Bently *supra* note 13, at p. 35 - 37.
[15] And by default the artists' resale right.

aforementioned justifications largely prove wanting when viewed in isolation, it is therefore argued that a dialectical approach is warranted. Each justification is therefore analysed through the framework of social citizenship. A synthesis of the aforementioned theories and social citizenship provides a more thorough-going justification for the artists' resale right than previously espoused and in doing so presents a novel but rigorous theoretical grounding for reform proposals. This dialectic draws heavily from the civil law's tradition of civic-republicanism and communitarianism. This is not to say however that this dialectical justification is in conflict with the current liberal construction of copyright that exists in common law jurisdictions such as Ireland and the UK. Indeed, both these legal jurisdictions operate within the context of a 'mixed economy' or welfare state. Accordingly a 'mixed' or combined understanding of copyright as both a free-market tool and as a tool of a larger social policy agenda is not without merit and is not unprecedented.[16] Furthermore, an understanding of the artists' resale right as both an economic right and as a social right is a theme returned to throughout this thesis.

Within the overall context of this thesis, Chapter 4 provides a theoretical basis to the observations made in Chapter 3 that historically, the historic *droit de suite* provided a form of income security for visual artists. This theoretical framework is based upon the dialectic of social citizenship and Hegel's personality theory, which in turn provide the framework upon which the reform proposals of Chapter 6 are based.

[16] For instance, throughout Europe artist tax exemptions and government funding (via Arts Councils) fulfil many of the socio-economic deficiencies of the extant copyright rubric.

4.1 The *Droit de Suite* – an Instrument of Social Welfare?

At the crux of the debate surrounding the *droit de suite* is the idea that it is a form of welfare.[17] Again, Becker asserts that '… the *droit de suite* does not lend itself to being an instrument of social security …' and '... is not suited to the function of wealth redistribution.'[18] Indeed, the provenance of intellectual property rights in common law jurisdictions does not suggest such a link.[19] The same, however, cannot be said of the *droit de suite*, the French pre-cursor to today's Artists' Resale Rights Directive. The socio-political ideologies[20] of 19th and 20th century France imbued the *droit de suite* with social values which challenged the liberal individualism of the free-market.[21] And while the *droit de suite* does not represent nor constitute the character of civil law intellectual property rights (IPRs) in their entirety, it does suppose a legal and political environment that supports the use of IPRs as a means of achieving social goals.[22]

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[17] T. M. Goetzl and S. A. Sutton 'The Visual Artist's Display Right' (1984) 9 (15) *Columbia Journal of Art and the Law,* p. 41.

[18] L. Becker, P. Huber and E. Kronjager (Project Leader: Marlies Hummel) *The Droit de Suite* Report Commissioned by the French Authors' Society ADAGP, The German Authors' BILD-Kunst and the Groupement Européen des Sociétés d'Auteiurs et Compositeurs (GESAC) (Munich: IFO Institut, 1995) p. 32; E. Hudson and S. Waller 'Droit de Suite Down Under: Should Australia Introduce a Resale Royalties Scheme for Visual Artists?' (2004) 115 *University of Melbourne Law School, Legal Studies Research Paper, Media & Arts Law Review* (2005) 1(10) p. 15 noting that copyright '… was never intended to act as a vehicle for the equitable redistribution of wealth.'

[19] See generally, Sherman and Bently *supra* note 13.

[20] Dion defines political ideology as a '… a more or less integrated system of values and norms, rooted in society, which individuals and groups project on the political plane in order to promote the aspirations and ideals they have come to value in social life.' See L. Dion 'Political Ideology as a Tool of Functional Analysis in Socio-Political Dynamics – An Hypothesis' (1959) 25 (1) *The Canadian Journal of Economics and Political Science / Revue canadienne d'Economique et de Science politique*, p. 49.

[21] See R. Nozick *Anarchy State and Utopia* (Oxford: Basil Blackwell, 1974) p. ix. In contrast, Biagini notes that for 'advanced Liberals' 'community' was a crucial concept. See E. F. Biagini *Citizenship and Community: Liberals, Radicals and Collective Identities in the British Isles, 1865 - 1931* (Cambridge: Cambridge University Press 2002) p. 1.

[22] For Durkheim, the prevailing type of law is an indication of the type of society, and changes in law signal the nature and type of social change. Accordingly, in this context, the *droit de suite* represented a social concern juxtaposed to early liberal ideology. See S. L. Roach Amleu *Law and Social Change* 2nd ed. (London: Sage, 2010) p. 4.

That is not to say that the use of IPRs as a social and political tool is unknown in common law jurisdictions. Patents, trademarks, copyright and design rights, all attempt to strike a balance between the needs of individual creators and society.[23] The distinction however may be drawn in terms of each of these system's grounding social and political ideologies. Traditionally, this has been presented as the struggle between republicanism and liberalism as ideological alternatives. These apparently disparate political ideologies undoubtedly informed the character and content of common law copyright and civil law authors' rights systems.[24] The question therefore is whether, in France, republican ideology created a political, social and legal environment in which IPRs such as the *droit de suite* functioned as a tool of social policy? If this is the case then Becker's comments may prove wanting. To address this question, it is necessary to explore these alternative ideologies.

The following section explores the competing political ideologies of liberalism and civic-republicanism in an attempt to discover whether these ideologies influenced the nature and scope of the forebear to the Artists' Resale Right the *droit de suite.* Based upon these observations the thesis builds the argument for a socially constructed artists' resale right (ARR) regime reflective of its civil law origins.

[23]'Intellectual property as regulation situates intellectual property law beyond the domain of individual decision-making and control. Patents, copyrights, trade marks and the other species of intellectual property are understood to have a social dimension. They are the means to a social end beyond the protection of individual self-interest.' S. Ghosh, 'When Property is Something Else: Understanding Intellectual Property through the Lens of Regulatory Justice' in A. Gosseries, A. Marciano, and A. Strowel (eds.), *Intellectual Property and Theories of Justice* (Palgrave Macmillan 2008) p. 114.

[24] Raz is acutely aware of the effect that external forces can exert on the internal nature of law; '… because the law thrives in a variety of political and cultural environments, it can have very different meanings and moral justifications from country to country.' Raz, supra *note* 1, at p. 370.

4.2 Two Traditions of Thought: Civic-Republicanism and Liberalism

Tushnet, who cites Locke and Mill, amongst others, as representative of liberal political theory defines liberalism as a

> '… psychology [which] posits a world of autonomous individuals, each guided by his or her idiosyncratic values and goals, none of which can be adjudged more or less legitimate than those held by others. In such a world, people exist as isolated islands of individuality who choose to enter into relations that can metaphorically be characterized as foreign affairs … . In a world of liberal individualism … if one person's values impel that person, for example, to seize the property of another, the victim cannot appeal to some supervening principle to which the assailant must be committed.'[25]

Dworkin disagrees with this definition and notes that 'liberals … are normally interested in one another's fates' and to suggest that liberals cannot appeal to a principle of justice is 'absurd'.[26] Developing upon Dworkin's objection, Sandel defines contemporary liberalism as an ideal which defends a strong notion of individual rights, but also demands of its citizens a high measure of mutual engagement. It insists on the 'plurality and distinctness of individuals,' but also requires that we 'share one another's fate,' and view our natural talents as common assets.[27] Tushnet and Sandel's definitions arguably represent opposite

[25] M. Tushnet 'Following the Rule Laid Down: A Critique of Interpretivism and Neutral Principles' (1983) 96 *Harvard Law Review* p. 783.
[26] R. Dworkin *Law's Empire* (Oxford: Hart Publishing, 2010) pp. 440 - 441.
[27] J. Rawls *A Theory of Justice* (Oxford: OUP, 1971) pp. 101 - 102.

ends of the liberal spectrum; Tushnet adopting a very right leaning, individualistic view of liberalism while Sandel's account supposes a liberalism cognisant of the importance of the community and not just of the individual.[28]

In contradistinction to the Anglo-American liberalism upon which the free market is said to be based, 'France continues … to construct a polity around the idea of the citizen rather than the consumer.'[29] For Arendt, republicans are concerned with the 'liberties of the ancients' – participation in political governance – rather than liberals' emphasis upon the 'liberties of the moderns' – personal attachments and projects.[30] Fitzpatrick describes republicanism as a political philosophy based upon citizenship which is concerned with the 'public good' and civic virtue rather than private interest.[31] Under this political philosophy there is a sense of community in which citizens are not just private individuals.

According to Honohan:

> '... all republican arguments seem to spring from a sense of the ineluctable interdependence of human beings, whose survival and flourishing depends on the kind of social frameworks they inhabit, and

[28] Biagini, *supra* note 21, at p. 1; for 'advanced Liberals' 'community' was a crucial concept.
[29] J. Livesey 'The Culture and History of French Republicanism: Terror or Utopia? (2001) 2 The Republic – *A Journal of Contemporary and Historical Debate: 'The Common Good'* p. 48, 'French republicanism has not just been institutionally and culturally successful: after the demise of socialism, it is the major, if not the only, intellectual alternative to Anglo-American liberalism.'
[30] H. Arendt *The Human Condition* (Chicago, Chicago University Press, 1958). See also T. Fitzpatrick *Welfare Theory: An introduction to the theoretical debates in social policy* 2nd ed. (Hampshire: Palgrave MacMillan, 2011) p. 78. See also Benjamin Constant's contrast between 'the liberty of the ancients' (participation in public power) and the 'liberty of the moderns' (private enjoyment of independence), B. Constant *Political Writings* (Cambridge: CUP, 1988).
[31] T. Fitzpatrick *New Theories of Welfare* (Basingstroke: Palgrave, 2005) p. 13 - 15.

> who have common, as well as separate and conflicting, interests. The political question with which republicans are concerned is what kind of *freedom* is possible in the light of this interdependence, and how it may be realised.'[32]

For Honohan this 'freedom' requires political equality and rests on two dimensions of active citizenship – civic virtue and political participation – citizenship therefore entails responsibilities as well as rights.[33] While there are many varying conceptions of the republican ideal,[34] the focus here will be on the French construction as it developed after the French revolution of 1789.[35] This form of political thought, often referred to as 'civic-republicanism', precedes the French construction and stretches back to ancient Greece and Rome.[36]

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[32] Honohan, *supra* note 8, at p. 7.
[33] *Ibid.* at p. 8.
[34] *Ibid.* at p. 7, '… there are almost as many hues of republican thought as there are of liberalism, socialism or conservatism.' See also F. O'Ferrall 'Civic-Republican Citizenship and Voluntary Action' (2001) 2 *The Republic – A Journal of Contemporary and Historical Debate: 'The Common Good'* p. 126. 'Aristotle's Politics and the Nicomachean Ethics are seminal texts originating a body of thought about the citizen and the citizen's relation to the common good (the res publica) and about the republic (or polis) as a community of values. From Aristotle, we can trace this body of thought as it develops (and changes with the context) through Cicero in Roman times, to the civic humanists and Machiavelli in the Renaissance, to Harrington in the seventeenth century, to Rousseau, Montesquieu and Paine in the eighteenth century, down to modern civic-republican thought as expressed by Hannah Arendt and, more recently, by Oldfield, Dagger and Pettit. Central to this civic republican tradition is the doctrine of 'uno vivere civile e politico', to use a phrase of Machiavelli, meaning a particular political and civil way of life based upon the practice of active citizenship. See also Livesey *supra* note 29, at p. 51; 'French republicanism was a total departure from the 'classical' variety … [c]lassical republicanism was not an egalitarian creed. Citizens in the classical tradition were differentiated by their capacity for *virtu* or public service. There was no contradiction between the tenets of classical republicanism and the adherence of many of the founding fathers of the United States, including Jefferson, to slave-holding. Classical republicanism derived political function from social position. The key text of the Atlantic republican tradition, James Harrington's *Oceana*, identified the land-holding barons as the backbone of the republic. Their material circumstances made them independent and incorruptible, therefore they were uniquely suited to the duties of citizenship.'
[35] See Livesey *supra* note 29, at p. 48; In this context Livesey notes that '[w]ith the notable intermission of Vichy, France has remained a republic since 1871 and the political form has provided the context for impressive sets of reforms … French republicanism has not just been institutionally and culturally successful: after the demise of socialism, it is the major, if not the only, intellectual alternative to Anglo-American liberalism.'
[36] Honohan, *supra* note 8, at p. 7.

According to Livesey;

> '[t]he central institution of the French revolution was that, despite the obvious social, economic and cultural inequalities generated by modern commercial societies, men should be politically equal. Citizenship was not to be derived from social function; citizenship would rescue men from their alienation from one another in society. The French revolution committed itself to the most untrammelled version of individualism, it promised that man could be regenerated, that is returned to his authentic self, through his commitment to the common good.'[37]

Interestingly, Livesey's construction of republicanism, and its emphasis on individualism, points towards a form of liberalism, while Sandel's definition of liberalism, and its emphasis on community, shares many of the republican ideals. For two apparently competing philosophies there is a clear cross pollination in terms of norms and values. It may be observed that liberalism can mean more than absolute individualism, in the face of the community, while republicanism, can allow for a form of individuality which does not exclude community participation.[38] Indeed, Skinner has observed that republicanism did not emerge as an anti-liberal theory, but as a pre-liberal theory.[39] Accordingly, a more fluid interpretation of these ideologies may be inferred. The importance of drawing upon these parallels is that while the *droit de suite* may have derived from a

[37] Livesey, *supra* note 29, at p. 51.
[38] Q. Skinner, 'The Republican Idea of Political Liberty', in G. Bock, Q. Skinner and M. Viroli (eds), *Machiavelli and Republicanism*, (Cambridge: CUP, 1990) p. 302. For a systematic discussion of the relation between 'republicanism' and 'liberalism' see D. T . Rodgers, 'Republicanism: the Career of a Concept', *The Journal of American History,* (1992) 79 (1), p. 11 - 38.
[39] *Ibid*. Skinner, at p. 309.

civic-republican ideology, it is not incompatible with the liberal tradition as both liberalism and republicanism exist on the one spectrum. This point will be returned to when presenting the argument for a socially orientated EU ARR regime.

As already noted, French republicanism constructs a polity around the idea of the citizen rather than the consumer.[40] It is this concept of the 'citizen' as opposed to the 'consumer' which defines the early social character of the *droit de suite*. Shifting the emphasis from the property rights of the purchaser/consumer to the social rights of the citizen confers certain duties and obligations in addition to rights and privileges.[41] However, the notion of a strict consumer-citizenship binarism does not enjoy widespread support. For Dean, the idea of citizenship is as much a part of the liberal tradition as it is a part of the republican tradition.[42] Nevertheless, the liberal citizenship tradition has tended towards a formal or procedural approach to equality while the civic-republican tradition adopts a more substantive approach.[43] Under the former construction, formal equality – equality of opportunity – takes precedence, thus potentially perpetrating social disadvantage. Anatole France's aphorism arguably encapsulates the deficiencies of the procedural approach: 'The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.'[44] Therefore, while in theory citizens are all equal, in practice, one's socio-economic status, education, environment and so forth determines the content of

[40] Livesey, *supra* note 29, p. 48.
[41] For more on these 'jural relations' see W. N. Hohfeld *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Surrey: Aldershot, 2001).
[42] Dean, *supra* note 10, at p. 10.
[43] *Ibid.*
[44] A. France *Le Lys Rouge* (Paris: Calmann Lévy, 1849).

that equality. Nevertheless, the question remains, how is substantive equality achieved without depriving man of his liberty? The following section explores communitarian theory, and its focus on inclusion.

4.3 Communitarianism

An important feature of the communitarian theory is that it extends the principle of responsibility for harm and compensation beyond the market liberal conception. For Dean, '[c]ommunitarian versions of the civic-republican tradition emphasise equality of belonging, inclusion and respect rather than strict material equality.'[45] It acknowledges individuals' debt to others for their own achievements. It acknowledges that individuals do not exist in isolation and where one sub-section of a society benefits from the market economy while another is marginalised[46] a redistribution of resources is required.[47] This redistribution of resources is based on the concept of compensation. The principle of compensation or damages as a remedy for loss or harm is no stranger

[45] Dean, *supra* note 10, at p. 10; '… though social democratic derivations of the tradition support broad equality of material outcomes.'

[46] P. Townsend *Poverty in the United Kingdom* (London: Penguin, 1979) p. 57; Townsend believes that '… as resources for any individual or family are diminished there is a point at which there occurs a sudden withdrawal from participation in the customs and activities sanctioned by the culture' D. Harris *Justifying State Welfare* (Oxford: Basil Blackwell, 1987) p. 51; that '[b]eyond a certain point, lack of resources entails exclusion; individuals are "in" but not "of" the community.'

[47] Honohan *supra* note 8, at p. 9, noting that early Greek republicanism acknowledged the function of wealth redistribution: 'Aristotle also saw that socio-economic conditions affect the success of the *polis.* Small states in which citizens know one another will be better able to generate common concern and accountability. Inequalities between citizens tend to undermine their political equality and destabilise the *polis.* So he endorsed redistributive measures to counteract this, such as public provision of land or employment, and payment for participating in the assembly and serving in office.' Furthermore, James Harrington's conception of classic republicanism guaranteed the political equality of citizens by limiting economic inequality. Independence from the will of others was a pre-cursor to citizenship. J. Harrington *The Commonwealth of Oceana and A System of Politics* (Cambridge: Cambridge University Press 1992). On economic inequality, Rousseau adopts a similar position 'No citizen should be so rich as to buy another, and none so poor that he is constrained to sell himself.' J.J. Rousseau *The Social Contract* (Harmondsworth: Penguin 1968), p. 96.

to legal theory. The concept can be seen is various areas of the law, including contract law,[48] copyright law,[49] tort law[50] and to a lesser degree, criminal law.[51] The principle of compensation is generally based on the concepts of duty, breach, loss and harm.[52] In other words there must be a duty owed, a harm caused, subsequent loss, a causal relationship between the two parties and where fault is found, provided it is not too remote, an award of damages.[53] From an economic perspective the market liberal understanding of compensation is quite narrow, and rightly so, it limits the potential class of individuals to which one may owe a duty. Therefore, the law draws a line regarding the amount of liability to which any one person may be reasonably exposed.[54]

Nevertheless, within the social policy sphere a strong case has been made for a wider conception of the compensation principle.[55] This is a break from the narrow conception of responsibility as put forward by market liberals who insist on a general duty of non-interference where there are no special relationships.[56] In jurisdictions where a progressive social policy agenda is pursued, a broader conception of responsibility and compensation impacts upon the normative

[48] E. A. Posner, *supra* note 2, at pp. 829 - 880.
[49] See Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167 [hereinafter InfoSoc Directive]; Recital 35 'In certain cases of exceptions or limitations, rightholders should receive *fair compensation* to compensate them adequately for the use made of their protected work or subject matter.'
[50] See generally M. Geistfeld 'Compensation as a Tort Norm' in John Oberdiek, ed. *Philosophical Foundations of Tort Law* (Oxford: Oxford University Press, 2014).
[51] *Ibid.,* See also A. Duff 'Theories of Criminal law' Stanford Encyclopedia of Philosophy (2013) <http://plato.stanford.edu/archives/sum2013/entries/criminal-law/> (date accessed: 12 July 2017).
[52] See K. S. Abraham *The Forms and Functions of Tort Law* 4th ed. (St. Paul: Foundation Press, 2002), Abraham's argument identifies and focuses on the four conceptual elements, common to all torts: duty, breach, causation and harm; see also S. Hedley *Tort* 6th ed. (Oxford: OUP, 2008).
[53] *Ibid.* Abraham's argument identifies and focuses on the four conceptual elements, common to all torts: duty, breach, causation and harm; see also S. Hedley, *supra* note 52.
[54] *Ibid.* Hedley, at p. 21 - 31.
[55] Harris, *supra* note 46*,* at p. 34.
[56] *Ibid.*

function as well as the positive character of the law.[57] Within social policy and welfare theory the compensation principle implicitly invokes notions-of-fairness and well-being.[58] The principle also forms part of a communitarian understanding of society as opposed to an individualistic approach inferred by market liberals.[59] The compensation argument is most clearly suggested by Titmuss, who argues those who are to be compensated are members of a class, or group who are making a contribution to the well-being of another class or group.[60] Those who receive the benefits of the social process are therefore under a duty to compensate.[61]

The foundation of the compensation principle can be seen from two perspectives: a) contribution, and b) a right not to be harmed. Firstly, where one person's losses are a necessary condition of another person's gain – i.e. there has been a contribution – the former is entitled to recompense from the latter.[62] Alternatively, the foundation of the principle trades on a right not to be harmed. This does not suggest that the harm caused constitutes a contribution to the welfare of others.[63] Under this construction, to justify compensation, it is necessary only to demonstrate the harm caused. There is no further requirement

[57] *Ibid*
[58] *Ibid*
[59] H. O. de Boor, 'Der NSJ-Entwurf und die Urheberrechtsreform', UFITA 1934, p. 413. Comp. G. Michaélides-Nouares, *le droit moral de l'auteur* (Arthur Roinsseau: Paris, 1935). Grosheide, citing De Boor (1934) states that 'on the continent the emergence of communal thinking led to polarization between French and German doctrine… .' 'The nationalist Socialist notion of law takes as its starting point the people as a whole. (…) All private law, including the law of authors' rights, becomes socially concerned law. Here lies the basic difference between the German and the French concepts of law, the French concept taking as its starting point the right of the individual.
[60] See Harris *supra* note 46, at p. 35; R. M. Titmuss *Commitment to Welfare* (NY: Pantheon Books, 1968).
[61] *Ibid.*
[62] See Harris, *supra* note 46, at p. 35. Theorists such as Marshall and Titmus based much of their work on the social change which Britain experienced after WWII.
[63] *Ibid.* at p. 36.

to show that the harm caused and loss suffered made some form of contribution. Harris notes that from a moral point of view, the contribution formula has a definite appeal.[64] Indeed, in the context of the ARR it is far more appealing to think of the visual artist's right to further resale royalties as deriving from his/her contribution to the purchaser's future financial gain rather than compensation for harm endured.

Irrespective of which formula is adopted, Harris notes that the compensation principle as understood in this context is too broad and would result in some unusual and unintended results. [65] One way of narrowing the compensation principle is through the application of citizenship theory.[66] The following section outlines three theories of citizenship before focusing on Harris's theory of social citizenship.

4.4 Citizenship Theory/Social Citizenship

According to Isin and Turner, '[c]itizenship is both a legal status that confers an identity on persons and a social status that determines how economic and cultural capital are *redistributed* and *recognized* within society.'[67] The work of T.H.

[64] Harris, *supra* note 46, at p. 36; 'Not only is there responsibility for the harm caused, but one is claiming that it is repugnant to profit at someone else's expense. So stated the principle captures intuitions of the injustice of exploitation.'
[65] *Ibid.* Harris expands upon this idea in the following example: Susan and Sally are neighbours. Both enjoy gardens. Only Sally likes to Garden. From her bedroom window Susan has an uninterrupted view of Sally's garden and spends many hours admiring it. Sally notices this and asks Susan to pay her some part of the cost of the garden. The external benefit of the garden is surely not one for which Susan is under any duty to pay, even if there is nothing to stop Sally building a wall, blocking the view and then charging a price to remove it.
[66] E. Jones and J. Javenta 'Concepts of Citizenship: A Review' (2002) Institute of Development Studies, Development Bibliography 19; M. Sandel *Liberalism and the Limits of Social Justice* (Cambridge: CUP, 1998).
[67] E. Isin and B. Turner 'Investigating Citizenship's An Agenda for Citizenship Studies' (2007) 11(1) *Citizenship Studies* at p. 14.

Marshall, remains the key point of departure for any discussion on citizenship, for Ellison it

> '… stands as the quintessential expression of [UK] post-war optimism about the capacity of the modern nation-state to act as a force for social cohesion, defining the relationship between state and individual citizen-members in terms of the institutionalised paternalism of state welfare.'[68]

Nevertheless, this form of citizenship has been criticized for conceiving of the nation-state as somehow '… unaffected by power politics and manipulation by dominant elites.'[69] For some, the greatest failing of Marshall's construct was that he did not consider that an imperfect state might propagate existing social and political divisions.[70] Others such as Offe criticise Marshall's inattentiveness to the accumulation requisites of capitalism[71] and the limitations that this places on the welfare state.[72] This aside, Marshall's tripartite construction of citizenship – civil, political and social – with its focus on social rights is paradigmatic of the

[68] N. Ellison 'Towards a New Social Politics: Citizenship and Reflexivity in Late Modernity' (1997) 31(4) *Sociology*, p. 698. It should be noted that Marshall's work primarily focused on post WWII Britain.
[69] *Ibid.* at p. 699.
[70] See generally M. Mann 'Ruling Class Strategies and Citizenship' in M. Bulmer and A.M. Rees (eds.) *Citizenship Today: The Contemporary Relevance of T.H. Marshall* (London: UCL Press, 1996); Ellison, *supra* note 68, at p. 700 'He consequently underestimated the potential for democratic dissent as citizens came to question the motives behind the state's role as provider and protector of social rights.' Furthermore P. Kivisto and T. Faist *Citizenship: Discourse, Theory and Transnational Prospects* (Oxford: Blackwell Publishing, 2009) pp. 65 - 66; noting that Marshall's optimistic view that once in place, the three types of citizenship – civil, political and social – would become institutionalized and would not be subject to reversal has not held true in many advanced industrial nations and that in the past three decades social rights have been rolled back and inequality has grown.
[71] *Ibid.* at pp. 65 - 66 'At the economic level, the problematic nature of the relationship between the capitalist economy and the state is contained in the reality that the latter both facilitates capital accumulation when it invests in the promotion of economic development, but it simultaneously retards accumulation insofar as it siphons off capital to make possible social Service delivery'
[72] C. Offe *Contradictions of the Welfare State* (MA: MIT 1984); C. Offe *Disorganised Capitalism* (MA: MIT 1984); For a useful synopsis of the criticisms of the welfare state, see Kivisto and Faist *supra note* 70, at p. 58 - 66.

citizenship which this thesis engages with rather than the 'boundary conscious' approach adopted by scholars in such areas as immigration law and the law of conflict.[73] Under the former conception the discourse is concerned with the substantive nature of citizen rights and what this may encompass in divergent political environments, whereas the latter is strictly concerned with procedural formalism concerning the point of access and inclusion within a citizenry as dictated by a nation-state.[74] Jones and Javenta identify three primary traditions in citizenship thought: 'citizenship in liberal thought', 'citizenship in communitarian thought' and 'citizenship in civic-republican thought'.[75] The authors are careful to highlight that these categorisations represent groupings of ideas with commonalities rather than strict categories of citizenship *per se*.[76] Indeed, this chapter adopts a view of citizenship which incorporates elements of all three constructs thereby adopting a pluralistic understanding of citizenship.[77]

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[73] L. Bosniak *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton: Princeton University Press, 2006) p. 1 - 36. See also P. Dwyer *Understanding Social Citizenship: Themes and perspectives for policy and practice* 2nd ed. (Bristol: Policy Press, 2010) p. 3. Dwyer notes that 'as a legal term, citizenship is often interchangeable with nationality … The core right of citizenship in this legal sense is that of abode. If a person is a legal citizen of a country in international law that person cannot be expelled from that country, and can expect to be able to … freely return. Citizenship of a particular nation-state also carries with it duties *to* the state and rights, beyond the right of abode, which the individual can claim *from* the state … .' See also G. Procacci 'Poor Citizens: Social Citizenship versus Individualization of Welfare in C. Crouch, E. Klaus and D. Tambini (eds.) *Citizenship, Markets and the State* (Oxford: OUP, 2004) p. 49; 'The strength of T.H. Marshall's (1963a) model of the development of citizenship – the evolution of citizenship rights from civil to political and social – is that it theorizes the dynamic nature of citizenship beyond rigid legal definitions of membership. … [l]egal theorists … tend to favour a rigid definition in its original meaning of membership of a political community, overlooking the fact that the modification of rights is a social, not merely a legal process.

[74] For an excellent discussion on defining citizenship see L. Bosniak *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton: Princeton University Press, 2006) p. 17 - 36.

[75] Jones and Javenta, *supra* note 66, at p. 2 - 5.

[76] Ellison *supra* note 68, at p. 698; Ellison proposes three alternative accounts of citizenship: state-centred, pluralist and post structuralist, but argues that none of these offer an entirely convincing understanding of citizenship in light of '… the fragmented condition of contemporary social politics.'

[77] In the context of African citizenship experiences and colonial histories, Halisi *et al. supra* note 1, at p. 337 - 350.

4.4.1 Citizenship in Liberal Thought

Traditional liberal theory conceives of citizenship as a legal status, which entitles members of a community to a specific set of state granted universal rights.[78] Central to liberal thought is the notion that individual citizens act 'rationally' to advance their own interests, and that the role of the state is to protect citizens in the exercise of these rights.[79] In this protectionist rather than paternal role, liberty is seen in the negative sense, as the right to be left alone[80] – non-interference – thus inferring a Lockean form of limited government.[81] Equality, in this regard, is achieved by removing social status, gender, race, political influence and economic power as a prerequisite to rights claims.[82] Accordingly, the exercise of rights is seen as a prerogative of the citizen. Crucially, this conceptualisation ignores that not all citizens possess the necessary resources and opportunities to claim those rights.[83] As previously noted, under this construction equality is therefore a right to claim rights – procedural equality – rather than a right to material outcomes. Despite his liberal stance Marshall did however recognise that citizens were entitled to a minimum level of social and economic provision but did not argue for the absolute elimination of equality.[84] Marshall was more

[78] Jones and Javenta, *supra* note 66, at p. 3; P. Dwyer, *supra* note 73, at p. 20 - 24.
[79] P. Dwyer, *supra* note 73, at p. 22; Jones and Javenta, *supra* note 66, at p. 3.
[80] Jones and Javenta, *supra* note 66, at p. 2; P. Dwyer, *supra* note 73, at p. 20 - 24.
[81] J. Locke *Second Treatise of Government* (London: Whitmore and Fenn, 1821), Originally published by the Library of Alexandria in 1689.
[82] Jones and Javenta, *supra* note 66, at p. 3.
[83] Fitzpatrick, *supra* note 31, at p. 70, 'To insist that what is wrong with society is that people, especially the poorest, have *too many rights,* is to overlook the effects that systematic inequalities of socioeconomic power have upon our talents and opportunities. It should be said that duties correlate not to rights but to powers, i.e. one's ownership of resources and property. A right is merely a claim; it is the actual power those claims do or do not confer which really counts'.
[84] Jones and Javenta, *supra* note 66, at p. 3. For Jones & Javenta, T. H Marshall 'might be considered a civic liberal'. Marshall argued that citizens have a right to their minimal social and economic needs, and that this security should be provided by the state. As with most liberal thinkers, he argued not for an elimination or inequalities, but a reduction in the risks associated

concerned with 'class abatement' and reducing the risks associated with capitalism.[85]

4.4.2 Citizenship in Communitarian Thought

Sandel argues that an individual's sense of identity is produced only through relations with others in the community of which she or he is a part.[86] Communitarian thought therefore centres on the notion of the 'socially-embedded citizen', that is, an individual with a sense of community belonging.[87] The individual develops this sense of community belonging by becoming an 'active citizen'. Active citizenship requires public service and the prioritisation of the 'common good' above individual interests.[88] The counterpoint to active citizenship is 'passive citizenship', in which a contribution to society is not a pre-requisite to receiving social rights such as education, health care and welfare support.[89] For communitarians, citizenship develops and is defined by particular

with capitalism for the poorest citizens. This, in Marshalls's view would lead to an overarching sense of community and social cohesion.

[85] Kivisto and Faist, *supra* note 70, at p. 73; for Marshall, the use of the term 'class abatement' meant first '… that inequality would not be overcome entirely, but instead a legitimate functional form of inequality would replace an illegitimate, dysfunctional form. Second, although Marshall did not develop this line of argument in any detail, if citizenship was actually going to make equals of people in their role as citizen it would have to ensure policies of redistribution that prevented unacceptable levels of economic and social inequality to exist. In other words, the assumption underpinning Marshall's thesis is that although inequality does not disappear, there is a level of inequality that is unacceptable because once a society moves beyond that level, the equality of citizens is jeopardized.'

[86] Sandel, *supra* note 66.

[87] A. Smith, *Laclau and Mouffe: The Radical Democratic Imaginary* (London: Routledge, 1998) p. 117.

[88] *Ibid.* at p. 118.

[89] K. Ketscher 'Contrasting Legal Concepts of Active Citizenship: Europe and Nordic Countries' in B Hvinden and H. Johansson (eds.) *Citizenship in Nordic Welfare States: Dynamics of choice, duties and participation in a changing Europe* (London: Routledge, 2007) p. 143, here the author refers to the principle of 'self-support' as a 'common ground.' 'Common ground' may also be understood as the 'common good'. Ketscher notes that 'The legal notion of active citizenship is above all connected to situations where an individual for various reasons is not able to earn an income because of social or personal circumstances (e.g. unemployment, health or family problems). Nevertheless public cash support is subsidiary to the importance of self-support. The

'civic virtues' such as respect for others and recognition of the importance of public service.[90] Thus in contrast to much liberal thought which '… dismiss[es] the possibility of assigning any political or legal meaning to group rights, communitarians assert the group as the defining centre of identity… .'[91]

4.4.3 Citizenship in Civic-Republican Thought

Ellison defines the civic-republican tradition as both statist and 'communitarian'.[92] As Oldfield has written, '… it stresses not that which differentiates individuals from each other and from the community, but rather what they share with other individuals, and what integrates them into the community.'[93] Underpinning this 'shared sense of belonging' is an emphasis on individual duty and obligations to the community.[94] Unlike civil-liberalism, civic-republicanism places emphasis on the community and not the individual.[95] For Isin and Wood, civic-republican thought attempts to incorporate the liberal notion of the self-interested individuals within the communitarian framework of egalitarianism and community belonging.[96] In many ways, the communitarian and civic-republican concepts of citizenship share many commonalities. This raises the question of whether there is in fact any real difference between the

welfare state is under no obligation to support a person who can provide for herself or himself. The citizen has a duty not to be a burden on the social benefit system or on society in general. This socially understood obligation expresses a basic aspect of active citizenship within the framework of the self-support principle in the Nordic countries.'

[90] Smith, *supra* note 87, at p. 118.
[91] E. Isin and P. Wood *Citizenship and Identity* (London: Sage, 1999) p. 2.
[92] Ellison, *supra* note 68, at p. 700.
[93] A. Oldfield *Citizenship and Community: Civic Republicanism and the Modern World* (London: Routledge, 1990) p. 145.
[94] Dwyer *supra* note 73, pp. 24 - 25.
[95] Ellison, *supra* note 68, at p. 700.
[96] Isin and Wood, *supra* note 91, at p. 8.

two? Jones and Javent outline one primary distinction in that communitarianism emphasises that which binds citizens together into a community, civic-republicanism, on the other hand is concerned with the citizens' obligations to sustain the community.[97] However, there is nothing preventing civic-republican constructs of citizenship from combining statist and communitarian values, as Ellison inferred, the two are not mutually exclusive.[98] Another way of viewing the relationship between these two theories of citizenship is to think of civic-republicanism as a vertical relationship between the citizen and the state whereas communitarianism stresses the horizontal relationship between the individual and his community. In the former the citizen owes a duty to the state whereas in the latter the duty is owed to other citizens. Civic-republican writers, such as Habermas[99] and Miller[100] argue that citizenship should be understood as a common civic citizenship, shaped by a common public culture. For Ellison, this conceptualisation of citizenship, incorporates the classical communitarian emphasis on belonging with recognition that '… modern societies are likely to contain a far greater diversity of interests than their classical forbears.'[101] Miller advocates for a form of citizenship where citizens set aside sectional interests and instead focused on '… fairness between different sections of the community and the pursuit of common ends.'[102] Again, the 'common ends' may be framed as a vertical duty to the state rather than to individual citizens or sections of the community.

[97] Oldfield, *supra* note 93, at p. 145.
[98] Ellison, *supra* note 68.
[99] J. Habermas 'The European Nation-State: On the Past and Future of Sovereignty and Citizenship' (1998) 10 (2) *Public Culture* p. 397 - 416.
[100] D. Miller 'Citizenship and Pluralism' (1995) 43 (3) *Political Studies* pp. 432 - 450; D. Miller *Market, State and Community: Theoretical Foundations of Market Socialism* (Oxford: Clarendon Press, 1989).
[101] Ellison, *supra* note 68, at p. 701.
[102] Miller (1989), *supra* note 100, at p. 284.

Relying on Harris's theory of social citizenship the following section adopts a pluralistic approach to citizenship, combining elements of the communitarian and civic-republican tradition.

4.5 Citizenship as a Communitarian Theory of Civic-Republicanism

The model of citizenship adopted in this chapter is Harris's model of social citizenship. This model combines both communitarian and civic-republican concepts of citizenship. For Harris, citizenship forms part of a communitarian theory of civic-republicanism. Under this construction Harris:

> '… acknowledges that public authority must be deployed according to moral principles. The appeal to community is an appeal to values to constrain self-interest. The goal is a political system in which citizens take an expansive view of their obligations to their fellows; a system in which the social order is not conceived purely instrumentally as a mechanism to be exploited for personal gain. Citizens are not expected to hold the community to ransom by extracting the highest price possible as a condition of their providing services. The community belongs to everyone equally, though not everyone is in the same position individually to derive advantages from it. Social justice requires that the

benefits of social cooperation be fairly distributed, that those who are excluded be included.'[103]

The theory focuses on certain types of social 'dis-services' which are peculiarly likely to compromise the status of individuals as full and participating members of the community. Harris gives the example of employment, and society's view of employment as a prized activity where the failure to hold or find a job is a reflection of personal failure. Not only does unemployment mean loss of income in the absence of income maintenance programmes but it also results in a lowering of self-esteem. For Harris,

> '[e]mployment is a good because it is a source of the wherewithal to participate in a community way of life; to engage in the consumption activities of one's society. A lack of resources leads to exclusion. But so too does a lack of self-respect, and there is considerable sociological evidence cataloguing the consequences of long-term unemployment: the unemployed lose a sense of self-esteem, become withdrawn and apathetic, and live at the margin of society. In a society in which what you are is bound up closely with what you do, work is [a] source of self-definition. To be effectively deprived of an opportunity to work is to be cruelly handicapped. Compensation therefore is required where social processes operate in ways which prejudice one's standing as a full member of the community. This is true whether the foundation of the principle is contribution or simply a right not to be harmed. Although the

[103] Harris, *supra* note 46, at pp. 35 - 36.

> claim to be compensated for bearing the costs of the progress of others is free-standing, it must be satisfied only where not to do so undercuts one's community membership. Thus the argument presupposes a theory of rights radically different from the property rights theory of market liberals. It suggests the existence of a right to have one's status as a full member of the community protected by social rights in the name of citizenship.'[104]

Compensating community members suggests that these members have been harmed and thus made worse-off than would otherwise have been the case, or alternatively, these members have made a contribution, in some form, to the community.[105] Under Harris's model of citizenship, compensation can only follow where a) the social process which caused the harm can be identified; b) the agent who bears the responsibility for the harm can be identified and c) the individual or group who are to benefit can be identified.[106] If these three elements cannot be satisfied then compensation cannot occur.

While the form of liberalism upon which the free-market is based requires a general duty of non-interference where there are no special relationships, social citizenship asserts a general duty to aid where one's status as a member of the community has been undermined.[107]

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[104] *Ibid.* at p. 38; 'The suggestion that property rights and private trading on the basis of those rights is sufficient to protect that status is rejected.'

[105] Isin and Wood, *supra* note 91, at p. 16 argue that '… past contributions to the community become the basis of legitimate claims on the "commonwealth." In this respect they can see or experience a clear connection between effort, reward and virtue.'

[106] Harris, *supra* note 46, at p. 30; Harris acknowledges that some social policies are not responses to harm, for example medical care and education.

[107] Harris, *supra* note 46, at p. 40, 'the basis of the duty to aid is the right of each individual to have his status as a full member of the community protected.'

Under Harris's definition of social citizenship,

> 'the moral foundation for interfering with market outcomes is most secure where citizenship theorists can press the argument that intervention is required by a contribution-based compensation principle. In defending compensation, satisfactory account of the social processes that benefit some by imposing costs on others is required. If that is provided, it is easier to argue that by accepting these benefits one assumes on obligation to compensate the victim, even though one has not acted unjustly toward any specific person. The injustice inheres in the social process itself and in the failure to recognise the unfairness of any claim to keep full control of the use and disposition of resources so derived. It is not simply that one is not entitled to everything one earns because one does not deserve it on the grounds of effort or desert; one's lack of entitlement is a consequence of the price which some must pay to make earnings possible.'[108]

Harris's definition of social citizenship provides an adequate justification for a socially orientated ARR. However, the thesis does not propose to recast intellectual property rights (IPRs) or the ARR as exclusively social constructs. Instead, social citizenship is employed as a means of softening some of the inequities that these systems propagate, specifically in relation to visual artists. Before turning to the theoretical justifications for intellectual property examined

[108] *Ibid.*

in this chapter, the following section briefly addresses the 'market failure', which IPRs attempt to resolve. An understanding of these market failures helps frame the requirements of IPRs and indeed the ARR which in turn informs many of the reforms that this thesis proposes.

4.6 Market Failure: The Need for intellectual Property Rights

Taking copyright as an example, Gordon states that copyright creates rights in intellectual property, with the primary aim of generating monetary incentives for the production of creative works:

> 'If the creators of intellectual productions were given no rights to control the use made of their works, they might receive few revenues and thus would lack an appropriate level of incentive to create. Fewer resources would be devoted to intellectual productions than their social merit would warrant.'[109]

Gordon's analysis reflects A. Hauser's comments regarding the professionalization of the creative arts.[110] The market failure to which economists and lawyers alike refer to is premised upon the 'public goods' character of intellectual property. This theory, as outlined below supposes that these goods are non-rivalrous and that they are non-excludable. For Toynbee the 'non-rivalrous' quality is intrinsic to most IPRs because the work can be used by

[109] W. Gordon 'Fair Use and Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors' (1982) 82 (8) *Columbia Law Review* p. 1610.
[110] See Chapter 3, section 3.1, p. 138 - 146.

one user without excluding or preventing its use by other users. The subject matter of intellectual property such as the 'film', 'song', 'novel' and so on, do not degrade with use or become 'exhausted' in a manner similar to tangible goods. Secondly, intellectual property is non-excludable in that it is difficult for creators to prevent would-be users from exploiting these goods.[111] While the user may prevent another person from using or reading a book that he has purchased, the original author cannot prevent that user from making copies and distributing them. Dworkin defines these 'public goods' as products

> '… whose production cannot efficiently be left to the market because it is impossible (or very difficult or expensive) to exclude those who do not pay from receiving the benefit and so riding free. People have no incentive to pay for what they will receive anyway if others buy it.'[112]

The 'non-rivalrous' and 'non-excludable' nature of intellectual property prevents creators of cultural goods from realising the full economic value of their work in a conventional market place. For Toynbee, '… [i]n this situation the function of copyright law is to extend property rights beyond the first copy to any and every copy over a specified term.'[113] Toynbee's analysis implicitly includes derivative works or adaptations, which create copies albeit in a medium, separate from the original. Copyright therefore corrects a market failure to compensate creators for

[111] J. Toynbee 'Creativity and Intellectual Property Rights' in H. Anheier and Y. R. Isar (eds.) *Cultural Expression, Creativity and Innovation* (London: Sage, 2010) p. 90 '… cinema exhibition enables a high degree of excludability – ushers will check your ticket before you go in – whereas it is impossible to exclude anyone from listening to a conventional radio broadcast once they have access to a receiver.'
[112] R. Dworkin *A Matter of Principle* (Oxford: Clarendon, 2001) 'Can a Liberal State Support Art?' p. 223, for an exploration of the concept of 'free riding', culture and internet see R. Levine *Free Ride* (London: Vintage Books, 2011).
[113] Toynbee, *supra* note 111, at p. 90.

their work by conferring property type rights which in turn allows creators to be compensated for their work thus creating an incentive to create.

As intimated earlier, the three primary theoretical justifications for intellectual property derive from property law theory, utilitarianism, and personhood/personality theory.[114] These theories acknowledge a dichotomy of interests which is often expressed on the one hand, in terms of the creator's ability to determine how their body of work is utilised, and on the other hand, the right of the general public to access and enjoy these socially beneficial works. Under this construction legislators are required to create laws that balance these competing interests. The primary tenets of each of these theories will be analysed in turn by drawing on the writings of their leading theorists. In addition, each of these theories will be assessed in light of their compatibility with Harris's theory of citizenship.

4.7 Theoretical Justifications for Intellectual Property Rights

Throughout its legislative history the artists' resale right has been classified under a number of IP and non-IP related constructs.[115] As previously noted, the

[114] Fisher identifies a fourth theoretical underpinning: Social Planning Theory. As this theory is of less established providence it will not be discussed further here. W. Fisher 'Theories of Intellectual Property' in S. Munzer (ed.) *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001). The Journal of Intellectual Law and Practice describes it as 'inadequate' because it lacks agreed upon goals. <http://jiplp.blogspot.ie/2014/03/theories-of-intellectual-property-is-it.html> (dates accessed: 13 July 2017.)

[115] See L. de Pierredon-Fawcett, *The Droit de Suite in Literary and Artistic Property,* A Comparative Law Study (Louise-Martin Valiquette Translation), (New York: Columbia University, 1991). See also Chapter 3.

resale right has been described as a related or neighbouring right,[116] a *sui generis* right,[117] a moral right,[118] and a tax.[119] This has led to some confusion in the literature, bringing into question the very nature of the resale right. Accordingly, an assessment of the theoretical underpinnings of the ARR is necessitated. This assessment will result in a more comprehensive understanding of the nature of the right, thereby presenting a sound theoretical and legal foundation upon which future reforms may be based.

While many theories have been proffered as a basis for IPRs and more specifically copyright[120] – of which the ARR belongs – the primary justifications fall within three broad categories. These include the Lockean property rights justification, Bentham's utilitarianism and the personhood or personality theory as espoused by Hegel.[121] Arguably none of these theories fully engender the nature of copyright in its totality, nevertheless, these theories provide an analytical framework through which to consider the normative function of the ARR, as well as grounds for reform proposals. The aim of the following section is to review these primary theoretical justifications and by default determine the appropriate theoretical justification for reform of the ARR Directive.

[116] See US Register of Copyright Report '*Droit de Suite:* The Artist's Resale Royalty' (1992) p. 92.
[117] *Ibid.* See also De Pierredon-Fawcett, *supra* note 115, at p. 25.
[118] J. Pasharikov 'Edvard Munch's "The Scream" Screams for Droit de Suite: Why Congress Should enact a Federal Droit de Suite Statute Governing Artists' Resale Rights in the United States' (2015) 26 *University of Florida Journal of Law and Public Policy*, p. 387.
[119] Chapter 3.
[120] Fisher, *supra* note 114, identifying four theories; D.B. Resnik 'A Pluralist Account of Intellectual Property' *Journal of Business Ethics* (2003) 46 (4) p. 322 - 330, identifying six theories; and S. Teilman-Lock *British and French Copyright: A Historical Study of Aesthetic Implications* (Copenhagen, DJOF Publishing, 2009) p. 39, identifying ten theories.
[121] While many theorists could have been employed here to investigate the personality theory, Hegel presents a more complete model than theorists such as Kant.

4.7.1 The Lockean Theory of Property Rights

Locke's theory of property, as stated in his *Second Treatise of Government*[122] is a natural law theory of property and comes in three parts: first, a general justification of property, second, a description of how man can appropriate assets that were previously held in common;[123] and third, a negative requirement that one man's appropriation does not disadvantage another man.

In the *Second Treatise of Government* Locke concludes that there are certain individual rights that are so important that no government, even if democratically elected, can override. Those fundamental rights include a natural right to life, liberty and property. Furthermore, the right to property is not just the creation of government or law, it is a natural right that is pre-political, it is a right that attaches to individuals as human beings. Under the Lockean construction, for there to be 'natural rights' there must be a pre-political state of liberty which Locke refers to as the 'state of nature'. Human beings are free and equal beings, there is no natural hierarchy, they are free and equal in the 'state of nature'. However, there is a law of nature that constrains what man can do, and this law says that man cannot give up his natural rights, nor can he take them from others. These rights of life, liberty and property[124] are inalienable.[125]

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[122] Locke, *supra* note 81.

[123] The 'commons' refers to a system of property where property is not exclusively owned by any one individual, instead the community, and the individual members that constitute that community are free to use the property as they see fit. One problem with the commons is that property may be overused and become valueless.

[124] Note that Locke uses the term 'property' generally to mean life liberty and property.

[125] Locke, *supra* note 81, Section 6. 'For men, being all the workmanship of one omnipotent, and infinitely wise maker, they are his property... .' Under this construction, these rights are inalienable because these rights are not his own because man is the property of God.

Locke states that in the original 'state of nature' God gave the earth to mankind in common for their preservation and subsistence.[126] He recognises however that to make use of the resources of nature there must be a means by which man can appropriate these resources.[127] The challenge concerns how these goods can be removed from the commons in such a way that another man's rights are legitimately extinguished. Locke suggests two means of legitimate appropriation; the first requires the consent of mankind to remove goods from the commons,[128] the second; and more practical method, states that man by mixing his labour with the commons, appropriates these goods or resources for himself.[129] This appropriation is justified on the basis that:

> '… every man has a property in his own person: this nobody has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his.'[130]

Here Locke recognises that if individuals could not privatise common resources without the consent of all mankind, 'man might have starved, notwithstanding the plenty God had given him.'[131] Locke proposes that rather than owning one's

[126] Locke, *supra* note 81, Section 25 'Whether we consider natural reason, which tells us, that men, being once born, have a right to their preservation, and consequently to meat and drink, and such other things as nature affords for their subsistence: or revelation, which gives us an account of those grants God made of the world to Adam, and to Noah, and his sons, it is very clear, that God, as King David says, Psalm cxv. 16. 'has given the earth to the children of men;' given it to mankind in common.'
[127] Locke, *supra* note 81, Section 26.
[128] Locke, *supra* note 81, Section 28.
[129] *Ibid.* Section 27.
[130] *Ibid,* Section 27.
[131] *Ibid,* Section 28.

self, one's body, man owns his labour.[132] Building on this he says that whatever man mixes his labour with, that is un-owned, becomes his property:

> 'Whatsoever then he removes out of the state that nature has provided, and left it in, he has mixed his labour with, and joined to it something that is his own, and thereby makes it his property.'[133]

Locke substantiates this claim on the basis that:

> '[f]or this labour being unquestionably the property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.'[134]

For 'Palmer' this is the hinge of Locke's theory.[135] As Sterk notes '… the author more than most property claimants appears quite likely to satisfy the Lockean proviso.'[136] The latter part of Locke's quote places an important caveat or negative requirement on the amount of procurement man can enjoy, he must leave enough of what he claims for himself in common for others. The second negative requirement is that an individual can only appropriate;

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[132] *Ibid.* Section 27.
[133] *Ibid.* Section 27.
[134] *Ibid.* Section 27.
[135] T. G. Palmer 'Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects. (1990) 13 *Harvard Journal of Law and Public Policy* p. 834. However, Palmer objects to Locke's theory as a justification for IPRs 'If one wishes to insist on the justice of intellectual property claims, ownership rights in ourselves would have to be rejected as a foundation for property and independent arguments offered for rewarding moral desert based on labour. This is a difficult task, and one that has not been adequately undertaken, for reasons that Hume, Kant and others have pointed out: desert has no principle, that is, no readily available and intersubjectively ascertainable measure. Such as inherently subjective standard provides a poor foundation for the abstract and general rules that guide conduct in a great society.'
[136] S. Sterk, 'Rhetoric and Reality in Copyright Law' 94 (5) *Michigan Law Review*, 1996 p. 1235.

> '… [a]s much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in: whatever is beyond this, is more than his share, and belongs to others.'[137]

Locke's concern for 'the commons' reflects Harris's concept of citizenship. This form of citizenship, prevents individuals from amassing the resources of mankind to the detriment of the community and its members. Over consumption or exploitation negatively impacts upon 'community membership' and results in the marginalisation of certain members of the community.[138] Locke asserts that '[h]e that had as good left for his Improvements, (sic) as was already taken up, needed not complain.'[139] The corollary being that where the community has not left enough behind for others, those individuals have been discriminated against. Where this occurs, social citizenship allows for a redistribution of wealth to the needy. In many ways the ARR recognises that visual artist's 'community membership' is negatively affected in situations where they cannot realise the full value of their work. The ARR attempts to remedy this situation by allowing visual artists to participate in the profits of subsequent sales.

[137] Locke, *supra* note 81, Section 31.
[138] D. Attas 'Lockean Justifications of Intellectual property' in A. Gosseries, A. Marciano and A. Strowel (eds.), *Intellectual Property and Theories of Justice* (Chippenham and Eastbourne: Palgrave & Macmillan, 2008) p. 46; Attas notes that Locke's proviso against spoilage 'is motivated not by the aesthetic of rotting fruit or the insult to the Creator, but by what is denied to other needy people. Thus it does not understand waste as the ruin or perishing of foodstuffs, but the non-use, abuse or misuse, that is to say, the criminally inefficient use, of resources'.
[139] J. Locke *Two Treatises of Government* (3rd ed. 1698) P. Lasett ed. (Cambridge: Cambridge University Press, 1970) p. 333 (Alternative version/edition to heretofore cited Whitmore and Fenn ed.).

For Locke, like Hegel, the extent of man's property rights, as well as the right to liberty and life, are limited by his interaction with government.[140] The content and limits of rights that existed before government, in 'the state of nature' are altered when man enters into society.[141] Locke states that man enters into society by consent and by an agreement to leave the 'state of nature' and to be governed by the majority.[142] This does not mean that the laws of nature cease upon entering society, they merely adopt a known and declared character.[143] Government proceeds to make laws and these laws for Locke are only legitimate if they respect man's natural inalienable rights.[144] However, government can determine the content of these fundamental, inalienable rights and while Locke insists upon limited government, that is government limited by the end for which it was created, namely the preservation of property,[145] what counts as property and what counts as respect for life and liberty is for government to define.[146] Conversely, it is these natural rights that limit government, government cannot legitimately and arbitrarily take man's life, liberty or property without justification.[147] Accordingly, this creates a tension between the natural rights of man and the prerogatives of government. To ascertain how Locke overcomes this dilemma the following section considers Locke's theory of legitimate government.

4.7.1.1 Locke's Theory of Legitimate Government

[140] Locke, *supra* note 81, Section 89.
[141] *Ibid.* Sections 96 - 99.
[142] *Ibid.* Section 15.
[143] *Ibid.* Section 95, 135 and 137.
[144] *Ibid.* Chapter XI.
[145] *Ibid.* Section 138.
[146] *Ibid.* Chapter IX.
[147] *Ibid.* Section 135 - 138.

Locke's theory of legitimate government has some important implications for his theory of property. Locke believes in certain fundamental rights that constrain what government can do and he believes that those rights are natural rights, not rights that flow from law or from government. Locke also places great weight on the idea of consent. Consent is a familiar concept in moral and political philosophy. Locke says that legitimate government is government founded on consent and this consent arises when man decides to leave the condition that is the 'state of nature'.[148] Locke says that the main reason why man decides to leave 'the state of nature' is because it contains certain inconveniences.[149] In the 'state of nature' anyone can enforce the law of nature. Violations of the law of nature are acts of aggression which must be responded to. In the 'state of nature' where there are no police, judges or jury, every man is effectively the judge and jury in his own case.[150] There is therefore no agreed upon punishment for varying acts of aggression and as such this gives rise to one of the inconveniences of the 'state of nature'. Where there is no certainty as to the accepted degree of punishment for an act of aggression this infringes upon man's enjoyment of his own inalienable rights to life, liberty and property. Perhaps one man steals an orange from another man and the other decides that death is a suitable response to this violation. For Locke, in the 'state of nature' such apparently unmeasured responses are acceptable, he says that:

> '[o]ne may destroy a man who makes war upon him … for the same reason that he may kill a wolf or a lion; because such men … have no

[148] *Ibid. S*ection 14.
[149] *Ibid. S*ection 13, 90.
[150] *Ibid. S*ection 13.

> other rule, but that of force and violence, and so may be treated as beasts of prey, those dangerous and noxious creatures, that will be sure to destroy him, whenever he falls into their power.'[151]

Seen from this perspective, the 'state of nature' is far from idyllic. What appeared to be a benign state where there is a law that respects people's rights and those rights are so strong that they are inalienable, is in actual fact quite a violent and uncertain place. Locke says that this is why people leave the 'state of nature'. The means of removing oneself from the 'state of nature' is consent. Man must give up his right to act as judge and jury and consent to creating a government and a legislature that will make laws based on what the majority decides. Those wishing to leave the 'state of nature' must agree or consent to whatever the majority decides.[152]

Again it is important to remember why people leave the 'state of nature' and consent to be governed by the majority, thereby entering into a social contract of sorts. Man does this to protect his right to property. Accordingly Locke says that:

> 'the Supreme power [by which he means the legislature] cannot take from any man any part of his property without his own consent. For the preservation of property being the end of government and that for which men enter into society, it necessarily supposes and requires that people should have property.'[153]

[151] *Ibid.* Section 16.
[152] *Ibid. S*ection 96.
[153] *Ibid,* Section 138.

After all, the protection of the right to property is the reason why people enter this social contract. Locke's right to property is a natural right but then Locke states that; '[m]en therefore in society having property, they have such a right to the goods, which by the laws of the community are theirs… .'[154] Sandel places emphasis on the latter part of this statement – laws of the community – which implies that the right to property is no longer a purely natural right but is now a right by convention, conferred by the government.[155] However, at the end of this passage Locke says that '… it is a mistake to think that the supreme or legislative power … can do what it will, and dispose of the estates of the subject arbitrarily, or take any part of them at pleasure.'[156] Yet, while the government cannot arbitrarily interfere with the property rights of the people, for government to exist and function it must be financed by the people:

> 'Government cannot be supported without great charge, and it is for everyone who enjoys his share of the protection, should pay out of his estate his proportion for the maintenance of it. But still it must be with his own consent, i.e. the consent of the majority, giving it either by themselves or their representatives chosen by them.' [157]

This exposes the dual nature of property for Locke; it is at once a natural inalienable right and simultaneously a right defined by convention, by government, by the consent of the people. Therefore an arbitrary taking of property by the government would violate the laws of nature but what constitutes

[154] *Ibid.*
[155] M. J. Sandel *Justice: What's the Right thing to do?* (NY: Farrar, Straus & Giroux, 2009) ch. 6, referring to Locke's *Second Treatise of Government,* Section 119 and 120.
[156] Locke, *supra* note 81, Section 138.
[157] *Ibid.* Section 140.

property is defined by the government and may be limited to whatever extent is deemed necessary to fulfil the social contract which man has voluntarily entered into. Such a construction naturally leads one to understand Locke's limited government as not being all that limited. However the veracity of natural rights under Lockean construction should not be under estimated. It is these natural and inalienable rights to property (and by property, Lock also means liberty and life)[158] that creates the limits of legitimate government. It is not what man consents to that limits government, it is what he lacks the power to give away when he enters into a social contract, based on consent, that limits government:

> '… for no body can transfer to another more power than he has in himself; and no body has an absolute arbitrary power over himself, or over any other, to destroy his own life, or take away the life or property of another.'[159]

Antecedent to entering the social contract is the implicit understanding that man's natural right to property cannot be subjugated in its totality. This is the underlying premise of Lockean property theory. Finally, what counts as a violation of natural rights by limited government are arbitrary decisions by government.[160] For any form of limited government to act legitimately it must treat all its citizens equally. Locke is against arbitrary acts by government but if there is a general law that is applied equally to the citizenry then that law does

[158] *Ibid. S*ection 6.
[159] *Ibid. S*ection 135. Here, Locke draws on his contention that man owns his labour but not himself: that being the property of God.
[160] *Ibid. S*ection 135.

not amount to a violation of the citizen's natural rights. The primary limit on government is that it does not act arbitrarily.

The following section considers whether Locke's theory of property supports a property based justification of the artists' resale right.

4.7.1.2 Locke's Theory of Property Rights and the Artists' Resale Right

The first challenge in relying on Locke's theory of property as a justification for authors' rights and thereby the artists' resale right concerns the divergent 'commons' of tangible and intangible assets. Attas makes the contentious argument that Locke's theory of property cannot be used to justify intellectual property.[161] Attas contends that tangible property and intellectual property are fundamentally different entities that cannot be reconciled under a theory of property. For instance, while tangible property is a right in perpetuity, intellectual property, as defined by '… the most common forms of institutionalised intellectual property, such as patents and copyrights … are limited in time.'[162] Furthermore, '…a material conception of assets, seems unsuited to the sphere of ideas'[163] Attas questions whether the intellectual commons refers to '… the historical basic knowledge available to all'[164] and if so, asks how a property right under the Lockean construction is possible where new ideas draw heavily from the 'historical basic knowledge'?[165] As an answer

[161] Attas, *supra* note 138, at p. 29.
[162] *Ibid.* at p. 30.
[163] *Ibid.* at p. 40.
[164] *Ibid.*
[165] See also H. Bloom *The Anxiety of Influence: A theory of Poetry xiii* 2nd ed (Oxford: OUP, 1997) as cited in Gordon, *supra* note 109, at p. 76 fn. 2.

to this Gordon states that '[a]ll artists create using much they have not themselves created, both in terms of physical and human surroundings and in terms of cultural heritage. The holders of a common cultural tradition resemble the inhabitants of Locke's state of nature: their riches are largely not of their making.'[166] Furthermore, Gordon states that '… anyone can copy from the public domain, and claim copyright in what he has added, regardless of whether doing so will impair others' use of the underlying domain that all inherited together'.[167] The latter part of this statement reflects the exclusive nature of intellectual property, however as noted earlier, the distinctive characteristic of intellectual property is that it is '… easily replicated and that enjoyment of these products by one person does not prevent enjoyment by others.' [168] On this Sterk observes that '… unlike land, intellectual property offers no potential for a tragedy of the commons. Once created, intellectual property is a public good, capable of enjoyment by millions … ,'[169] therefore over use is not possible, at least not in the conventional sense.[170] Whatever creators take from the 'commons' still remains in the 'commons' for others to repurpose and shape as they wish. In this light, Gordon's 'impairment' or restriction of other's use refers only to the property subsisting in the newly created work which is a combination of the intellectual commons plus the creator's labour.

Applying Gordon's understanding of IP and Lockean theory to Attas's remarks, it may be observed that Attas's metaphysical argument, while compelling,

[166] Gordon, *supra* note 109, at p. 78.
[167] W. J. Gordon 'Render Copyright Unto Caesar: On Taking Incentives Seriously' (2004) 75 *University of Chicago Law Review* p. 78.
[168] See M. Landes and R. A Posner *The Economic Structure of Intellectual Property law* (Harvard: Harvard University Press, 2003).
[169] Sterk, *supra* note 136, at p. 1236.
[170] Over use may occur in the sense that society no longer values the good; similarly to society tiring of a pop song.

ignores the fact that under the original Lockean construction, tangible matter – 'the common state of nature'[171] – presupposed property rights. Man's mixing of his labour required the soil of the earth to exist, as tangible matter, to complete his equation.[172] The application of the Lockean theory to intellectual property therefore requires 'something' to presuppose these developed rights: 'the historic basic knowledge' or as more commonly known, the 'commons' or the 'public domain'. What exists in the intellectual commons (the intellectual commons referring to the expression of ideas outside the protection of IP) is for present purposes analogous to the soil of the earth; the state of nature. Man may mix his labour with these previously expressed ideas and in doing so claim something of it as his own. And where these previously expressed ideas are still within one of the aforementioned regimes of protection[173] he may seek a licence, permission to use these intangibles in the new work.[174] He may not however acquire '… the benefits of another's Pains which he had no right to, … ;[175] meaning, in this context, that any infringement of established IPRs is precluded. Under this construction there is no perceivable obstacle to applying Locke's theory to intangible property.[176]

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[171] Locke, *supra* note 81, Section 27.

[172] *Ibid.* 'Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person. This no body has any right to but him. The labour of his body and the work of his hands, we may say, are properly his. Whatsoever, then, he removes from out of the state that nature has provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state of nature placed it in, it hath by his labour something annexed to it that excludes the common right of other men. For this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough and as good left in common for others.'

[173] Copyright, Trademark, Patents etc.

[174] Gordon *supra* note 109, at p. 78, notes that excluding users from using the intellectual work of others does not make them any worse off and leaves them with 'enough, and as good' as the labourer herself possessed. 'Denying them use of a work or making them pay for it simply restores them to their status quo ante… .'

[175] Locke, *supra* note 81, Section 34.

[176] Ghosh, *supra* note 23, at p. 47 - fn 71 ' tying ethics to intangibles in the Lockean framework is common both to those who are sympathetic to Locke in copyright' *see* Gordon *supra* note 109.

Attas is not the only critic of Locke's theory. Rawls rejects Locke's theory that each person is entitled to the fruits of their labour and instead adopts a distinctly utilitarian position.[177] While he acknowledges that natural talents should be rewarded, these rewards should only extend to '… cover[ing] the costs of training and to encourage the efforts of learning, as well as to direct ability to where it best serves the common interest'[178] Rawls's 'difference principle' allows for the distribution of resources[179] but only to the extent that '… rewarding the talented would improve the lot of the least fortunate.'[180] For Rawls, rewarding authors is only justified on an incentive and therefore utilitarian basis. The libertarian, Robert Nozick counters the Rawlian position, adopting elements of the Lockean formula. He acknowledges that while man's natural assets/abilities, from a moral position, have been allocated arbitrarily, man is nonetheless entitled to them and to what flows from them.[181]

If the foregoing can be accepted as presenting a justification for IPRs based upon Lockean theory, the next task is to determine whether Locke's theory provides a theoretical underpinning for the ARR. Clearly under the Lockean construction visual artists already own their 'works of art'; they have mixed their labour with the raw materials of canvas and paint.[182] Subsequent to the creation of the art the

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And to those who critique Locke; see J. Craig 'Locke's Labor and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright Law' 28 *Queen's Law Journal* 1 (2002).

[177] Rawls *supra* note 27, at pp. 311 - 312.

[178] *Ibid.*

[179] *Ibid.*

[180] Sterk, *supra* note 136, at p. 1237.

[181] Nozick, *supra* note 21, at p. 226. However, Nozick advocates for a society with minimal state interference and therefore in Nozick's version of Utopia, intellectual property rights may not exist.

[182] S. Breyer 'The Uneasy Case for Copyright: A study of Copyright in Books, Photocopies and Computer Programs' (1970) 84 (2) *Harvard Law Review* p. 289 fn 29. Breyer questions why it is

artist then sells the work to a willing purchaser. Under the auspices of the EU ARR Directive, and unlike other spheres of copyright and related rights, visual artists are entitled to a subsequent royalty payment upon the re-sale of the original work.[183] For authors and composers alike the doctrine of exhaustion prevents further compensation after the first-sale of a copy of the work.[184]

In this regard, the question that arises is whether the ARR can be justified under a Lockean construction? Arguably under the Lockean formulation the artist's entitlement has been exhausted by the first sale.[185]

In a limited sense, the answer to this question is clearly no. Where labour secures the labourer with his just desert – property – so too does the sale of that property for monetary gain or fair exchange. Under a sale agreement the labourer's property rights are exchanged for cash reward or a benefit in kind. In this event the labourer has given up or exhausted his property rights and cannot claim any further rights. Thus, an ARR under Lockean construction is impossible.

However, this is not the end of the matter, where Locke's theory of government is applied to the ARR an alternative result may be found. As noted above '… the Supreme power [the legislature] cannot take from any man any part of his

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appropriate to deem the author's *creation* his property and further questions why under the Lockean construction property in intellectual products *ought* to be created,

[183] A portion of the sale price is allocated to the artist in the form of a royalty, see Article 4, Directive 2001/84/EC 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. OJ L 272/32. Note, however that not every resale results in a royalty payment. There are a number of exceptions under the Directive.

[184] In this regard, reference is being made to the rights that exist in each individual and tangible copy of the work and not the intangible body of work as a whole. In practical terms the author cannot claim compensation from a purchaser who goes on to sell his copy of the author's work for a profit.

[185] For Further see, Sherman and Bently, *supra* note 13 at pp. 12 - 15, and pp. 151 - 153.

property without his own consent.'[186] It may be presumed that given the choice, few purchasers of fine art would agree to additional taxes or royalties being levied against their purchases. Nevertheless, Locke's 'legitimate theory of government' and in particular his reference to the 'laws of the community' allows the legislature to determine the nature and scope of property rights. Therefore just as an easement, or a *profit-a-prendre*, may attach to a parcel of land, a royalty may attach to a work of art.[187] There are however two provisos in this context. Firstly, man cannot give up his inalienable rights to property in its entirety, and secondly, that any encumbrance is of universal application and that government may not act arbitrarily against any one man or section of society. It would appear to this author that the ARR satisfies both these requirements in that it does not deprive subsequent purchasers of their property rights in their entirety, and that the royalty is payable by a designated subsection of the art market: i.e. the re-sellers of visual art protected by copyright. By applying the law universally, albeit to a discrete subsection of the community, the government has not acted arbitrarily. Once this is understood, Lockean theory can indeed provide a justification for the artists' resale right.

Concluding on this point, there is nothing within the Lockean construction that precludes the ARR Directive from being grounded in property law theory; the question however remains whether the reform proposals of Chapter 6 remain within the limits of Locke's theory. That question is addressed therein.

4.7.2 Utilitarianism and the Artists' Resale Right

[186] Locke, *supra* note 81, Section 138.
[187] Under the Lockean construction the legislature can legislate for these encumbrances.

Sterk observes that '[s]ince the Statute of Anne, copyright rhetoric has focused both on economics and on "deserving" authors. The statute's preamble deplored the growing tendency of printers and booksellers to reprint books "without the Consent of the Authors or Proprietors … to their great Detriment, and too often to the Ruin of them and their Families."'[188] According to the preamble, not only were these printers and booksellers usurping revenues from deserving authors, but copyright legislation was also needed "for the Encouragement of Learned Men to Compose and write useful Books."[189] Indeed, the statute was entitled "An Act for the Encouragement of Learning."[190]

Hettinger argues that in order to promote the creation of valuable intellectual works authors must be granted property right in these works:

> 'Without the copyright, patent, and trade secret property protections, adequate incentives for the creation of a socially optimal output of intellectual products would not exist. If competitors could simply copy books, movies, and records, and take one another's inventions and business techniques, there would be no incentive to spend the vast amounts of time, energy, and money necessary to develop these products and techniques. It would be in each firm's self-interest to let others develop products, and then mimic the result. No one would engage in original development, and consequently no new writings, inventions, or business techniques would be developed. To avoid this disastrous result,

[188] Statute of Anne, 1710, 8 Anne, ch. 19 (Eng).
[189] *Ibid.*
[190] *Ibid.*

the argument claims, we must continue to grant intellectual property rights.'[191]

From a utilitarian perspective, IPRs can be justified insofar as they promote the 'greatest good' for society. These rights maximize social utility[192] by providing authors with incentives and rewards, which in this sphere encourages the arts and its development.[193] The utilitarian justification for intellectual property rights, including copyright, therefore posits that it is necessary to '… strike an optimal balance between, on the one hand, the power of exclusive rights to stimulate the creation of inventions and works of art and, on the other hand, the partially offsetting tendency of such rights to curtail widespread public enjoyment of those creations.'[194] The dichotomy may be reduced to 'incentive and 'access'.

There are a number of problems with the utilitarian justification for copyright. Firstly, utilitarianism assumes that without legal models of protection, such as copyright, creators would not create. Zemer notes that the 'propagation of literary and artistic works is dependent, in many instances, on economic reward. Copyright protection promotes creativity, social and cultural exchange and

[191] E. C. Hettinger 'Justifying Intellectual Property' (1989) 18 (1) *Philosophy and Public Affairs* p. 48.
[192] This thesis will not engage in a definition of 'utility'. As noted by Resnik, *supra* note 120, it will be assumed that the development of science, technology, industry, and the arts will promote utility however that term is defined. For authors who engage in this analysis see: J. Bentham *The Principles of Morals and Legislation* (On-line edition; Batoche Books, kitchener, 2001), Chapter 1, Section 2, p. 2; J.S. Mill *Utilitarianism*; J. S. Mill *Utilitarianism* in A. Ryan eds. *Utilitarianism and Other Essays* John Stuart Mill and Jeremy Bentham, (London; Penguin Books Ltd., 1987) p. 279; H. Sidgwick, The Methods of Ethics, 7th ed. (London: Macmillan, 1907), as excerpted in Economic Justice, E. S. Phelps, ed. (Baltimore: Penguin, 1973) p. 227; K. Bykvist *Utilitarianism: A Guide for the perplexed* (London; Continuum International Publishing Group, 2010); A.C. Pigou *The Economics of Welfare* (London, Macmillan, 1921)
[193] Resnik *supra* note 120, at p. 324.
[194] Fisher, *supra* note 114, at p. 169.

interaction.'[195] In Breyer's view '… an author will not write unless he is paid his "persuasion" cost'.[196] Against this, Tushnet is of the opinion that '… the desire to create can be excessive, beyond rationality, and free from the need for economic incentive. Psychological and sociological concepts can do more to explain creative impulses than classical economics.'[197] Building on this Sterk questions the blanket application of the model to all creators – amateurs and professionals alike – arguing that hobbyist photographers will create no less snap shots irrespective of the existence of copyright protection. The opposite is true of professional photographers, authors and indeed publishers who are, in the main, driven by a need to secure monetary reward.[198] The difficulty with this type of argument is that it must rely on empirical data which may not exist.[199] As Robert Merges points out, '[t]he sheer practical difficulty of measuring or approximating

[195] L. Zemer 'On the Value of Copyright Theory' (2006) 1 *Intellectual Property Quarterly* p. 2.
[196] Breyer, *supra* note 182, at p. 285.
[197] Tushnet, *supra* note 25, at p. 515, See also Sterk *supra* note 136, at pp. 1197 - 1249, see also A.D. Moore 'Intellectual Property, Innovation, and Social Progress: The Case Against Incentive Based Arguments (2003) 26 (3) *Hamline Law Review* p. 619. 'Many authors, poets, musicians, and other artists would continue to create works of intellectual worth without properietary rights being granted. A number of musicians, craftsman, poets, and other artists simply enjoy the creative process and need no other incentive to produce intellectual works.'
[198] Sterk *supra* note 135, at p. 1213; see also Gordon *supra* note 108; Fisher, *supra* note 114; P. S. Menell 'Intellectual Property: General Theories' in B. Bouckaert and G. de Geest (eds.) *Encyclopaedia of Law & Economics*: Volume II (Cheltenham: Edward Elgar, 2000) p. 129; J. Ginsburg 'The Concept of Authorship in Comparative Copyright Law' (2002-2003) 52 *DePaul Law Review*, p. 1068, describing the U.S copyright system '… as a system designed to advance the public goal of expanding knowledge, by means of stimulating the efforts and imaginations of private creative actors.'
[199] See J. W Harris *Property and Justice* (Oxford, Oxford University Press, 1996) p. 297, 'if it can be demonstrated, for example, that a pharmaceutical corporation will invest research and development costs in the manufacture of a new drug only if it is granted a patent, or that an author or composer will create an artistic work only if he is accorded copyright, and if in either case considerations parallel … to conditions for augmenting social wealth through incentives apply, then justice requires that the patent or the copyright be awarded' The question is whether copyright and patents can be empirically proved to incentive creativity and invention. See also S.G. Winter, noting that '[t]heoretical problems involving the relationship of intellectual property rights to incentives for economic progress are complex and multifaceted… .' S. G. Winter 'Patents in Complex Contexts: Incentives and Effectiveness in V. Weil & J. Snapper eds. *Owning Scientific and Technical Information* (New Brunswick: Rutgers University Press, 1989) pp. 56 - 57. For studies on IP as means of incentivisation see D. Nelkin *Science as Intellectual Property* (New York; Macmillan, 1985); S. Pejovich 'Property Rights and Technological Innovation' (1996) 13 *Social Philosophy and Policy* pp. 168 - 180; C. May 'Thinking, Buying, Selling: Intellectual Property Rights in Political Economy' (1998) 3(1) *New Political Economy*; R. Merges 'Property Right Theory and the Commons: the Case of Scientific Research' (1996) 13 *Social Philosophy and Policy* pp. 145 - 167.

all the variables involved means that the utilitarian program will always be at best inspirational. Like designing a perfect socialist economy, the computational complexities of this philosophical project cast grave doubt on its fitness as a workable [model].' [200] Related to this, Gordon, questions whether '… subsidies, cash prizes, reputational advantage, or tax credits …' may act as a better means of incentivising creators.[201] Despite these criticisms there are those who believe that the greatest benefit that utilitarianism has to offer is as an analytical tool rather than as a justification for IPRs. Svatos sees utilitarianism as a useful means of analysing whether policy choices are most beneficial for society,[202] concurring, Resnik concludes that '… the utilitarian justification for IP is … the dominant paradigm for evaluating laws and policies.'[203]

The second major failing of a utilitarian justification for intellectual property and copyright is that it might produce more harm than good. Resnik gives the example of patent law and the possibility that a company might patent an invention in order to keep it off the market.[204] It is also possible to patent an invention that has only harmful uses – i.e. guns and ammunition.[205] In addition, Paine notes that the utilitarian approach does not provide a convincing account of trade secrets and private, personal information.[206] Such information may indeed benefit the wider public thereby providing the 'greatest good' but these institutions do not demand that these rights holders disclose such socially

[200] R. Merges, *supra* note 199, at p. 3.
[201] Gordon, *supra* note 109, at p. 632.
[202] See M. Svatos 'Biotechnology and the Utilitarian Argument for Patents' (1996) 13 (2) *Social Philosophy and Policy* pp. 113 - 144.
[203] Resnik, *supra* note 120, at p. 324.
[204] *Ibid. at* p. 324.
[205] *Ibid.*
[206] See L. Paine 'Trade Secrets and the Justification of Intellectual Property' (1991) 20 *Philosophy and Public Affairs* p. 247 - 263.

valuable information.[207] In the field of copyright, extensive term protection of copyright – life of the author plus 70 years – arguably prevents secondary users from appropriating copyrighted material in order to create secondary works. Examples include fan fiction and music sampling.[208]

Furthermore Sunder contends that intellectual property is more than simply a tool for incentivizing creative production in the form of more things:[209]

> '… intellectual property law must adopt broader social and cultural analysis. The fundamental failure in the economic story of intellectual property has to do with information's role in cultural life and human flourishing … . Thus rather than narrowly viewing intellectual property as incentives-for-creation – that is, as merely economic or technology policy – we must understand intellectual property as social and cultural policy. Increasingly in the Knowledge Age, intellectual property laws come to bear on giant-sized values, from democracy and development to freedom and equality.'[210]

For Bentham the public good 'ought to be the object of the legislator; general utility ought to be the foundation of his reasoning.'[211] In order to achieve this there has to be a balancing of individual interests with communal welfare. This

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[207] *Ibid.*
[208] See *Grand Upright Music Ltd v. Warner Bros. Records* (1991) 780 F. Supp. 182 (SDNY 1991).
[209] M. Sunder, *From Goods to a Good Life: Intellectual Property and Global Justice* (Connecticut: Yale University Press, 2012) p. 24.
[210] *Ibid.* at p. 31 - 32.
[211] A. J. Milne 'Bentham's Principle of Utility and Legal Philosophy' in *Bentham and Legal Theory* (ed. James) p. 19 and the *Northern Ireland Legal Quarterly* (1973) 24 (3) pp. 9 - 38. Bentham, *supra* note 192, Ch. 1, para. 7.

idea of the balancing of interests plays an important part in moral and political theory however Bentham did not adequately show how such balancing could be achieved.[212] Social Citizenship presents a rubric in which the contrasting requirements of individual interests and communal welfare may be aligned. Under Harris's formulation, where an individual has been deprived of full community membership – for instance, where they have been deprived of a livelihood/work – they are entitled to compensation. However, and as already noted, for compensation to follow three requirements must be met; a) the social process which caused the harm can be identified, b) the agent who bears the responsibility for the harm can be identified, and c) the individual or group who are to benefit can be identified. The ARR satisfies this criteria in that the social process that causes the harm is the process by which the visual artist sells his work 'at a mere pittance' because he is unable to ascertain the true value of the work, only to see subsequent buyers profit substantially from a future sale.[213] The agent who bears the responsibility for causing the harm in this case is the buyer – art market intermediary. And the individual or group who are to benefit are visual artists. In addition, it must be remembered that the harm which citizenship theory writers such as Harris refers to is much more encompassing than the notion of harm that lawyers conventionally understand from areas of the law such as tort and contract law. The agent need not be morally culpable, only that he or she benefited from the transaction – the social process – while another member of the community suffered a loss.[214]

[212] Dias, *supra* note 2, at p. 593.
[213] See generally, M. E. Price 'Government Policy and Economic Security for Artists: The case for the Droit de Suite' (1967 – 1968) 77 *Yale Law Journal*, p. 1335.
[214] Harris, *supra* note 46, at p. 40.

Concluding on this point, it may be noted that utilitarianism as a construct is conceivably more useful as a model for comparing competing policy options then as an adequate justification for the various forms which intellectual property rights assume. Indeed, utilitarianism does not adequately describe the processes, which drive visual artists to create. In addition, the inadequacy of utilitarianism to provide a functioning model for balancing the rights of individuals as against that of the wider society can be seen in its most starkest light when applied to visual artist's who are unable to make an adequate living from their art and are therefore cast to the margins of society.

However, for all its failings, utilitarianism and its 'greatest good' principle, when combined with citizenship's compensation principle has the potential to create a defendable justification for a socially orientated ARR model. Under this construction, where the market fails to provide adequate compensation for visual artists, compensation through a social welfare scheme is justifiable on the basis that society as a whole is better off where more cultural goods are produced than not. Utilitarianism and social citizenship combined arguably provide a sufficient justification for the current ARR Directive, as well as for the reform proposals of Chapter 6.

4.7.3 Hegel

The third justification for intellectual property rights that this thesis explores is the personhood or personality theory: '… creative people define themselves by

reference to their work, and giving them control over their work is essential in order to protect their self-conceptions. Intellectual property rights are designed not so much to provide financial rewards as to allow the author to maintain a sense of identity.'[215]

Juxtaposed to Locke's theory of property rights lies Hegel's personality theory. Several political philosophers and legal theorists such as Radin,[216] Waldon[217] and Rawls[218] have drawn inspiration from Hegel's work. Hegel posits that property provides an adequate means for individuals to achieve self-actualisation or self-fulfilment.[219] This has been described as the 'personhood perspective' whereby 'to achieve proper self-development – to be a person – an individual needs some control over resources in the external environment.'[220] This theory maintains that a system of property and its incumbent rights represents the best means of achieving self-actualisation.[221]

Personality or personhood theory intuitively lends itself to certain classes of intellectual property, none more so than copyright which deals with literary, dramatic and artistic works. Accordingly, many have justified the expansion of author's rights, particularly in civil law countries, on Hegelian and Kantian

[215] Sterk, *supra* note 136 at p. 1197, See also L. C. Becker 'Deserving to Own Intellectual Property' (1993) *Chicago-Kent Law Review* p. 609 - 629, p. 622, E. J. Damich 'The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors' (1988) 23 (1) *Georgia Law Review* p. 35 - 75, R. Kwall 'The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis' (1994) *70 Indiana Law Journal* p. 60.
[216] M. Radin *Reinterpreting Property* (Chicago: University of Chicago Press, 1993) p. 35. See also M. Radin, 'Property and Personhood' (1982) 34 *Stanford Law Review*, p. 957.
[217] J. Waldron *The Right to Private Property* (Oxford: Clarendon Press, 1988).
[218] J. Rawls *Justice as fairness: A Restatement* (Cambridge: Harvard University Press, 2001).
[219] Resnik, *supra* 120, at p. 326, notes that for Hegel '… property provides a canvas for the development, expression and realization of one's self.'
[220] Radin, 'Property and Personhood' *supra* note 216, at p. 957.
[221] J. Hughes 'The Philosophy of Intellectual Property' (1988) 77 *Georgetown Law Review,* p. 28.

conceptions of personality/personhood.[222] A central theme in Hegel's *Philosophy of Right* is the concept of human will, personality, and freedom. For Hegel, individual will represents '… the core of the individual's existence, constantly seeking actuality (*Wirklichkeit*) and effectiveness in the world.'[223] Under this construction '[p]roperty becomes [an] expression of the will, a part of personality, and it creates the condition for further free action.' Property represents the first stage of this actualizing process. It is one of the first acts of free will in which the will as personality takes on a concrete, free form. However property, for Hegel, does not primarily exist to satisfy ordinary needs, desires or cravings, although he concedes that it can easily appear so.[224] The underlying reality is that 'property is the first embodiment of freedom.'[225] To Hegel, the person, in its initial state is an abstract entity. He has no distinguishing characteristics and cannot be distinguished from others in this initial state. 'Property transforms abstract individuals into persons with distinguishing individual characteristics'.[226] The acquisition of property enables individuals to relate to each other. For Hegel, property plays a crucial role in defining an arena of social life in which desires rather than law are the prime determinants of choice and activity.[227] But property also has a more fundamental role; in the

[222] See E. Adeney, *supra* note 12, at pp. 24 - 27, citing Morillot, Kohler and O. Van Gierke in this regard.
[223] Hughes, *supra* note 221, at p. 28.
[224] G. W. F. Hegel *Philosophy of Right* (1821; T. M Knox translation, Oxford, Clarenden Press 1952, 1st ed., 1967 reprint) para. 45.
[225] *Ibid.* at para. 45. See also Hughes *supra* note 221, at p. 343 ('Hegel argues that recognizing an individual's property rights is an act of recognizing the individual as a person.')
[226] Sterk, *supra* note 136, at p. 1240. See J. L. Schroeder 'Virgin Territory: Margaret Radin's Imagery of Personal Property as the inviolate Feminine Body' (1994) 79 *Minnesota Law Review* pp. 133 -134.
[227] P. Drahos *A Philosophy of Intellectual Property* (Hants: Dartmouth Publishing, 1996) p. 77.

context of the individual's social system it is essential to individual survival. To survive, man must accumulate property.[228]

Hegel's theory posits an absolute right of appropriation but this does not confer a monopolistic or exclusive entitlement.[229] Hegel elucidates on this point by presenting the case of extremely needy individuals and the 'rightful property of someone else'.[230] There is in this situation a 'right of distress'.[231] The needy individual is entitled to take those resources he requires for survival. Drahos observes that for Hegel '… where the denial of property involves the denial of life, a person is truly being deprived of his freedom of will.'[232] This part of Hegel's theory has some interesting implications for a personality based approach to the ARR, particularly the 'starving artist' justification. In addition, the theory shares some of the traits inherent in social citizenship. Ultimately, property serves a merely instrumental purpose and the greater 'good' for Hegel is 'freedom realized, the absolute end and aim of the world'.[233] The abstract right of property is subordinate to this end; it has no independent validity.[234] Furthermore, Hegel views property as serving a functional link between state and civil society. Property therefore becomes the subject matter of a social contract between individual personality and the state.[235] This theme is reminiscent of Locke's idea of legitimate government.

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[228] *Ibid.*
[229] *Ibid.*
[230] Hegel, *supra* note 224, at para. 127.
[231] *Ibid.*
[232] *Ibid.* at paras. 252 - 253.
[233] *Ibid.* at para. 129.
[234] *Ibid.* at para. 130.
[235] *Ibid.* at p. 217. See also Drahos, *supra* 227, at p. 78.

Hegel purports that the free mind may consider anything to be the subject matter of property whether that be tangible or intangible. There is no normative argument for what should and should not be the subject matter of property, just an explanation of their nature: '[p]roperty is whatever the will chooses to occupy, although the nature of the thing in question can determine the effectiveness of the occupation.'[236] For instance, food may be completely appropriated but the elements may not.[237] Furthermore, Hegel contends that '… mastery of things in the sense of occupying them is always likely to be incomplete[238]… our equipment, cunning and dexterity also condition the activity of occupation.'[239] However, for highly advanced societies there is very little that lies outside its potential for appropriation.

In addition to the appropriation of property, Hegel posits that property may be abandoned or alienated through an act of will.[240] Any such abandonment or alienation can only be asserted on goods that are 'external by nature.'[241] Therefore it would appear that personality cannot be abandoned or alienated.[242] However, within the Hegelian framework, whatever is 'not external by nature' can be made external through alienation or by force, for instance personality can

[236] Drahos, *supra* 227, at p. 79.
[237] Resnik *supra* note 120, at p. 326; incorrectly argues that '[a]lthough there is some general sense in which we express ourselves in everything we do, we need some way of distinguishing between activities that are highly self-expressive and those that are not, otherwise the Hegelian theory would imply the absurd conclusion that we can assert property rights over almost anything, including the air we breath.'
[238] Hegel, *supra* note 224, at para. 52.
[239] Drahos, *supra* 227, at pp. 7 - 8, Hegel *supra* note 224, at para. 52.
[240] Hegel, *supra* note 224, at para. 127.
[241] *Ibid.* at para. 65.
[242] *Ibid.* at 67. This supports Hegel's proposition that '… those goods, or rather substantive characteristics which constitute my own private personality and the universal essence of my self-consciousness are inalienable and my right to them is imprescriptible. Such characteristics are my personality as such, my universal freedom of will, my ethical life, my religion.'

be externalised through slavery.[243] That does not infer that under such circumstances personality is lost forever and cannot be re-appropriated, on the contrary, regaining personality '… involves negating just those actions which make it external and therefore capable of possession by someone else.'[244] For instance where the individual had given someone else power over their conduct, the re-appropriation of personality could only occur where the individual subsequently denied this external power over their conduct.

Hegel's claim that 'property is the embodiment of personality' has lead many to use his theory as a justification for IPRs in artistic works. Hughes posits that poems, stories, novels … musical works … sculptures, paintings and prints are 'natural receptacles for personality' while 'patents, microchip masks and engineering trade secrets' are not.[245] However, Drahos argues correctly that within Hegel's framework '[a]rtistic forms and objects have no privileged position in this respect.'[246] According to Hegel, '[a] person has the right to place his will in any thing … [t]he thing thereby becomes *mine* and acquires my will as its substantial end.'[247] The imposition of artistic form is simply one means by which we can take possession of something. Under the Hegelian construction personality does not allow for special rights for artists and other creators. [248] The individual's will may be used to appropriate property in any form; tangible or intangible, creative or non-creative. Hegel's argument is that private property is an essential part of the process in which personality realises itself in the world.

[243] Drahos, *supra* note 227, at p. 79.
[244] *Ibid.*
[245] Hughes, *supra* note 221, at p. 35.
[246] Drahos, *supra* note 227, at p. 80.
[247] G. W. F. Hegel *Elements of the Philosophy of Right* (first published 1821, A. Wood and H. Nisbet tr., Cambridge University Press 1991) para. 44.
[248] Hegel, *supra* note 224, paras. 4 & 56.

However, Hegel does not suggest that there is a hierarchy of rights whereby certain types of labour results in greater entitlements. Interestingly, in the context of visual art, the visual artist may imbue his work with his creative sprit or personality but then this manifestation of personality may be appropriated by another and employed as an expression of their own will/personality. Therefore the artist's personality may become another's will expressed through the work of art.

Another key feature of Hegel's theory relates to the acquisition of 'products of the mind' by others and how this relationship between creativity and use is managed. For Hegel, products of the mind which are 'peculiarly' ours may, when externalized, be produced by others.[249] Hegel does not see this as a problem but rather as a good. An individual, by coming into possession of externalized thoughts, whether in literary or inventive form, comes in contact with 'universal methods of so expressing himself and producing numerous other things of the same sort.'[250] For Hegel, intellectual products must be accessible and recognisable to others and therefore form the basis for learning by others. This view implies that the creative process cannot operate in a vacuum or in isolation. Contributions and developments to society's 'stock of knowledge' – the commons – is dependant upon previous innovations and processes of thought that have been acquired by society through individual ingenuity.[251] For Hegel knowledge is a stream that individuals can dip into and re-direct in a new direction, thus reworking knowledge and giving it a new form:

[249] *Ibid.* at para. 68.
[250] *Ibid.* at para. 68.
[251] Drahos, *supra* note 227, is of the opinion that 'Existing forms of knowledge' are revised by individuals of different generations and as such are propagated and advanced for the benefit of others.

> … the destiny [*Bestimmung*] of a product of the intellect [*Geistesprodukt*] is to be apprehended by other individuals and appropriated by their representational thinking, memory, thought, etc. hence the mode of expression whereby these individuals in turn make *what they have learned* … into an *alienable thing* will always tend to have some distinctive *form*, so that they can regard the resources which flow from it as their property, and may assert their right to reproduce it.[252]

According to Hegel the furthering of arts and science relies on '… the repetition of established thoughts, all of which have already been expressed and acquired from external sources.'[253] Furthermore, Hegel's conception of IP mirrors many of the attributes of both Lockean and Utilitarian theory. Hegel states that

> '[t]he purely negative, but most basic, means of furthering the sciences and arts is to protect those who work in them against *theft* and to provide them with security for their property, just as the earliest and most important means of furthering commerce and industry was to protect them against highway robbery.'[254]

The question that arises in this context is how society should confer property rights in this new form of knowledge? And how should society balance public versus private control of information? For Hegel, it is for communities and ultimately the legislature to set the balance between society's access to

[252] Hegel, *supra* note 247 (Wood & Nisbet trans.), para. 69.
[253] *Ibid.*
[254] *Ibid.*

knowledge while protecting the creators of this knowledge. Like Locke, Hegel recognises the role of the state in delineating the boundaries between public and private property, thus recognising the importance of an intellectual commons.[255]

One criticism of Hegel's theory in relation to IP is that it provides too low a bar for creativity and therefore appropriation of intangible goods. Resnik is critical of Hegel's theory when applied to IP because it is possible to obtain a copyright or patent despite minimal 'self-expression.'[256] For example, a photographer may randomly 'point and click', thereby producing a series of photos, vested with copyright, with little creative input. Resnik's critique also reflects recent CJEU case law which has raised the test for copyright from 'labour, skill and judgment' to possessing a 'creative' element.[257] However, this is not detrimental to Hegel's theory. Hegel's explanation of how personality begins to actualise itself in the world allows individuals to place their 'will into any and everything.'[258] Plucking an apple from a tree may require little effort but it does not prevent the individual from appropriating it. Similarly, under the Hegelian construction, the photographer can claim a property right in the photo despite minimal effort. Hegel's test for appropriating property is therefore quite low and necessarily raises the question of how Hegelian theory can be used as a justification for intellectual property? There is a clear incongruity between the means of appropriation under Hegelian theory and that employed by traditional IP regimes. Again, like Locke, Hegel recognises the role of judges and legislatures in this

[255] Drahos, *supra* 227, at p. 82. See also G. Hardin *The Tragedy of the Commons* (1968) 162 (3859) *Science New Series*, p. 1243.
[256] Resnik *supra* note 120, at p. 327.
[257] *University of London Press v. University Tutorial Press* [1916] 2 ch 601; *Sawkins v. Hyperion* [2005]. See also *C-5/08 - Infopaq International* – 'Copyright within the meaning of Article 2(a) of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation.'
[258] Hegel, *supra* note 224, at para 44.

capacity. Society, through its institutions, may determine the nature and scope of IPRs. Accordingly, Resnik's critique is not detrimental to Hegelian theory as a justification for IP.

4.7.3.1 The Hegelian Construct and the Artists' Resale Right

Similar to Lockean theory, Hegel's theory allows for the creation of property rights in intellectual, intangible goods. And like Locke, Hegel views the state as the primary arbiter of these rights. There is nothing in Hegel's theory which contradicts the ARR and its interference with the property rights of subsequent purchasers; once the legislature has provided for it, it is deemed legitimate.

As previously noted, for Hegel, 'needy individuals' have a 'right of distress'[259] which is a right to take the resources that they require from society.[260] The 'needy individual' is entitled to take those resources from others, which he requires for survival.[261] Similarly, the 'starving artist' rationale employed by the original proponents of the *droit de suite* maybe interpreted as a manifestation of this Hegelian justification albeit within a defined legal framework which delimits the boundaries of said transfer. Despite the apparently militant connotations of the 'right to take' Hegel's personality theory maybe aligned and tempered in many respects by Harris' theory of social citizenship. For Hegel, the deprivation of property, is a denial of individual will which excludes individuals from realising their full potential and from participating effectively as a member of

[259] Hegel, *supra* note 247, at para 127.
[260] *Ibid.*
[261] '… where the denial of property involves the denial of life, a person is truly being deprived of his freedom of will.'

their community. This idea of social exclusion shares much with social citizenship and its demand for community membership. Where individuals are marginalized a right to aid is realized and citizens are entitled to compensation based on their contribution or harm endured. For Harris the 'need principle' plays a key role in defining citizenship[262] and welfare rights.[263] Similarly, George and Wilding posit that the '… fundamental principle of radical social policy is that resources, whether in the field of health, education, housing or income, should be distributed according to need.'[264] In this context need is a social construct determined by the type of society in which we live.[265] The concept of need is explored further in Chapter 5.

The combination of Hegelian and citizenship theory therefore creates a dialectic based upon personality and community membership which most fully grounds a socially concerned ARR model. Social citizenship also presents a more justifiable basis for Hegel's 'needy individuals' by recasting their 'right to take' as a right to compensation. Furthermore, where the compensation requirement demands a social process, an agent and a beneficiary to be identified, this safeguards society from an unfettered right of the needy to take the property of others. Social citizenship also implicitly identifies a role for legitimate

[262] Harris, *supra* note 46, at p. 48.
[263] *Ibid.* at p. 49.
[264] Quoted in R. Plant, H. Lesser and P. Taylor-Gooby *Political Philosophy and Social Welfare: essays on the normative basis of welfare provisions* (London: Routledge and Kegan Paul, 1980) p. 21. Need satisfaction is also central to Titmuss' 'institutional redistributive model' of welfare, which sees 'social welfare as a major integrated institution in society, providing universalist services outside the market on the principle of need.' See R. M. Titmuss *Social Policy: an introduction* (London: George Allen and Unwin, 1974) p. 10.
[265] For Harris needs are socially constructed, needs can be identified by examining prevailing expectations and 'styles of living' in the community. Harris, citing Towsend: 'Needs arise by virtue of the kind of society to which individuals belong. Society imposes expectations, through its occupational, educational, economic and other systems, and it also creates wants, through its organization and customs.'; see Townsend, *supra* note 46, at p. 50.

government in this process rather than allowing unfettered individual rights from dictating when a redistribution of resources occurs. This dialectic provides the ARR with the most compelling justification for the inclusion of a social welfare entitlement.

4.8 Conclusion

This chapter has critically analysed three of the primary justifications for intellectual property. Social citizenship has been employed as a theoretical framework through which to view the application of these theories to the artists' resale rights. It has been found that the dialectic of social citizenship and Hegelian theory overcome many of the shortcomings of current IP models as they apply to the ARR.

A question that arises in this context is whether IPRs and more specifically copyright have the capacity to legitimately function as an instrument of social welfare? The first challenge in this regard concerns whether any precedent exists within the common law for the use of IPRs as an instrument of social welfare. As Sterk observes the Statute of Anne attempted to remedy a situation wherein authors were unable to benefit financially from their exploits to the 'detriment' and 'ruination' of them and their families.[266] The Act possessed a social character that in no way resembled the 'poor laws' of the 18th century but instead responded to a market failure to recompense deserving authors. The Act instead, in recognising this social dis-service, provided authors with the means to

[266] Statute of Anne, 1710, ch. 19 (Eng).

participate in an economy designed to allow citizens reach their full potential. This in turn provided creators with a legitimate means of employment.

As noted by Harris, employment is a 'good' in itself because it provides citizens with the wherewithal to participate in a community life. However, the form of liberalism upon which the free market is premised requires a general duty of non-interference where there are no special relationships. Therefore, in relation to the ARR, where visual artists have been compensated for the first sale of their work, no further 'special-relationships' exist; all rights and obligations under the initial contract for sale have been discharged. Accordingly, a strict application of free-market liberalism does not provide adequate grounds nor support the ARR, indeed, this has been the charge of many of the opponents of the resale right.[267]

However, the second condition of the preamble to the Statute of Anne states that the Act incentivises 'learned men' to compose and write 'useful books'. The ARR Directive in recognising many of the deficiencies of the extant copyright rubric, and specifically its application to visual artists, encourages visual artists to create by guaranteeing them their just deserts. In this context where an artist's work subsequently sells for sums far beyond the original sale price, an additional re-sale royalty follows. It therefore provides a form of compensation to visual artists who were unable to assess the true value of their work at the time of its first sale.

[267] See Merryman *et al*, Chapter 3, Section 2.3.5, p. 122.

Harris's theory of citizenship takes this compensation principle and expands it to encompass situations where social processes operate in ways which prejudice one's standing as a full member of the community. Harris's argument proposes a theory of rights '… radically different from the property rights theory of market liberals. It suggests the existence of a right to have one's status as a full member of the community protected by social rights in the name of citizenship.'[268] Such a theory, when considered in conjunction with the IP justifications considered here not only provide a more complete grounding for the ARR Directive but also provide grounds for an ARR Directive that embodies a more socially progressive outlook.

A second challenge in this regard concerns whether social citizenship as a communitarian theory of civic-republicanism has a place within common law jurisdictions that are the product of individualistic free-market liberalism. As an answer to this, and as suggested in section 4.2, it is proposed that both liberal and republican schools of thought acknowledge the competing forces of individual autonomy and community obligation. Neither school of thought guarantees absolute and untrammelled respect for individual rights to the detriment of the community or vice-versa. Harris notes that '[t]he welfare state civilizes market relations; it compensates for their inadequacies and promotes goals they could never achieve alone. It does not, however, seek totally to replace the market.'[269] Indeed, the modern 'mixed economy' of free-market liberalism and welfare statism – which exists in the EU today[270] – reflects the communitarian ethos of community belonging and a refusal to allow the marginalisation of society's

[268] Harris, *supra* note 46, at p. 38.
[269] *Ibid.* at p. 62.
[270] See Chapter 5, Section 5.2.3, p. 281.

weakest members. Accordingly, Harris's conception of citizenship, as a basis for welfare reform finds fertile grounds in an EU context. Under Harris's model of citizenship, welfare reforms are justified once a social process can be identified along with the parties who benefit and suffer from the social des-service. In the context of this thesis, the social dis-service in question is the inability of many visual artists to make an adequate living from their profession. Accordingly there is nothing preventing a more socially focused ARR model grounded upon social citizenship theory.

A related theme that was explored in Chapter 1 is that the EU ARR Directive, by adhering strictly to the strictures of extant EU IP institutions, emphasises 'form over function' or in other words places greater importance on the character of the ARR Directive rather than focusing on the function that it ought to serve. In this regard, social citizenship theory is drawn upon to justify the expansion of the ARR to encompass a social welfare function and in doing so fulfil its original intended function – to remedy the plight of the 'starving artist'.

In conclusion and to cite Brierly once more, '[law] is only a means to an end, and that end is to assist the problems of the society in and for which it exists.'[271] The EU ARR Directive as it currently stands does not adequately assist the vast majority of visual artists and as such most be reformed to reflect the needs of these cultural creators.

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[271] Brierly, *supra* note 5 at p. 72.

Chapter 5 – The ARR Directive: a Means of Targeted Intervention for Visual Artists

5.0 Introduction

The chapter is divided into four main sections. Section one focuses on the progressive realisation of social rights within the EU over the past 60 years and in doing so grounds the argument for a socially orientated ARR Directive. Having established a legal basis for reform the chapter progresses to consider the related issues of welfare, need and poverty. It is proposed that within the construct of the free-market, the exclusion that social citizenship seeks to alleviate is dependent upon the welfare state. However the extent of a state's response to the issue of poverty is largely dependent upon whether it adopts a narrow or broad based understanding of welfare and indeed need.[1] In this context the competing forces of welfare and poverty are explored before considering 'need' and its function as a determinant of state welfarism.[2] While these concepts are formulated and advanced at a certain level of abstraction, they nonetheless translate into concrete institutional practices evident in European welfare models and more pertinently the German and Norwegian ARR models, which are explored in the final section of this chapter.

[1] Broadly conceived, the institution of welfare not only includes policies related to income security but policies relating to education, housing, employment and health initiatives. How a state deals with the issue of poverty is reflected in the degree to which it orientates its focus within each of these policy areas. While each policy area plays a pivotal role in its own right, the focus of this thesis, being the artists' resale right, naturally centres the debate within the income security policy arena.

[2] Welfarism refers to the principles and policies associated with the welfare state.

In considering whether visual artists might benefit from an ARR derived income security benefit this chapter evaluates empirical research on the socio-economic status of various creative classes with a specific focus on visual artists. This serves to highlight the often extremely precarious position of visual artists and the extent to which they experience social exclusion. Having established the financial benefits that an ARR derived, income security benefit is capable of providing for visual artists, the chapter outlines and evaluates two socially orientated ARR rubrics; namely that of Germany and Norway. These models form the basis of the reforms proposals of Chapter 6.

5.1 EU Social Policy Framework

Within the majority of discussions concerning Social Europe, the concept is framed as a broad commitment to '… a mixture of values, accomplishments and aspirations, varying in form and degree of realization among European states.'[3] Preece notes that '… beyond these broad values and orientations, the specific operation of the European social model is left explicitly undefined, reflecting the wide variety of welfare practices among the member states … .'[4] Within the context of EU social rights this approach is also observable, largely due to the fact that EU social policy is structured around the principle of subsidiarity.[5] Accordingly, EU involvement in member state social policy remains limited to

[3] A. Giddens 'A Social Model for Europe?' in A. Giddens, P. Diamond and R. Liddle (eds.) *Global Europe, Social Europe* (Alden: Polity Press, 2006) p. 15; D. V. Preece *Dismantling Social Europe: The Political Economy of Social Policy in the European Union* (London: FirstForumPress, 2009) p. 2, for Preece, Social Europe is better understood by what it is not; US, liberal and residual.

[4] Preece *supra* note 3, at p. 2, Preece's thesis is that this ambiguity has been exploited and manipulated by the neoliberal agenda.

[5] B. Cantillon, S. Marchal and C. Luigjes 'Decent Incomes for the Poor: Which Role for Europe' *Journal of Common Market Studies* (2017) (55) 2, p. 242.

soft governance initiatives, which include non-binding policy targets – for instance the Europe 2020 social targets – and the monitoring of member state's progress towards these targets through the Open Method of Co-operation (OMC).[6] Therefore, as noted by Hervey, '[a] distinctly 'European' model is discernible only at a high level of abstraction.[7] With a view to understanding the dynamics, extent and form of EU social policy, the following section reviews the development of the EU's social agenda over the past 60 years.

Originally, the Treaty of Rome, which established the European Economic Community (EEC) (1957) was predominantly market driven.[8] The six original EEC member states – Belgium, France, the Federal Republic of Germany, Italy, Luxembourg and the Netherlands – adopted a *laissez-faire* position to the social implications that an unrestricted market might have on member states.[9] In line with the teachings of liberal economists such as Hayek and others, it was thought that an unrestricted market would create the optimal re-allocation of resources, thus enabling economic growth and social development.[10] Accordingly, in the early days of the EU (as it is now) social harmonisation was seen as a natural development of economic integration and accordingly no specific social provisions were written into the founding Treaty.[11] However, in 1973 when

[6] *Ibid.*
[7] T. K. Hervey 'Social Security: the European Union Dimension' in N. Harris eds. *Social Security Law in Context* (Oxford, OUP, 2000) p. 247.
[8] Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11.
[9] B. Reynolds and S. Healy *Does the European Social Model Have a Future?: Challenges and Responses 70 Years after the Beveridge Report* (Dublin: Social Justice Ireland, 2012) p. 87. For Reynolds and Healy this position represented '… an ideology that gives primacy to the economy. It believes that people should serve the economy, not vice verse.' Conversely, the authors argue that an untrammelled market undermines social development, creates inequalities rather than solidarity, '… creating what is superfluous rather than redistributing necessities.'
[10] *Ibid.*
[11] L. Hantrais *Social Policy in the European Union*, 3rd ed. (Hampshire: Macmillan Press, 1995) p. 2.

Ireland, Denmark and the UK joined the EEC a more active approach to social reform was espoused. The inequalities created by an unfettered market were now evident and no longer considered to be in member states' long-term interests.[12] As a result the following decades witnessed a growing commitment to the development of social policies as a necessary counter balance to the Community's economic mandate.[13]

Nevertheless the Treaty of Rome was not devoid of social responsibility, while the primary aim of the Treaty of Rome was to create a European economic community, twelve of the 248 Articles also referred to matters of social policy.[14] Article 118 gave the Commission responsibility for promoting close co-operation between member states relating to training and employment, working conditions, social security and collective bargaining but without stating the means of achieving these objectives. Article 119 defined the equal pay principle,[15] Article 121 provided for the implementation of common social security measures for migrant workers[16] while Article 123 – 128 set out specific arrangements for

[12] *Ibid.*
[13] *Ibid.* That is not to say that the founding text of the EEC Treaty was devoid of any social character. Article 2 committed member states to raise standards of living while Article 3 enshrined the provision of a social fund. Nevertheless, the development of a European social policy agenda largely derived from the Council of Europe and particularly the signing of its Social Charter in 1961. This in turn served as the basis for the Community Charter of the Fundamental Social Rights of Workers in 1989.
[14] Treaty Establishing the European Community, Articles 117 - 128 (EEC Treaty).
[15] Resulting in Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women
OJ L 045; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39.
[16] Resulting in Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community Official Journal L 149.

operating the European Social Fund (ESF).[17] The ESF was intended to compensate workers for the costs related to geographic and occupational mobility within the EU by providing assistance with the cost of vocational retraining and resettlement allowances.[18] However, it also helped poorer regions 'catch up' with wealthier member states and prevent 'a race to the bottom',[19] otherwise known as social dumping.[20] The ESF made provision for equal pay, the improvement of standards of living and social harmonisation to the extent that these social objectives supported the overall aim of economic integration.[21] From the perspective of member states, Caune *et al* note that economic integration and its focus on a sound public budget, reducing national debt, lowering inflation (which means both wage moderation and stabilising social contributions) placed real constraints on member state's social policies.[22] Similarly, from the supra-national perspective, Pierson and Leibfried, recognising the constraints of economic integration, note that national welfare states became 'semi sovereign', limiting member state's control of the social

[17] See European Social Fund and the European Regional Development Fund (1975) <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_5.1.2.html> (date accessed: 25th May 2017).
[18] Hantrais, *supra* note 11, at p. 3.
[19] The danger was that the 'internal market' might give states with lower minimum wage levels and lower social security provision an unfair competitive advantage over states with more developed minimum wage and social security structures. For more see H. Caune, S. Jacquot and B. Palier 'Social Europe in Action' in P. R. Graziano, S. Jacquot and B. Palier (eds.) *The EU and the Domestic Politics of Welfare State Reforms* (Hampshire: Palgrave MacMillan, 2011) p. 20.
[20] While there is no exact definition of social dumping it may be described as '… a set of practices on an international, national or inter-corporate level, aimed at gaining an advantage over competitors, which could have important negative consequences on economic processes and workers' social security. Examples include actions taken by actors from 'low wage' Member States to gain market advantage over actors from Member States with higher pay and social standards; multinational companies from 'high wage' countries searching for ways to avoid legal constraints by employing subcontractors from low-wage countries; and companies engaging cheaper and more vulnerable temporary and agency workers, or relocating production to lower wage and less regulated locations. Social dumping takes different forms in different sectors.' EU Parliament Think Tank 'Understanding Social Dumping in the European Union' <http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2017)599353> (date accessed: 26 May 2017).
[21] See Caune *et al*, *supra* note 19, at p. 20.
[22] *Ibid.*

field.[23] However, this 'shared competency' resulted in an EU social agenda which has been described as '… modest, cautious and narrowly focused … .'[24] In addition, the 'Merger Treaty' (1965)[25] which brought together the institutions of the European Coal and Steel Community (ECSC), the European Economic Community (EEC) and the European Atomic Energy Community (EAEC) thereby establishing a single Council and Commission did not result in any formal changes in the social policy field.[26] Signs however, of a growing political commitment to social policy were evident in the Community's Council of Ministers' Resolution 'concerning a social action programme' (1974)[27] (SAP)[28] which noted that economic expansion was not to be seen as an end in itself but should result in an improvement of workers quality of life.[29] The SAP neither sought to establish a '… standard solution to all social problems …',[30] nor to take responsibility in this area away from member states, instead it continued to adopt a cautious approach, which in many ways foreshadowed the concept of

[23] P. Pierson and S. Leibfried *European Social Policy: between Fragmentation and Integration* (Washington: Brookings Institution, 1995).
[24] Hantrais, *supra* note 11, at p. 4.
[25] Treaty of 8 April 1965 establishing a Single Council and a Single Commission of the European Communities, OJEC No. 152.
[26] Hantrais, *supra* note 11, at p. 4.
[27] Council Resolution of 21 January 1974 concerning a social action programme, OJ 13/1
[28] See EurWORK – European observatory of Working Life <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/social-action-programme> (date accessed: 2 April 2017). 'Social Action Programmes (SAPs) are launched periodically by the Commission to promote the EU's social objectives. SAPs identify areas for EU initiatives, which may take the form of legislative proposals and, more often, non-legislative activities. The Community's first SAP of 1974 was in response to a mandate issued by the Heads of States meeting in Paris at the Summit of October 1972. The final communiqué declared that the Member States 'attached as much importance to vigorous action in the social field as to the achievement of economic union ... (and considered) it essential to ensure the increasing involvement of labour and management in the economic and social decisions of the Community'. Accordingly, the Commission was instructed to draw up a Social Action Programme. By a Resolution adopted on 21 January 1974, the Council of Ministers approved the Social Action Programme involving more than 30 measures over an initial period of three to four years. The three main objectives were: the attainment of full and better employment in the Community, the improvement of living and working conditions, and the increased involvement of management and labour in the economic and social decisions of the Community and of workers in companies.'
[29] Hantrais, *supra* note 11, at p. 4.
[30] Council Resolution of 21 January 1974 concerning a social action programme (OJ C 13/1 12.2.74).

subsidiarity.[31] Importantly, the EEC Treaty did not require a social programme, and the community did not have direct powers of intervention. Instead, its focus was on the promotion of co-operation between member states, therefore ' … action had to be justified on political rather than legal grounds.'[32] Accordingly SAP represented the 'political will' to act albeit within the confines of the EEC's economic objectives of free movement and equalisation of competition.[33] Within this political economy, the ESF acted as a means of '… palliating the uneven effects of economic growth on weaker sectors of the population.'[34] SAP set the scene for the development of the Community's social policy for the next decade in areas such as education and training, health and safety at work, workers' and women's rights and poverty.[35]

By the mid-1980s, pressure was building to further harmonize EU social policy,[36] however given the lack of legislative competence and political will at that time, the adoption of social standards through European regulation was neither 'realistic' nor 'desirable'.[37] It was in this environment that the idea of a 'social space' (*espace social*) developed as a means of harmonizing laws through convergence rather than regulation.[38] In this regard, the 'social space' forwarded by Mitterand, in 1981, and adopted by the Commission under Delors, in 1985, attempted to reduce the role of the Commission, thereby signifying an alternative

[31] Hantrais, *supra* note 11, at p. 4.
[32] Hantrais, *supra* note 11, at p. 5.
[33] Caune *et al*, *supra* note 19, at p. 23.
[34] Hantrais, *supra* note 11, at p. 5.
[35] *Ibid.* p. 6.
[36] *Ibid.* p. 6.
[37] S. Smismans 'The Open Method of Coordination and Fundamental Social Rights' in G. de Búrca and Bruno de Witte *Social Rights in Europe* (Oxford OUP, 2005) p. 218.
[38] *Ibid.* at p. 228.

approach to harmonization.[39] Due to the aforementioned structural constraints (competency),[40] and the non-binding nature of convergence measures over regulation,[41] the 'social space' that Mitterrand advocated, merely provided aspirational rather than substantive guidance to member states in the harmonization of their social policies.[42] These 'soft governance initiatives' encouraged member states to adopt traditionally corporatist principles that favoured the creation of policy objectives through stakeholder dialogue between member state governments, trade unions and employer representatives. It is perhaps worth noting that in parallel with EU IP policy at that time, EU social policy was equally fragmented and incoherent.[43] Nevertheless, the notion of a 'social space' developed at a time when the importance of EU social policy was considered to be a pre-cursor to economic performance.[44] For Delors it was the

[39] Hantrais, *supra* note 11, at p. 6 notes that 'By referring to a social space, Delors appeared to be seeking to introduce an equivalence of standards, which would be agreed and accepted by both sides of industry through social dialogue, a concept central to his thinking. The social dialogue was intended to make trade unions and employers act as initiators of social policy, on the understanding that in return, the Commission would refrain from developing new initiatives itself. The social partners would thus be concerned with principles and objectives, leaving member states to implement them within existing industrial relations frameworks, thereby achieving convergence in the employment and labour policy goals of the member states, rather than the standardisation of industrial relations institutions and processes.' See also P. Teague *The European Community: The Social Dimension. Labour Market Policies for 1992* (London: Kogan Page in association with Cranfield School of Management, 1989) p. 69 - 70.

[40] Hervey, *supra* note 7, at p. 235. 'Before the Treaty of Amsterdam … virtually all social measures had to be enacted by unanimity in Council, and even after Amsterdam the unanimity procedure remains for various social security and social welfare measures.' For instance Article 153(c) TFEU – social security.

[41] Caune *et al, supra* note 19, at p. 20.

[42] B. Bercusson 'The European Community's Charter of Fundamental Social Rights of Workers' (1990) 53 *The Modern Law Review*, p. 631; In relation to the creation of a wage standard under the Community Charter on the Fundamental Rights of Workers: '[t]he final Draft does not make clear where the standard to 'be assured' is to be found: in law, collective agreements at various levels, national practices, or any of these.'

[43] For further, see Chapter 1; see also S. Weatherhill 'Flexibility or Fragmentation: Trends in European Integration' in J. Usher (ed.), *The State of the European Union* (Harlow: Longman, 2000).

[44] D. Beretta (rapporteur) *Social Aspects of the Internal Market: European Social Area* (Brussels: European Communities/Economic and Social Committee, 1989). p. 5.

European social dimension that allowed competition to flourish and any attempt to exclude the former would be self-defeating.[45]

When the Single European Act was signed in 1986 little had changed regarding the integration of social policy into the legislative framework.[46] In 1989 the heads of all member states, with the exception of the United Kingdom, adopted the Community Charter of the Fundamental Rights of Workers.[47] The preamble of the Charter states that '… the same importance must be attached to the social aspects as to the economic aspects and … therefore, they must be developed in a balanced manner.'[48] However, similarly to the Council of Europe's Social Charter, the Community Charter did not enjoy the force of law and was therefore not binding on its signatories. At a minimum, the Charter represented a 'solemn declaration' of intent by member states to establishing a baseline of social rights, [49] and at best, it opened up the wider debate concerning the interventionist role of the Community in matters of social policy and the extent to which this might challenge national sovereignty. For Berghman however, the SEA was largely ineffectual and did nothing to expand the Community's indirect and limited competence in the social welfare field.[50]

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[45] J. Delors 'Preface' in J. Vandamme, ed., *New Dimensions in European Social policy* (London: Croon Helm, 1985) p. xviii; G. Room 'European Social Policy: Competition, Conflict and Integration', in R. Page and J. Baldock (eds), *Social Policy Review 6* (Canterbury: Social Policy Association, 1994) p. 21, In a similar vein, Room is of the opinion that European social policy was a 'functional prerequisite of economic, monetary and industrial policy.'

[46] Hantrais, *supra* note 11, at p. 9.

[47] Commission of the European Communities, Charter of the Fundamental Social Rights of Workers (Luxembourg: Office of Official Publications of the European Communities, 1990).

[48] *Ibid,* 'Preamble.'

[49] Hantrais, *supra* note 11, at p. 8.

[50] J. Berghman 'The Implications of 1992 for Social Policy: A Selective Critique of Social Insurance Protection' *Cross-National Research Papers,* 2 (1) in S. Mengen (eds.) *The Implications of 1992 for Social Insurance* (London-Birmingham: London School of Economics, 1990) p. 9.

The principles set out in the Community Charter were followed in the Agreement on Social Policy annexed to the Treaty on European Union (EU) signed in Maastricht on 7 February 1992.[51] This was not a binding document and despite its 'soft-law' nature, the UK insisted upon its removal from the Treaty.[52] The Maastricht summit once again illustrated the difficulties in reaching agreement on the 'social chapter'. By including a separate Protocol on Social Policy the other eleven member states proceeded with the development and expansion of the Social Charter without the UK. In addition '… by incorporating the principle of subsidiarity in the Maastricht Treaty, member states seemed to be confirming their continued reluctance to develop an overarching social policy which might impinge upon national sovereignty.'[53] At this point in time EU relations may be characterised as distinctly intergovernmental rather than supranational in nature.[54]

As highlighted above, the first four decades of the European project contained varying attempts to incorporate member state's diverse social policies into the burgeoning supranational EU framework. This resulted in a somewhat fragmented system of rights which, Weatherhill describes, in the broader sense, as an 'accumulation of texts, breeding ever deepening intransparency.'[55]

[51] Treaty on European Union (EU), signed in Maastricht on 7 February 1992, came into force on 1 November 1993 Agreement and Protocol on Social Policy, concluded between the member states, with the exception of the United Kingdom.
[52] B. de Witte 'The Trajectory of Fundamental Social Rights in the EU' in G. de Búrca and B. de Witte eds. *Social Rights in Europe* (Oxford: OUP, 2005) p. 165.
[53] Hantrais, *supra* note 11, at p. 12.
[54] For further see Preece, *supra* note 3, at p. 19 - 42. At p. 26 'Informed by the realist tradition in international relations theory, the theoretical framework of intergovernmental maintains that the process of integration is being driven by states in an attempt to pursue their interests and enhance their relative power. … the history of European integration may alternatively be read as an attempt to rescue the nation-state rather than a process that would ultimately subsume it (Cini 2004 p. 96).' See also Caune *et al, supra* note 19, at p. 33.
[55] Weatherhill, *supra* note 43, at p. 18.

Accordingly, a review of member state laws was a necessary pre-requisite to further legislative action in this area. In 1993 the Commission published a Green Paper outlining the *acquis communautaire* in the area of social policy[56] before proceeding to develop a White Paper on 'European Social Policy – a Way Forward for the Union' in 1994.[57] Arguably the most significant aspect of the White Paper was its clear intention to extend social rights to categories of people who were not in work, thereby establishing '… the fundamental social rights of citizens as a constitutional element of the European Union';[58] a goal which the Community Charter did not espouse.[59] The recognition of social citizenship marked an important turning point in EU social policy.[60] The 1994 White Paper was followed by a medium-term SAP for 1995 – 97, it contained the message that '… social policy is a productive factor facilitating change and progress rather than a burden on the economy or an obstacle to growth.'[61] Hantrais notes that at this time:

> '[t]he main challenge the Union faced was how to adapt social protection to sustain high standards of provision in a context of population ageing, changing family structures, a new gender balance and enlargement, without abandoning the values of solidarity and cohesion.'[62]

[56] Commission of the European Communities, European Social Policy: options for the Union, Green Paper, COM(93) 551, 12.11.1993, OOPEC, 1993.
[57] European Commission, European Social Policy: a way forward for the Union, White paper, COM(94) 333 final, 27.7.1994, OOPEC, 1994.
[58] *Ibid.* p. 53.
[59] Hantrais, *supra* note 11, at p. 13.
[60] No longer was the focus restricted to workers rights.
[61] A Medium-term social action programme for 1995 – 97, *Social Europe,* 1/95; Progress report on the implementation of the medium-term social action programme 1995-97, *Social Europe Supplement,* 4/96 p. 1.
[62] Hantrais *supra* note 11, at p. 14.

Guided by the principles of subsidiarity and proportionality SAP 1998 – 2000 again reaffirmed the underlying relationship between social and economic progress – '… economic and social progress go hand in hand … '[63] – but for the first time specified what this might entail: '… a decent quality of life and standard of living for all in an active, inclusive and healthy society that encourages access to employment, good working conditions, and equality of opportunity.'[64]

The Treaty of Amsterdam (1997) continued this momentum by amending the Treaty on European Union and the Treaties establishing the European Communities.[65] The Treaty renumbered the articles in the original EEC Treaty and following the British opt-in,[66] the Agreement on Social Policy was incorporated into the main body of the Consolidated Treaty under Title XI on social policy, education, vocational training and youth.[67] For Hantrais this move solidified '… member states commitment to the development of the social dimension as an important component in the process of European integration.'[68]

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[63] European Commission, Social action programme 1998 – 2000, COM(1998) 259 final, 29.4.1998, OOPEC, 1998 p. 8

[64] European Commission, Social action programme 1998 – 2000, COM(1998) 259 final, 29.4.1998, OOPEC, 1998 p. 8; Hantrais *supra* note 11, at p. 14 - 15, notes that the Union was facing increased pressure from major social challenges at the turn of the 21st century. 'On the one hand, Economic and Monetary Union (EMU) was creating the economic conditions needed to underpin social progress. On the other, population ageing and, more especially, the ageing of the workforce were raising concerns about the implications of demographic trends for employment and social protection systems in Europe. In addition the prospect of enlargement was fuelling debates about the role that social policy could play in the transition to a market economy in candidate countries, raising questions about how they would bring their social legislation into line with other member states and develop adequate systems of social protection.'

[65] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed in Amsterdam on 2 October 1997.

[66] P. Craig and G. De Búrca 2nd ed. *The Evolution of EU Law*, (Oxford: OUP, 2011) p. 656. 'A new labour government was elected in the UK in May 1997. This precipitated a sea change in the British approach towards the European Union.'

[67] The original EEC Treaty articles 117 - 128 on social provision and the European Social Fund were re-numbered articles 136 - 150.

[68] Hantrais, *supra* note 11, at 14. In addition to various policy changes on the Environment and competition the Treaty inserted a new article 13 which extended action against discrimination to

De Witte on the other hand is more cautious in this regard, noting that while '… the new Treaty text extended the EU's capacity for social regulation of the market, … this change was not accompanied by a major new role for fundamental social rights.'[69] Nevertheless, the Treaty of Amsterdam signified an important milestone in EU social policy and while it did not establish the means by which social exclusion might be eradicated it did progress the realisation of this objective by further strengthening the position of social policy within the Treaties.

The progressive realisation of social rights continued under the Treaty of Nice (2000).[70] Due to the enlargement of the European Union one of the Treaty's primary objectives was to ensure that smaller member states would not enjoy disproportionate influence in EU decision-making. While this would have clear ramifications for the development of EU social policy,[71] the more direct effect on social policy brought about by the Nice Treaty related to the establishment of a Social Protection Committee and the Charter of Fundamental Rights.[72] The Social Protection Committee – another soft governance initiative – was charged with monitoring the social protection policies of member states, promote exchange of information and prepare reports and opinions.[73] The Charter of

encompass 'sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation' thereby expanding the notion of citizenship and inclusion.

[69] De Witte *supra* note 52, at p. 158.

[70] Treaty of Nice, adopted on 11 December 2000, ratified in 2002, and brought into force on 1 February 2003.

[71] Mainly because the requirement of unanimity was replaced with the ordinary decision making process. For further see the European Parliament 'Fact Sheet on the EU' <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_1.4.1.html> (date accessed: 3 April 2017).

[72] Charter of Fundamental Rights of the European Union, 2000, OJ C 364.

[73] For further see N. Moussis *Access to the European Union: Law, Economics and Policies* 22nd ed. (Cambridge: Intersentia, 2016). < http://www.europedia.moussis.eu/books/Book_2/5/13/05/03/?all=1> (date accessed: 13 July 2017).

Fundamental Rights, respecting the principles of subsidiarity and proportionality extended the boundaries of social policy beyond the workplace – as protected under the Charter of the Fundamental Social Rights of Workers[74] – to the reconciliation of family and professional life, the protection and care of children and older people, social and housing assistance, preventive health care, and religious belief and practice.[75] Hantrais notes that '[t]he aim was to consolidate the union's commitment to the values of human dignity, freedom, equality and solidarity, while continuing to respect the diversity of cultures and traditions.'[76] However, the Charter of Fundamental Rights – like the Charter of the Fundamental Social Rights of Workers – again took the form of a solemn proclamation, which meant that it was not legally binding. While attempts were made to incorporate the charter into the Constitutional Treaty of Europe,[77] that Treaty's failure to be ratified did not change the 'soft law' status of the social charter.[78]

The most profound change for EU social rights came with the Treaty of Lisbon in 2007.[79] The focus on inclusion is most clearly expressed in Article 2(3) which again acknowledges the important link between social and economic policy:

[74] The impact of which can be seem in the development of Directives such as the Pregnancy and Maternity Directive 2002/73/EC, The Working Time Directive 93/104/EC, The European Works Council Directive 94/45/EC (now updated by the recast Directive 2009/38/EC) and the directives based on the framework agreements on parental leave, part-time work and fixed-term work.
[75] Hantrais, *supra* note 11, at p. 17.
[76] *Ibid.*
[77] Constitutional Treaty for Europe, signed on 29 October 2004, not ratified by 1 November 2006, OJ C 310 47/1.
[78] Hantrais, *supra* note 11, at pp. 17 - 18.
[79] Treaty Of Lisbon Amending The Treaty On European Union And The Treaty Establishing The European Community (2007/C 306/01) 17.12.2007. The Treaty took effect in 2009.

> 'The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment … *It shall combat social exclusion and discrimination, and shall promote social justice and protection,* equality between women and men, solidarity between generations and protection of the rights of the child. *It shall promote economic social and territorial cohesion, and solidarity among Member States*.'[80] [emphasis added]

However, given the EU's shared competence in the area of social policy, the forgoing is arguably merely aspirational, signposting a general intention to influence the social policies and legal framework of member states. Nevertheless, the Treaty of Lisbon elevated the standing of social rights within the Treaties; for instance, Article 3 of the Treaty on European Union now emphasises the EU's social objectives, including full employment and solidarity between generations,[81] but most importantly, Article 6(1) provides that '[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union […], which shall have the same legal value as the Treaties.'[82] The Charter, therefore, constitutes primary EU law, against which the validity of secondary EU legislation and national measures

[80] *Ibid.* Article 2(3).
[81] Article 3, Consolidated Version Of The Treaty On European Union (TEU) OJ C 326/13.
[82] *Ibid.* Article 6.

may be assessed.[83] Perhaps most importantly, the Charter has direct effect[84] and is binding on EU institutions and member states when implementing EU law.[85]

Furthermore Title X TFEU recognises the social obligations of the Union and member states to its citizens, setting a number of objectives, including the promotion of employment, improved living and working conditions, proper social protection and the combating of social exclusion.[86] More specifically Articles 151 – 153 of Title X provide the legal basis upon which the Union may legislate for social change.[87] Importantly, for the first time, the Treaty recognises the EU economy as a '… competitive social market economy …' [88] and not simply an open market economy free of state intervention. A competitive social market economy may be described as a social and economic system combining free market capitalism, which supports private enterprise alongside social

[83] European Parliament *Fact Sheet on the European Union* <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_1.1.6.html> (date accessed: 12 July 2017).

[84] J. Blackstock 'The EU Charter of Fundamental Rights Scope and Competence' (2012) *Justice Journal* pp. 19 - 32. <https://eutopialaw.com/2012/04/17/the-eu-charter-of-fundamental-rights-scope-and-competance/> (date accessed: 12 July 2017).

[85] International Labour Organization *Studies on Growth with Equity: Building a Social Pillar for European Convergence* (Geneva: ILO, 2016) p. 25.

[86] Title X, TEU, *supra* note 81.

[87] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union.
See also <https://portal.cor.europa.eu/subsidiarity/policyareas/Pages/SocialPolicy.aspx> (date accessed: 13 June 2017). Article 153 states that: 'With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the member States in the following fields: (a) improvement in particular of the working environment to protect workers' health and safety; (b) working conditions; (c) social security and social protection of workers; (d) protection of workers where their employment contract is terminated; (e) the information and consultation of workers; (f) representation and collective defence of the interests of workers and employers, including codetermination, subject to paragraph 5; (g) conditions of employment for third-country nationals legally residing in Union territory; (h) the integration of persons excluded from the labour market, without prejudice to Article 166; (i) equality between men and women with regard to labour market opportunities and treatment at work; (j) the combating of social exclusion; (k) the modernisation of social protection systems without prejudice to point (c).' Clearly the provision of social security (section c) and the combating of social exclusion (section j) – provide the strongest legal basis and justification for the incorporation of an income maintenance provision within the current architecture of the ARR Directive.

[88] As opposed to democratic socialism where democratic control of a socialist economic system which combines political democracy with social ownership of significant elements of the means of production.

policies which establish both fair competition within the market and a welfare state.[89] Reframing the 'internal market' as a social market economy rather than as a purely economic construct has inescapable normative value in terms of influencing the objectives and expanding the limits of the EU. In addition the Treaty acknowledges the role of the state in combating social exclusion while promoting social justice and protection.[90] For Kraatz, the Treaty therefore mandates that member state action is compatible with the objective of 'social justice.'[91] In this regard the socially oriented ARR models of Germany and Norway fulfil this function by providing a means of income redistribution, albeit between visual artists.

Tentatively, the Lisbon Treaty also created a space for an EU cultural programme by amending the TFEU and the TEU. Article 167 of the Treaty on the Functioning of the European Union (TFEU) establishes the principles and the current framework concerning EU cultural policy. Furthermore, Article 6 TFEU states the EU's competences in the field of culture: 'The Union shall have competence to carry out actions to support, coordinate or supplement the actions

[89] A welfare state is a concept of government in which the state plays a key role in the protection and promotion of the economic and social well-being of its citizens. It is based on the principles of equality of opportunity, equitable distribution of wealth, and public responsibility for those unable to avail themselves of the minimal provisions for a good life. The general term may cover a variety of forms of economic and social organization. The sociologist T.H. Marshall described the modern welfare state as a distinctive combination of democracy, welfare, and capitalism. See generally M. Bulmer and A. M. Rees (eds.) *Citizenship Today: The Contemporary Relevance of T.H. Marshall* (London: UCL Press, 1996).

[90] R. Lister *Poverty* (Cambridge: Polity Press, 2004) p. 75, describes social exclusion as 'a travelling concept' that originated in the work of Max Weber; but more recently social policy analysts in the nations of the European Union have embraced it. Although the term means slightly different things to different analysts in different geographic contexts, the bottom-line shared understanding is that if categories of people are in fact victims of social exclusion, they are incapable of exercising their rights as citizens in the same way as those who are fully included into the polity.

[91] P. Kenna *Housing Law, Rights and Policy* (Dublin: Clarus Press, 2011) p. 121; Kenna asserts that '[s]ocial justice is a concept associated with rights … [and] … is used to demand a greater degree of economic egalitarianism, income or property redistribution, as well as laws and policies which promote equality of opportunity or equality of outcome for particular groups in society.'

of the Member States'.[92] In addition the preamble to the TEU explicitly refers to the need to draw '… inspiration from the cultural, religious and humanist inheritance of Europe'. Article 3 TEU states that one of the EU's key aims, as specified in the Treaty, is to 'respect its rich cultural and linguistic diversity, and […] ensure that Europe's cultural heritage is safeguarded and enhanced'.[93]

Post Lisbon, and in response to the economic down turn in 2007, the EU Commission published a renewed social agenda entitled 'Opportunities, access and solidarity in 21st century Europe'.[94] Under this initiative measures were introduced to enhance the impact of existing financial instruments such as the ESF and the European Globalisation Adjustment Fund (EGF).[95] The 'Europe 2020 Strategy' which replaced the 'Lisbon Strategy' of 2000 was such a measure.[96] The Strategy placed 'inclusive growth' – fostering a high-employment economy that delivers social and territorial cohesion – as one of its primary objectives. In addition the strategic agenda mentions for the first time a clear social target; with the objective of lifting 20 million people out of the risk of poverty by 2020, and by raising employment to 75% of capacity for the 20-64 age group.[97] The OMC has been employed in the achievement of these targets however Healy, Reynolds and Murphy note that the OMC has in fact 'little impact' and that over time the gap between economic/market policies and social

[92] *Supra* note 87.
[93] Article 3, TEU.
[94] S. Kraatz 'Social and Employment Policy: General Principles', Section C. <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_5.10.1.html> (date accessed: 15 May 2017).
[95] *Ibid.*
[96] EUROPE 2020 A strategy for smart, sustainable and inclusive growth /* COM/2010/2020 final */ < http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52010DC2020> (date accessed: 18 July 2017).
[97] Kraatz, *supra* note 94.

policy continued.[98] Furthermore the authors are of the opinion that the Lisbon strategy, which concluded in 2010, failed to deliver on either its economic or social goals and that the *Europe 2020* strategy has already failed '… to get to grips with some of the major challenges that face the welfare state … .' [99]

Nevertheless, the progressive realisation of social rights continues under the Commission's Work Programme 2016 and its focus on creating a 'European Social Pillar of Social Rights'. This initiative focuses on equal opportunities and access to the labour market, fair working conditions and access to adequate and sustainable social protection.[100] In this regard the EU has resolved to 'support and complement the activities of the Member States' under shared competences.[101]

In summary, this section has mapped the historic initiatives in the field of EU social policy from the Treaty of Rome to the Commission's current work programme in this area. Since social policy is primarily a competence of member states, the progressive realisation of social rights within the EU has been at times slow and arduous but nonetheless real. The analysis in this section leads to the conclusion that EU action in this area ought not be conceived of as ineffective because of the soft governance approach adopted but instead pragmatic. Soft governance in this area has established social rights that EU institutions and

[98] S. Healy, B. Reynolds, M. Murphy 'The European Social Model and Ireland – Re-imagining for the twenty first century' in B Reynolds and S. Healy eds. *Does the European Social model have a Future: Challenges and Responses, 70 years after the Beveridge Report* Dublin: Social Justice Ireland, 2012) p. 94.
[99] S. Healy, B. Reynolds and M. Murphy 'The European Social Model and Ireland – Re-imagining for the twenty first century' in B. Reynolds and S. Healy eds. *Does the European Social model have a Future: Challenges and Responses, 70 years after the Beveridge Report* Dublin: Social Justice Ireland, 2012) p. 95; See also Caune *et al*, *supra* note 19 at pp. 36 - 37.
[100] Kraatz, *supra* note 94.
[101] Article 153 TFEU.

members states cannot ignore. Moves towards a 'social union' are as real as the aspiration of an economic union 50/60 years ago. It is now incumbent upon EU institutions and member states to reflect this social mandate in their laws. It is clear from the foregoing that social policy is an integral part of the European Union and that within both the TEU and TFEU there exists a legal basis for such reforms, namely, Article 3 and Article 6 TEU, Article 2(3) and Article 151 – 153 TFEU. Furthermore, Article 4(2)(b) and (c) TFEU recognise the shared competence of the EU and member states in the area of social policy.[102] The combined commitment to solidarity, social protection and the elevation of the Charter of Fundamental rights to that of the Treaties provides a legal basis upon which a socially orientated ARR Directive may be based.[103]

The following section investigates the triumvirate of welfare, poverty, and need, and in doing so serves the purpose of linking the theories explored in Chapter 4 with the reform proposals of Chapter 6.

5.2 Social Citizenship and Social inclusion

Before continuing to consider the concept of need it is informative to consider the relationship between social citizenship, social rights and welfare. Procacci describes the nexus as follows; '… citizenship at the theoretical level refers to

[102] *Supra* note 87.

[103] Hervey, *supra* note 7, at pp. 231 - 234: Legal basis provisions both provide the source of the EU's competence to make law and policy and the legislative procedures to be applied. In the area of social security and social welfare, Hervey notes that since the Treaty of Amsterdam (Articles TFEU 151 – 53), "… the Council is empowered to 'adopt, by means of directives, minimum requirements for gradual implementation' in order to achieve the aims of 'proper social protection' and 'the combating of exclusion' and may 'adopt measures designed to encourage co-operation between Member States … in order to combat social exclusion.'"

social rights whereas at the institutional level it refers to the welfare state.'[104] Social citizenship is directed towards regulating inclusion and exclusion so that those at the margins of society are brought closer to the centre. This raises the question as to how inclusion can be achieved? In the mixed economies of Europe where the free-market has failed to provide full employment and eradicate poverty,[105] the welfare state assumes the role of countervailing force to unbridled capitalism[106] and in doing so creates an environment in which social inclusion can and must exist.[107] A number of related questions thus present: how is welfare to be determined, and who should benefit from the social welfare system?[108] In answering these questions, the concept of 'need' requires attention because need provides the basis upon which social rights are construed.[109] Spicker notes that '[n]eeds are not neutral concepts … they have a normative purpose – they are used to make an argument for provision. It is implicit in the idea of need that some kind of response is possible – and it generally follows that something must be done.'[110] Social rights, such as the right to participate fully in one's community, are a direct response to the recognition of a society's needs, however

[104] G. Procacci 'Poor Citizens: Social Citizenship versus Individualization of Welfare in C. Crouch, E. Klaus and D. Tambini (eds.) *Citizenship, Markets and the State* (Oxford: OUP, 2004) p. 50.
[105] T. Fahey 'Welfare and Debt: Lessons from Beveridge and his Times' in B. Reynolds and S. Healy eds. *Does the European Social Model have a Future?*: *Challenges and Responses 70 years after the Beveridge Report* (Dublin: Social Justice Ireland, 2012) p. 22.
[106] T. Novak *Poverty and State Support* (Buckingham: Open University Press, 1988); Novak advances the argument that within the market economy the unequal distribution of assets is not only a product of the market economy but is essential to the operation of the market economy.
[107] P. Spicker *Social Policy: Themes and Approaches*, 2nd ed. (Bristol: Polity Press, 2008) p. 25. Spicker notes that '… the idea of 'social exclusion' has been mauled and twisted … it was developed, initially, to refer to people who were not part of the networks of solidarity that others experienced – people who were left out of the systems of support developed in welfare states.'
[108] R. Mishra *The Welfare State in Crisis* (Brighton: Wheatsheaf, 1984) p. xi and ch. 1; Mishra notes that the state accepts responsibility for welfare and (via legislation and other constitutional means) provides mechanisms – institutions and procedures – for the delivery of the services and other forms of provision required to meet basic needs. The welfare state is defined partly by its functions and partly by the mechanisms which are developed to enable it to perform them.
[109] Spicker, *supra* note 107, at p. 51 - 66.
[110] *Ibid.* at p. 66.

defined.[111] The way in which a society or its government respond to these needs determines the degree to which an individual's status in the community is preserved. This is a key component of social citizenship. The related concept of poverty also plays a pivotal role in this respect. In many ways the success and failure of the welfare state can be measured in terms of poverty.[112] Furthermore, the extent of citizen's social rights largely depends upon whether a broad or narrow interpretation of need is adopted. Where a society adopts a broad interpretation of need, universal rights analogous to the social democratic model of Scandinavian countries follow.[113] Where a society adopts a narrow interpretation of need, residual rights epitomised by the US social welfare system follow. This chapter draws on the related themes of social citizenship, welfare, poverty and need, and in doing so presents the case for a socially orientated AAR model.

5.2.1 Welfare

In considering the argument for a socially orientated ARR model an understanding of the concept of welfare is required. The origins of the modern welfare state can be traced back to the Beveridge Report (1942)[114] which identified the 'Five Giant Evils' of Want, Disease, Ignorance, Squalor and

[111] *Ibid.* at p. 51 - 66.
[112] B. Cantillon, S. Marchal and C. Luigjes 'Decent Incomes for the poor: Which Role for Europe' Journal of Common Market Studies (2017) 55(2) pp. 240 - 256; see also B. Cantillon and F. Vandenbroucke (eds.) *Reconciling Work and Poverty Reduction: How Successful are European Welfare States?* (Oxford: Oxford University Press, 2014) pp. 157 – 184.
[113] P. Dwyer 'Understanding Social Citizenship: Themes and Perspectives for Policy and Practice, 2nd ed. (Bristol: Policy Press, 2003) p. 12.
[114] W. A. Beveridge *Social Insurance and Allied Services. Report by Sir William Beveridge,* CMD 6404. (London: His Majesty's Stationery Office, 1942).

Idleness.[115] Today the concept of welfare evokes a multitude of understandings. T.H Marshall describes welfare as the satisfaction of wants.[116] Fitzpatrick defines welfare in terms of well-being, with the 'welfare system' acting as a '… set of socio-economic and cultural relations that effects social change by trying both to address social problems and to promote well-being.'[117] Titmuss sees 'social welfare as a major integrated institution in society, providing universalist services outside the market on the principle of need.'[118] Dominelli adopts a much broader definition of welfare by incorporating the work of both public and private actors[119] while Cochrane *et al* adopt a distinctly narrow view that ignores the work of informal carers such as women within the family and voluntary/charitable organisation.[120] In a similar vein to Marshall, Dean defines welfare rights as '… rights to needs satisfaction'.[121] However for Dwyer, '[c]laims to welfare rights are often underpinned by differing views as to what constitutes a legitimate need and the role that the state or other agencies should then play in meeting that need.'[122] A central theme, which the majority of these

[115] Fahey, *supra* note 105, at pp. 21. These social problems were to be dealt with through the mechanisms of social insurance and social assistance to overcome want, health services to overcome disease, education to overcome ignorance, housing to overcome squalor, and full employment to overcome idleness. While in the main the report focused on alleviating the social problem of 'want', the report 'outlined the package of services that later were to become the pillars of the welfare state … .'

[116] T. H. Marshall 'Welfare in the Context of Social Development' in J. S. Morgan (ed.) *Welfare and Wisdom* (1966) republished in T.H. Marshall *The Right to Welfare and other essays* (London: Heinemann Educational Books, 1981) p. 54.

[117] T. Fitzpatrick *Welfare Theory: An Introduction to the Theoretical Debates in Social Policy,* 2nd ed. (Hampshire: Palgrave Macmillan, 2011) p. 3.

[118] See R. M. Titmuss *Social Policy: an introduction* (London: George Allen and Unwin, 1974) p. 10.

[119] L. Dominelli *Women Across Continents: Feminist Comparative Social Policy* (Hemel Hempstead: Harvester Wheatsheaf, 1991) p. 9; 'the welfare state comprises those public and domestic relationships which take as their primary objectives the well-being of people.'

[120] A. Cochrane, J. Clarke, and S. Gewirtz *Comparing Welfare States: Family Life and Social Policy*, 2nd ed. (London: Sage Publications, 2001) p. 6. Defining the 'welfare state' as '… the involvement of the state in the provision of welfare services and benefits.'

[121] H. Dean *Welfare Rights and Social Policy* (Harlow: Prentice Hall, 2002) p. 29. Similarly Dwyer *supra* note 113, at p. 11, notes that '[t]he meeting of social needs is a central concern of social welfare institutions.'

[122] Dwyer, *supra* note 113, at p. 12.

authors share in their exposition of welfare, is the concept of need. But what is this 'need' and why is it so intrinsic to the concept of welfare? Thus, before delving deeper into the concept of welfare, the fundamental concept of need is explored.

5.2.2 The Need Principle

For writers such as Titmuss and Harris the 'need principle' plays a key role in defining social citizenship[123] and welfare rights.[124] Fitzpatrick draws a distinction between *basic* and *social* needs. Basic needs are those '… natural needs whose lack of fulfilment means that human life cannot flourish nor perhaps even survive.'[125] Social needs on the other hand are those, which recognise the importance of 'social participation', one's engagement with their community.[126] Fitzpatrick observes that once social needs are recognised, the distinction between basic and non-basic needs becomes blurred.[127] The point being that need satisfaction is not merely limited to physical survival. Maslow's 'hierarchy of needs' presents a useful point of departure in conceptualising human need.[128] Maslow proposes a five tier understanding of need which begins with the satisfaction of physiological needs (food, clothing); second, needs related to physical safety and security (housing); third, the need for companionship (love); fourth, self esteem (external validation); and finally, self actualisation (life ambition fulfilment). While Maslow's hierarchy is useful as a didactic tool, it

[123] D. Harris *Justifying State Welfare* (Oxford: Basil Blackwell, 1987) p. 48.
[124] *Ibid.* at p. 49. See also Titmuss *supra* note 118 at p. 10.
[125] Fitzpatrick, *supra* note 117, at p. 110.
[126] Fitzpatrick, *supra* note 117, at p 110.
[127] Fitzpatrick, *supra* note 117, at p 110.
[128] A. Maslow 'A Theory of Human Motivation' (1943) 50 *Psychological Review,* pp. 370 - 396.

proposes a rigid, linear, graduated and relatively discrete understanding of human need. It also ignores the point that in highly developed societies, individuals may ignore lower level needs in order to satisfy higher level needs.[129] Therefore need is an elastic concept that can be defined in a number of ways;[130] in this regard Bradshaw makes three basic distinctions between 'felt needs', 'normative needs' and 'comparative needs'.[131] 'Felt needs' are needs that we are aware of ourselves, for example when we are ill we realise that we need medical attention.[132] 'Normative needs' are needs defined by professionals or others who can take an objective view based on expert knowledge.[133] Finally 'comparative needs' are defined relative to comparable individuals or groups[134] and are determined by a society's concept of justice.[135] Dwyer notes that '… all three dimensions are important for decisions about the allocation of welfare.'[136] For example, some individuals may feel that they are living in poverty, experts may in turn agree or disagree depending on how poverty is defined and measured and finally the degree or extent of the poverty experienced may be evaluated by a comparison of income levels, assets and wealth.[137]

An alternative approach to the concept of need proposed by Doyal and Gough[138] focuses on the concepts of personal autonomy and the avoidance of serious

[129] Fitzpatrick, *supra* note 117; Dwyer, *supra* note 113; Dean *supra* note 121.
[130] Dwyer, *supra* note 113, at p. 12.
[131] J. Bradshaw 'The Concept of Social Need' (1972) 30 *New Society* p. 640 – 643.
[132] *Ibid.*
[133] *Ibid*
[134] *Ibid*
[135] K. Blakemore *Social Policy: An Introduction,* 3rd ed. (Buckingham: Open University Press, 2007) p. 29.
[136] Dwyer, *supra* note 113, at p. 12.
[137] *Ibid.*
[138] L. Doyal and I. Gough *A Theory of Human Need* (Basingstoke: Macmillan, 1991) p. 50.

harm.[139] Serious harm maybe understood '… as the significantly impaired pursuit of goals which are deemed of value to individuals. To be seriously harmed is thus to be fundamentally disabled in the pursuit of one's vision of the good.'[140] In a similar vein to Fitzpatrick, Doyal and Gough state that there are certain basic needs – survival (health) and autonomy – that must be met for citizens to engage in the social activities that are central to the human condition.[141] This concept also shares much with Harris's understanding of need in that an individual is in need '… to the extent that he lacks the resources to participate as a full member of society in its way of life.'[142]

The concept of need, whether narrowly or broadly defined determined the constructs of welfare and social citizenship:[143]

> '[a] *broad definition of needs* emphasises an expansive universal notion of citizenship that favours extensive shared rights to public welfare. In contrast, a *narrow definition of needs* leads us towards a residual welfare state in which welfare is discretionary and entitlement often subject to a means test' (emphasis in original). [144]

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[139] The advantage of using 'harm' as an indicator of 'need' is that it removes subjective influence of feelings such as anxiety and sadness as determinants of 'need'.
[140] *Ibid.* D. Miller *Social Justice* (Oxford, Clarendon, 1976) p. 134 'Harm, for any individual, is whatever interferes directly or indirectly with the activities essential to his plan of life; and correspondingly, his needs must be understood to comprise whatever is necessary to allow these activities to be carried out. In order, then, to decide what a person's needs are, we must first identify his plan of life, then establish what activities are essential to that plan, and finally investigate the conditions which enable those activities to be carried out.'
[141] Doyal and Gough, *supra* note 138 at p. 50 – 55.
[142] Harris, *supra* 123, at p. 101. It is perhaps worth noting the similarities to Sen's 'Capabilities' approach – the idea that needs and rights are grounded in social practice. For more on this discussion see Dean *supra* note 121, at p. 24.
[143] R. Lister 'Citizenship and Gender' in K. Nash and A. Scott (eds.) *The Blackwell Companion to Political Sociology,* (Oxford: Blackwell, 2003).
[144] Dwyer, *supra* note 113, at p. 12.

In the context of EU welfarism and social citizenship, the question that arises is whether a broad or narrow definition of need ought to be adopted? Preece argues that EU social policy has been increasingly narrowed to focus upon questions of efficacy, competition, and innovation and that:

> [w]ithin this policy environment, the question of how focused welfare policies should be on enhancing solidarity and decommodification is now being rephrased as an attempt to bring social protection regimes in line with the goal of greater competitiveness. By manipulating the discourse surrounding Social Europe, neoliberal actors have systematically dismantled the social dimension of the EU and reoriented European social policy to strengthen their own hegemonic project.'[145]

While Preece makes a compelling and sometimes prescient argument, as outlined in the previous section, the progressive realisation of social rights within the EU, cannot be ignored.[146] The concept of social citizenship, which forms part of the fabric of EU social policy imagines an inclusive social space in which all individuals can achieve their full potential.[147] Accordingly, a broad interpretation of need is required because in the alternative, a narrow definition would prove inconsistent with the historical social character of EU member states and current EU social policy.[148]

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[145] Preece, *supra* note 3, at p. 1.
[146] See section 5.2; see also Kraatz, *supra* note 94.
[147] See 'White Paper' *supra note* 57
[148] Preece, *supra* note 3, at p. 2; P. Spicker 'Exclusion' *Journal of Common Studies* 35 (1), pp. 133 - 43, contends that the form of inclusion that developed in France in the 18th and 19th century and which spread to neighbouring European nation states – Belgium, Portugal, Spain and Italy – become a integral part of the fabric of the policies of the European Union.

While a thorough exploration of the concept of need is beyond the scope of this thesis, the distinction between *basic* and *social* need will be returned to when considering whether the ARR Directive ought to include a social welfare component.

5.2.3 European Models of Welfare

As noted in Chapter 3, the forebear of the ARR Directive, the *droit de suite* served a quasi-welfare function in early 20th century France, in that it attempted to alleviate the experienced poverty of visual artists. Attempting to position a socially orientated ARR Directive within today's EU welfare environment requires an understanding of the dynamics of member state's welfare systems. Accordingly the following section explores these dynamics.

Within the social and political discourse of welfare there are generally three proposed models of welfare. Titmuss proffers the residual model, the industrial achievement-performance model, and the institutional redistributive model. Under the residual model, social welfare institutions take effect where the private market and the family have failed, state intervention is therefore limited to marginal and deserving groups.[149] However, the assessment of who deserves is not value free and in the majority of EU welfare states today, indicators of poverty are employed in this assessment.[150] Under the achievement-performance model, social needs are met on the basis of merit, work performance and

[149] Titmuss, *supra* note 118, at p. 30 - 32.
[150] Cantillon *et al*, *supra* note 5, at pp. 240 - 256.

productivity.[151] Under the institutional redistributive model, social welfare is seen as a major integrated institution in society, operating to provide universalist services outside of the market.[152] These models represent very different conceptions of welfare: minimum-targeted provision, performance related provision and optimum universal provision.[153]

Gosta Esping-Anderson provides a typology of welfare that is broadly comparable to the models put forward by Titmuss. These include liberal welfare regimes, conservative corporatist regimes and social democratic regimes. Liberal welfare regimes (residual model) are primarily characterized by market-based social insurance systems and the use of means-testing in the distribution of benefits.[154] Social insurance and universal welfare payments are 'modest' and welfare is largely targeted at a stigmatized and disenfranchised poor.[155] Private schemes are often subsidised by the state to encourage the working and middle classes to pay for services above that offered by the state.[156] Esping-Anderson describes these liberal welfare regimes as highly differentiated and stratified; providing a blend of '… relative equality of poverty among state-welfare recipients, marked differentiated welfare among the majorities, and a class-political dualism between the two.'[157] In these systems, like Titmuss's residual model, there is a marked reluctance to interfere with the free-market. Examples of liberal welfare states include the USA, Canada and Australia.[158]

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[151] Titmuss, *supra* note 118, at p. 30 - 32.
[152] *Ibid.*
[153] Hantrais, *supra* note 11, at p. 28.
[154] Cochrane *et al, supra* note 120, at p. 11.
[155] *Ibid.*
[156] *Ibid.*
[157] G. Esping Anderson *The Three Worlds of Welfare Capitalism* (Cambridge: Polity Press, 1990) p. 27.
[158] Cochrane *et al, supra* note 120, at p. 11.

As in the industrial achievement-performance model, Esping-Andersen's conservative corporatist regime could be applied to countries such as Germany, where a conservative central government developed systems of occupational social insurance in an effort to ensure that the working and middle classes contributed. Conservative welfare regimes are those in which 'corporatist' arrangements dominate. Corporatism maybe described as a socio-political organisation of society where social partnership between employers, labour representatives and the state, is used as a means of establishing economic policies.[159] Esping-Anderson notes the tendency of these arrangements to maintain class differences rather than promoting redistribution and equality.[160] These welfare regimes largely exist in countries where the Church has traditionally enjoyed high levels of influence and accordingly promote the standing of the family within society. The state only intervenes where the family cannot resolve the problems of its members. Cochrane *et al* note that '[t]he entry of married women into the labour market is discouraged, and benefits tend to encourage motherhood, while collective forms of childcare provisions are underdeveloped.'[161] Examples of this welfare regime include Austria, France, Germany and Italy.[162] Ireland shares many of the attributes of the conservative-corporate model however historically the social partner that exerted the greatest

[159] *Ibid.* at p. 154, describe corporatist as '… meaning that various interest groups are incorporated into policy making and administrative processes and into the delivery of welfare. This inclusion is in the interests of coalition building, incremental change and the maintenance of social stability.' Dean *supra* note 121, at p. 7 describes it as '… a process of tri-partite negotiation between the representatives of business, workers and the government. What is often involved in the development of social rights is not an impersonally established equilibrium between formal principles, but a directly negotiated compromise between substantive class interests.'

[160] Esping Anderson, *supra* note 157*,* at p. 26 - 30.

[161] Cochrane *et al. supra* note 120, at p. 10.

[162] *Ibid.* at p. 12.

influence on the state was the Catholic Church. McLaughlin describes this form of social partnership as Catholic Corporatism.[163] Under this model the state had a limited welfare role with the church providing ' … a rudimentary mixed economy of social welfare.'[164]

Esping-Anderson's third taxonomy, the social democratic regime, corresponded to the institutional redistributive model, as represented by Scandinavian countries. The model is characterised by principles of universalism and equality. The social democratic regime promotes equality across classes by promoting high-level social welfare rights as opposed to residual rights. Crucially, these services and benefits are not only appealing to both working and middle class groups alike but are universal.[165] The model promotes class solidarity and reduces the role of the market in the provision of welfare. The place of the family changes to that adopted under the former models; here the state takes on many of the traditional roles of the family such as carer thus encouraging independence, particularly for women.[166]

Hantrais purports that the founding members of the EEC shared a certain similarity of approach to welfare in that their social protection systems were

[163] E. McLaughlin 'Ireland: From Catholic Corporatism to Social Partnership' in A. Cocharine, J. Clarke, and S. Gewirtz *Comparing Welfare States: Family Life and Social Policy,* 2nd ed. (London: Sage Publications, 2001) p. 223 - 260.
[164] *Ibid.* at p. 255. The influence of the church can further be seen in relation to the National Insurance Act 1911 which established the beginnings of insurance-based social security in Ireland. The Act was based on contributory insurance, with contributions coming from three sources, the employer, the employee and the state. The first part provided health insurance giving entitlements to medical benefits, the second provided national insurance in the event of sickness or unemployment. However, many groups in Ireland including the Catholic Church objected to the Act. As a compromise the medical benefit entitlement was removed thus removing the opportunity to develop a state insurance based health system such as the UK's NHS.
[165] Cochrane *et al. supra* note 120, at p. 11.
[166] *Ibid.*

mainly derived from the corporatist model, in accordance with the principle that workers are guaranteed benefits and substitute income related to their previous earnings through a contractual insurance scheme.[167] This 'continental' insurance model was based on the assumption that employment qualifies individuals for welfare benefits as well as wages, and that benefits were funded primarily, if not exclusively, by employer and employee contributions as part of labour costs,[168] whereas, the states that joined the Community in 1973 – Denmark, Ireland and the United Kingdom – shared a general conception of social protection closer to what Hantrais describes as the 'citizenship' or 'welfare' (i.e. social democratic) model. Traditionally, the British and Scandinavian models, guaranteed a right to pensions, health care, and family allowances, on the basis of social citizenship. However, the extent of social citizenship in Ireland, historically, and in the UK today, is questionable.[169] As highlighted above, Ireland's catholic brand of corporatism represented a unique form of welfare provision while in the UK, the Blair administration's 'third way' reforms of the 1990s, moved the UK closer to traditional understandings of corporatism, distinct from the universal entitlements envisaged by Beveridge.[170] It is submitted that Hantrais' observation's regarding the member states that joined the EU in 1973 ignores the nuances of these distinct systems. Nevertheless, EU enlargement brought with it many challenges and in this respect, highlighted the degree to which European

[167] Hantrais, *supra* note 11, at p. 32.
[168] *Ibid.*
[169] Dwyer, *supra* note 113, at p. 87 - 109.
[170] *Ibid.* at p. 73; 'this new politics ['third way'] simultaneously rejected what it regarded as the Old Left approach to social citizenship (that is the social democracy of Titmuss and Marshall, typified by state control, high taxation and public spending), and the New Right approach with its hostility to collective forms of welfare. Both the then Prime Minister, Tony Blair and the sociologist, Anthony Giddens, looked to replace the polarised politics of the past with a 'third way; built around certain core values.' These core values included, equal opportunity, opportunity for all, responsibility, community, freedom of autonomy, and no rights without responsibility. This approach shares much with communitarianism.

welfare states differed in terms of the nature and extent of their welfare provision.

In the context of welfare and social citizenship a further factor that must be considered is that of poverty. Procacci writes that '[t]he challenge of poverty *vis-á-vis* citizenship has been crucial in acknowledging society's needs.'[171] In this way, a society's understanding of what constitutes poverty not only helps define need but also determines the extent of the state's welfare apparatus. It is to this issue that the following section turns.

5.2.4 Poverty: Defining the Limits of Social Citizenship

Within the field of welfarism, the definition, measurement, relief and prevention of poverty is of central concern, serving as the contextual framework within which the relationship between need and welfare can be analysed.[172] For Procacci:

> '[p]overty is identified with individual trajectories of social exclusion and [that] the idea of shared social risk as the basis for organizing solidarity is rejected. The desocialization of poverty reinforces the political exclusion of the poor, and risks strengthening a process of *décitoyenneté*, raising anew a question that we had thought solved once for all (sic): when

[171] Procacci, *supra* note 104, at p. 54.
[172] Dean, *supra note* 121, at p. 20.

poverty is no longer treated as a social problem, are the poor still citizens?'[173]

Building on Procacci's question of the relationship between poverty and citizenship, it may be observed that the 'Poor Laws' that preceded the modern welfare state[174] ascribed the nomenclature of 'pauper' to the recipients of welfare.[175] Paupers were not citizens and as such were deprived of certain rights, such as the right to vote.[176] By repealing the Poor Laws the modern welfare state – UK and Ireland – sought to end both poverty and pauperism.[177] This phenomenon can be seen in civil as well as common law jurisdictions; examples include the social laws that followed the French Revolution of 1789 and in Germany, Bismarck's social reforms of the late 19th century.[178] Welfare rights therefore denote a formal equality of citizenship.[179] However for Dean, '[i]f poverty persists in capitalist welfare states this implies a failure of citizens to secure their rights and a failure by the welfare state to honour those rights.'[180] Building on this relationship between welfare, poverty and citizenship, Roche

[173] Procacci, *supra* note 104, at p. 51. Décitoyenneté is not a word *per se* but it is used in this context to represent the opposite of citizenship: 'without citizenship' or 'losing citizenship' (definition provided by Emilie Ghio).
[174] Examples of 'Poor Laws' can be found in Ireland, the UK and continental Europe. For further see Cochrane *at al. supra* note 120.
[175] Dean, *supra note* 121, at p. 20. Here Dean is referring to the UK position but as noted below the Act of Union would have also made this distinction relevant to Ireland.
[176] *Ibid.* at p. 20, it is worth noting that Ireland introduced its first Poor Law in 1838. Under the Act of Union 1800, Ireland and the UK were one political body, therefore this distinction between pauper and citizen existed in Ireland as well as the UK.
[177] Dean, *supra note* 121, at p. 20; see also D. Lucey, *The End of the Irish Poor Law? Welfare and Healthcare Reform in Revolutionary and Independent Ireland* (Manchester: Manchester University Press, 2015) "The 1919 Democratic Programme – the Irish republican declaration of social and economic objectives read out at the revolutionary First Dail – claimed that the 'Irish Republic' would abolish the 'odious, degrading and foreign' poor law system: J. J. Lee, the Irish historian, sardonically notes that Irish independence merely succeeded in bringing about a 'degrading and native system'."
[178] Bismarck's reforms represented a form of 'worker's insurance', which foreshadowed the development of the current corporatist system.
[179] Dean, *supra note* 121, at p. 20.
[180] *Ibid.*

argues that poverty determines the boundaries of social citizenship.[181] Furthermore, in developing this nexus, Dean contends that poverty is the '… yardstick against which the effectiveness of welfare rights is to be defined and judged.'[182] If it can be accepted that welfare advances social citizenship and that the effectiveness of the welfare state can be judged in terms of poverty, the question is how can poverty be determined?

The difficulty in defining poverty is that politically and technically it is a highly contested concept.[183] Traditionally, a distinction has been drawn between an 'absolute' and 'relative' understanding.[184] The absolute definition represents the view that it is possible to identify an absolute minimum standard of living based on the requirements of physical health.[185] The relative definition, favoured by Fabian academics '… expands the term poverty so as to apply to people with

[181] M. Roche *Rethinking Citizenship* (Cambridge: Polity Press 1993) p. 55.
[182] *Ibid.*
[183] Dean, *supra note* 121, at p. 20.
[184] Although in Ireland today we also refer to a third measure, 'consistent poverty'. The official Government approved poverty measure used in Ireland is consistent poverty, developed independently by the Economic and Social Research Institute (ESRI). This measure identifies the proportion of people, from those with an income below a certain threshold (less than 60% of median income), who are deprived of two or more goods or services considered essential for a basic standard of living.
The consistent poverty measure was devised in 1987 using indicators of deprivation based on standards of living at that time. The Government in 2007 accepted the advice of the ESRI to revise the deprivation indicators to better reflect current living standards and, in particular, to focus to a greater degree on items reflecting social inclusion and participation in society. This resulted in the measure, originally based on lacking one or more items from an 8-item index, changing to one based on lacking two or more items from the following 11-item index:

1. Two pairs of strong shoes
2. A warm waterproof overcoat
3. Buy new not second-hand clothes
4. Eat meals with meat, chicken, fish (or vegetarian equivalent) every second day
5. Have a roast joint or its equivalent once a week
6. Had to go without heating during the last year through lack of money
7. Keep the home adequately warm
8. Buy presents for family or friends at least once a year
9. Replace any worn out furniture
10. Have family or friends for a drink or meal once a month
11. Have a morning, afternoon or evening out in the last fortnight, for entertainment.

For further see <http://www.socialinclusion.ie/poverty.html> (date accessed: 25 April 2017).
[185] J. H. Mack and S. Lansley *Poor Britain* (London: George Allen & Unwin, 1985) p. 16.

insufficient resources for normal social participation.'[186] These points of conceptual divergence raise issues of a technical, explanatory, political and sociological nature.[187]

First, at the technical level, there is no agreed upon way of measuring poverty. In 1901 Rowntree, defined 'primary poverty' as an income '… insufficient to obtain the minimum necessaries for the maintenance of merely physical efficiency.'[188] Under this approach policy makers attempt to identify a 'poverty line' with reference to average household incomes, against which individual's income is then measured to establish whether they qualify for social assistance benefits. Another approach, proposed by Orshansky, uses statistical or 'income proxy' measures to identify the level of income below which need replaces choice in determining household expenditure.[189] Sociologists such as Townsend focus instead on indicators of 'deprivation' such as diet, housing and working conditions to identify poverty rather than simply income levels alone.[190] Irrespective of whether the 'poverty line', 'income proxy' or 'deprivation' approach is employed in the measurement of poverty, none offer a complete definition or universal solution. Second, there are explanatory conflicts between descriptions of poverty based on pathology and those based on structural causes.[191] Pathological explanations blame poverty on the failures of the poor due to genetic make-up, personality, laziness or incapacity.[192] The clergyman

[186] Dean, *supra note* 121, at p. 21.
[187] Dean, *supra note* 121, at p. 21.
[188] S. Rowntree *Poverty: A study of Town Life* (1922) p. 167.
[189] M. Orshansky, 'How Poverty is Measured' (1969) 92 (2) *Monthly Labour Review* p. 37 - 41.
[190] P. Townsend *Poverty in the United Kingdom* (London: Allen Lane and Penguin Books, 1979) p. 31 – 60; this is referred to as the deprivation index.
[191] Dean, supra note 121, at p. 22.
[192] See C. Murray *Losing Ground: American Social policy 1950 – 1980* (New York: Basic Books, 1984).

Joseph Townsend encapsulated this understanding in his *Dissertation on the Poor Laws*: '[t]he poor know little of the motives which stimulate the highest ranks to action – pride, honour, and ambition … [i]n general it is only hunger which can spur and goad them onto labour; yet our laws have said, they shall never hunger.'[193] Malthus goes further, for him, poor relief causes poverty, destroys the work ethic and reduces productivity. Poverty he argues should be tackled through shame: '… dependent poverty ought to be disgraced.'[194] Structural problems on the other hand attribute poverty to 'diswelfares' created by the free market economy,[195] the nature of class relations[196] or on other structural issues such as race and gender.[197] Solutions based on the former approach (pathological) tend to address the effects of poverty whereas the latter approach (structural) attempts to address the causes of poverty. Third, there are political conflicts concerning the role of the state, and whether social policy should be directed at preventing or limiting relative poverty or to relieve absolute poverty.[198] The varying models of welfare discussed in the previous section – liberal, corporatist, and universal – highlights the role of the political system in shaping social policy. The model of welfare favoured by political elites in turn defines the content and limits of state welfare systems. Fourth, there are sociological issues concerning the definition of poverty as a social or symbolic construct. While for many a 'breadline' definition of poverty is appealing, in real terms, poverty is an individually relative construct with many people who are in fact 'poor' not regarding themselves as such. As Dean convincingly explains,

[193] J. Townsend *A Dissertation on the Poor Laws: By a Well-Wisher to Mankind* (Berkeley: University of California, 1971, originally published in London in 1786).
[194] T. Malthus 'An Essay on the Principle of Population' (London: J. Johnson, 1798).
[195] R. Titmuss *Commitment to Welfare* (London: Allen & Unwin, 1968).
[196] Townsend *supra* note 193, at pp. 369 - 412.
[197] F. Williams *Social Policy: A Critical Introduction* (Cambridge; Polity, 1989).
[198] Dean, *supra* note 121, at p. 22.

'[p]overty is not an objective state – in either an absolute or a relative sense – but a discursively created spectre that can impact on the personal experiences and private identities of everybody.'[199] It may be inferred from Dean that a society's conception of poverty is not only a unique experience but also a layered and multi-faceted experience perceived differently by social actors and individuals alike. Therefore the question is not only, what is poverty, but also, when a measure of poverty has been adopted, when should social policy and its social systems intervene?

Related to this question Room identifies a conceptual divergence in the definition of poverty between common law and civil law traditions. Common law traditions tend to focus on *distributional* issues – related to how resources are distributed – while civil law traditions tend to focus on 'social exclusion' which is *relational.*[200] Social exclusion as a concept is not concerned with distributional inequality but with inadequate social participation and lack of social integration.[201] Therefore the concept of social exclusion – being relational, rather than absolute – shares a natural affinity with the concepts of social citizenship that this thesis incorporates.[202] Interestingly, social exclusion as a relational concept may be compared to concepts of relative poverty because both employ the use of a benchmark to determine social or economic inequality. However, for Dean, poverty and social exclusion are not one and the same: '[w]hile one is ultimately concerned with the (mal)distribution of incomes, goods and services, the other is concerned with the processes by which people may become

[199] *Ibid.* at p. 23.
[200] G. Room *Beyond the Threshold: The Measurement and analysis of Social Exclusion* (Bristol: Polity Press, 1995)
[201] Dean, *supra* note 121, at p. 25.
[202] See generally Chapter 4, p. 203 - 209.

marginalised within society.'[203] This may be defined as the difference between treating the symptoms of a disease rather than treating the underlying problem itself. It is submitted that while poverty and social exclusion are not one and the same, poverty as an indicator of need – and of the failures of the welfare state – performs a preliminary function in that the structural causes of social exclusion cannot be examined until poverty has been defined.

Before proceeding, it may be informative to restate the nexus between these related concepts. It will be remembered that social citizenship advances social rights, which in turn promote participation and inclusion in one's community. For those at the margins, this inclusion is achieved via the welfare state; the nature and scope of which is derived from each society's definition, tolerance and response to poverty. These binary concepts of poverty and welfare are reducible to the fundamental concept of need. Once need is understood in terms of being both *basic* and *social*, the inclusion which social citizenship espouses can begin to be realised. How need is defined also determines how poverty is defined and in turn the extent of state welfarism. A purely *basic* definition of need results in a limited definition of poverty and a residual welfare state. However, where a broader *social* understanding of need is employed, both the notion of poverty and what it means to be poor expand proportionally with state welfarism. Such an understanding of need results in the recognition of social needs, which in turn creates social rights. These social rights can also be given a narrow or broad interpretation. A narrow interpretation of social rights results in the mere recognition of basic needs of survival, reminiscent of the initial stages

[203] Dean, *supra* note 121, at p. 24 'It is possible for people to be poor but socially included, or affluent but socially excluded. In practice however, poverty and social exclusion are closely related and tend to occur together.'

of Maslow's hierarchy.[204] A broad interpretation on the other hand gives rise to social citizenship with the associated right to social inclusion. To quote Harris once more: '[s]ocial rights are rooted in a conception of need which takes its bearing from what is necessary to grant an individual fair access … to the community way of life.'[205] It is within this broad conceptualisation of need, social rights, welfare and citizenship that a socially orientated ARR model may be proposed.

Before determining the validity of a socially orientated EU ARR model, it is necessary to consider the practical reality faced by visual artists in their everyday lives. Accordingly the following section analyses available empirical data relating to the socio-economic position of artists in general and where possible visual artists specifically.

5.3 The Socio-Economic Condition of Visual Artists

In 1882 Thomas Edward Scrutton J. asked the following question: '[w]here are the great works that might have been produced if the great minds that could have written them had not been forced to spend precious hours in uncongenial tasks, in the drudgery of earning a livelihood?'[206] With this question in mind this section reviews the socio-economic standing of contemporary artists in Ireland, the EU and further afield. The Irish position, which represents the focus of this

[204] Maslow, *supra* note 128.
[205] Harris, *supra* note 123, at p. 38.
[206] T. E. Scrutton *The Laws of Literary Property – An examination of the principles which should regulate literary and artistic property in England and other countries* (London: John Murray, 1882) (London: Clowes & Sons, 1884) p. 11.

section, presents a case study, which is drawn upon to assess the socio-economic conditions of contemporary artists in Ireland. Many of the conclusions reached in this regard are compared and contrasted against European and international reports. Accordingly, the thesis takes the position that the Irish experience is indicative of the position of contemporary artists in Europe and further afield. Indeed, the majority of reports referred to in this section support the view that the Irish position, as a case study of the socio-economic position of artists, is capable of extrapolation, and is consistent with international findings in this area.[207]

Due to the nature of the available data, this assessment adopts a broad understanding of the term 'artist' to include, architect, circus performer, street performer, craft worker, dancer, film maker, writer, musician and composer, theatre maker and actor, and of course, the visual artist.[208] It is acknowledged that this approach is to some degree problematic because of the diversity of this sub-section of the workforce. However, as noted in previous chapters, empirical data pertaining broadly to artists and specifically to visual artists is in short supply, and where it is available it is somewhat imprecise in its definition of what constitutes a 'professional artist'.[209] The EU Parliament came to a similar

[207] For instance see generally, UNESCO Recommendation Concerning the Status of the Artists (1980); G. Neil 'Full Analytic Report (2015) on the implementation of the UNESCO 1980 *Recommendation concerning the Status of the Artist*' (UNESCO, 2016) <https://en.unesco.org/creativity/sites/creativity/files/analytic-report_g-neil_sept2015.pdf> (date accessed: 13 July 2017).

[208] C. McAndrew and C. McKimm 'The Living and working conditions of artists in the Republic of Ireland and Northern Ireland (ROI Version) (Dublin: The Arts Council of Ireland, 2010), <http://www.artscouncil.ie/uploadedFiles/LWCA_Study_-_Final_2010.pdf> (date accessed: 10 July 2017) p. 17 - 18.

[209] Arts Council of Ireland Report (Prepared by Leigh-Doyle & Associates) 'Joint Research Project into the living and Working Conditions of Artists in Ireland (2008), at p. 1; Leigh-Doyle Associates observe that: 'There is no agreed definition of the category 'professional artist' in Ireland; this is not unique to Ireland. Working definitions of artists are often based on either the criteria or categories used by official data sources or independent studies. Many countries have no legal or fiscal definition of the term 'artist' despite having specific tax rules to deal with them.' See also European Statistical System Network on Culture (Final Report) (Luxembourg:

conclusion in 2004 in its report on 'The Status of Artists in Europe'[210], as did the US Copyright Office in 2013, when conducting a study into the Artists' Resale Right; '… the general lack of reliable empirical evidence in this area makes any comparison of the relative position of visual artists and other artists inherently imprecise.'[211] Nevertheless, where empirical data, specific to visual artists is available, it is drawn upon to assess whether visual artists are socio-economically disadvantaged relative to the broader class of artist as well as the general work force.

In 2010, in a joint report commissioned by the Arts Councils of the Republic of Ireland and Northern Ireland entitled, '*The Living and Working Conditions of Artists in the Republic of Ireland and Northern Ireland*,' the authors, McAndrew and McKimm found that 59% of artists '… balance their work as artists with other work, either in or outside of the arts.'[212] They do this for a number of reasons; varying from the need to supplement their income, better job security, more stable income, to higher levels of pay.[213] The report found that the mean income of professional artists in Ireland derived solely from their work product, was under €15,000 in 2008, with 50% of artists earning €8,000 or less. When

ESSNet-Culture, 2012) < ec.europa.eu/culture/library/reports/ess-net-report_en.pdf> (date accessed: 13 July 2017).

[210] EU Parliament 'The Status of Artists in Europe' (2004) IP/B/CULT/ST/2005-89, p. 8 < https://www.andea.fr/doc_root/.../51b5afb01bb8d_The_status_of_artists_in_EU.pdf> (date accessed: 13 July 2017); Previously, and as noted in Chapter 2, s. 2.3.3, the Committee on Legal Affairs in their 1997 Report ***I A4-0030/97 were of the view that to effectively determine the appropriate resale rate, a study, 'based on unassailable data', should have been carried out on the art market over a relatively long period of time. It was also the rapporteur's [Committee on Legal Affairs] impression that no reliable harmonised data existed at that time. See also Chapter 2, s. 2.4.4. fn. 193 (MTIC 2000 data).

[211] See United States Copyright Office Report 'Resale Rights, and Updated Analysis' (Washington: USCO, Dec. 2013) p. 65.

[212] McAndrew and McKimm, *supra* note 209, at p. 8; Similarly Leigh-Doyle, *supra* note 209, found that the main source of artists income in 1998 were earnings from 'non-art' related endeavours.

[213] *Ibid.* p. 8.

income from all sources (including social welfare)[214] is taken into account, the mean income rose to just over €25,000, however, 50% of artists continued to earn less than €19,832.[215] This compares less favourably than to the mean earnings of Irish workers of €36,229 for the same period.[216] Earnings of an average Irish worker were more than 1.4 times the earnings of the average artist, with the average professional (manager, teacher, nurse, solicitor) earning 2.2 times that of artists despite obtaining similar levels of education.[217] The report also highlights that between 1978 and 2008 artists incomes have fallen relative to other workers over this period.[218] This finding is corroborated by the EU Parliament's report on 'The Status of Artists in Europe'.[219]

In relation to these artists' standard of living, 58% of Irish artists found it difficult to 'make ends meet'.[220] Some 23% were in arrears in relation to a utility bill in the year prior to study, compared to 8% of the wider population.[221] CSO data indicates that 31% of Irish artists made provision for a pension compared to 54% of all workers.[222] The main reasons given were affordability and the

[214] These are often referred to as 'social transfers'.
[215] McAndrew and McKimm, *supra* note 209, at p. 10.
[216] *Ibid.* p. 11. It may be important to note that the figure of €36,229, when compared to the information available from the CSO's website was not corroborable (i.e. these are not CSO statistics). When this author contacted the CSO, (January 20th 2017, 12:10pm) Brian Cahill from the CSO advised that the figures for ROI mean earnings were not available nor did he know where the authors of the report (McAndrew *et al*) might have received this information. Mr. Cahill advised that the first three income categories (Manager…, Production…, & Clerical…) on page 11 of the McAndrew's report (Fig. 5) were CSO figures but not the latter 'bars' (referring to a bar chart) 'ROI All Workers (Mean)' and 'ROI artists (Mean)'. The Authors of the report were contacted subsequently but no response was received.
[217] McAndrew and McKimm *supra* note 209, at 12; 'The same CSO release shows that average 2008 earnings in the ROI private sector were €32,453, or 1.3 the average earnings of an ROI artist. Average public sector 2008 earnings were €48,367, or 1.9 times the average income of an artist.
[218] McAndrew and McKimm, *supra* note 209, at p. 12.
[219] *Supra* note 211, at p. 57.
[220] McAndrew and McKimm, *supra* note 209, at p. 12.
[221] *Ibid.*
[222] National pensions figures from Central Statistic Office (2008) Quarterly National Household Survey – Pensions Update (data for Q1 2008). (Cork: CSO, 2009).

unpredictability of their work patterns. The authors note that these findings are consistent against studies conducted in the UK, Austria, Demark, Finland, the US, Canada and Australia.[223] However, McAndrew and McKimm suggest that '… the challenges faced by artists are faced by self-employed workers in general.'[224] This would suggest that the socio-economic conditions experienced by artists has more to do with their employment status – being self-employed – than their occupational status. Nevertheless, artists in general were found to be more likely to suffer from a long term illness than the general population,[225] with female artists less likely to have children.[226] These indicators suggest that artists experience higher levels of poverty and deprivation than self-employed contemporaries in comparable occupational categories. Heightened levels of experienced poverty, deprivation and social exclusion objectively undermine the argument that visual artists' socio-economic condition is related to their employment status rather than choice of occupation.

In addition, in their comparison of related international studies, McAndrew and McKimm, observed that:

<http://www.cso.ie/en/releasesandpublications/er/qnhs/quarterlynationalhouseholdsurveyquarter12016/> (date accessed: 13 July 2017)

[223] (UK) R. Davies and R. Lindlet *Artists in Figures: A Statistical Portrait of Cultural Occupations.* (London: Arts Council of England, 2003); (Canada) Hill Strategies *Artists in Canada's Provinces and Territories based on the 2006 Census* (Hamilton, Ontario: Hill Strategies Research Inc., 2009); (Fn) P. Karhunen and K. Rensujeff *Preliminary Findings from a Survey on the Economic and Labour Market Situation of Finnish Artists. Working Papers no 39.* (Helsinki: Arts Council of Finland, 2002); (US) N. Alper and G. Wasall Artist's Careers and their Labour Markets in D. Throsby and V. Ginsburgh (eds.) *Handbook of the Economics of Art and Culture. Volume 1* (Amsterdam: B.V. Elsevier, 2006); (Dn) T. Bille *Labour Market and Education for Artists and the Creative Industries – Some Descriptive Results from Denmark* Creative Encounters Working Paper No. 4, pp. 1-26 (Denmark: Copenhagen Business School, 2008); (Aus) P. Wetzel *et al Study on the Social Situation of Artists in Australia* (Vienna: L&R Sozialforschung, 2009); (Auz) D. Throsby and V. Hollister *Don't Give Up Your Day Job: An Economic Study of Professional Artists in Australia* (Sydney: Australia Council, 2003).

[224] McAndrew and McKimm, *supra* note 209, at p. 15.

[225] Potentially, this is due to the older age profile of artists and their propensity to work past retirement.

[226] McAndrew and McKimm, *supra* note 209, at pp. 80 - 81.

> '… despite the increased recognition of the importance of the arts, many artists worldwide struggle to make ends meet.[227] A recurrent finding in international research is that artist's typically earn less on average than other workers with comparable education and skills set.'[228]

Furthermore, many artists experience under employment and spend a significant part of their lives 'income-less'. The designation of 'income-less' for social welfare purposes acknowledges that individuals may spend periods of time in forms of employment that does not generate income. Artists in general are particularly vulnerable to this designation because they '… devote long periods of unpaid time to artistic practice, research and other aspects of personal and career development … .'[229] The net result of which is that while these creators are acknowledged to be without income, they are not recognised 'job-less' and therefore cannot claim unemployment and other associated benefits.[230] The European Parliament's 2006 report makes a similar point; '[s]ocial security programmes which are structured according to classic employment models penalise professional artists regardless of the nature of the social protection regime be it insurance based, universal, public or private.'[231] Drawing on related research McAndrew and McKimm show that artists are particularly sensitive to

[227] See generally, *supra* note 223.
[228] McAndrew and McKimm, *supra* note 209, at p. 21.
[229] *Ibid.*
[230] *Ibid.*
[231] *Supra* note 210, at p. 21; See also S. Coffey 'A Perspective on the Situation of Visual Artists in Europe' in World Congress on the Implementation of the Recommendation Concerning the Status of the Artist (1997) Appendix 3 p. 51. CLT/CONF/206/INF.4.

worsening economic conditions and are prone to leaving their profession during income down turns for paid work in other fields.[232]

More pertinently, a number of international reports cited by the authors note that visual artists tended to be the art form most disadvantaged alongside musicians and dancers.[233] In the US, dancers, fine artists and musicians were in general earning half of that earned by creators in other art forms.[234] Similarly in Finland, Karhunen and Rensujeff found that the share of artists earning €10,000 or less per annum was highest for visual artists, writers and dancers.[235] Worse still, only 15% of Finnish visual artists income was derived from their art.[236] In Canada, an earnings gap of 25% was found to exist between artists and comparable workers, whereas visual artists were found to earn 61% less than the average worker.[237] It may be observed from the foregoing that while visual artists are not alone as a disadvantaged class of artist, the findings clearly indicate that visual artists and performers earn less than comparable creators – writers and composers – thus underlining the *raison d'être* of the ARR Directive – to create parity between the creative classes.[238]

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[232] McAndrew and McKimm, *supra* note 209, at p. 28 citing, (US) National Endowment for the Arts 'Artists in the Year of a Recession: Impact on Jobs in 2008.' (Washington: NEA, 2009).
[233] *Ibid.* p. 29.
[234] *Ibid*. citing the National Endowment for the Arts *Artists in the Workforce 1990 – 2005* (Washington: NEA, 2008), the research showed that $34,800 was earned by the average arts worker as opposed to $15,000 for fine artists, musicians and dancers.
[235] *Ibid.* citing P. Karhunen and K. Rensujeff *Preliminary Findings from a Survey on the Economic and Labour Market Situation of Finnish Artists. Working Papers no 39.* (Helsinki: Arts Council of Finland, 2002).
[236] *Ibid.* at p. 30.
[237] *Ibid.* at p. 29 citing Hill Strategies *Artists in Canada's Provinces and Territories based on the 2006 Census* (Hamilton, Ontario: Hill Strategies Research Inc., 2009). In addition, dancers earned 64% less, with musicians earning 60% less than the average artist.
[238] See generally, Chapter 2, Section 2.1. p. 78.

Furthermore, a study conducted in 2009 by Visual Artists Ireland – *The Social, Economic and Fiscal Status of Visual Artists in Ireland* – found that visual artists represent a highly educated part of the community, with 57% having a third-level education.[239] Most visual artists were found to have two or three other jobs and the main reason for not having enough time for their arts practice is insufficient income from art making.[240] The 2009 report also found that visual artists are at the lowest income level of society with 67% earning under €10,000 per year from their creative work.[241] The finding showed that 72% have no private pension and 45% have no private health insurance.[242] According to the visual artist, economist and sociologist, Hans Abbing, while there is much talk about 'rich visual artists and high prices of artworks', the majority of visual artists in Europe are poor.[243] Abbing contends that in Europe 40 -60% of visual artists have a total income that is below the poverty line.[244] Regarding a working definition of poverty 'The European Anti Poverty Network Ireland' (EAPNI) define poverty as follows:

> 'People are living in poverty, if their income and resources (material, cultural and social) are so inadequate as to preclude them from having a standard of living, which is regarded as acceptable by Irish society

[239] Visual Artists Ireland *The Social, Economic and Fiscal Status of Visual Artists in Ireland.* (Dublin: Visual Artists Ireland, 2009) < http://visualartists.ie/advocacy-advice-membership-services/advocacy/advocacy-datasheet-1-topic-the-status-of-the-artist-in-ireland/the-social/> (date accessed: 13 July 2017).
[240] *Ibid.*
[241] *Ibid.*
[242] *Ibid.* The results were broadly similar to McAndrew and McKimm's finding (p. 65) in relation to the wider class of artist.
[243] H. Abbing 'Are Artists Rich? The Value of Artistic – Working Conditions, Rights and Demands of Visual Artist in Europe' (Berlin: IGBK, 2012) p. 21, fn. 1; 'Around 40% of the visual artists cannot cover their costs … for instance in the Netherlands almost 80% [of artists have] an income below the Dutch minimum wage. In Europe, the average [visual] artist earns circa 40% less than the average worker. And the percentage he earns less than professionals with a similar level of previous training is much higher (sic).'
[244] *Ibid.* at p. 21.

> generally. As a result of inadequate income and resources people may be excluded and marginalised from participating in activities which are considered the norm for other people in society.'[245]

According to the EAPNI and the Central Statistics Office, people or households are considered to be 'at risk of poverty' when their income is less than 60% of the median income.[246] In 2014 Irish median incomes were found to be €18,210 per annum, placing the 'poverty line' at €10,926.[247] If it can be assumed that the 'art incomes' earned by visual artists is relatively stable then, the majority of visual artists 'are at risk of poverty',[248] and therefore experience some degree of deprivation.[249] Had the data been available, a year on year analysis would have proved useful in this regard. McAndrew and McKimm note that 'the risk of poverty' forces visual artists, and artists more generally, to substitute their income by working in other occupational categories or through welfare.[250] This not only reflects Scrutton J.'s observation[251] but highlights the stark inequities

[245] See European Anti Poverty Network Ireland Website 'Relative Poverty Rates' <http://www.eapn.ie/eapn/training/poverty-in-ireland> (date accessed: 13 July 2017). To varying degrees the EAPNI and the CSO employ a combination of the 'poverty line', 'income proxy' and 'deprivation' approaches in measuring poverty. For instance the CSO incorporates a 'deprivation index' into their analysis that is broadly comparable to the deprivation indicators proposed by Townsend.

[246] See CSO Survey on Income and Living Conditions (SILC) 2014 results. <http://www.cso.ie/en/releasesandpublications/er/silc/surveyonincomeandlivingconditions2014/> (date accessed: 24 January 2017).

[247] *Supra* note 245; According to the EAPNI between 2008 and 2013, median disposable income for an individual dropped from €20,758 to €17,550.

[248] Eurostat <http://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:At-risk-of-poverty_rate> (date accessed 20 January 2017). 'The at-risk-of-poverty rate is the share of people with an 'equivalised disposable income' (after social transfer) [i.e. social transfers include employment benefits, pension entitlements etc.] below the at-risk-of-poverty threshold, which is set at 60 % of the national median equivalised disposable income [total disposable income after tax and other deductions] after social transfers.'

[249] *Supra* note 246, the CSO employ a number of poverty indicators, which include the 'at risk of poverty' rate, the 'consistent poverty rate' and rates of 'enforced deprivation',

[250] McAndrew and McKimm, *supra* note 209, at p. 11.

[251] Scrutton J., *supra* note 206, '[w]here are the great works that might have been produced if the great minds that could have written them had not been forced to spend precious hours in uncongenial tasks, in the drudgery of earning a livelihood?'

between the exorbitant market value maintained by certain classes of art and the lived experience of many visual artists. In addition, it has been found that when artists are faced with short to medium term poverty they are more inclined to leave their profession.[252] McAndrew and McKimm conclude from their analysis that the threat of poverty is significantly higher for artists than comparable occupational categories of workers.[253]

With regard to national responses to the plight of artists, McAndrew and McKimm note that a number of options for intervention exist in the form of income tax and VAT relief, social security measures, the ARR, as well as other direct and indirect measures provided by governments.[254] However, the authors note that '… it is impossible to evaluate fully the effectiveness of a country's response without evaluating all of the measures in place on aggregate and their interactions with each other and with other non-arts policies and programmes.'[255] Nevertheless, a general trend emerges in that '[m]any schemes such as royalties and some tax-related programmes by their nature benefit more established artists most, while leaving those that may have higher needs (e.g. emerging artists) with less assistance.'[256] In relation to the ARR Directive, this observation is only partly reflected by the finding of Chapter 2. It will be remembered that while it was generally assumed by commentators in the field that successful and established visual artists benefited the most from the ARR Directive and its predecessor the *droit de suite*, more recent studies indicate that emerging visual

[252] *Ibid.* at p. 28; Although as previously noted, what drives artists is not always logically deducible.
[253] *Ibid*. at p. 29; citing the National Endowment for the Arts *Artists in the Workforce 1990 – 2005* (Washington: NEA, 2008),
[254] *Ibid.* at p. 47.
[255] *Ibid.*
[256] *Ibid.*

artists also benefit from the ARR albeit to a lesser extent.[257] A wider dispersal of ARR royalties is indicative of a functionally redistributive royalty model and therefore exhibits facets of many EU income maintenance, social assistance, and general welfare schemes. While it could be argued that this observation undermines the reform proposals suggested in this thesis, – for a socially orientated ARR Directive – it is instead contended that this redistributive quality reflects the underlying *raison d'être* of the *droit de suite*, thus exposing a shared social commonality between the historic and extant European resale right rubrics. Nevertheless, this redistributive quality, in its current EU manifestation is limited and pales in comparison to the historic *droit de suite* and the ARR rubrics of a number of EU member states.

Having demonstrated the depressed socio-economic conditions faced by visual artists the following section reviews two EU ARR models – Germany and Norway – that incorporate an income security provision and in doing so alleviates the plight of these creators.

5.4 Germany: The Resale Right as a Social Welfare Right

Although Germany was one of the first countries to consider implementing the *droit de suite*,[258] the right did not enter the German statute books until 1965 and is protected under section 26 of the German Copyright Act. [259] When the *droit de*

[257] See Kawashima, Chapter 2, section 2.3.5, p. 121.
[258] For a detailed and extensive history of the development of the *folgerecht* see Max-Planck-Institute 'The Droit de Suite in German Law' in Legal Protection for the Artist VI, VI-35 (M. Nimmer ed. 1971) Chapter. VI, p. 13 - 34.
[259] See German Copyright Act of 1965 [BGBI.I 1273] §26, reprinted in F. K. Beier and G. Schricker, 'German Industrial Property Copyright and Antitrust Laws', 6 IIC *Studies in Industrial*

suite or the *Folgerecht*[260] as it is referred to was enacted, it imposed a 5% statutory royalty rate and included a social welfare scheme.[261] This scheme contains a number of component parts and primarily pursues two objectives; firstly, to provide pension entitlements to qualifying artists; and secondly, to support contemporary fine art.[262] On September 29th 1980 *VG Bild Kunst,*[263] a collective management organisation (CMO) completed a blanket agreement with the Association of German Art Dealers and Auctioneers[264] [hereinafter BVDG].[265] The agreement effectively replaced[266] the statutory 5% resale royalty

Property and Copyright Law (Munich: Max Planck institute, 1983) p. 121. For a full history of the legislative process in Germany see The Register of Copyrights of the United States of America 'The Droit de Suite: The Artist's Resale Royalty' (A Report of the Register of Copyrights 1993) p. 35 - 38

[260] Other terms proposed included: *Nachgangsrecht* (right of pursue), *Wertzuwachsanspruch* (right on increase in value), B*eteiligungsrecht* (participation interest), *Zuwachsgebúh*r (growth fee) *Tantiemenrecht* (royalty right), *Tantiemenanteil* (royalty share) *Urheberanteil* (author's share), See M.Nimmer 'The droit de suite in German Law' (Munich: Max-Planck-Institut, 1968) reprinted in N. Nimmer *Legal Rights of the Artist* (California: Nimmer, 1971) Chapter VI. p.2.

[261] See US Register of Copyright Report 'Droit de Suite: The Artists Resale Right' (1992) p. 44.

[262] See K. Lubina, H. Schneider *et al* 'One Year and Millions of Euros Later: Taking Stock of the Implementation of the European Directive 2001/84/EC on Droit de Suite' in Demarsin, Schrage, Tilleman & Verbeke eds. *Art & Law* (Belgium: die Keure, 2009), p. 309.

[263] Bild-Kunst is an artists' rights licensing and collection organisation. Bild-Kunst was founded in 1968. The society administers the claims and enforces the rights of its members and is not of a commercial nature. It is financed solely from its own income, membership is free and all proceeds after administrative costs are distributed to its beneficiaries. In 2013, VG Bild-Kunst distributed €54 million to its rights holders in Germany and abroad. See <http://www.bildkunst.de/en/vg-bild-kunst/about-vg-bild-kunst.html> (date accessed: 13 July 2107); For further details see German Commission for UNESCO 'Survey on the economic Situation and Social Status of the Artist in Germany (1992) p. 1. Social welfare (health insurance, occupational accidents, disability, unemployment and pensions):
'While regularly employed artists in Germany are covered by the same social security system with regard to health care, pensions, occupational accidents and unemployment payments as other employees. The same could not be said for those who work as self-employed or on a freelance basis. This situation prompted the Federal Parliament, in the early 1970s, to commission the Centre for Cultural Research (ZfKf) with a large-scale empirical survey among professional artists. Following publication of this 'Künstler-Report' in 1975 and debates with professional organizations, the Federal Government developed a specific social insurance system for self-employed artists, the 'Kün-stlersozialkasse' (KSK). The 1981 Artists' Social Security Act (Künstler-Sozialversicherungsgesetz - KSVG) established the KSK with strong links to the public social security system in the fields of health insurance and pensions.' See UNESCO website <http://portal.unesco.org/culture/en/ev.php-URL_ID=34252&URL_DO=DO_TOPIC&URL_SECTION=201.html> (date accessed: 13 July 2017).

[264] Bundesverband Deutscher Galarien und Kunshandler e.V.

[265] Lubina *et al, supra* note 262, at p. 307. See also J. Merryman, A. Elsen and K. Urice *Law Ethics and Visual Art* (5th ed.) (Netherlands: Kluwer International, 2007) p. 582.

rate with a blanket levy.[267] The agreement covered both the *droit de suite* and the art trade's contribution to the German social security system.[268] Up until December 31st 2014, BVDG were obliged to report all sales to the commonly-instituted independent body, *Ausgleichsvereinigung Kunst*, [hereinafter AV Kunst] which calculated the sum due to artists and their successors.[269] Under the agreement the levy was calculated as a lump sum from sellers/galleries who paid a percentage of their annual net sales of art created after 1900.[270] The lump sum was calculated as a percentage of the volume of sales ranging between 0.8% and 1.3% for galleries and 1.3% to 3% for auction houses.[271] The sum formed part of the tax declarations that each auctioneer and gallery has to provide to the German tax authorities.[272] The levy was divided equally into two parts, one dealing specifically with resale royalties and the other with the contributions due to the

[266] The majority of art market intermediaries opted for the contractual 'blanket agreement' rather than adopting the administrative burden associated with paying the resale royalty on each individual art sale.
[267] L. de Pierredon-Fawcett, *The Droit de Suite in Literary and Artistic Property,* A Comparative Law Study (Louise-Martin Valiquette Translation), (New York: Columbia University, 1991) p. 132 reports that over 300 galleries and auctioneers choose the contractual solution.
[268] *Ibid.* p. 132.
[269] Lubina *et al, supra* note 262, at p. 309. For the current position see VG Bild-Kunst's Annual Report 2014 <http://wwwbildkunst.de/en/vg-bild-kunst/about-vg-bild-kunst/what-do-we-do.html>
[270] *Ibid.*
[271] *Ibid.* at p. 309. See also L. de Pierredon-Fawcett *supra* note 267, at p. 132; 'An agreement was signed on September 29, 1980 between the Bild Kunst collecting society and the working party of the art dealer organization. This agreement provides for a general and joint settlement regarding the droit de suite and contributions to Social Security. A statute passed in 1980, which took effect on January 1, 1983, extended the Social Security system to artists, who had previously been unable to benefit from it. Dealers were required under this law to pay to Social Security 5% of the amounts they paid each year to living artists so as to cover 2/3 of the employer's share, the remaining third being paid by the state. These payments could be made, however, through a compensation office by means of royalties paid over by its members … . The agreement provided that the monies paid to the Kunst Compensation Office would be 1% of the revenues for 20th century works. The Compensation Office was to pay 50% of the amounts thus collected to the Artists' Social Security Fund, the other 50% being distributed to artists able to claim the benefits of the droit de suite. 10% to 15% was deducted from the monies collected as droit de suite to go into a fund to aid artists who did not qualify for any other social benefits. This agreement became applicable as soon as the artists' Social Security law took effect, i.e., January 1, 1983. Each dealer and each auctioneer, by entering into an individual contract, could thus declare he was ready to accept such a method of collection which had the advantage of great simplicity. Those who decided not to subscribe had to comply with the requirements of the law, in particular to make payments for each separate transaction.'
[272] Lubina *et al, supra* note 262, at p. 309.

Kunstler Sozialkasse[273] [hereinafter KSK].[274] Previously the *AV Kunst* transferred the collected royalties to the collecting society *VG Bild-Kunst*, which then distributed the levies due to artists under their distribution scheme.[275] However, as of January 1st 2015, *AV Kunst* is no longer in existence, accordingly resale rights are now settled individually with *VG Bild-Kunst. VG Bild-Kunst* applies a 10% administration fee before paying obligatory deductions to two separate funds – *Stiftung Sozialwerk & Stiftung Kulturwerk*[276]. These funds serve two very different purposes. The *Sozialwerk* scheme is a separate and additional social security bond scheme which is designed to aid artists who do not qualify for the official state pension scheme and 'artists in need'.[277] The main recipients are elderly artists who do not receive adequate monthly support and who are not entitled to a pension under the Artists' Social Fund (KSK).[278] Recipients also include 'artists in need' and assistance under this scheme is limited to artists who have suffered a loss and are in crisis due to fire or other such accident.[279] A supervisory board made up of members of *VG Bild-Kunst* decides which applications for support qualify for aid. The second fund – *Kulturwerk* – is designed to cultivate contemporary fine art by providing, amongst others,

[273] The KSK is partially publicly financed as a social security scheme for self-employed artists in Germany. For further see Lubina *et al*, *supra* note 262, at pp. 307 and 309.
[274] De Pierredon-Fawcett *supra* note 267, at p. 132.
[275] Lubina *et al, supra* note 262, at p. 309.
[276] The Stiftung Kulturwerk cultural foundation carries out the cultural mandate of the collecting society VG Bild-Kunst. It supports projects and programmes run by organisations of visual artists that have legal capacity, awards grants to photographers, illustrators, graphic artists and graphic designers and sponsors projects of cultural significance in the film industry. The resources of the foundation come from the revenues of VG Bild-Kunst. The society is required by the German Copyright Administration Act to use a certain proportion of the income it receives from the management of copyrights to promote cultural objectives in all three professional groups. < http://www.bildkunst.de/en/vg-bild-kunst/stiftung-kulturwerk.html> (date accessed: 17 February 2016).
[277] Lubina *et al supra* note 262, at p. 309.
[278] *Ibid.* These artists are not entitled to a pension because they fell outside the age threshold when the legislation was introduced.
[279] *Ibid.*

promotion and exhibition bursaries.[280] The distribution scheme differentiates between the various recipients of levies as follows: for living artists, a further 10% is deducted for the *Sozialwerk* and 10% *Kulturwerk*, i.e. the artist receives 80% of the net royalty; for artist' heirs and their estates, 10% is deducted for *Kulturwerk,* but no deductions are due for the *Sozialwerk* scheme – this category of beneficiary receiving 90% of the net contribution. Foreign artists who are collecting royalties in Germany under the International Confederation of Societies of Authors and Composers (CISAC) are not subject to further deductions. These artists receive 100% of the royalty.[281] In cases where the society feels that the levy paid by the art intermediary is insufficient, the society may renegotiate the amount due with the intermediary.[282]

In addition there is a third funding body that is partly financed by the *Stiftung Kulturwerk* fund, it is known as *Stiftung Kunstfonds*[283] – 'Art Fund Foundation' – which supports young and less successful artists who do not enjoy a secondary market for their work.[284] A mix of public and private investment funds *Stiftung*

[280] *Ibid.*
[281] Minus the collecting society's administrative expenses etc. as outlined above.
[282] De Pierredon-Fawcett *supra* note 267, at p. 132; Lubina *et al supra* note 262, at p. 309.
[283] According to the VG-Bild Kunst website: '[t]he 'Stiftung Kulturwerk' cultural foundation carries out the cultural mandate entrusted with the Verwertungsgesellschaft Bild-Kunst [Visual Arts Collecting Society]. It awards project grants to photographers, illustrators, graphic artists and graphic designers and sponsors projects of cultural significance in the film sector. Advisory councils decide on funds granted by the 'Kulturwerk' and their members are elected separately within each professional group. In the field of visual art, funds are passed on to the 'Stiftung Kunstfonds' [Art Fund Foundation] – no funds of its own are granted.' <http://www.bildkunst.de/en/vg-bild-kunst/contact-partners/stiftung-kulturwerk.html> (date accessed: 11 December 2016).
[284] The purpose of the arts fund is to promote contemporary art in Germany. See German Statute from 3 June 2002, last modified in 15 November 2012. Statute available (German version) at < http://www.kunstfonds.de/fileadmin/user_upload/Kunstfonds/Sonstige_Dokumente/Satzung-2012-11-15-web.pdf> (date accessed 17 February 2016) The founding members of the Art Fund were the Federal Association of artists, the German Association of Artists, the community of artists and art lovers, the Federal Association of German Galleries, the collecting society Bild-Kunst and the artist Rune Mields. Later, the International Artists Committee and the Working Group of German art associations were added. See Stiftung Kunstfonds website <http://www.kunstfonds.de/ueberuns.html> (date accessed: 13 July 2017).

Kunstfond.[285] Lubina *et al* note that '[t]he German system is quite remarkable insofar as the collected resale royalties are at least partially used for social purposes.'[286]

From the foregoing it is clear that the German system operates within the remits of the EU Artists Resale Rights Directive; its primary function is to collect resale royalties from art sales involving 'art market intermediaries' and distribute the resulting royalties to their respective artists. The Directive does not prohibit the taxing of resale royalties[287] to provide, for all intents and purposes, an income maintenance element for visual artists who reside in Germany.[288] Lubina *et al* note that these deductions can be categorised '… as a specific tax on resale royalties.'[289] Furthermore, the German scheme complies with Recht's definition of a 'tax' '… collected by authority of the state and allocated to a public service … .'[290] Importantly, because the German ARR model directly funds social security entitlements it therefore presents a direct challenge to Becker's view that

[285] See Stiftung Kunstfonds website <http://www.kunstfonds.de/ueberuns-organisation.html> (date accessed: 13 July 2017) – the German Federal Cultural Foundation provide the Stifung Kunstfond with €1,000,000 annually, VG Bild Kunst also make a contribution, which is currently estimated to be €250,000 p.a. Since 1981 the fund has contributed over €30 million to art projects.
[286] Lubina *et al supra* note 262, at p. 309.
[287] Directive 2001/84/EC 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 L 272/32, [hereinafter ARR Directive] Article 5 merely notes that the calculation of the resale royalty be net of tax, thus acknowledging that the royalty is susceptible to taxation.
[288] See Lubina *et al, supra* note 262, at p. 309.
[289] *Ibid.*
[290] P. Recht 'Le droit de suite est-il un droit d'auteur?' 3 *Bulletin du Droit d'Auteur [Copyright Bulletin]* (UNESCO) (1950) 1, p. 65, [English Translation] p. 66, for the *droit de suite* to fit the 'tax' characterisation the royalty/tax would have to be collected by government and used for public purposes. See also K. L. Boe 'The Droit de Suite has arrived: can it thrive in California as it has in Calais? (1977 – 1979) 11 *Creighton Law Review*, p. 543.

'… the *droit de suite* [ARR] does not lend itself to being an instrument of social security.'[291]

5.5 The Norwegian Social Model

Despite Norway's original objection to the inclusion of the *droit de suite* into the Berne Convention, it today embodies one of the most progressive regimes.[292] In Norway the social welfare function of the ARR is administered by the 'Relief Fund for Visual Artists' – *Bildende Kunstneres Hjelpefond* (BKH). The Artists' Resale Right is protected under Norwegian Law under Section 38c of the Norwegian Copyright Act.[293] Just like the early French model as it applied to gallery sales and the German model, the Norwegian model bifurcates revenues to a social fund as well as providing royalties to entitled visual artists. The *Fee on Sale of Visual Art Act* of 1948,[294] established the 'Relief Fund' which obliged buyers of art to pay a fee of 5%, supplemental to the sale price, provided the sale price surpassed the threshold of 2000 NOK.[295] Today the BKH or 'Relief Fund' administers this art tax (Kunstavgiften) and has done so for over 50 years. According to Hege Imerslund,[296] Managing Director of the Norwegian Visual

[291] L. Becker, P. Huber and E. Kronjager (Project Leader: Marlies Hummel) *The Droit de Suite* Report Commissioned by the French Authors' Society ADAGP, The German Authors' BILD-Kunst and the Groupement Européen des Sociétés d'Auteiurs et Compositeurs (GESAC) (Munich: IFO Institut, 1995) p. 32.
[292] See Chapter 1, Section 1.2, p. 34.
[293] (Nor.) Copyright Act (Act No. 2 of May 12, 1961, relating to Copyright in Literary, Scientific and Artistic Works, as last amended by Act No. 103 of June 19, 2009) accessed from WIPO webpage < http://www.wipo.int/wipolex/en/details.jsp?id=11086> (date accessed: 13 July 2017). See <http://www.wipo.int/wipolex/en/details.jsp?id=9661> for English translation of S. 38c from 2006 Act.
[294] See Norwegian Statute of November 4, 1948, 'Fee on Sale of Visual Art a.o. - Lov om avgift på offentlig omsettning av billedkust, 1948, cited in M. Heikkinen & the Arts Council of Finland *The Nordic Model for Supporting Artists* Research, Reports of the Arts Council of Finland No. 26 (Helsinki: Nykypaino Oy, 2003) p. 90.
[295] See BKH website <http://kunstfond.no/index.php/about-bkh> (date accessed: 13 July 2017).
[296] E-mail correspondence with Hege Imerslund and author, 5 May 2015 - 10 June 2015.

Artist Collecting Society, the tax is applied to all sales of art and not just resales.[297] Imerslund notes that the tax is based on the concept of the resale right, but is more of a 'cultural political tool' since the tax that is collected is distributed mainly to living artists on a collective basis (as scholarships, funds etc.).

Norway implemented the Artists' Resale Right Directive in 2007, since its inception the resale right has been subject to compulsory collective management.[298] The Norwegian Visual Artists Copyright Society (*Billedkunst Opphavsrett I Norge*) [hereinafter Bono], a state appointed collecting society, collects royalties from the 'Relief Fund' for works subject to the artists' resale right. Art dealers are obliged to collect the fee and send it to BKH and in turn BONO collects on behalf of members as well as non-members. After the amounts have been collected, royalties are paid out to visual artists whose works have been resold.[299] The fund has distributed over €30 million since its creation.[300]

The question which arises from the foregoing is whether the German and Norwegian models are exemplars of the *droit de suite* as an 'instrument of social security' or are merely *droit de suite* systems with an adjunct tax that funds specific social projects? It must be remembered that when the *droit de suite* entered the French statute books in 1920 it '… involved a significant social

[297] Applicable works include copyright-protected as well as non-protected works, first sales (including works sold in commission for the artist), as well as works that are resold.
[298] The Artists' Resale Right is regulated under Article 38(c) of the Norwegian Copyright Act 1961 (as amended by Act No. 103 of June 19, 2009)
[299] *Supra* note 295.
[300] *Ibid.*

component …'[301] which is arguably as relevant today. For Becker, the *droit de suite* is not suited to the function of wealth redistribution[302] and while each country must decide how it wishes to provide social security for its visual artists '[t]he droit de suite does not lend itself to being an instrument of social security.'[303] The German and Norwegian schema perhaps reflects Becker's conclusion by separating the author's rights function from its social welfare function. Indeed today, under the current EU ARR Directive that social welfare component has been abandoned. Crucially however, the German and Norwegian models embrace the dialectical nature of the artists' resale right as part intellectual property right and part social welfare. In doing so, these models suggest a re-conceptualising of the ARR Directive that more adequately reflects its civil law origins and the needs of visual artists today.

The preceding exploration of European welfarism provides a contextual background against which the development of extant European ARR models can be better understood. It can be seen from the foregoing that the socially orientated ARR models of Germany and Norway originate from quite distinct welfare models. Germany's ARR regime, and in particular the blanket agreement reached between galleries and the state is a socio-political arrangement and therefore distinctly corporatist in nature.[304] Furthermore, because the relationship between the gallery and the visual artist is framed as that of a typical employee-employer relationship, the social entitlement derived by visual artists from the scheme is a form of occupational social insurance. Like any insurance scheme, a

[301] Becker *et al, supra* note 292, at p. 32.
[302] *Ibid.* at p. 32.
[303] *Ibid.*
[304] See section 5.3.3.

recipient's entitlement to the benefits of the scheme is justified on the basis that they have made a financial contribution. The notion of contribution shares an affinity with Harris's concept of social citizenship.[305] The German ARR model, in particular its social security component, is therefore distinctly corporatist in nature and a product of the state's wider social security regime. The Norwegian scheme on the other hand, which neither attempts to justify ARR social welfare payments on the basis of social insurance nor the creation of an artificial employee-employer relationship reflects Esping-Anderson's social democratic and universalist form of welfare. These schemes are typified by state control, high taxation and public spending.[306] The Norwegian ARR model represents one of the means by which the Norwegian state provides for universal social entitlements through high levels of taxation.

5.6 Conclusion

Scrutton J.'s observation not only bemoans the personal loss that artists experience when they are forced to leave their profession but also the fact that society may ultimately bear the greatest loss. As Arnold Hauser convincingly argues, any bifurcation of effort inevitably confines the exploits of the creative classes to that of the dilettante.[307] The taxonomy of dilettante further entrenches the process of social exclusion for visual artists. Doubtless, being deprived of the opportunity to fully develop one's talents deepens this experience. As noted in

[305] For further see Chapter 4. Section 4.5. p. 209.
[306] Dwyer *supra* note 113, at p. 73.
[307] A. Hauser *The Social History of Art* Vol. 1 (New York: Vintage Books, 1957) p. 22. On this point see, H. Read *Art and Society* 2nd ed. (London: Faber & Faber, 1967), Chapters 1 & 2. See also, A.P. Elkin 'The Secret Life of the Australian Aborigines' (1932) 3(2) Oceana p. 210. T.E. Scrutton *The Laws of Literary Property – An examination of the principles which should regulate literary and artistic property in England and other countries* (London: John Murray, 1882) (London: Clowes & Sons, 1884) p. 11.

Chapter 4, social citizenship focuses on certain types of social 'dis-services' which compromise the status of individuals as full and participating members of the community.[308] Harris gives the example of employment, and society's view of employment as a prized activity where the failure to hold or find a job is a reflection of personal failure. Not only does unemployment mean a loss of income but it also results in a lowering of self-esteem. For Harris, '… a society in which what you are is bound up closely with what you do, work is [a] source of self-definition. To be effectively deprived of an opportunity to work is to be cruelly handicapped.'[309] The international reports cited by McAndrew and McKimm evidence the inability of visual artists to make a living from their profession, therefore furthering the process of social exclusion. As noted in Chapter 3, historically the visual artist was nothing more than a slave and as such not a citizen of the ancient city-state. Arguably the treatment of visual artists today – as modern day paupers, unable to translate their talents into tangible financial reward – continues to deprive them of the status of citizen and full community participation.[310]

In response to this glaring inequity, the ARR Directive, as an interventionist measure, presents a means of addressing the social exclusion of visual artists. However, the question that this thesis continually returns to is whether the ARR Directive ought to be extended to engender a social orientation and adopt a social security or welfare function reflective of its civil law origins? In answering this question it is worth reflecting upon the French jurist Plaisant's observation. He was of the opinion that the resale right was never at ease within traditional

[308] Chapter 4, Section 4.5, p. 209 - 213.
[309] Harris, *supra* note 24, at p. 50
[310] See Chapter 4, Section 4.5, p. 209 - 213.

copyright rubrics; that it was a 'historical phenomenon' enacted to satisfy a specific need – the starving artist – and that its 'maintenance element' represented its most legitimate *raison d'être*.[311] It is this social element that historically underpinned the right's legitimacy and it is with this social understanding of the ARR Directive and its potential to alleviate the experienced poverty of visual artists that Chapter 6 now turns.

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[311] R. Plaisant – 'The Droit de Suite' *General Studies - Copyright* (1969), Monthly Review of the United Bureaux for the Protection of Intellectual Property (BIRPI), pp. 159 – 160; see also A. O'Dwyer, 'The Artists' Resale Right: The Greatest Good?*'* (2016) *Edinburgh Student Law Review*.

Chapter 6 – Conclusion and Reform Proposals

6.0 Introduction

It has been said that writers such as Hobbes and Locke could not have been more wrong when they claimed that in the state of nature we were engaged in a war 'of every man against every man'.[1] For Monbiot this was not the case, man was always a social creature '… mammalian bees, who depended entirely on each other.'[2] In the context of visual artists and the artists' resale right, the interactive and dependent relationship that Monbiot describes is equally as relevant. Society thrives when it is immersed in a rich and diverse culture but for society to experience this rich existence and for culture to thrive the creators of this culture need to be provided for, encouraged and protected. President Higgins could not have been more unerring when he noted that:

> '[c]reativity and culture are about the articulation and vindication of rights, the right for everyone to participate fully in society. They are a social good which, if left to the vagaries of the marketplace, will either fail to survive or become so compromised and distorted that the public good will not be served.'[3]

[1] G. Monbiot *How Did We Get Into This Mess?: Politics, Equality, Nature* (London: Verso, 2016). p. 9.
[2] *Ibid.*
[3] President Michael D. Higgins address to the General Assembly of Aosdána 2015. <http://www.president.ie/en/media-library/speeches/speech-at-the-2015-aosdana-general-assembly> (date accessed: 6 July 2017).

Similarly, for Hauser the creation of great art is dependant upon the support of the community, without it the visual artist would be inevitably confined to that of the dilettante.[4] Worse still, Scrutton J. imagined a somewhat present dystopia when he asked: '[w]here are the great works that might have been produced if the great minds that could have written them had not been forced to spend precious hours in uncongenial tasks, in the drudgery of earning a livelihood?'[5] Notably, there is a slight hint of irony in the latter part of Scrutton J.'s comments concerning the drudgery of earning a livelihood. After all, why should the creative classes be spared the 'humiliation' of earning a livelihood? Indeed, the Greek's distaste for manual labour did not survive the demise of the ancient city-state.[6] Whether well intentioned or not, Scrutton J.'s comments nevertheless serve a vital purpose in exposing a common misconception about the creative arts, a misconception that President Higgins also eluded to. As Abel Ferry argued when he petitioned for the *droit de suite* in 1920, it is not 'alms for the poor' that is sought and similarly the modern manifestation of Ferry's petition does not attempt to excuse visual artists from earning a livelihood by giving them a 'hand out'. It is quite the opposite, the socially orientated, or socially constructed ARR that this thesis proposes provides visual artists with the means to vindicate their rights as citizens, to be drawn in from the margins and to participate fully as members of society. This social construction not only rewards successful visual artists through royalties but also provides a form of social security that existed

[4] A. Hauser *The Social History of Art* Vol. 1 (New York: Vintage Books, 1957) p. 22; see also, H. Read *Art and Society* 2nd ed. (London: Faber & Faber, 1967), Chapters 1 & 2; A. P. Elkin 'The Secret Life of the Australian Aborigines' (1932) 3(2) *Oceana* p. 210.
[5] T. E. Scrutton *The Laws of Literary Property – An examination of the principles which should regulate literary and artistic property in England and other countries* (London: John Murray, 1882) (London: Clowes & Sons, 1884) p. 11.
[6] See Chapter 3, Section 3.1, p. 141 fn. 18.

under the guild and patronage system of old.[7] Both systems realised the importance of nurturing talent and creating a space in which creative talent could transcend that of the dilettante and produce social and cultural goods that not only enriched the lives of their patrons but of the wider community. Just like the guild and patronage systems of old it is proposed that an ARR rubric, with an attendant social security, social welfare or income maintenance function, would allow many visual artists to professionalise their art form and earn a livelihood. Such a system also recognises the precarious nature of visual artists and in addition to nurturing talent, creates a social security net during times of hardship.

6.1 Justification for a Socially Orientated ARR Directive

Highlighting the social component of all IPRs, Waldron observes that '… in our legal culture, the defense (sic) of intellectual property is seldom cast in purely individualistic terms. Officially the justification is supposed to have more to do with the *social good* than with the individual natural rights of authors … ' (emphasis added).[8] Reflecting upon Waldron's observations, and drawing on the conclusions of Chapter 3, it is submitted that the EU ARR Directive, by adhering to the strictures of extant EU IP law, emphasises 'form over function' thereby placing greater importance on the character of the ARR Directive rather than focusing on the function that it ought to serve. The distinctly individualistic

[7] *Ibid.*

[8] J. Waldron 'From Authors to Copiers: Individual Rights and Social Values in Intellectual Property (1993) 68 (2) Symposium on Intellectual Property Law Theory, *Chicago-Kent Law Review* p. 849. Here the author cites cases such as *Millar v. Taylor*, 4 Burrows 2302, 98 Eng. Rep. 201 (1769) and *Donaldson v. Beckett*, 4 Burrows 2408, 98 Eng. Rep. 257 (1774) as authority for this statement.

character of the extant ARR Directive implicitly undermines the social basis of the historic *droit de suite* and in doing so undermines its *raison d'être.*

The German and Norwegian schemes tie together many of the themes that have been discussed throughout this thesis. As to the question of whether society values the creators of great works of art, the German scheme answers this question in the affirmative by acknowledging the binary and dependent relationship between visual artists and society. If society wishes to enjoy a rich culture – Art 167 TFEU – then it must be willing to provide adequate recompense for these cultural creators; this is the social contract upon which copyright law is built,[9] it is the underlying rationale of the historic *droit de suite*,[10] furthermore, this recompense must be inclusive of all visual artists and not just the select few whom today's society deem valuable.[11] The multiple strands of the German model recognise the complexities and nuances of this relationship. The scheme not only provides a royalty to reward successful visual artists but it also provides incentives and social security to artists whether they are at the nascent or latter period of their professional lives. The Norwegian model operates in much the same way albeit to a lesser extent. This in turn allows visual artists to earn a living from their art commensurate to that of other creators. The German and Norwegian schemes, the former underpinning the reforms herein, provide a normative framework upon which a contemporary EU ARR model might be based. These schemes in turn provide a benchmark against which policy makers may assess the utility of both the ARR Directive and national resale right's models, thus providing an impetus for reform.

[9] See Statute of Anne.
[10] See Chapter 3. Section 3.3, p. 151 - 155.
[11] After all, Van-Gough was not recognised by his contemporaries during his life-time.

As noted in Chapter 4, social citizenship focuses on certain types of social 'dis-services' which compromise the status of individuals as full and participating members of the community.[12] Harris gives the example of employment, and society's view of employment as a prized activity where the failure to hold or find a job is a reflection of personal failure. Not only does unemployment mean a loss of income but it also results in a lowering of self-esteem. For Harris, '… a society in which what you are is bound up closely with what you do, work is [a] source of self-definition. To be effectively deprived of an opportunity to work is to be cruelly handicapped.'[13] Arguably the treatment of visual artists today – as modern day paupers, unable to translate their talents into tangible financial reward commensurate with the time, effort and talented invested – continues to deprive these creators of the status of citizen and full community participation.[14] Indeed despite the dearth of empirical research relating to the socio-economic condition of visual artists, McAndrew and McKimm's research evidences the struggles that artists generally and visual artists specifically face when attempting to make a living from their profession. The vast majority of which are forced to subsidise their profession by alternative means or through the stigma of welfare supports. It may be observed that in almost 100 years since the enactment of the *droit de suite* little has changed in this regard and while this very fact may appear to support claims that the ARR is a 20th century solution to a 19th century problem that no longer exists,[15] it is argued in this thesis that the

[12] Chapter 4, Section 4.5, p. 210.
[13] D. Harris *Justifying State Welfare* (Oxford: Basil Blackwell, 1987) p. 48.
[14] See Chapter 5, Section 5.6, p. 313.
[15] See Chapter 2, Section 2.3.5, p. 121 - 126.

removal of a social component from the historic *droit de suite* and its successor Directive created a right that does not fulfil its ultimate potential.

Drawing on the conclusions of Chapters 1 and 2, and in anwering the first research question, it is submitted that the ARR Directive harmonizes EU law in this area and that the attendant royalties go some way towards creating remunerative parity between the creative classes, although the extent of which is unknown. It will be remembered from Chapter 3 that while established and often wealthy visual artists receive the greatest share of ARR royalties by value, a modest coterie of visual artists benefit from the ARR by volume.[16] This finding suggests that the ARR Directive functions efficiently and is not in need of reform.[17] To leave the matter there would ignore the vast inequality in terms of distribution between established and nascent career visual artists. This observation was again reflected in McAndrew and McKimm's analysis concerning state intervention and those who benefit the most.[18] Indeed, it can be presumed that the original proponents of the *droit de suite* never intended for the resale right to enrich the wealthy, it was, as outlined numerous times throughout this thesis, to remedy the plight of the 'starving artist'.[19]

In answering this thesis's second research question – whether visual artists would be better served under a socially oriented ARR model and whether the apparent tension between copyright and social rights is resolvable? – the German and Norwegian models, by redistributing ARR royalties in a more equitable manner,

[16] For further see Chapter 3, Section 3.6, p. 185.
[17] *Ibid.*
[18] i.e. established artists.
[19] See generally Chapter 3 and 4.

reflective of the historic *droit de suite*, undeniably benefit a broader cohort of visual artists while not disproportionately disadvantaging visual artists that currently benefit under the Directive. Both models clearly demonstrate that the apparent tension between social rights and copyright is not irresolvable. As noted by Brierly, the law '… is only a means to an end, and that end is to assist the problems of the society in and for which it exists.'[20] The end is this context is the recognition of the unique nature of the visual arts and the establishment of a rights matrix that effectively rewards these creators. The primary failure of the extant ARR Directive is that it overwhelmingly rewards established and wealthy visual artists above emerging and struggling visual artists. Accordingly, and reflecting Plaisant's[21] observations, it is proposed that the ARR Directive be reframed to engender a social focus and adopt a social security or welfare function reflective of its civil law origins.

It will be remembered from Chapter 4 that the combination of Hegelian theory and social citizenship creates a dialectic based upon personality and community membership that most fully grounds a socially concerned and redistributive ARR rubric.[22] Social citizenship also presents a more justifiable basis for Hegel's 'needy individuals' by recasting the 'right to take' as a right to compensation. Furthermore, where the compensation requirement demands a social process, an agent and a beneficiary to be identified, this safeguards society from an unfettered right of 'the needy' – in this construct visual artists – to take the property of others. It is the role of government to balance these competing

[20] J. L. Brierly *The Basis of Obligation in International Law: And Other Papers* H. Lauterpacht and C. H. M. Waldock eds. (Oxford: Scientia, 1977) p. 72.
[21] R. Plaisant – 'The Droit de Suite' General Studies (1969) Copyright: Monthly Review of the United Bureaux for the Protection of Intellectual Property (BIRPI) 157, pp. 159 &160.
[22] For further see Chapter 5, Section 5.6, p. 313 - 316.

demands. In this paradigm, the social process that provides visual artists – the needy – with the right to compensation is the failure of the market to adequately reward visual artists for their labour. Those who benefit are wealthy visual artists and those harmed are impoverished/emerging visual artists. The ultimate injustice in this social process derives from the fact that struggling artists are represented as the beneficiary of the right when in fact it is already wealthy visual artist that stand the most to gain. By establishing a mechanism in which a portion of earned royalties is redistributed from wealthy visual artists to emerging visual artists, Harris's paradigm is complete.

Furthermore in Chapter 5 it was firmly established that social policy is an integral part of the European Union and that within both the TEU and TFEU there exists a legal basis for such reforms, namely: Article 3 TEU (full employment and solidarity between the generations), Article 6 TEU (recognising the Charter of Fundamental Rights of the European union), Article 2(3) (recognising the social market economy … solidarity … combating social exclusion) and Article 151 – 153 TFEU (providing the legal basis upon which the Union may legislate for social change). Furthermore, Article 4(2)(b) and (c) TFEU recognise the shared competence of the EU and member states in the area of social policy.[23] The recognition of a social market economy, a combined commitment to solidarity, social protection and the elevation of the Charter of Fundamental rights to that of the Treaties provides a legal basis upon which a socially orientated ARR Directive may be based.[24]

[23] Consolidated Version Of The Treaty On the Functioning of the European Union 26.10.2012 OJ C 326/13.
[24] T. K. Hervey 'Social Security: the European Union Dimension' in N. Harris (eds.) *Social Security Law in Context* (Oxford, OUP, 2000) p. 231 – 234: Legal basis provisions both provide

A further question that arises in this context relates to why financial support for visual artists might be placed, in part, outside developed state welfare systems? The answer to this question centres upon the issue of stigma as related to dependency and the receipt of social services. As noted by Townsend, basic social assistance tends to '… lump the unemployed, sick, widowed, aged and others into one undifferentiated and inevitably stigmatised category.'[25] Employing the ARR Directive as both a means of rewarding successful visual artists and as a means of securing the incomes of less successful visual artists captures the liminal essence of the historic *droit de suite* as part royalty, part income security and in doing so prevents the stigmatization of this creative class of workers.

6.2 Recommendations

In answering the third research question, the following recommendations employ the *Kulturwerk* facet of the German Artists' Resale Rights exemplar as the paradigmatic schema for reform of the Artists' Resale Right Directive. The *Kunstler Sozialkasse* which taxes German art dealers and auctioneers is not relied upon in this regard because it supposes a somewhat manufactured and artificial

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the source of the EU's competence to make law and policy and the legislative procedures to be applied. In the area of social security and social welfare, Hervey notes that since the Treaty of Amsterdam (Articles TFEU 151 – 53), "… the Council is empowered to 'adopt, by means of directives, minimum requirements for gradual implementation' in order to achieve the aims of 'proper social protection' and 'the combating of exclusion' and may 'adopt measures designed to encourage co-operation between Member States … in order to combat social exclusion.'"

[25] L. Leisering and S. Leibfried *Time and Poverty in Western Welfare States* (Cambridge: Cambridge University Press, 1999) pp 245 – 9; see also P. Towsend *Sociology and Social Policy* (Harmondsworth: Penguin, 1976) p. 14.

relationship between these market intermediaries and visual artists so that the German art trade make a contribution to the German social security system on behalf of affected visual artists.[26] While this arrangement may reflect the historical nuances of the German social security system it would not be appropriate to propose, transplant or scale this model across EU member states that do not share a similar social typology or history.[27] Furthermore, the Norwegian system is not employed because it taxes the purchasers of art in a similar way to the German *Kunstler Sozialkasse*. The German *Kulturwerk* model conforms to both Harris's conception of social citizenship and his contribution/compensation based exchange model. Again this exchange model has three primary facets: a) the social process which caused the harm can be identified; b) the agent who bears the responsibility for the harm can be identified and c) the individual or group who are to benefit can be identified (a *social process*, an *agent* and a *beneficiary*).[28] As previously noted it is the failure of the market to adequately reward visual artists for their labour that is the *social process* that causes harm and therefore requires compensation or in the alternative it is the failure of the market to adequately reward visual artists for their exploits that deprives them of the financial benefit that their contribution to society deserves. The *beneficiary*, under the construction proposed in this thesis, is the visual artist who struggles to maintain a standard of living above that of the poverty line.[29] The *agent* who bears the responsibility for the harm however is not so neatly categorical. The *agent* nomenclature could be ascribed to the art dealer who purchased the artwork from the artist and subsequently sold it to a

[26] See Chapter 5, Section 5.4, p. 303 - 309.
[27] *Ibid.*
[28] Harris, *supra* note 13, at p. 30 acknowledges that some social policies are not responses to harm, for example medical care and education.
[29] See Chapter 5, Section 5.3, p. 293 - 308.

willing purchaser for a multiple well above the initial perceived value that the dealer and artist agreed upon. For present purposes, whether the dealer enjoyed the benefits of an asymmetrical bargaining position or possessed additional information pertaining to the market for said goods is largely irrelevant; there simply needs to be a winner and a loser. Alternatively the *agent* might be the legislator who created the discriminatory legislation. It is however the visual artist himself to whom the nomenclature of *agent* is ascribed. Or more specifically those visual artists who are already benefiting from the initial sale price of their work or are benefiting from alternative exploitations of their work because the market deems their work to be of value. Effectively, the *agent* for present purposes is the successful and wealthy visual artist who inadvertently benefits from an ARR royalty that was historically intended to benefit the 'starving artist'. Admittedly they too may have once sold their work below market value and are therefore deserving *beneficiaries* of ARR royalties related specifically to those works but clearly not for works that firstly sold at a 'fair market price' reflective of the work's long term value and secondly continue to enjoy a healthy resale market. The incongruity of a right that was intended to benefit the 'starving artist', or at least a comparable class of visual artist, but now largely benefits wealthy, successful and independent visual artists is antithetical to the *raison d'être* of the historic *droit de suite* and therefore creates the *agent.* As noted by Harris:

> 'The injustice inheres in the social process itself and in the failure to recognise the unfairness of any claim to keep full control of the use and disposition of resources so derived. It is not simply that one is not entitled to

everything one earns because one does not deserve it on the grounds of effort or desert; one's lack of entitlement is a consequence of the price which some must pay to make earnings possible.'[30]

The 'price' in this context is the use of the 'starving artist' designation to justify a royalty that in the main benefits 'not so starving artists'. Those who benefit, for the most part, are wealthy visual artists and those harmed are impoverished/emerging visual artists. By distributing ARR royalties from wealthy visual artists to emerging visual artists, Harris's paradigm is complete and the true *raison d'être* of the historic *droit de suite* is satisfied.

Hence there is a perfect symmetry between the aforementioned distribution or redistribution of royalties and the *Kulterwerk* element of the German schema which taxes the ARR royalty earnings of visual artists. In this sense, successful visual artists nurture emerging talent by 'giving back' to their community which in turn fosters inclusion and participation by providing visual artists with an income source that is capable of providing said artists with a livelihood.

6.3 Proposed Reforms

It is proposed that the ARR Directive incorporate a recital with a social orientation. This social provision finds a legal basis under Article 6 TEU (recognising the Charter of Fundamental Rights of the European union), Article 2(3) (recognising the social market economy … solidarity … combating social

[30] Harris *supra* note 13, at p. 40.

exclusion) and Article 151 – 153 TFEU (providing the legal basis upon which the Union may legislate for social change).

It is proposed that the Directive incorporate a provision based on the German *Kulterwerk* model, mandating that member states adopt a social redistributive mechanism, which takes a small percentage of ARR royalty earnings from all visual artist beneficiaries. The monies collected are to be referred to, for present purposes, as the ARR Tax-Social (ARRTS).

A precursor to the effective operation of the fund requires the collection of ARR royalties by nationally appointed CMOs. Central administration is key to the effective collection of royalties and the overall legitimacy of the system. In parallel an independent body should be created to administer the fund in a similar fashion to the German 'commonly instituted body'. Under this rubric, it is envisioned that the independent body apply to CMOs for a quarterly statement of accounts relating to collected ARR royalties. CMOs would then pay the independent body a percentage of monies collected minus an administration fee. Again drawing from the German model, it is proposed that ARR royalties be 'taxed' for this social purpose at 10% and that the independent body and CMOs administration fees amount to no more than 1% of ARRTS. After administration fees have been deducted the remainder benefit derived from the tax on ARR royalties provides the financial basis of ARRTS.

Furthermore, it is proposed that ARRTS be divided into three social strands:

Firstly, it is proposed that (and for simplicity) 'Fund 1' provide a form of income maintenance for visual artists that are unable to earn a livelihood from their art. 'Fund 1' would provide a modest but additional income to earned incomes and in doing so provide a substitute, either wholly or partly, for state social welfare contributions. The degree to which this substitution occurs is to be defined by member states on a national basis, reflective of the national poverty line.

Secondly, in recognition of visual artists' contribution to society and culture during their working lives it is envisioned that 'Fund 2' provide an additional pension entitlement to supplement private and state pension provisions. As previously noted by the reports cited in Chapter 5, visual artists do not always enjoy retirement in the traditional sense, and often work throughout their lives. Accordingly, the additional pension benefit can be justified on the basis of reward for continued participation in the labour-force rather than as a traditional pension entitlement that provides a level of subsistence for individuals who are no longer active members of the labour-force. The level of entitlement will be dependant upon the financial resources of the fund, the number of annual applicants seeking relief, the estimated longevity of claimants, as well as the individual's personal financial resources.

Thirdly, it is envisioned that 'Fund 3' provide nascent and emerging career artists with a bursary fund which would cover the cost of materials, travel expenses and exhibitions etc. Both the German and Norwegian models incorporate a bursary fund. It is envisioned that this fund operate alongside extant national funding models and not act as a replacement. Potentially the criteria for the allocation of

bursary funds to visual artists might be based on non-conventional metrics. For instance, failure to obtain funding from traditional funding models might provide a pre-requisite to approval. While on the one hand this may seem wasteful, because it might appear to reward undeserving creators it might also serve the purpose of presenting a counter-balance to the influence of current trends on the allocation of art funds. Once again, Van Gough, arguably one of the most important visual artists in the post-impressionist movement would never have created many of his masterpieces without the financial aid of his brother. Had he not been able to obtain funding, albeit quite modest and from familial sources, society and culture would have been significantly deprived. Once again, echoing Scutton J.'s comments, it is difficult to think of Van Gough's body of work absent 'Starry Night' or 'Sunflowers'. Finally, these proposed social provisions find a legal basis under Article 6 TEU, Article 2(3) and Article 151 – 153 TFEU.

In conclusion, if creativity and culture are truly about the 'articulation and vindication of rights' and the 'right for everyone to participate fully in society' then a socially constructed Artists' Resale Right Directive offers an un paralleled opportunity for EU member states to recognise the great talents and contribution of the visual arts to European culture and society. Much like social housing, the maintenance of a rich and diverse culture depends upon state intervention and cannot be left to the 'vagaries of the marketplace' because if that view continues, great art '… will either fail to survive or become so compromised and distorted that the public good will not be served.'[31]

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[31] President Michael D. Higgins address to the General Assembly of Aosdána 2015. <http://www.president.ie/en/media-library/speeches/speech-at-the-2015-aosdana-general-assembly> (date accessed: 6 July 2017).

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Appendix I

Appendix II

DIRECTIVE 2001/84/EC 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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the Economic and Social Committee [2],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [3], and in the light of the joint text approved by the Conciliation Committee on 6 June 2001,

Whereas:

(1) In the field of copyright, the resale right is an unassignable and inalienable right, enjoyed by the author of an original work of graphic or plastic art, to an economic interest in successive sales of the work concerned.

(2) The resale right is a right of a productive character which enables the author/artist to receive consideration for successive transfers of the work. The subject-matter of the resale right is the physical work, namely the medium in which the protected work is incorporated.

(3) 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 exploitations of their works.

(4) The resale right forms an integral part of copyright and is an essential prerogative for authors. The imposition of such a right in all Member States meets the need for providing creators with an adequate and standard level of protection.

(5) Under Article 151(4) of the Treaty the Community is to take cultural aspects into account in its action under other provisions of the Treaty.

(6) The Berne Convention for the Protection of Literary and Artistic Works provides that the resale right is available only if legislation in the country to which the author belongs so permits. The right is therefore optional and subject to the rule of reciprocity. It follows from the case-law of the Court of Justice of the European Communities on the application of the principle of non-discrimination laid down in Article 12 of the Treaty, as shown in the judgment of 20 October 1993 in Joined Cases C-92/92 and C-326/92 Phil Collins and Others [4], that domestic provisions containing reciprocity clauses cannot be relied upon in order to deny nationals of other Member States rights conferred on national authors. The application of such clauses in the Community context runs counter to the principle of equal treatment resulting from the prohibition of any discrimination on grounds of nationality.

(7) The process of internationalisation of the Community market in modern and contemporary art, which is now being speeded up by the effects of the new economy, in a regulatory context in which few States outside the EU recognise the resale right, makes it essential for the European Community, in the external sphere, to open negotiations with a view to making Article 14b of the Berne Convention compulsory.

(8) The fact that this international market exists, combined with the lack of a resale right in several Member States and the current disparity as regards national systems which recognise that right, make it essential to lay down transitional provisions as regards both entry into force and the substantive regulation of the right, which will preserve the competitiveness of the European market.

(9) The resale right is currently provided for by the domestic legislation of a majority of Member States. Such laws, where they exist, display certain differences, notably as regards the works covered, those entitled to receive royalties, the rate applied, the transactions subject to payment of a royalty, and the basis on which these are calculated. The application or non-application of such a right has a significant impact on the competitive environment within the internal market, since the existence or absence of an obligation to pay on the basis of the resale right is an element which must be taken into account by each individual wishing to sell a work of art. This right is therefore a factor which contributes to the creation of distortions of competition as well as displacement of sales within the Community.

(10) Such disparities with regard to the existence of the resale right and its application by the Member States have a direct negative impact on the proper functioning of the internal market in works of art as provided for by Article 14 of the Treaty. In such a situation Article 95 of the Treaty constitutes the appropriate legal basis.

[1] OJ C 178, 21.6.1996, p. 16 and OJ C 125, 23.4.1998, p. 8.
[2] OJ C 75, 10.3.1997, p. 17.
[3] Opinion of the European Parliament of 9 April 1997 (OJ C 132, 28.4.1997, p. 88), confirmed on 27 October 1999, Council Common Position of 19 June 2000 (OJ C 300, 20.10.2000, p. 1) and Decision of the European Parliament of 13 December 2000 (OJ C 232, 17.8.2001, p. 173). Decision of the European Parliament of 3 July 2001 and Decision of the Council of 19 July 2001.
[4] [1993] ECR I-5145.

(11) The objectives of the Community as set out in the Treaty include laying the foundations of an ever closer union among the peoples of Europe, promoting closer relations between the Member States belonging to the Community, and ensuring their economic and social progress by common action to eliminate the barriers which divide Europe. To that end the Treaty provides for the establishment of an internal market which presupposes the abolition of obstacles to the free movement of goods, freedom to provide services and freedom of establishment, and for the introduction of a system ensuring that competition in the common market is not distorted. Harmonisation of Member States' laws on the resale right contributes to the attainment of these objectives.

(12) The Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — common system of value added tax: uniform basis of assessment [1], progressively introduces a Community system of taxation applicable *inter alia* to works of art. Measures confined to the tax field are not sufficient to guarantee the harmonious functioning of the art market. This objective cannot be attained without harmonisation in the field of the resale right.

(13) Existing differences between laws should be eliminated where they have a distorting effect on the functioning of the internal market, and the emergence of any new differences of that kind should be prevented. There is no need to eliminate, or prevent the emergence of, differences which cannot be expected to affect the functioning of the internal market.

(14) A precondition of the proper functioning of the internal market is the existence of conditions of competition which are not distorted. The existence of differences between national provisions on the resale right creates distortions of competition and displacement of sales within the Community and leads to unequal treatment between artists depending on where their works are sold. The issue under consideration has therefore transnational aspects which cannot be satisfactorily regulated by action by Member States. A lack of Community action would conflict with the requirement of the Treaty to correct distortions of competition and unequal treatment.

(15) In view of the scale of divergences between national provisions it is therefore necessary to adopt harmonising measures to deal with disparities between the laws of the Member States in areas where such disparities are liable to create or maintain distorted conditions of competition. It is not however necessary to harmonise every provision of the Member States' laws on the resale right and, in order to leave as much scope for national decision as possible, it is sufficient to limit the harmonisation exercise to those domestic provisions that have the most direct impact on the functioning of the internal market.

(16) This Directive complies therefore, in its entirety, with the principles of subsidiarity and proportionality as laid down in Article 5 of the Treaty.

(17) Pursuant to Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights [2], the term of copyright runs for 70 years after the author's death. The same period should be laid down for the resale right. Consequently, only the originals of works of modern and contemporary art may fall within the scope of the resale right. However, in order to allow the legal systems of Member States which do not, at the time of the adoption of this Directive, apply a resale right for the benefit of artists to incorporate this right into their respective legal systems and, moreover, to enable the economic operators in those Member States to adapt gradually to the aforementioned right whilst maintaining their economic viability, the Member States concerned should be allowed a limited transitional period during which they may choose not to apply the resale right for the benefit of those entitled under the artist after his death.

(18) The scope of the resale right should be extended to all acts of resale, with the exception of those effected directly between persons acting in their private capacity without the participation of an art market professional. This right should not extend to acts of resale by persons acting in their private capacity to museums which are not for profit and which are open to the public. With regard to the particular situation of art galleries which acquire works directly from the author, Member States should be allowed the option of exempting from the resale right acts of resale of those works which take place within three years of that acquisition. The interests of the artist should also be taken into account by limiting this exemption to such acts of resale where the resale price does not exceed EUR 10 000.

(19) It should be made clear that the harmonisation brought about by this Directive does not apply to original manuscripts of writers and composers.

(20) Effective rules should be laid down based on experience already gained at national level with the resale right. It is appropriate to calculate the royalty as a percentage of the sale price and not of the increase in value of works whose original value has increased.

(21) The categories of works of art subject to the resale right should be harmonised.

[1] OJ L 145, 13.6.1977, p. 1. Directive as last amended by Directive 1999/85/EC (OJ L 277, 28.10.1999, p. 34).

[2] OJ L 290, 24.11.1993, p. 9.

(22) The non-application of royalties below the minimum threshold may help to avoid disproportionately high collection and administration costs compared with the profit for the artist. However, in accordance with the principle of subsidiarity, the Member States should be allowed to establish national thresholds lower than the Community threshold, so as to promote the interests of new artists. Given the small amounts involved, this derogation is not likely to have a significant effect on the proper functioning of the internal market.

(23) The rates set by the different Member States for the application of the resale right vary considerably at present. The effective functioning of the internal market in works of modern and contemporary art requires the fixing of uniform rates to the widest possible extent.

(24) It is desirable to establish, with the intention of reconciling the various interests involved in the market for original works of art, a system consisting of a tapering scale of rates for several price bands. It is important to reduce the risk of sales relocating and of the circumvention of the Community rules on the resale right.

(25) The person by whom the royalty is payable should, in principle, be the seller. Member States should be given the option to provide for derogations from this principle in respect of liability for payment. The seller is the person or undertaking on whose behalf the sale is concluded.

(26) Provision should be made for the possibility of periodic adjustment of the threshold and rates. To this end, it is appropriate to entrust to the Commission the task of drawing up periodic reports on the actual application of the resale right in the Member States and on the impact on the art market in the Community and, where appropriate, of making proposals relating to the amendment of this Directive.

(27) The persons entitled to receive royalties must be specified, due regard being had to the principle of subsidiarity. It is not appropriate to take action through this Directive in relation to Member States' laws of succession. However, those entitled under the author must be able to benefit fully from the resale right after his death, at least following the expiry of the transitional period referred to above.

(28) The Member States are responsible for regulating the exercise of the resale right, particularly with regard to the way this is managed. In this respect management by a collecting society is one possibility. Member States should ensure that collecting societies operate in a transparent and efficient manner. Member States must also ensure that amounts intended for authors who are nationals of other Member States are in fact collected and distributed. This Directive is without prejudice to arrangements in Member States for collection and distribution.

(29) Enjoyment of the resale right should be restricted to Community nationals as well as to foreign authors whose countries afford such protection to authors who are nationals of Member States. A Member State should have the option of extending enjoyment of this right to foreign authors who have their habitual residence in that Member State.

(30) Appropriate procedures for monitoring transactions should be introduced so as to ensure by practical means that the resale right is effectively applied by Member States. This implies also a right on the part of the author or his authorised representative to obtain any necessary information from the natural or legal person liable for payment of royalties. Member States which provide for collective management of the resale right may also provide that the bodies responsible for that collective management should alone be entitled to obtain information,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

SCOPE

Article 1

Subject matter of the resale right

1. Member States shall provide, for the benefit of the author of an original work of art, a resale right, to be defined as an inalienable right, which cannot be waived, even in advance, to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author.

2. The right referred to in paragraph 1 shall apply to all acts of resale involving as sellers, buyers or intermediaries art market professionals, such as salesrooms, art galleries and, in general, any dealers in works of art.

3. Member States may provide that the right referred to in paragraph 1 shall not apply to acts of resale where the seller has acquired the work directly from the author less than three years before that resale and where the resale price does not exceed EUR 10 000.

4. The royalty shall be payable by the seller. Member States may provide that one of the natural or legal persons referred to in paragraph 2 other than the seller shall alone be liable or shall share liability with the seller for payment of the royalty.

Article 2

Works of art to which the resale right relates

1. For the purposes of this Directive, 'original work of art' means 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.

2. Copies of works of art covered by this Directive, which have been made in limited numbers by the artist himself or under his authority, shall be considered to be original works of art for the purposes of this Directive. Such copies will normally have been numbered, signed or otherwise duly authorised by the artist.

CHAPTER II

PARTICULAR PROVISIONS

Article 3

Threshold

1. It shall be for the Member States to set a minimum sale price from which the sales referred to in Article 1 shall be subject to resale right.

2. This minimum sale price may not under any circumstances exceed EUR 3 000.

Article 4

Rates

1. The royalty provided for in Article 1 shall be set at the following rates:

(a) 4 % for the portion of the sale price up to EUR 50 000;

(b) 3 % for the portion of the sale price from EUR 50 000,01 to EUR 200 000;

(c) 1 % for the portion of the sale price from EUR 200 000,01 to EUR 350 000;

(d) 0,5 % for the portion of the sale price from EUR 350 000,01 to EUR 500 000;

(e) 0,25 % for the portion of the sale price exceeding EUR 500 000.

However, the total amount of the royalty may not exceed EUR 12 500.

2. By way of derogation from paragraph 1, Member States may apply a rate of 5 % for the portion of the sale price referred to in paragraph 1(a).

3. If the minimum sale price set should be lower than EUR 3 000, the Member State shall also determine the rate applicable to the portion of the sale price up to EUR 3 000; this rate may not be lower than 4 %.

Article 5

Calculation basis

The sale prices referred to in Articles 3 and 4 are net of tax.

Article 6

Persons entitled to receive royalties

1. The royalty provided for under Article 1 shall be payable to the author of the work and, subject to Article 8(2), after his death to those entitled under him/her.

2. Member States may provide for compulsory or optional collective management of the royalty provided for under Article 1.

Article 7

Third-country nationals entitled to receive royalties

1. Member States shall provide that authors who are nationals of third countries and, subject to Article 8(2), their successors in title shall enjoy the resale right in accordance with this Directive and the legislation of the Member State concerned only if legislation in the country of which the author or his/her successor in title is a national permits resale right protection in that country for authors from the Member States and their successors in title.

2. On the basis of information provided by the Member States, the Commission shall publish as soon as possible an indicative list of those third countries which fulfil the condition set out in paragraph 1. This list shall be kept up to date.

3. Any Member State may treat authors who are not nationals of a Member State but who have their habitual residence in that Member State in the same way as its own nationals for the purpose of resale right protection.

Article 8

Term of protection of the resale right

1. The term of protection of the resale right shall correspond to that laid down in Article 1 of Directive 93/98/EEC.

2. By way of derogation from paragraph 1, those Member States which do not apply the resale right on (the entry into force date referred to in Article 13), shall not be required, for a period expiring not later than 1 January 2010, to apply the resale right for the benefit of those entitled under the artist after his/her death.

3. A Member State to which paragraph 2 applies may have up to two more years, if necessary to enable the economic operators in that Member State to adapt gradually to the resale right system while maintaining their economic viability, before it is required to apply the resale right for the benefit of those entitled under the artist after his/her death. At least 12 months before the end of the period referred to in paragraph 2, the Member State concerned shall inform the Commission giving its reasons, so that the Commission can give an opinion, after appropriate consultations, within three months following the receipt of such information. If the Member State does not follow the opinion of the Commission, it shall within one month inform the Commission and justify its decision. The notification and justification of the Member State and the opinion of the Commission shall be published in the *Official Journal of the European Communities* and forwarded to the European Parliament.

4. In the event of the successful conclusion, within the periods referred to in Article 8(2) and (3), of international negotiations aimed at extending the resale right at international level, the Commission shall submit appropriate proposals.

Article 9

Right to obtain information

The Member States shall provide that for a period of three years after the resale, the persons entitled under Article 6 may require from any art market professional mentioned in Article 1(2) to furnish any information that may be necessary in order to secure payment of royalties in respect of the resale.

CHAPTER III

FINAL PROVISIONS

Article 10

Application in time

This Directive shall apply in respect of all original works of art as defined in Article 2 which, on 1 January 2006, are still protected by the legislation of the Member States in the field of copyright or meet the criteria for protection under the provisions of this Directive at that date.

Article 11

Revision clause

1. The Commission shall submit to the European Parliament, the Council and the Economic and Social Committee not later than 1 January 2009 and every four years thereafter a report on the implementation and the effect of this Directive, paying particular attention to the competitiveness of the market in modern and contemporary art in the Community, especially as regards the position of the Community in relation to relevant markets that do not apply the resale right and the fostering of artistic creativity and the management procedures in the Member States. It shall examine in particular its impact on the internal market and the effect of the introduction of the resale right in those Member States that did not apply the right in national law prior to the entry into force of this Directive. Where appropriate, the Commission shall submit proposals for adapting the minimum threshold and the rates of royalty to take account of changes in the sector, proposals relating to the maximum amount laid down in Article 4(1) and any other proposal it may deem necessary in order to enhance the effectiveness of this Directive.

2. A Contact Committee is hereby established. It shall be composed of representatives of the competent authorities of the Member States. It shall be chaired by a representative of the Commission and shall meet either on the initiative of the Chairman or at the request of the delegation of a Member State.

3. The task of the Committee shall be as follows:

— to organise consultations on all questions deriving from application of this Directive,

— to facilitate the exchange of information between the Commission and the Member States on relevant developments in the art market in the Community.

Article 12

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 2006. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the provisions of national law which they adopt in the field covered by this Directive.

Article 13

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 14

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 27 September 2001.

For the European Parliament	*For the Council*
The President	*The President*
N. FONTAINE	C. PICQUÉ