

The Artist's Resale Right: Global Perspectives and Vietnam's Path to Protection under the EVFTA

Tran Anh Tuan¹, Tran Kien²

¹ Faculty of Private Law, University of Law – Vietnam National University, Hanoi, Vietnam. E-mail: anh tuan.ulaw@gmail.com

² Faculty of Private Law, University of Law – Vietnam National University, Hanoi, Vietnam. E-mail: trankien@vnu.edu.vn

Abstract: The artist's resale right, enabling visual artists to receive royalties from secondary market sales, is a pivotal intellectual property mechanism with varied global adoption. This article traces its historical evolution from early 20th-century legislation to its inclusion in international frameworks, contrasting the European Union and United Kingdom's harmonized approaches with the United States' rejection due to differing copyright philosophies. It examines the resale right provisions in a new-generation free trade agreement, analyzing Vietnam's current legal gap under its intellectual property framework and the feasibility of incorporation. Using jurisprudential, comparative, and empirical methods, the study assesses legal principles, international benchmarks, and Vietnam's art market readiness. The article evaluates arguments for and against the resale right, highlighting its role in promoting artist equity and creative incentives against concerns of market distortion and administrative burdens. Vietnam's potential legal harmonization through this agreement offers a novel pathway to integrate global intellectual property standards. By proposing solutions to legal, cultural, economic, and political challenges, this research significantly contributes to comparative law and developing country legal harmonization discourse, providing insights for jurisdictions navigating intellectual property integration in trade agreements.

Keywords: Resale Right; Droit De Suite; Intellectual Property Rights; Civil Law; Common Law; Comparative

1. Introduction

Intellectual property, particularly copyright, remains a cornerstone of global legal discourse, with the artist's resale right (*droit de suite*) emerging as a critical mechanism to safeguard the economic interests of artists. Works of art means works of graphic or plastic art, sometimes referred to as Visual arts encompassing painting, sculpture, photography, and design, have evolved from prehistoric origins to indispensable cultural expressions.¹ Yet, artists often receive minimal compensation for resales, particularly in jurisdictions lacking resale right protections. The resale right addresses this inequity by enabling artists or their heirs to benefit from the appreciating value of their works in secondary markets.

First enacted in France in 1920 and later enshrined in the Berne Convention for the Protection of Literary and Artistic Works of 1886 (as revised in 1971), the resale right entitles artists to royalties from subsequent sales of their original artworks, excluding 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 L272/32, art 2(1); "Visual Arts," Britannica, accessed August 20, 2024, <https://www.britannica.com/browse/Visual-Arts>.

initial transfer.² This right has garnered significant attention from legislators, scholars, and artists worldwide, reflecting its growing importance in protecting creative contributions. The EU-Vietnam Free Trade Agreement (EVFTA), signed on 30 June 2019 and effective from 1 August 2020, incorporates provisions on the resale right, marking a pivotal development for Vietnam's integration into global intellectual property frameworks.³

Free Trade Agreements (FTAs) facilitate the reduction of tariff and non-tariff barriers to foster unified markets for goods and services. The EVFTA, a new-generation FTA, surpasses traditional agreements like the Vietnam-Japan EPA by encompassing commitments in trade, services, investment, and intellectual property, with near-complete tariff elimination and stringent standards. The inclusion of the resale right in Article 12.15 of the EVFTA underscores its significance for Vietnam, a nation yet to incorporate this right into its domestic law. On the other hand, the United Kingdom's exit from the EU raised questions about its application of the EVFTA; however, the UK-Vietnam FTA (UKVFTA), signed concurrently, mirrors EVFTA terms, ensuring continuity of resale right provisions.⁴

Despite its growing significance globally, the artist's resale right has received limited attention from Vietnamese legal scholars in particular and ASEAN countries in general with scant academic or practical exploration of its unique characteristics and potential incorporation into a country's domestic legal framework. The authors of this article appear to be among the first in Vietnam to address this notable gap. In 2022, they published a doctrinal study examining the nature of the resale right and its compatibility with Vietnam's intellectual property regime. While primarily doctrinal and normative in approach, this foundational work has enabled the authors to further investigate the issue through interdisciplinary and cross-jurisdictional analyses, as presented in this article.⁵ This article examines the resale right within the EVFTA, structured in several parts: an overview of its historical and international dimensions, the EU, UK, and US approaches, EVFTA regulations, Vietnam's current situation, criticisms for and against the right, and arguments for its codification into Vietnamese law, offering insights for other jurisdictions most notably ASEAN countries.

This study's urgency stems from Vietnam's need to align with global intellectual property standards under the EVFTA, addressing a critical gap in artist protections. Its strengths lie in a pioneering interdisciplinary analysis, blending jurisprudential, comparative, and

² J.L. Duchemin, *Le Droit de Suite des Artistes* (Paris 1948) 35; Berne Convention for the Protection of Literary and Artistic Works (adopted 9 September 1886, revised 24 July 1971) art 14ter.

³ VCCI, "Có những loại FTA nào?," VCCI, 2019, accessed August 20, 2024, <https://vcci.com.vn>.

⁴ Secretary of State for International Trade, "Continuing the United Kingdom's Trade Relationship with the Socialist Republic of Vietnam," Department for International Trade, 2021, accessed August 20, 2024, <https://www.gov.uk>.

⁵ Trần, Kiên, and Trần Anh Tuấn. "Quyền bán lại của tác giả tác phẩm nghệ thuật theo EVFTA và khả năng nội luật hoá ở Việt Nam." *Tạp chí Luật học*, no. 10 (2022): 40–55.

empirical methods to propose actionable solutions for Vietnam's art market. Significant for its novel focus on Vietnam's legal harmonization, it fills a scholarly void in resale right discourse, particularly for ASEAN nations. Unlike prior studies focusing on Western jurisdictions, this article uniquely positions Vietnam within global intellectual property debates, offering a model for emerging economies such as ASEAN countries, making it a vital contribution worthy to global scholarship.

2. Method

This study employs a multifaceted methodology to explore the incorporation of the artist's resale right into Vietnam's intellectual property law under the EU-Vietnam Free Trade Agreement (EVFTA). Combining jurisprudential, comparative, and empirical legal analyses, the research examines the legal, economic, and practical dimensions of the resale right. This approach aims to clarify its legal nature, assess its compatibility with Vietnam's legal framework, and propose strategies for integration. The methodology aligns with the study's goal of evaluating the feasibility and legal techniques for adopting the resale right in Vietnam.

The jurisprudential analysis investigates the legal principles underlying the resale right, focusing on the rights and obligations of authors, heirs, and art market professionals. It applies the principle of strict liability to assess whether violations of the resale right constitute tortious acts and how liability should be attributed. Primary legal texts, such as Article 12.15 of the EVFTA and Article 14ter of the Berne Convention, are analyzed to define the scope and non-mandatory nature of the resale right. Secondary sources, including legal commentaries, contextualize the right within intellectual property law, exploring debates on whether it is a moral or economic right. This method ensures compatibility with Vietnam's Intellectual Property Law 2005 and Civil Code 2015, highlighting ethical considerations in protecting artists' rights.

The comparative legal analysis examines resale right implementation in the European Union, the United Kingdom, and the United States to identify best practices for Vietnam. The EU's Directive 2001/84/EC provides a harmonized framework, while the UK's post-Brexit retention of resale rights demonstrates economic benefits. The US, which does not recognize the right, highlights risk of non-adoption. Key aspects analyzed include definitions of "original artwork," royalty percentages, and post-death rights, using primary documents like EU directives and UK copyright law, alongside judicial cases (e.g., Salvador Dalí case C-518/08). Secondary sources, such as UK Intellectual Property Office reports, provide economic data. This comparison informs Vietnam's potential adoption of precise regulations tailored to its legal system.

The empirical analysis assesses the practical feasibility of incorporating the resale right in Vietnam's art market. It uses data from auction houses (e.g., Sotheby's Hong Kong) and media reports on sales like Mai Trung Thu's "Portrait of Miss Phuong" to evaluate market size. The Copyright Office of Vietnam's perspective on market limitations and institutional gaps is considered. UK studies, such as those by Graddy and Banternghansa, show increased art sales post-resale right implementation, offering lessons for Vietnam's nascent market. This method evaluates the need for institutional frameworks, like collecting societies, to administer royalties, ensuring realistic recommendations.

Data are sourced from international treaties (EVFTA, Berne Convention), national laws, judicial decisions, and secondary materials like academic articles and media reports. Sources are cross-verified for reliability, prioritizing recent and authoritative materials. The analytical framework integrates jurisprudential, comparative, and empirical methods to address the resale right's legal nature, international benchmarks, and Vietnam's market readiness. This mixed-method approach captures the complexity of the resale right across legal, economic, and cultural domains.

However, the study is limited by its focus on three major jurisdictions, potentially missing global diversity, and by sparse data on Vietnam's art market. Cultural attitudes toward intellectual property are underexplored. These are mitigated by using authoritative sources and proposing flexible legal techniques. This methodology provides a robust framework for informed policy recommendations on incorporating the resale right into Vietnamese law.

3. The Origin and Historical Development of the Resale Right

The artist's resale right, commonly termed *droit de suite*, is an inalienable intellectual property right granting authors of original artworks royalties from subsequent sales, excluding the initial transfer.⁶ Defined in the Berne Convention, it enables artists or their heirs to receive a percentage of the resale price in public transactions, such as auctions, thereby addressing economic disparities faced by visual artists compared to other creators like writers or musicians.⁷ Originating in an 1893 article by Albert Vaunois, the term *droit de suite* initially related to real property but was adapted to ensure artists benefit from their works' appreciating value without reclaiming ownership.⁸ This right is crucial for artists, whose works are less reproducible, and for their heirs, who bear costs of preservation and management post-mortem.⁹

⁶ Berne Convention, art 14ter; Duchemin, *Le Droit de Suite*, 35. .

⁷ Directive 2001/84/EC, art 1; Franklin Feldman and Stephen E. Weil, "Droit de Suite," in *Art Works: Law, Policy, Practice* (New York: Practising Law Institute, 1974), 81.

⁸ De Pierredon-Fawcett, *The Droit de Suite in Literary and Artistic Property: A Comparative Law Study* (Columbia University Law School 1992) 3.

⁹ US Copyright Office, *Droit de Suite: The Artist's Resale Royalty* (1992) 12.

The historical roots of the resale right trace to the plight of Jean-François Millet's family, whose painting *The Angelus* (sold for \$100 in 1865) fetched \$150,000 in 1889, benefiting dealers while his family remained impoverished.¹⁰ This injustice prompted France to enact the resale right in 1920 under Article L-122-8 of the Intellectual Property Code, applicable to public auctions.¹¹ Formalized globally in the Berne Convention's 1971 revision (Article 14ter) available to the original works of art and original manuscripts of writers and composer, the right remains optional, applying only in states with domestic legislation.¹² By 2001, the EU's Directive 2001/84/EC mandated resale rights across member states, harmonized by 2006, covering original artworks like paintings and sculptures albeit with a narrower scope than the Berne convention.¹³ In contrast, the US has resisted adoption, citing utilitarian copyright principles that prioritize economic exclusivity over royalties, as seen in the failed California Resale Royalty Act (1977–2018).¹⁴ This rejection limits reciprocal benefits for US artists abroad, underscoring global disparities.¹⁵ By 2018, 70 countries recognized the resale right, reflecting its growing significance in protecting visual artists' economic interests.¹⁶

3.1. The European Union's Approach: Pro - Artist's Resale Right

The European Union's adoption of the artist's resale right represents a cornerstone of its intellectual property framework, ensuring that visual artists and their heirs benefit economically from the resale of their original artworks.¹⁷ Enshrined in Directive 2001/84/EC, enacted on 27 September 2001 and harmonized across EU member states by 1 January 2006, the resale right establishes a mandatory regime for royalties on sales subsequent to the initial transfer, addressing the economic vulnerabilities of visual artists whose works appreciate significantly in secondary markets.¹⁸ This directive, a pivotal step in harmonizing copyright protections across the EU, reflects a balance between moral and economic considerations, distinguishing the EU's approach from jurisdictions like the United States, where such rights remain unrecognized due to utilitarian copyright principles.¹⁹ The EU's framework, rooted in the Berne Convention's optional provision (Article 14ter), transforms the resale right into a binding obligation, offering a model for

¹⁰Alexander Bussey, "The Incompatibility of Droit de Suite with Common Law Theories of Copyright," *Fordham Law Review* 81 (2013): 1098.

¹¹Legifrance, *Intellectual Property Code*, art. L-122-8, accessed August 20, 2024, <https://www.legifrance.gouv.fr>.

¹² Berne Convention, art 14ter(2).

¹³ Directive 2001/84/EC .

¹⁴US Copyright Office, *Resale Royalties: An Updated Analysis* (2013), 15–18.

¹⁵ Directive 2001/84/EC, art 2.

¹⁶US Copyright Office, *Resale Royalties*, , 10.

¹⁷Catherine Jewell, "The Artist's Resale Right: A Fair Deal for Visual Artists," *WIPO Magazine*, 2017, accessed August 20, 2024, <https://www.wipo.int>.

¹⁸Anthony O'Dwyer, "The Artists' Resale Right Directive 2001/84/EC: A Means of Targeted Intervention for Visual Artists," *Wiley*, 2021, accessed August 20, 2024, <https://onlinelibrary.wiley.com/doi/epdf/10.1111/jwip.12170>; Directive 2001/84/EC.

¹⁹ US Copyright Office, *Droit de Suite*, 16.

jurisdictions like ASEAN countries particularly Vietnam, a signatory to the EVFTA, which includes similar provisions.²⁰

The Directive defines original artworks as works of graphic or plastic art, such as paintings, drawings, sculptures, collages, ceramics, photographs, and tapestries, created by the artist or under their authority in limited numbers, typically marked by signatures or numbering to ensure authenticity.²¹ This precise definition excludes manuscripts of writers and composers as found in the Berne Convention, a deliberate choice to address the financial imbalance between visual artists and other creators, as literary or musical works are more readily reproducible, generating royalties through mass distribution.²² The EU's focus on visual arts acknowledges the unique market dynamics where artworks, often singular or limited, appreciate in value post-creation, benefiting intermediaries like auction houses or galleries rather than artists.²³ The Directive's scope ensures that only professional transactions—through salerooms, galleries, or art dealers—are subject to royalties, safeguarding the right's application in formal secondary markets.²⁴

A critical aspect of the EU's approach is the royalty obligation. The Directive mandates that royalties, calculated as a percentage of the net resale price, be paid to the artist or their heirs, with the seller typically bearing this liability.²⁵ However, member states retain flexibility to assign this obligation to buyers or intermediaries, or even share it, fostering adaptability to national legal traditions.²⁶ For instance, in France, sellers may contractually shift the royalty payment to buyers, as upheld in a 2009 French Supreme Court ruling involving Christie's France, provided such terms are clearly stipulated in sales agreements.²⁷ This flexibility mitigates concerns about market distortions, though debates persist about its impact on competition, with some auction houses arguing that buyer-paid royalties increase transaction costs.²⁸ The Directive sets a minimum resale price threshold of €3,000 to ensure that only significant transactions trigger royalties, balancing administrative feasibility with artist benefits.²⁹ An exception allows member states to exempt resales within three years of the initial sale if the price does not exceed €10,000, protecting new artists whose works may not yet command high values.³⁰

²⁰ Berne Convention, art 14ter; EU-Vietnam Free Trade Agreement (signed 30 June 2019, entered into force 1 August 2020) art 12.15.

²¹ Directive 2001/84/EC art 2.

²² US Copyright Office, *Droit de Suite*, 10.

²³ US Copyright Office, *Droit de Suite*, 12.

²⁴ Directive 2001/84/EC art 1(2).

²⁵ Directive 2001/84/EC art 1(3).

²⁶ Court of Justice of the European Union, Case C-41/14, *Christie's France SNC v Syndicat national des antiquaires*, February 26, 2015, accessed August 20, 2024, <https://curia.europa.eu/juris/liste.jsf?&num=C-41/14>.

²⁷ Gareth Harris, "Christie's France Wins the Artist Resale Royalty Battle," *The Art Newspaper*, December 31, 2018, accessed August 20, 2024, <https://www.theartnewspaper.com/2018/12/31/christies-france-wins-the-artist-resale-royalty-battle>.

²⁸ Directive 2001/84/EC art 3(1).

²⁹ Directive 2001/84/EC art 3(1).

³⁰ Directive 2001/84/EC art 3(2).

The royalty structure is tiered, with percentages decreasing as the resale price increases, ranging from 4% for sales up to €50,000 to 0.25% for sales above €500,000, capped at €12,500 to prevent excessive burdens on high-value transactions.³¹ This cap addresses concerns, particularly in major art markets like the UK, that high royalties could drive sales to non-recognizing jurisdictions like the US or Switzerland, where no such obligations exist.³² The US Copyright Office's 2013 report highlights this competitive disadvantage, noting that the absence of resale rights in the US creates an attractive market for sellers seeking to avoid royalties, potentially undermining EU markets.³³ Yet, empirical evidence, such as a 2008 UK Intellectual Property Office study, demonstrates that the UK art market grew by 238% post-2006, suggesting that the resale right does not significantly deter market activity.³⁴

The Directive extends protection for 70 years post-mortem, aligning with the EU's general copyright term under Directive 93/98/EEC, ensuring that heirs benefit from the appreciating value of artworks.³⁵ This provision addresses the ongoing costs of managing an artist's estate, such as preservation and restoration, a burden highlighted in the 1992 US Copyright Office report as a significant burden for heirs in jurisdictions lacking resale rights.³⁶ However, variations exist across member states regarding post-mortem entitlements. The case of *Fundación Gala-Salvador Dalí v ADAGP* (C-518/08) illustrates this, where French law reserved resale royalties for statutory heirs, excluding testamentary legatees, highlighting the Directive's flexibility in allowing national discretion on inheritance rules.³⁷ Such variations underscore the need for clear domestic regulations, a consideration relevant for Vietnam as it contemplates incorporating EVFTA's resale right provisions.

The Directive also ensures access to information, allowing artists or their representatives to request necessary details from art market professionals within three years of a resale to secure royalty payments.³⁸ This provision balances privacy concerns with the artist's right to fair compensation, avoiding overly intrusive inquiries.³⁹ For non-EU artists, the Directive applies reciprocity: only those from countries recognizing the resale right for EU artists can claim royalties in the EU, a principle rooted in the Berne Convention's optional

³¹ Directive 2001/84/EC art 4.

³² US Copyright Office, *Resale Royalties*, 17.

³³ US Copyright Office, *Resale Royalties*, 20.

³⁴ Katy Graddy, Noah Horowitz, and Stefan Szymanski, "A Study into the Effect on the UK Art Market of the Introduction of the Artist's Resale Right," UK Intellectual Property Office, 2008.

³⁵ Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights [1993] OJ L290/9, art 1.

³⁶ US Copyright Office, *Droit de Suite*, 15.

³⁷ Court of Justice of the European Union, Case C-518/08, *Fundación Gala-Salvador Dalí and Visual Entidad de Gestión de Artistas Plásticos (VEGAP) v Société des auteurs dans les arts graphiques et plastiques (ADAGP) and Others*, April 15, 2010, accessed July 30, 2025, <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-518/08>.

³⁸ Directive 2001/84/EC art 9.

³⁹ Directive 2001/84/EC art 9.

framework.⁴⁰ The US reports emphasize this reciprocity challenge, noting that American artists are excluded from EU royalties due to the US's non-recognition, a disadvantage mirrored for EU artists in the US market.⁴¹ Artists habitually resident in an EU member state, regardless of nationality, may also benefit, promoting inclusivity within the EU's art market.⁴²

3.2. The United Kingdom and the United States: Against and Compromise

The artist's resale right represents a critical intersection of intellectual property law and economic policy, yet its adoption varies significantly across jurisdictions, as exemplified by the contrasting approaches of the United Kingdom and the United States. The UK, initially resistant due to its common law tradition, incorporated the resale right in 2006 under the EU's Directive 2001/84/EC, retaining it post-Brexit to balance artist protections with market dynamics.⁴³ In contrast, the US has consistently rejected the resale right at the federal level, rooted in a utilitarian copyright framework that prioritizes exclusivity over ongoing royalties, creating global disparities in artist compensation.⁴⁴ These divergent approaches, shaped by legal, philosophical, and economic considerations, offer valuable lessons for other jurisdictions like Vietnam, which, under the EVFTA, must contemplate integrating the resale right into its domestic law.⁴⁵ This section examines the UK's adoption and the US's rejection of the resale right, analyzing their legal frameworks, economic impacts, and implications for international art markets.

The UK's integration of the resale right reflects a pragmatic adaptation of its common law copyright tradition to EU mandates, balancing artist protections with market concerns. Historically, the UK's common law system, which emphasizes economic exclusivity over moral rights, resisted the resale right, viewing it as a continental concept misaligned with market-driven principles.⁴⁶ However, as an EU member state, the UK was obliged to implement Directive 2001/84/EC, which mandated royalties for artists on resales of original artworks in professional markets, such as auctions or galleries.⁴⁷ Effective from 2006, the UK incorporated the resale right into its Copyright, Designs and Patents Act 1988, setting a minimum resale price threshold of €1,000 and capping royalties at €12,500, consistent with the Directive's tiered structure (4% for sales up to €50,000, declining to 0.25% for sales above €500,000).⁴⁸

⁴⁰ Berne Convention art 14ter(2); Directive 2001/84/EC art 7.

⁴¹ US Copyright Office, *Droit de Suite*, 20–21.

⁴² Directive 2001/84/EC art 7(2).

⁴³ Directive 2001/84/EC.

⁴⁴ US Copyright Office, *Droit de Suite*, 16.

⁴⁵ EU-Vietnam Free Trade Agreement art 12.15.

⁴⁶ Bussey, "Incompatibility of Droit de Suite," 1100.

⁴⁷ Shira Perlmutter, "Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report," *Journal of the Copyright Society of the U.S.A.* 40 (1993): 284.

⁴⁸ Copyright, Designs and Patents Act 1988, s 178; DACS, "Artist's Resale Right," DACS, 2019, accessed August 20, 2024, <https://www.dacs.org.uk>.

The UK's implementation faced significant opposition from art market stakeholders, particularly auction houses and dealers, who argued that the resale right functions as a tax on buyers, increasing transaction costs and potentially driving sales to non-recognizing jurisdictions like the US or Switzerland.⁴⁹ Critics contended that the right disproportionately benefits established artists, as only works resold in secondary markets—typically those by well-known creators—trigger royalties.⁵⁰ For example, at the €1,000 threshold, artists receive approximately €35 after a 15% commission to collecting societies like the Design and Artists Copyright Society (DACS), a sum deemed negligible by detractors but significant for emerging artists reliant on such income for materials or sustenance.⁵¹ Supporters, however, argue that these royalties, however modest, reinforce artists' economic stake in their works' appreciating value, aligning with the moral underpinning of *droit de suite* as a recognition of creative contribution.⁵²

Post-Brexit, the UK government committed to preserving the resale right, replacing references to the European Economic Area with the UK in its copyright legislation, ensuring continuity of entitlements.⁵³ This retention defied expectations of repeal, given the UK's historical skepticism and the absence of EU obligations. Empirical evidence supports this decision: a 2008 UK Intellectual Property Office study found that the art market grew by 238% post-2006, with the number of works sold increasing from 22,613 to 29,538, and average prices rising from £21,000 to £41,000.⁵⁴ Further studies, such as Graddy et al. (2008) and Banterghansa and Graddy (2011), confirmed that the resale right did not deter market growth, with the UK outperforming non-recognizing markets like the US, which saw a 141% growth rate in the same period.⁵⁵ These findings refute claims that royalties drive sales overseas, suggesting that the resale right enhances market stability by fostering transparency and artist engagement.

The UK's experience highlights practical challenges and solutions. Collecting societies like DACS play a pivotal role in administering royalties, ensuring efficient distribution while mitigating administrative burdens on artists.⁵⁶ However, the low royalty threshold (€1,000) and commission deductions limit benefits for emerging artists, whose works

⁴⁹ Ivan Macquisten, "Should Post-Brexit UK Get Rid of the Artist's Resale Right?," *The Art Newspaper*, 2021, accessed August 20, 2024, <https://www.theartnewspaper.com>.

⁵⁰ Christopher Sprigman and Guy Rub, "Resale Royalties Would Hurt Emerging Artists," *Artsy*, 2018, accessed August 20, 2024, <https://www.artsy.net>.

⁵¹ Artists' Collecting Society, "How Does Brexit Affect the Artist's Resale Right?," Artists' Collecting Society, 2021, accessed August 20, 2024, <https://artistscollectingsociety.org/news/how-does-brexit-affect-the-artists-resale-right/>.

⁵² Jack Hutchinson, "Is Anything Wrong with the Artist's Resale Right?," *A-N*, 2012, accessed August 20, 2024, <https://www.a-n.co.uk>.

⁵³ DACS, "Copyright Uncovered, Brexit Update: What Will Happen to Copyright and Artist's Resale Right?," DACS, 2019, accessed August 20, 2024, <https://www.dacs.org.uk>.

⁵⁴ Chanont Banterghansa and Kathryn Graddy, "The Impact of the *Droit de Suite* in the UK: An Empirical Analysis," *Journal of Cultural Economics* 35, no. 2 (2011): 81.

⁵⁵ Banterghansa and Graddy, "Impact of the *Droit de Suite*," 81.

⁵⁶ DACS, 'Copyright Uncovered, Brexit Update'

rarely enter secondary markets. Additionally, the right's focus on secondary sales means that young artists, reliant on primary market sales, may see little immediate benefit, a concern echoed in debates about market fairness.⁵⁷ Nevertheless, the UK's retention of the resale right post-Brexit underscores its perceived value, offering a model for jurisdictions like Vietnam to balance artist protections with market vitality.

In stark contrast, the United States has steadfastly rejected the resale right at the federal level, rooted in a utilitarian copyright philosophy that prioritizes economic efficiency and exclusivity over ongoing artist benefits. The US Constitution's copyright clause (Article 1, Section 8) empowers Congress to promote the progress of science and arts by securing exclusive rights for limited periods, a principle articulated in *Fox Film Corp v Doyal* as incentivizing innovation through market-driven exclusivity.⁵⁸ This utilitarian framework, emphasizing wealth maximization, views resale royalties as a distortion that reduces initial sale prices and seller profits in secondary markets, as argued in the US Copyright Office's 1992 and 2013 reports.⁵⁹ These reports contend that visual artworks, unlike literature or music, require significant technical skill to reproduce, diminishing the need for additional protections like resale rights, as copying does not threaten artists' economic incentives.⁶⁰

The US's resistance is further evidenced by the failure of state-level initiatives, most notably the California Resale Royalty Act of 1977, which mandated a 5% royalty on resales of artworks valued over \$1,000, payable to artists or their heirs for 20 years post-mortem.⁶¹ Enacted to address inequities like those faced by artists whose works appreciated significantly after initial sales, the Act faced legal challenges and was declared unconstitutional in 2018 by the Ninth Circuit Court of Appeals for conflicting with federal copyright law's first-sale doctrine, which limits control over a work after its initial sale.⁶² The US Copyright Office's 2013 report highlights additional concerns: resale royalties could deter collectors from purchasing artworks, fearing future royalty obligations, and increase administrative costs for auction houses, potentially driving sales to jurisdictions without such obligations.⁶³

The absence of resale rights in the US creates significant global disadvantages, particularly under the Berne Convention's reciprocity principle (Article 14ter).⁶⁴ US artists cannot claim royalties in recognizing jurisdictions like the EU or UK unless their home country

⁵⁷ Macquisten, "Should Post-Brexit UK."

⁵⁸ *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127–28 (1932); Carole M. Vickers, "The Applicability of the Droit de Suite in the United States," *Boston College International and Comparative Law Review* 3 (1980): 433.

⁵⁹ US Copyright Office, *Droit de Suite* 16; US Copyright Office, *Resale Royalties* 16–17.

⁶⁰ US Copyright Office, *Resale Royalties* 18.

⁶¹ US Copyright Office, *Resale Royalties* 15.

⁶² *Close v. Sotheby's, Inc.*, No. 16-56234 (9th Cir. 2018); *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

⁶³ US Copyright Office, *Resale Royalties: An Updated Analysis*, 17; Rub, "Unconvincing Case."

⁶⁴ Berne Convention art 14ter(2).

adopts the right, nor can foreign artists claim royalties for works sold in the US.⁶⁵ For example, a French artist selling at a US auction house receives no royalties, just as an American artist selling in France is excluded, a point emphasized in the 1992 US Copyright Office report as a barrier to international equity.⁶⁶ Proposals to introduce federal resale rights, such as the American Royalties Too (ART) Act, have repeatedly failed, with opponents arguing that royalties benefit only successful artists and burden the art market unnecessarily.⁶⁷ The 2013 report notes that major US auction houses, like Sotheby's, expressed concerns that royalties could shift high-value sales to markets like Hong Kong, where no resale rights apply.⁶⁸

Despite these objections, the US reports acknowledge potential benefits. The 1992 report highlights that resale rights address the financial imbalance between visual artists and other creators, whose works generate royalties through reproduction.⁶⁹ The 2013 report concedes that royalties could support emerging artists, though it argues that the US's robust primary art market reduces the urgency for such protections.⁷⁰ Critics like Sprigman and Rub argue that resale rights may lower initial sale prices, as buyers anticipate future royalty obligations, a concern less evident in the UK's experience, where market growth persisted post-adoption.⁷¹

4. For and Against the Protection of Resale Rights: That Is the Problem

It is often argued and positioned in the international and comparative law scholarship that Vietnam and other concerning countries such as ASEAN can learn from the EU and UK's efficient collecting societies, which streamline royalty distribution, advancing cross-border legal development. These mechanisms exemplify transnational intellectual property law norms diffusion through centralized administration. Conversely, the US's resistance underscores the risk of non-adoption, isolating artists from global royalty benefits due to reciprocity failures in international frameworks. Interested countries should establish similar societies to implement the resale right, aligning with free trade agreement obligations. This approach fosters harmonization, positioning related countries within global intellectual property norms while avoiding the US's isolation in transnational legal discourse, enhancing its integration into international creative markets. However, as the following discussions will show, this is easier said than done.

⁶⁵ US Copyright Office, *Droit de Suite*, 20.

⁶⁶ US Copyright Office, *Droit de Suite*, 20–21.

⁶⁷ Laurels Wickersham Salisbury, "It's Not That Easy: Artist Resale Royalty Rights and The ART Act," *Center of Art Law*, 2019, accessed August 20, 2024, <https://www.itsartlaw.org>.

⁶⁸ US Copyright Office, *Droit de Suite*, 17.

⁶⁹ US Copyright Office, *Resale Royalties*, 10–12.

⁷⁰ US Copyright Office, *Resale Royalties*, 16.

⁷¹ Sprigman and Rub, "Resale Royalties."

The artist's resale right has sparked significant debate across jurisdictions, particularly in the EU, UK, and US, reflecting divergent legal philosophies and economic priorities. Enshrined in the EU's Directive 2001/84/EC and adopted by the UK, the resale right grants visual artists royalties on secondary market sales of their original artworks, aiming to address economic inequities.⁷² In contrast, the US has rejected the right at the federal level, citing its incompatibility with utilitarian copyright principles.⁷³ These contrasting approaches highlight a spectrum of arguments for and against the resale right, encompassing moral, economic, and practical considerations. Proponents argue that it ensures artist equity, fosters creative incentives, and aligns with global standards, while critics contend it distorts art markets, imposes administrative burdens, and disproportionately benefits established artists.

The EU and UK's efficient collecting societies and market growth post-resale right adoption highlight the value of robust administrative systems for Vietnam's integration into global trade frameworks. Conversely, the US's non-adoption underscores risk of isolation from international royalty benefits due to reciprocity failures. Vietnam should establish collecting societies and adopt phased implementation to address market distortion concerns. These lessons, emphasizing harmonized norms and enforcement, could guide ASEAN jurisdictions like Indonesia or Malaysia facing similar intellectual property integration challenges. This comparative framework informs Vietnam's path to codifying the resale right, ensuring alignment with transnational intellectual property standards. This section examines these criticisms, drawing on experiences in the EU, UK, and US, and considers their implications for jurisdictions like Vietnam, which faces the challenge of incorporating the resale right under the EVFTA.

4.1. Arguments in Favor of the Resale Right

a. Ensuring Economic Equity for Artists

A primary argument for the resale right is its role in addressing the economic disparity between visual artists and other creators, such as writers or musicians, who benefit from royalties through reproduction or licensing.⁷⁴ The EU's Directive 2001/84/EC recognizes that visual artworks, being singular or limited in number, rarely generate recurring income, leaving artists reliant on initial sales that often undervalue their works' future market appreciation.⁷⁵ The historical case of Jean-François Millet's *The Angelus* exemplifies this inequity, as the artist's impoverished family received no benefit from the resale.⁷⁶ The 1992 US Copyright Office report acknowledges this rationale, noting that

⁷² Directive 2001/84/EC.

⁷³ Sprigman and Rub, "Resale Royalties."

⁷⁴ Sprigman and Rub, "Resale Royalties."

⁷⁵ Directive 2001/84/EC art 1.

⁷⁶ Bussey, "Incompatibility of Droit de Suite," 1098.

visual artists face unique financial challenges due to the limited reproducibility of their works, justifying royalties as a means of equitable compensation.⁷⁷ In the UK, the resale right has been lauded for supporting artists' livelihoods.⁷⁸ Collecting societies like DACS distribute royalties, enabling artists to invest in materials or sustain creative practice, even if the amounts are modest.⁷⁹ Supporters argue that these payments reinforce the moral principle that creators should benefit from their works' enduring value.⁸⁰

b. Fostering Creative Incentives and Cultural Recognition

The resale right is also championed for its role in fostering creativity by providing financial incentives for artists to continue producing works. The EU's harmonized approach underscores the right as a recognition of artists' contributions to cultural heritage, aligning with the Berne Convention's moral and economic protections.⁸¹ In the UK, supporters argue that royalties signal societal respect for artists, encouraging sustained creative output.⁸² Studies demonstrate that the UK art market grew by 238% post-2006, suggesting that resale rights enhance market transparency and artist engagement without deterring collectors.⁸³ This growth refutes critics' claims of market harm, positioning the resale right as a catalyst for a vibrant cultural sector. For Vietnam, adopting the EVFTA's resale right provisions could ensure its artists benefit from sales in the EU and UK, fostering international recognition and economic support for its growing art scene.⁸⁴

c. Aligning with Global Standards

Proponents argue that the resale right aligns jurisdictions with international intellectual property standards, as recognized by 70 countries by 2018.⁸⁵ The EVFTA's Article 12.15 reflects this trend, encouraging Vietnam to adopt the right to integrate into global frameworks.⁸⁶ The EU's reciprocity principle, requiring recognizing jurisdictions for mutual royalty benefits, further incentivizes adoption, as artists from non-recognizing countries like the US are excluded from EU royalties.⁸⁷ By adopting the resale right,

⁷⁷ US Copyright Office, *Droit de Suite*, 12.

⁷⁸ Copyright, Designs and Patents Act 1988.

⁷⁹ Gerhard Pfennig, "The Resale Right of Artists (*Droit de Suite*)," *Copyright Bulletin* 31 (1997): 20; DACS, "Artist's Resale Right."

⁸⁰ Hutchinson, "Is Anything Wrong?"

⁸¹ Berne Convention art 14ter.

⁸² DACS, "Copyright Uncovered."

⁸³ Banterghansa and Graddy, "Impact of the *Droit de Suite*,"

⁸⁴ Hieu Nhan, "Lý do tranh 'Chân dung cô Phương' có giá 3,1 triệu USD," *VNExpress*, 2021, accessed August 20, 2024, <https://vnexpress.net>.

⁸⁵ Catherine Jewell, "The Artist's Resale Right: A Fair Deal for Visual Artists," *WIPO Magazine*, 2017, accessed August 20, 2024, <https://www.wipo.int>.

⁸⁶ EU-Vietnam Free Trade Agreement art 12.15.

⁸⁷ Directive 2001/84/EC art 7.

Vietnam could strengthen its position in the global art market, leveraging the EU's experience to protect artists while fostering market growth.⁸⁸

4.2. Arguments against the Resale Right

a. Market Distortion and Economic Disincentives

Critics, particularly in the US and initially in the UK, argue that the resale right distorts art markets by increasing transaction costs and deterring sales. In the US, the 2013 US Copyright Office report contends that royalties reduce initial sale prices, as buyers anticipate future obligations, diminishing artists' earnings from primary sales.⁸⁹ Auction houses have expressed concerns that royalties drive high-value sales to non-recognizing jurisdictions, a fear echoed in early UK debates.⁹⁰ In the UK, opponents argued that the resale right acts as a tax on buyers, raising costs and potentially reducing market competitiveness.⁹¹ The 1992 US report notes that the administrative costs of tracking and collecting royalties burden auction houses and galleries, potentially increasing prices and deterring collectors.⁹²

b. Disproportionate Benefits for Established Artists

A significant criticism is that the resale right primarily benefits established artists whose works command high secondary market prices, leaving emerging artists with minimal benefits.⁹³ In the UK, the €1,000 threshold yields low royalties, which critics argue is insignificant for successful artists but irrelevant for new artists.⁹⁴ This concern is amplified in the US, where opponents argue that royalties favor "star" artists, exacerbating inequalities.⁹⁵ For Vietnam, with its primary-focused art market, this critique suggests that resale rights may have limited immediate impact.⁹⁶

c. Administrative and Legal Challenges

Implementing the resale right poses significant administrative challenges, particularly in jurisdictions lacking infrastructure like Vietnam. The EU's success relies on collecting societies, but the 2013 US report highlights the high costs of establishing such systems.⁹⁷ In the UK, early opposition focused on the administrative burden on auction houses.⁹⁸

⁸⁸ Banterghansa and Graddy, "Impact of the Droit de Suite,".

⁸⁹ US Copyright Office, *Resale Royalties*, 16–17.

⁹⁰ US Copyright Office, *Resale Royalties*, 17.

⁹¹ Macquisten, "Should Post-Brexit UK."

⁹² US Copyright Office, *Droit de Suite*, 17.

⁹³ Macquisten, "Should Post-Brexit UK."

⁹⁴ DACS, "Copyright Uncovered."

⁹⁵ Sprigman and Rub, "Resale Royalties."

⁹⁶ Quyen Tran and Ngo Yen, "Gặp Xèo Chu - thần đồng hội họa nhí và những bức tranh tiền tỉ," *Thanh Nien*, 2021, accessed August 20, 2024, <https://thanhvien.vn>.

⁹⁷ US Copyright Office, *Resale Royalties*, 17.

⁹⁸ Macquisten, "Should Post-Brexit UK."

The French case involving Christie's France (2009) illustrates legal ambiguities, as disputes over liability required court clarification, a risk for Vietnam without clear regulations.⁹⁹

5. EU-Vietnam Free Trade Agreement and the Case of Vietnam

5.1. EU-Vietnam Free Trade Agreement Resale Right Provision

The EVFTA, signed on 30 June 2019 and effective from 1 August 2020, represents a landmark in Vietnam's integration into global trade and intellectual property frameworks, with Article 12.15 articulating provisions for the artist's resale right.¹⁰⁰ Article 12.15 aligns with the Berne Convention's optional framework, offering a flexible yet principled approach to securing royalties for artists or their heirs in secondary market transactions, such as those conducted through auction houses, galleries, or professional art dealers.¹⁰¹ By embedding the resale right within a new-generation free trade agreement, the EVFTA underscores its growing global significance, contrasting with jurisdictions like the United States, where the right remains unrecognized, creating disparities in international artist compensation.¹⁰² This section examines the resale right provisions in the EVFTA, their legal scope, conditions, and implications, particularly for Vietnam's emerging art market.

Article 12.15 of the EVFTA defines the resale right as an inalienable entitlement, granting the author of an original artwork, or their heirs, a royalty based on the sale price of any resale subsequent to the initial transfer by the artist.¹⁰³ The inalienable nature of the right ensures that it cannot be assigned or waived, distinguishing it from other intellectual property rights that may be transferred or licensed, and aligning it closely with moral rights while retaining an economic function through royalty payments.¹⁰⁴ This provision reflects the EU's influence, as seen in Directive 2001/84/EC, but the EVFTA's generality allows signatories like Vietnam flexibility in implementation, a critical consideration given the country's nascent secondary art market.¹⁰⁵ Unlike the EU Directive, which specifies artwork types and royalty structures, Article 12.15 remains broad, leaving details such as collection procedures and royalty amounts to domestic legislation, thereby accommodating diverse legal systems.¹⁰⁶

The scope of the resale right under the EVFTA is confined to professional art market transactions, explicitly involving sellers, buyers, or intermediaries like salerooms,

⁹⁹ *Christie's France SNC v Syndicat national des antiquaires*, Case C-41/14.

¹⁰⁰ EU-Vietnam Free Trade Agreement art 12.15.

¹⁰¹ Berne Convention art 14ter.

¹⁰² US Copyright Office, *Resale Royalties*, 16.

¹⁰³ EU-Vietnam Free Trade Agreement art 12.15(1).

¹⁰⁴ EU-Vietnam Free Trade Agreement art 12.15(1).

¹⁰⁵ Quan-Hoang Vuong et al., "Paintings Can Be Forged, But Not Feeling': Vietnamese Art—Market, Fraud, and Value," *Arts* 7, no. 4 (2018): 62, <https://doi.org/10.3390/arts7040062>.

¹⁰⁶ EU-Vietnam Free Trade Agreement art 12.15(4).

galleries, or dealers.¹⁰⁷ This focus ensures that royalties apply only to formal secondary market sales, excluding private transactions or informal exchanges, which aligns with the Berne Convention's emphasis on public sales.¹⁰⁸ The provision's limitation to professional markets addresses practical concerns about enforcement, ensuring that royalties are collectible in structured settings where sales data is transparent, a model proven effective in the EU through collecting societies like DACS.¹⁰⁹ For Vietnam, this restriction is significant, as its art market is primarily driven by primary sales, with secondary markets limited to high-profile international auctions, such as the \$3.1 million sale of Mai Trung Thu's Portrait of Miss Phuong in Hong Kong.¹¹⁰ Implementing such a provision would require Vietnam to develop mechanisms for tracking and administering royalties in professional settings, a challenge given the absence of established collecting societies.

Article 12.15 further stipulates conditions for the resale right's application. First, the right applies only to the author of the artwork or their heirs, excluding legal entities, which reinforces its personal and moral character.¹¹¹ Second, royalties are triggered only from the second transaction onward, meaning the initial sale from the artist to the first buyer is exempt.¹¹² This exemption acknowledges that artists set the initial sale price, which reflects their valuation of the work, whereas subsequent resales, often at significantly higher prices, benefit intermediaries without compensating the artist.¹¹³ The 1992 US Copyright Office report highlights cases where artworks resold for millions generated no income for artists or their estates, underscoring the inequity the resale right seeks to address.¹¹⁴ The EVFTA's focus on subsequent sales ensures that artists share in the economic appreciation of their works, a principle rooted in the historical case of Jean-François Millet's *The Angelus*.¹¹⁵

A third condition limits the resale right's application to jurisdictions where both the artist's home country and the country of sale recognize the right, mirroring the Berne Convention's reciprocity principle.¹¹⁶ This reciprocity requirement which stems from the EU directive itself poses challenges for Vietnam, as its failure to adopt the resale right domestically would prevent Vietnamese artists from claiming royalties in recognizing jurisdictions like the EU or UK, and vice versa for foreign artists selling in Vietnam.¹¹⁷ The US Copyright Office's 2013 report emphasizes this global disadvantage, noting that US artists are excluded from EU royalties due to non-recognition, a scenario Vietnam risks

¹⁰⁷ EU-Vietnam Free Trade Agreement art 12.15(2).

¹⁰⁸ Berne Convention art 14ter(1).

¹⁰⁹ DACS, "Copyright Uncovered."

¹¹⁰ Nhan, "Lý do tranh 'Chân dung cô Phương'."

¹¹¹ EU-Vietnam Free Trade Agreement art 12.15(1).

¹¹² EU-Vietnam Free Trade Agreement art 12.15(2).

¹¹³ EU-Vietnam Free Trade Agreement art 12.15(1).

¹¹⁴ US Copyright Office, *Droit de Suite*, 10.

¹¹⁵ Duchemin, *Le Droit de Suite*, 35..

¹¹⁶ Berne Convention art 14ter(2).

¹¹⁷ EU-Vietnam Free Trade Agreement art 12.15(4).

replicating without legislative reform.¹¹⁸ This reciprocity issue underscores the urgency for Vietnam to align with EVFTA obligations to ensure its artists benefit from international sales.

The EVFTA also introduces an exemption for resales occurring within three years of the initial sale if the resale price does not exceed a minimum amount, to be determined by domestic legislation.¹¹⁹ This provision, akin to the EU Directive's €10,000 exemption, protects new artists whose works may not yet command high values, reducing administrative burdens on low-value transactions.¹²⁰ However, the EVFTA's silence on the specific minimum amount or royalty percentages leaves significant discretion to signatories, a flexibility that could complicate Vietnam's implementation given its limited experience with resale rights.¹²¹ The EU's approach, with a €3,000 minimum threshold and tiered royalties capped at €12,500, offers a potential model, balancing artist benefits with market feasibility.¹²² Vietnam could adopt similar thresholds to ensure royalties are meaningful without deterring collectors, a concern raised in the US context where auction houses fear royalties drive sales to non-recognizing markets like Hong Kong.¹²³

5.2. Vietnam's Status Quo on Resale Right

Vietnam's intellectual property framework, primarily governed by the Intellectual Property Law of 2005 as amended in 2009, 2019 and 2022 and by the other provisions such as the 2015 Civil Code, has yet to recognize the artist's resale right, despite its inclusion in the EVFTA under Article 12.15.¹²⁴ This absence places Vietnam at a crossroads, as the EVFTA encourages but does not mandate the incorporation of resale rights, mirroring the optional nature of the Berne Convention's Article 14ter.¹²⁵ The lack of domestic provisions limits Vietnamese artists' ability to benefit from royalties in secondary art market transactions, both domestically and in recognizing jurisdictions like the EU, while highlighting the need for legislative reform to align with international standards.¹²⁶ This section examines Vietnam's current legal and market context for the resale right, assessing the feasibility and challenges of its incorporation into the national framework.

The Intellectual Property Law of 2005, as amended in 2022, comprehensively addresses copyright, industrial property rights and plant varieties rights but omits provisions for the resale right, focusing instead on traditional protections like reproduction and distribution

¹¹⁸ US Copyright Office, *Droit de Suite*, 20.

¹¹⁹ EU-Vietnam Free Trade Agreement art 12.15(3).

¹²⁰ Directive 2001/84/EC art 3(2).

¹²¹ EU-Vietnam Free Trade Agreement art 12.15(4).

¹²² Directive 2001/84/EC arts 3(1), 4.

¹²³ US Copyright Office, *Resale Royalties*, 17.

¹²⁴ EU-Vietnam Free Trade Agreement art 12.15.

¹²⁵ Berne Convention art 14ter.

¹²⁶ Directive 2001/84/EC art 7.

rights.¹²⁷ The 2022 amendments enhanced enforcement mechanisms and digital copyright protections, reflecting Vietnam's integration into global trade agreements like the EVFTA, yet failed to incorporate the resale right, citing the modest size of the domestic visual art market and the absence of infrastructure for royalty collection.¹²⁸ Vietnam's art market remains predominantly primary, with secondary sales, such as auctions, often occurring abroad, as evidenced by the \$3.1 million sale of Mai Trung Thu's Portrait of Miss Phuong at Sotheby's Hong Kong in 2021.¹²⁹ This reliance on international markets underscores the economic disadvantage for Vietnamese artists, who cannot claim royalties in jurisdictions requiring reciprocity, a concern echoed in the US Copyright Office's 2013 report on the US's non-recognition of the right.¹³⁰

The feasibility of incorporating the resale right hinges on Vietnam's art market dynamics and legal capacity. The market, while growing with talents like Xeo Chu, who has sold works for billions of VND, lacks a robust secondary sector, limiting the immediate demand for resale royalties.¹³¹ The Copyright Office of Vietnam notes the absence of collecting societies, unlike the UK's DACS, as a barrier to implementation, a challenge also highlighted in the 1992 US Copyright Office report, which emphasizes the need for administrative infrastructure.¹³² However, international evidence, such as the UK's 238% art market growth post-2006, suggests that resale rights can stimulate market transparency and artist engagement without deterring sales.¹³³ Vietnam could adopt a phased approach, initially applying royalties to high-value secondary sales, leveraging the EVFTA's flexibility to set minimum thresholds akin to the EU's €3,000.¹³⁴

Incorporation faces challenges, including low awareness among artists and traders, and the need for regulatory mechanisms to track sales and distribute royalties.¹³⁵ The 2022 amendments' focus on digital enforcement offers a foundation for developing such systems, potentially through government-backed agencies or partnerships with international collecting societies.¹³⁶ Reciprocity, as required by the EVFTA and Berne Convention, necessitates domestic recognition to ensure Vietnamese artists benefit abroad, a lesson from the US's exclusion from EU royalties.¹³⁷ By integrating the resale

¹²⁷ Law on Intellectual Property 2005 (as amended 2022) (Vietnam), arts 18–25.

¹²⁸ Nhan, "Lý do tranh 'Chân dung cô Phương'."

¹²⁹ Trang Thanh Hien, "Vietnamese Paintings at International Auctions Reach Milestones," *Vietnamnet*, 2021, accessed August 20, 2024, <https://vietnamnet.vn/en/vietnamese-paintings-at-international-auctions-reach-milestones-788360.html>.

¹³⁰ US Copyright Office, *Resale Royalties*, 20–21.

¹³¹ Tran and Yen, "Gặp Xèo Chu."

¹³² US Copyright Office, *Droit de Suite*, 12.

¹³³ Banterghansa and Graddy, "Impact of the Droit de Suite,"

¹³⁴ Directive 2001/84/EC art 3(1).

¹³⁵ US Copyright Office, *Droit de Suite*, 17.

¹³⁶ Law on Intellectual Property 2005 arts 56–58.

¹³⁷ Berne Convention art 14ter(2)

right, Vietnam can protect its artists, align with global standards, and foster a competitive art market, drawing on the EU's structured model to address local realities.

As can be seen, Vietnam's legal and institutional framework reveals limited readiness to incorporate the artist's resale right, critical for aligning with global trade commitments. The Intellectual Property Law of 2005, as amended in 2022, omits provisions for the resale right, prioritizing traditional protections like reproduction and distribution over emerging mechanisms like royalties for secondary art market sales. Institutionally, Vietnam lacks collecting societies, essential for administering royalties, while low awareness among artists and traders further hampers implementation. The art market, predominantly primary, sees significant secondary sales occurring abroad, underscoring the need for robust systems to capture royalty benefits. Rampant copyright infringement exacerbates enforcement challenges, weakening the legal foundation for resale right adoption.

Within ASEAN's intellectual property harmonization efforts, Vietnam lags behind nations like Singapore, which boast advanced IP frameworks supporting regional integration. Adopting the resale right could position Vietnam as a leader in ASEAN's push for cohesive IP norms, aligning with trade agreement pressures and fostering cross-border legal development. This reform requires legislative amendments to define artworks and royalty structures, alongside institutional innovations like government-backed collecting agencies. Partnerships with international auction houses could enhance compliance for overseas sales, strengthening Vietnam's global market presence. By addressing these gaps, Vietnam can bridge its legal and institutional shortcomings, leveraging ASEAN's harmonization dynamics to enhance artist protections and elevate its cultural sector, contributing to a unified regional IP framework that supports economic and creative growth across Southeast Asia.

6. Protect or Not Protect: That is the Question

The EVFTA's Article 12.15 presents a critical opportunity for Vietnam to enhance its intellectual property framework by ensuring visual artists benefit from royalties on secondary market sales.¹³⁸ In a Vietnamese law article published by the two authors in 2022, invoking doctrinal research the two authors argued that Vietnam should adopt and incorporate the resale right as a moral right with monetary value within the realm of copyright.¹³⁹ However, this call has not been taken up by Vietnamese law making authorities. As a result, Vietnam's Intellectual Property Law of 2005, as amended in 2022, currently lacks provisions for the resale right, leaving artists without domestic or international royalty protections in secondary markets.¹⁴⁰ This section continues arguing

¹³⁸ EU-Vietnam Free Trade Agreement art 12.15.

¹³⁹ Trần and Trần, "Quyền bán lại," 40–55.

¹⁴⁰ Law on Intellectual Property 2005 (as amended 2022).

that Vietnam should codify the EVFTA's resale right into its domestic law to promote artist equity, align with global standards, and foster its emerging art market, while addressing legal, cultural, economic, and political challenges through tailored solutions.

6.1. The Case for Codifying the Resale Right

a. Promoting Artist Equity and Economic Justice

A compelling argument for codifying the resale right is its role in addressing economic inequities faced by visual artists.¹⁴¹ Unlike writers or musicians, visual artists rely heavily on initial sales, which often undervalue their works' future market appreciation.¹⁴² Vietnam's artists, such as Mai Trung Thu, face similar challenges, as secondary sales often occur abroad without royalty benefits.¹⁴³ Codifying the resale right would enable Vietnamese artists to claim royalties domestically and in recognizing jurisdictions, enhancing their financial stability. The EU's approach, extending protection for 70 years post-mortem, provides a model for Vietnam to ensure long-term benefits for artists' estates.¹⁴⁴

b. Fostering Creative Incentives and Cultural Development

Codifying the resale right would foster creative incentives by providing financial support for artists, encouraging sustained artistic production. The UK's experience demonstrates that royalties enable artists to invest in materials and focus on creative work.¹⁴⁵ For Vietnam, with emerging talents like Xeo Chu, the resale right could stimulate a nascent secondary art market, promoting cultural development and international recognition.¹⁴⁶ The moral dimension of the resale right aligns with the Berne Convention's principles, encouraging Vietnam to elevate its cultural sector.¹⁴⁷

c. Aligning with International Standards and Reciprocity

The EVFTA's Article 12.15 reflects a global trend, with 70 countries recognizing the resale right by 2018.¹⁴⁸ Codifying this right would align Vietnam with international standards, fulfilling its obligations under the EVFTA and the Berne Convention.¹⁴⁹ The EU's reciprocity principle underscores the urgency of adoption, as Vietnamese artists are

¹⁴¹ Directive 2001/84/EC.

¹⁴² US Copyright Office, *Droit de Suite*, 10.

¹⁴³ Nhan, "Lý do tranh 'Chân dung cô Phương'."

¹⁴⁴ Directive 2001/84/EC art 8.

¹⁴⁵ DACS, "Copyright Uncovered."

¹⁴⁶ Mickael R. Viglino, "The Reception of Droit de Suite in International Law: Diagnosis and Remedy," *Brazilian Journal of International Law* 17 (2020): 171; Tran and Yen, "Gặp Xèo Chu."

¹⁴⁷ Berne Convention art 14ter; Lara Mastrangelo, "Droit de Suite - Why the United States Can No Longer Ignore the Global Trend," *Chicago-Kent Journal of International Law* 18 (2018): 3.

¹⁴⁸ Jewell, "Artist's Resale Right."; Sam Ricketson and Jane C. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 2nd ed. (Oxford: Oxford University Press, 2006), § 11.54.

¹⁴⁹ EU-Vietnam Free Trade Agreement art 12.15.

currently excluded from royalties in the EU and UK due to non-recognition.¹⁵⁰ By incorporating the resale right, Vietnam can ensure its artists benefit from sales in recognizing jurisdictions, enhancing their global competitiveness.¹⁵¹

6.2. Challenges to Incorporation

While there is a strong case for codifying resale right into domestic intellectual property law in Vietnam, there remains substantial challenges for a successful incorporation that should be taken into consideration seriously and with great care. The challenges are diverse ranging from legal to cultural to economic as well as political and administrative.

a. Legal Challenges

Vietnam's Intellectual Property Law of 2005, as amended in 2022, lacks provisions for the resale right, focusing on reproduction and distribution rights.¹⁵² Incorporating the right requires amending the law to define original artworks, royalty structures, and post-mortem protections, a complex process given the EVFTA's generality.¹⁵³ The Fundación Gala-Salvador Dalí case illustrates the need for clarity on inheritance rules.¹⁵⁴ Aligning with the Civil Code 2015's inheritance framework adds further complexity.¹⁵⁵ Rampant copyright infringement also poses a huge problem for the implementation of any resale right should it be adopted.¹⁵⁶

b. Cultural Challenges

Vietnam's cultural context, where art is often viewed as a luxury, limits public and artist awareness of the resale right.¹⁵⁷ Unlike the EU, Vietnam's art market is in its infancy, with galleries struggling for broader appeal.¹⁵⁸ This cultural disconnect could hinder advocacy for legislative reform.

¹⁵⁰ Directive 2001/84/EC art 7.

¹⁵¹ Janae Camacho, "'This Artwork Is Always on Sale': The Need for a U.S. Resale Royalty Right for Digital Visual Artists in This Technological Age, and Proof of Concept Through the Blockchain and NFTs Explosion," *Washington Journal of Law, Technology & Arts* 18 (2023), <https://digitalcommons.law.uw.edu/wjlta/vol18/iss1/2>; Nhan, "Lý do tranh 'Chân dung cô Phương'."

¹⁵² Marshall A. Leaffer, "Of Moral Rights and Resale Royalties: The Kennedy Bill," *Maurer Faculty* 911 (1989): 1989; Irina Tarsis, "Droit de Suite: Let's Talk About Artists Resale Royalty Rights," *Secrets of Art Magazine*, June 10, 2020, accessed August 20, 2024, <https://secretsofartmagazine.com/2020/06/droit-de-suite-lets-talk-about-artists-resale-royalty-rights/>; Irina Tarsis, "Moral Rights of the Artist (when Present): An Updated US Perspective," *The Art Law Review*, 2023, accessed August 20, 2024, <https://www.lexology.com/library/detail.aspx?g=905fc12e-97ea-4e42-94b7-1ea3c733e4ae>.

¹⁵³ EU-Vietnam Free Trade Agreement art 12.15(4).

¹⁵⁴ Court of Justice of the European Union, Case C-518/08, *Fundación Gala-Salvador Dalí and Visual Entidad de Gestión de Artistas Plásticos (VEGAP) v Société des auteurs dans les arts graphiques et plastiques (ADAGP) and Others*, April 15, 2010, accessed July 30, 2025, <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-518/08>.

¹⁵⁵ Civil Code 2015 (Vietnam), arts 609–630.

¹⁵⁶ Vuong et al., "Paintings Can Be Forged," 62.

¹⁵⁷ Tran and Yen, "Gặp Xèo Chu."

¹⁵⁸ P. Corey and N. A. Taylor, "Đổi Mới and the Globalization of Vietnamese Art," *Journal of Vietnamese Studies* 14, no. 1 (2019): 1–34, <https://doi.org/10.1525/vs.2019.14.1.1>.

c. Economic Challenges

Vietnam's art market is predominantly primary, with secondary sales often occurring abroad.¹⁵⁹ Critics warn that royalties could deter collectors by increasing transaction costs, potentially driving sales to non-recognizing jurisdictions.¹⁶⁰ The UK's experience suggests that such fears may be overstated, but Vietnam's less developed market may face greater sensitivity.¹⁶¹

d. Political and Administrative Challenges

Politically, While Vietnam's legislative priorities focus on economic growth, intellectual property reforms remain inadequate. The absence of strong and well – equipped collecting societies poses a significant administrative barrier, as highlighted in the 1992 US report.¹⁶² The EVFTA's optional nature reduces political pressure for immediate codification.¹⁶³

7. A Way Forward or An Open Conclusion

The artist's resale right, as evidenced by the EU and UK, offers a robust mechanism to protect visual artists, while the US's rejection highlights global disparities. Vietnam should codify the EVFTA's resale right to promote equity, foster creativity, and align with international standards. Legal, cultural, economic, and political challenges can be addressed through amendments, awareness campaigns, phased implementation, and collecting societies, ensuring Vietnam's artists thrive in a competitive global art market. Vietnam should amend the Intellectual Property Law to incorporate the resale right, drawing on the EU's Directive to define original artworks and set a €3,000 threshold. The law should specify royalty percentages, adopt the EU's tiered structure, and align post-mortem protections with the Civil Code 2015, with clear provisions for heirs. A decree could provide flexibility, detailing implementation specifics. Awareness campaigns targeting artists, galleries, and collectors, in collaboration with WIPO, could emphasize the resale right's benefits. Public exhibitions showcasing Vietnamese artists could foster cultural support for reform. A phased implementation, initially applying royalties to high-value secondary sales, would minimize market disruption. Setting a balanced threshold and capping royalties would prevent deterring collectors. Partnerships with international auction houses could ensure compliance for overseas sales. And lastly, Vietnam should prioritize the resale right as part of its EVFTA commitments, establishing a collecting

¹⁵⁹ Nhan, "Lý do tranh 'Chân dung cô Phương'."

¹⁶⁰ US Copyright Office, *Droit de Suite*, 17.

¹⁶¹ Banterghansa and Graddy, "Impact of the Droit de Suite,"

¹⁶² US Copyright Office, *Droit de Suite*, 17.

¹⁶³ Laurel Wickersham Salisbury, "It's Not That Easy: Artist Resale Royalty Rights and The ART Act," *Center for Art Law*, July 1, 2019, accessed August 20, 2024, <https://itsartlaw.org/its-not-that-easy-artist-resale-royalty-rights-and-the-art-act/>; Nhan, "Lý do tranh 'Chân dung cô Phương'."

society modeled on DACS. Government funding or partnerships with EU societies could address startup costs. Training programs for officials could build expertise, and a pilot program targeting major galleries could test implementation.

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References

- Artists' Collecting Society. "How Does Brexit Affect the Artist's Resale Right?." Artists' Collecting Society, 2021. Accessed August 20, 2024. <https://artistscollectingsociety.org/news/how-does-brexit-affect-the-artists-resale-right/>.
- Banternghansa, Chanont, and Kathryn Graddy. "The Impact of the Droit de Suite in the UK: An Empirical Analysis." *Journal of Cultural Economics* 35, no. 2 (2011): 81–100.
- Berne Convention for the Protection of Literary and Artistic Works (adopted 9 September 1886, revised 24 July 1971)
- Bridgeman Art Library, Ltd. v. Corel Corp.* 36 F. Supp. 2d 191 (S.D.N.Y. 1999).
- Britannica. "Visual Arts." Accessed August 20, 2024. <https://www.britannica.com>.
- Bussey, Alexander. "The Incompatibility of Droit de Suite with Common Law Theories of Copyright." *Fordham Law Review* 81 (2013): 1095–98.
- Camacho, Janae. "'This Artwork Is Always on Sale': The Need for a U.S. Resale Royalty Right for Digital Visual Artists in This Technological Age, and Proof of Concept Through the Blockchain and NFTs Explosion." *Washington Journal of Law, Technology & Arts* 18 (2023).
- Close v. Sotheby's, Inc.* No. 16-56234 (9th Cir. 2018).
- Corey, P., and N. A. Taylor. "Đổi Mới and the Globalization of Vietnamese Art." *Journal of Vietnamese Studies* 14, no. 1 (2019): 1–34. <https://doi.org/10.1525/vs.2019.14.1.1>.
- Court of Justice of the European Union, Case C-41/14, *Christie's France SNC v Syndicat national des antiquaires*, February 26, 2015, accessed August 20, 2024, <https://curia.europa.eu/juris/liste.jsf?&num=C-41/14>.
- Court of Justice of the European Union, Case C-518/08, *Fundación Gala-Salvador Dalí and Visual Entidad de Gestión de Artistas Plásticos (VEGAP) v Société des auteurs dans les arts graphiques et plastiques (ADAGP) and Others*, April 15, 2010, accessed July 30, 2025, <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-518/08>.
- DACS. "Artist's Resale Right." DACS, 2019. Accessed August 20, 2024. <https://www.dacs.org.uk>.

- DACS. "Copyright Uncovered, Brexit Update: What Will Happen to Copyright and Artist's Resale Right?." DACS, 2019. Accessed August 20, 2024. <https://www.dacs.org.uk>.
- De Pierredon-Fawcett. *The Droit de Suite in Literary and Artistic Property: A Comparative Law Study*. Columbia University Law School, 1992.
- 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
- Duchemin, J. L. *Le Droit de Suite des Artistes*. Paris, 1948.
- Feldman, Franklin, and Stephen E. Weil. "Droit de Suite." In *Art Works: Law, Policy, Practice*, 81–97. New York: Practising Law Institute, 1974.
- Fox Film Corp. v. Doyal*. 286 U.S. 123 (1932).
- Gerhard Pfennig, "The Resale Right of Artists (Droit de Suite)," *Copyright Bulletin* 31 (1997): 20.
- Graddy, Katy, Noah Horowitz, and Stefan Szymanski. "A Study into the Effect on the UK Art Market of the Introduction of the Artist's Resale Right." UK Intellectual Property Office, 2008.
- Harris, Gareth. "Christie's France Wins the Artist Resale Royalty Battle." *The Art Newspaper*, December 31, 2018. Accessed August 20, 2024. <https://www.theartnewspaper.com/2018/12/31/christies-france-wins-the-artist-resale-royalty-battle>.
- Hutchinson, Jack. "Is Anything Wrong with the Artist's Resale Right?." *A-N*, 2012. Accessed August 20, 2024. <https://www.a-n.co.uk>.
- Hutchinson, Jack. "Is Anything Wrong with the Artist's Resale Right?." *A-N*, 2012. Accessed August 20, 2024. <https://www.a-n.co.uk>.
- Jewell, Catherine. "The Artist's Resale Right: A Fair Deal for Visual Artists." *WIPO Magazine*, 2017. Accessed August 20, 2024. <https://www.wipo.int>.
- Leaffer, Marshall A. "Of Moral Rights and Resale Royalties: The Kennedy Bill." *Maurer Faculty* 911 (1989): 1989.
- Legifrance. *Intellectual Property Code*. Art. L-122-8. Accessed August 20, 2024. <https://www.legifrance.gouv.fr>.
- Macquisten, Ivan. "Should Post-Brexit UK Get Rid of the Artist's Resale Right?." *The Art Newspaper*, 2021. Accessed August 20, 2024. <https://www.theartnewspaper.com>.
- Mastrangelo, Lara. "Droit de Suite - Why the United States Can No Longer Ignore the Global Trend." *Chicago-Kent Journal of International Law* 18 (2018): 1–3.
- Nhan, Hieu. "Lý do tranh 'Chân dung cô Phương' có giá 3,1 triệu USD." *VNExpress*, 2021. Accessed August 20, 2024. <https://vnexpress.net>.
- O'Dwyer, Anthony. "The Artists' Resale Right Directive 2001/84/EC: A Means of Targeted Intervention for Visual Artists." *Wiley*, 2021. Accessed August 20, 2024. <https://onlinelibrary.wiley.com/doi/epdf/10.1111/jwip.12170>.

- Perlmutter, Shira. "Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report." *Journal of the Copyright Society of the U.S.A.* 40 (1993): 284–98.
- Pfennig, Gerhard. "The Resale Right of Artists (Droit de Suite)." *Copyright Bulletin* 31 (1997): 20.
- Ricketson, Sam, and Jane C. Ginsburg. *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*. 2nd ed. Oxford: Oxford University Press, 2006.
- Rub, Guy A. "The Unconvincing Case for Resale Royalties." *Yale Law Journal Forum*, 2014. Accessed August 20, 2024. https://www.yalelawjournal.org/forum/the-unconvincing-case-for-resale-royalties#_ftnref31.
- Salisbury, Laurel Wickersham. "It's Not That Easy: Artist Resale Royalty Rights and The ART Act." *Center of Art Law*, 2019. Accessed August 20, 2024. <https://www.itsartlaw.org>.
- Salisbury, Laurel Wickersham. "It's Not That Easy: Artist Resale Royalty Rights and The ART Act." *Center for Art Law*, July 1, 2019. Accessed August 20, 2024. <https://itsartlaw.org/its-not-that-easy-artist-resale-royalty-rights-and-the-art-act/>.
- Secretary of State for International Trade. "Continuing the United Kingdom's Trade Relationship with the Socialist Republic of Vietnam." Department for International Trade, 2021. Accessed August 20, 2024. <https://www.gov.uk>.
- Sprigman, Christopher, and Guy Rub. "Resale Royalties Would Hurt Emerging Artists." *Artsy*, 2018. Accessed August 20, 2024. <https://www.artsy.net>.
- Tarsis, Irina. "Droit de Suite: Let's Talk About Artists Resale Royalty Rights." *Secrets of Art Magazine*, June 10, 2020. Accessed August 20, 2024. <https://secretsofartmagazine.com/2020/06/droit-de-suite-lets-talk-about-artists-resale-royalty-rights/>.
- Tarsis, Irina. "Moral Rights of the Artist (when Present): An Updated US Perspective." *The Art Law Review*, 2023. Accessed August 20, 2024. <https://www.lexology.com/library/detail.aspx?g=905fc12e-97ea-4e42-94b7-1ea3c733e4ae>.
- Trần, Kiên, and Anh Tuấn Trần. "Quyền bán lại của tác giả tác phẩm nghệ thuật theo EVFTA và khả năng nội luật hoá ở Việt Nam." *Tạp chí Luật học*, no. 10 (2022): 40–55.
- Tran, Quyen, and Ngo Yen. "Gặp Xèo Chu - thần đồng hội họa nhí và những bức tranh tiền tỉ." *Thanh Nien*, 2021. Accessed August 20, 2024. <https://thanhnien.vn>.
- Trang Thanh Hien. "Vietnamese Paintings at International Auctions Reach Milestones." *Vietnamnet*, 2021. Accessed August 20, 2024. <https://vietnamnet.vn/en/vietnamese-paintings-at-international-auctions-reach-milestones-788360.html>.
- US Copyright Office. *Droit de Suite: The Artist's Resale Royalty*. 1992.
- US Copyright Office. *Resale Royalties: An Updated Analysis*. 2013.

- VCCI. “Có những loại FTA nào?” VCCI, 2019. Accessed August 20, 2024. <https://vcci.com.vn>.
- Vickers, Carole M. “The Applicability of the Droit de Suite in the United States.” *Boston College International and Comparative Law Review* 3 (1980): 433–66.
- Viglino, Mickael R. “The Reception of Droit de Suite in International Law: Diagnosis and Remedy.” *Brazilian Journal of International Law* 17 (2020): 170–71.
- Vuong, Quan-Hoang, Manh-Tung Ho, Hong-Kong T. Nguyen, Thu-Trang Vuong, Kien Tran, and Manh Toan Ho. “‘Paintings Can Be Forged, But Not Feeling’: Vietnamese Art — Market, Fraud, and Value.” *Arts* 7, no. 4 (2018): 62. <https://doi.org/10.3390/arts7040062>.

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