

The Urgency of Regulating Resale Royalty Right on Painting Copyrights in Indonesia (Comparative Study of Germany and Australia)

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Abstract

The Berne Convention includes provisions for resale royalty rights, which have been adopted by countries worldwide. However, Indonesia has yet to establish a framework for resale royalty rights, leading to suboptimal protection of economic rights for creators of painting works. This study aims to analyze the regulation of economic rights for the resale of painting works under Copyright Law in Indonesia, Germany, and Australia. Additionally, it seeks to identify the urgency of implementing royalty rights resale in the Indonesian Copyright Law. The research utilizes a normative legal approach with a statutory and

comparative focus. The findings indicate that Indonesia currently lacks specific regulations for royalty rights resale within its Copyright Law. In contrast, Germany and Australia have incorporated the resale royalty right provisions of the Berne Convention into their respective Urheberrechtsgesetz 1965 and Resale Royalty Right for Visual Artist Act 2009. The creators of painting works deserve royalty rights on the resale of their works to enhance their well-being and secure benefits for their heirs. Therefore, it is crucial for Indonesia to adopt legal practices regarding royalty rights resale based on the experiences of Germany and Australia. Recognizing the advantages of implementing royalty rights resale, it becomes evident that such regulations are essential in Indonesia. To protect the economic rights of creators of painting works adequately, Indonesia should consider incorporating provisions for royalty rights resale in its copyright law reform. This will not only strengthen the legal protection of creators but also promote the growth of the artistic community in the country.

Keywords

Copyright, Economic Rights, Painting Works, Resale Royalty Right

Introduction

Refined version:

Copyright plays an important role in supporting Indonesia's national creative economy, as it significantly contributes to optimizing the country's overall economic performance. The creative economy sector's Gross Domestic Product (GDP) witnessed a notable growth rate of 4.04% in 2021, making a significant impact on the nation's economic expansion.¹ However, despite the immense potential within Indonesia's creative economy, there remains a considerable untapped opportunity, mainly due to a lack of understanding about how Intellectual Property (IP) can enhance business value, for instance painting works.²

¹ Katriana Katriana, "GDP from Indonesia's creative economy sector grows by 4.04 percent", *ANTARA News* June 21 (2022). Retrieved from <<https://en.antaranews.com/news/235269/gdp-from-indonesias-creative-economy-sector-grows-by-404-percent>>.

² Catherine Jewell, "Leveraging Indonesia's Creative Economy", *WIPO Magazine*, October 5 (2019). Available online at <https://www.wipo.int/wipo_magazine/en/2019/05/article_0003.html>.

Looking ahead to 2030, Indonesia is projected to undergo substantial economic growth on a global scale. Consequently, it becomes essential for creative businesses to raise awareness about the significance of obtaining maximum economic benefits through proper Intellectual Property Rights (IPR) protection. Ira Aprilianti, a researcher at the Center for Indonesian Policy Studies (CIPS), emphasizes the importance of copyright protection as a means to drive economic growth. Copyright owners possess the exclusive economic rights to authorize and receive remuneration for the use of their creative works.³ To fully realize the potential of the creative economy and stimulate economic prosperity, it is crucial for individuals and businesses to prioritize IPR protection. By safeguarding their creative works through copyright, creators can harness their economic rights, fostering growth, and encouraging innovation within Indonesia's creative industries, especially in painting works. This, in turn, will contribute to the nation's economic development and global competitiveness as it approaches the projected economic expansion by 2030.

Painting works are a subsector of the creative economy that is included in objects protected by copyright, namely in the category of fine art. Currently, there are still several obstacles related to legal protection of copyright, one of which is the protection of the economic rights of the creator of painting works. So far, painters do not realize that they can receive economic rights in the form of royalties on paintings when there is commercialization or resale of works in the secondary market. Royalty is a form of remuneration addressed to the copyright owner because the ownership has been used, use here is utilization for certain purposes in relation to the economic rights of the creator. The protection of economic rights in the resale of works of this painting is realized through resale royalty rights, which is a percentage of the resale price paid to artists at each resale of their works involving auction houses, galleries, or art dealers.⁴ Resale royalty is governed by the Berne Convention for the Protection of Literary and Artistic Works. The Berne Convention itself has been ratified by Indonesia and ratified through Presidential Decree Number 18 of 1997.

However, the protection of creators' economic rights through royalty rights resale is not regulated in copyright law in Indonesia. The absence of regulations related to royalty rights resale in Indonesian laws and regulations inevitably results in the rights of painters as creators being less protected.

³ Retno Wulandhari, "Perlindungan Hak Cipta Dorong Pertumbuhan Ekonomi", *REPUBLIKA*, April 27 (2020). Retrieved from <<https://ekonomi.republika.co.id/berita/q9f7nh349/perlindungan-hak-cipta-dorong-pertumbuhan-ekonomi>>.

⁴ Nathalie Moureau, "Droit de Suite" on Alain Marcianto & Giovanni Battista Ramello (eds.). *Encyclopedia of Law and Economics*. (New York: Springer New York, 2014), p. 1.

Moreover, a painter cannot reproduce his creation as can be done by songwriters or books. This happens because in general the market structure does not want to make reproductions of a work of painting. As a comparison, currently the copyright category of books and music has been guaranteed rights by the state through licensing, adaptation, and royalties. Conversely, works of art in all forms such as paintings do not get rights facilities like book and music creations. The painters do not realize that the creators of the paintings have the right they can get to improve welfare for themselves and to be passed on to their heirs. Thus, Law Number 28 of 2014 concerning Copyright (hereinafter referred to as the Copyright Law of 2014) in this case can be said to lack aspects of justice for the protection and recognition of the rights of the creators of painting works.

Painting is an art object with a complexity of value, therefore the determination of the price of a painting can have a fantastic selling value beyond the general estimate in assessing an object. The painting entitled "*Antre Mandi*" by Indonesian painter, Hendra Gunawan in the 1979 exhibition the painting was labeled at a price of 4 million until then in 1996 it was sold at a price of 245,750 SGD or around 2.3 billion Rupiah at Sotheby's auction house. At Sotheby's auction in 2016 another painting by Hendra entitled "*Ali Sadikin during the War of Independence*" was sold at the highest bid price reaching 33.2 million HKD or equivalent to 56.5 billion Rupiah, which in this case the selling value of Hendra's work increased more than 60 million times.⁵ In this case, Hendra as the creator of the painting work could not enjoy the increase in selling price.

When reviewing the sale of paintings by Indonesian painters, *Masterpiece Auction House* Singapore, one of the largest auction houses in Southeast Asia recently held an auction themed *Masterpiece: Southeast Asian, Chinese, Modern & Contemporary Art* which presented several works of art from Indonesian maestros who have gone global, such as Affandi, Ahmad Sadali, Srihadi Soedarsono, Basoeki Abdullah, and Hendra Gunawan.⁶ The works of Indonesian painters are in great demand by collectors of world paintings. This is evidenced by about 60% of the list of artworks from Southeast Asia at *the Asian 20th Century Art Sale* organized by Christie's Auction Hall in Hong

⁵ Tia Agnes, "Lukisan Hendra Gunawan di Pasar Internasional 60 Kali Lipat Lebih Tinggi", *Detik Online News*, August 7 (2018). Retrieved from <<https://hot.detik.com/art/d-4154542/lukisan-hendra-gunawan-di-pasar-internasional-60-kali-lipat-lebih-tinggi>>.

⁶ Oki Hajiansyah Wahab, "Masterpiece Auction House Singapura Lelang Lukisan Affandi dan Basoeki Abdullah", *Metro Suara Online* August 6 (2022). Retrieved from <<https://metro.suara.com/read/2022/08/06/174844/masterpiece-auction-house-singapura-lelang-lukisan-affandi-dan-basoeki-abdullah>>.

Kong in 2017 is the work of Indonesian painting artists.⁷ This shows that the development of the world market in painting is currently quite rapid, marked by the transactional significance between painters and collectors of paintings. In the event that there is no positive law in Indonesia regarding *royalty right* resale, if there is a resale of paintings by Indonesian painters, the creator cannot enjoy the proceeds of the sale.

Since 2014, the *International Confederation of Societies of Authors and Composers* (CISAC) and others have been actively campaigning to push *royalty rights* to the international copyright agenda, calling for legal reform so that fine art artists can benefit every time their creations are resold.⁸ Currently, a total of 94 countries have implemented arrangements regarding *royalty right resale*,⁹ including Germany and Australia. Germany regulates *royalty rights* resale in *Article 26 Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz)* 1965. According to a research report by Clare McAndrew and Lorna Dallas-Conte in *Implementing Droit de Suite (artist' resale right) in England, the royalty right resale management system* in Germany is one of the most efficient systems.¹⁰ In Australia, the *resale royalty right arrangement* is contained in the *Resale Royalty Right for Visual Artist Act* 2009. Australia in this regard is said to have the most developed system in the protection and mode of collection and distribution, including in terms of managing rights to cross-border transactions.¹¹ The absence of regulations regarding the protection of economic rights in the *resale* of painting works in Indonesia's positive law can be said to be a phenomenon of legal vacuum (*rechtsvacuum*). Therefore, Indonesia's position to provide further arrangements related to *royalty rights* resale on painting works is very important in efforts to protect the economic rights of the creators of painting works. Moreover, Indonesia already has an art market that can later strengthen the *royalty right resale* system to be applied in Indonesia so as to encourage idealization of regulations in copyright. Based

⁷ Kahfi Dirga Cahya, "Lukisan Indonesia di Balai Lelang Christie's", *KOMPAS Online*, October 27 (2017). Retrieved from <<https://amp.kompas.com/lifestyle/read/2017/10/27/191001420/lukisan-indonesia-di-balai-lelang-christies>>

⁸ Catherine Jewell, "The artist's resale right: a fair deal for visual artists", *WIPO Magazine*, June (2017). https://www.wipo.int/wipo_magazine/en/2017/03/article_0001.html.

⁹ Feny Aprianti, "Kemenkumham segera atur regulasi "resale right" bagi perupa", *ANTARA News*, July 22 (2022). Retrieved from <<https://www.antaranews.com/berita/3012257/kemenkumham-segera-atur-regulasi-resale-right-bagi-perupa>>

¹⁰ Clare McAndrew and Lorna Dallas-Conte, *Implementing Droit de Suite (artist' resale right) in England*. (London: The Arts Council of England, 2012), p. 65.

¹¹ Mickael R. Viglino, "The Reception of Droit de Suite in International Law: Diagnosis and Remedy", *Revista de Direito Internacional* 17, No. 3 (2020): 170-187. <https://doi.org/10.5102/rdi.v17i3.7066>

on this description, the author is interested in conducting further analysis related to the urgency of protecting economic rights in reselling painting works through the *royalty right resale* system if regulated in Indonesia's positive law as has been done by Germany and Australia.

Method

This study used a normative type of legal research. The approach that researchers will use in this study is a statutory approach and a comparative approach.¹² The statutory approach is used to find out how to regulate the economic right to resale of painting works in positive law in Indonesia. While the comparative approach is used to analyze how the *droit de suite* arrangement through royalty right resale in the positive law of Germany and Australia to obtain an overview for the improvement of positive law in Indonesia. This research uses primary, secondary, and tertiary legal materials.¹³ Primary legal material is authoritative legal material, secondary legal material is all law-related publications that are not classified as official documents, while tertiary legal material is non-legal material that functions to support analysis and identification activities. The data collection technique used is a literature study, literature study is used as a data collection technique in normative type legal research.¹⁴

Regulation of Economic Rights for Resale of Paintings under Copyright Law in Indonesia, Germany, and Australia

A. *Regulation of Economic Rights for the Sale of Paintings in Indonesia*

Painting is a copyrighted work that is the object of protection from copyright as stipulated in Article 40 paragraph (1) letter f of the Copyright Law of 2014. Painting as a creation must be expressed in tangible form as described in Article 1 point 1 of the Copyright Law of 2014. That is, painting

¹² Peter Mahmud Marzuki. *Penelitian Hukum*. (Jakarta: Kencana Prenada Media Group, 2014), pp. 133-135.

¹³ Marzuki, pp. 181-206.

¹⁴ Bahder Johan Nasution. *Metode Penelitian Ilmu Hukum*. (Bandung: Mandar Maju, 2008), p. 167.

can provide a benefit when it has been stated and has a form that can be seen or felt by the senses, not just as an idea. The characteristics of the copyright of the painting can be seen in terms of the protection obtained by the creator of the artwork. The form of protection in question is in the form of protection in terms of protection of moral rights owned by the creator and the use of economic rights by the creator or copyright holder. Economic rights in copyright law in Indonesia are generally regulated through Article 8 to Article 11 of the Copyright Law of 2014. Economic rights according to Article 8 are defined as the exclusive rights of creators or copyright holders to obtain economic benefits from works.

The right to distribute works is regulated in Article 9 paragraph (1) letter e. Distribution rights are rights owned by creators to distribute their works to the public either through sale, rental, or other forms. As stipulated in Article 16 paragraph (2) of the Copyright Law of 2014, copyright can be transferred or transferred, either in whole or in part due to, inheritance, grant, endowment, will, written agreement, or other causes justified in accordance with the provisions of laws and regulations. Copyright can be transferred due to a written agreement, where the transfer of copyright through this agreement can be done in the form of a sale and purchase agreement. The agreement in this case is subject to the elements of the agreement contained in the Civil Code (*KUH Perdata*) both through authentic deeds and under hand. The economic right in the resale of paintings is a right of the creators of works of fine art to a percentage share of the proceeds from the resale of their works of art in the art market.¹⁵ Economic rights to resale of paintings allow the creator of a painting work to obtain economic rights to the activity of selling his work in the secondary market. Economic rights related to the resale of painting works are not regulated in the Copyright Law of 2014. The transfer of copyright through an agreement contained in Article 16 paragraph (2) of the Copyright Law of 2014, one of which is a written agreement is often carried out using a sale and purchase agreement. This is in line with the provisions of Article 584 of the Civil Code where ownership of an object can be obtained through buying and selling. Then, according to Article 570 of the Civil Code, the owner may act freely on the property he owns as long as it does not contradict the laws and general regulations, and does not interfere with the rights of others. In other words, the creator no longer has commercial rights to his work when it has been transferred. So when a painting has been distributed to the buyer, the economic rights will be entirely in the hands of the buyer and so on. Thus, when a painting increases in price due to sales in

¹⁵ Viglino, "The Reception of Droit de Suite in International Law: Diagnosis and Remedy".

the secondary market, the creator cannot enjoy the benefits of the price increase.

In this regard, there is a doctrine called the *first-sale doctrine* (*exhaustion doctrine*) which states that the first sale of IPR goods by the owner or its licensee exhausts their right to control the subsequent sale of the goods.¹⁶ The United States as a country that does not apply *royalty right resale* considers that *royalty right resale* is a violation of the *first-sale* principle which results in a prevention of art buyers from having full ownership of the artwork concerned.¹⁷ In addition, this conflict also results because *the common-law* legal system is based on economic rights, not moral rights.¹⁸ In Indonesia, the principle of *first-sale* is regulated in the provisions of Article 11 paragraph (1) of the Copyright Law of 2014 where the right to distribute works or copies does not apply to works or copies that have been transferred ownership. In addition, it is also regulated in Article 17 paragraph (1) of the Copyright Law of 2014 that economic rights to a work remain in the hands of the creator or copyright holder as long as the creator or copyright holder does not transfer all economic rights from the creator or copyright holder to the recipient of the transfer of rights to the work, then in paragraph (2) it is stated that the economic rights transferred by the creator or copyright holder for all or part cannot be transferred a second time by the same creator or copyright holder. However, in reality countries limit the application of the *first-sale* principle to certain situations, this is done to protect the interests of IPR holders. Likewise, in *royalty right resale*, restrictions related to the *principle of first-sale* can be done to protect the economic interests of the creator of fine art works considering the nature of creation and distribution is different from other types of copyrighted works.

B. Regulation of Economic Rights for the Resale of Paintings in Germany

Germany as a country that adheres to the *civil law* legal system pours regulations regarding copyright into one law. Germany regulates copyright and related rights in a law called *Urheberrechtsgesetz* (*Act on Copyright and Related Rights*) of 1965 or commonly referred to as UrhG. Although Germany was one of the first countries to consider implementing *droit de suite*, the right

¹⁶ M Hawin and Budi Agus Riswandi, *Isu-Isu Penting Hak Kekayaan Intelektual di Indonesia*. (Yogyakarta: Gadjahmada University Press, 2020), pp. 38-39.

¹⁷ Michelle Janevicius, "Droit de Suite and Conflicting Priorities: The Unlikely Case for Visual Artists' Resale Royalty Rights in the United States", *DePaul Journal of Art, Technology & Intellectual Property Law* 25, No. 2 (2015): 383-428.

¹⁸ M. Elizabeth Petty, "Rauschenberg, Royalties, and Artists' Rights: Potential Droit de Suite Legislation in the United States, *William & Mary Bill of Rights Journal* 22, No. 3 (2014): 977-1009.

was not provided for in German law until 1965. Since the establishment of resale rights in 1965, the rules regarding resale rights have undergone changes in 1972 and 2006. As for the right to resale (*folgerecht*) regulated in subchapter 4 of the UrhG concerning other *rights of authors*, Section 26 concerning the right on resale (*right on resale*) in paragraphs (1) to paragraph (8). The right to resale is regulated by the German state based on the ratification of the Berne Convention into German national law. In addition, Germany as a member of the European Union also adjusted the rules regarding the right to resale with Directive 2001/84/EC on the Resale Right for the benefit of the Author of an Original Work of Art or referred to as the Resale Right Directive. As a result, the regulation regarding resale rights in Germany was amended in 2006.

Directive 2001/84/EC is based on several main objectives, among others to enable artists of fine art works to receive economic success from their works at the same level as other creators. In addition, the directive is aimed at eliminating anti-competitive practices and market distortions that result in the movement of sales to countries that do not recognize resale rights.¹⁹ This directive is also part of the EU's efforts to advocate for resale rights globally so that a harmonized instrument for the entire EU will strengthen the global interests of resale rights and will provide a competitive advantage for the EU.²⁰ The resale rights arrangements in UrhG are described as follows:

1. Definition

The right of resale in paragraph (1) of Section 26 of the UrhG is referred to as the *right on resale*. In this verse it is stated: “*If the original of an artistic work or a photographic work is resold and if an art dealer or an auctioneer is involved as purchaser, vendor or intermediary, the vendor shall pay to the author a share of the selling price...*”

It can be interpreted that the definition of resale rights in UrhG is if the original artwork or photographic work is resold and if the art dealer or auctioneer is involved as a buyer, seller or intermediary, the seller must pay to the creator a share of the sale price.

2. Covered works

In subsection (1) of Section 26 of the UrhG, resale rights are limited to original artwork or photographic works resold. Subsection (8) of Section 26 of the UrhG confirms that the resale rights provisions in Section

¹⁹ Anthony O’Dwyer, “The Artist Resale Right Directive 2001/84: Reflecting upon a Distasteful Encounter of Art and Commerce”, *European Intellectual Property Review* 40, No. 1 (2017): 21-40.

²⁰ Maximilian Gaber, “The Resale Right Directive: A Comparative Analysis of Its Implementation in Germany and United Kingdom”, Valentina Vadi dan Hildegard E.G.S. Schneider (eds.), *Art, Cultural Heritage and the Market: Ethical and Legal Issues*. (Heidelberg: Springer, 2014), pp. 297-298.

26 do not apply to architectural works and works of applied art. The UrhG covers only the original work and does not include copies, but the German interpretation of the original document is broad enough to include a "limited copy" interpretation of the *Resale Right Directive*. Copies can also be referred to as works of art if they have been certified by the creator and are limited in number.

According to *Article 2 of Directive 2001/84/EC*, works of art are defined as works of graphic or plastic art, this directive mentions certain works of art, namely pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware, and photographs). This list is not limiting. According to the directive, the term "*original*" has a very specific meaning and relates to works of graphic art or sculpture. The French collective management organization *Authors Society for Graphic and Plastic Arts (ADAGP)* notes that the authenticity requirements contained in this directive are not the same as those that depend on copyright protection. In this context "*original*" refers to a class of work created by the creator or a copy authorized by the creator, and not in the sense of creativity or effort expended by the creator in creating the work.

3. Subject of resale rights

Under subsection (1) of *Section 26* of the UrhG, resale rights are limited to the original artwork or photographic work being resold and if the art dealer or auctioneer is involved as a buyer, seller or intermediary. If the seller is a person acting in his or her personal capacity, the art dealer or auctioneer, who is involved as a buyer or intermediary, is jointly responsible alongside the seller; In their relationship, it is the seller who should be responsible for the payment itself.

4. Minimum selling price subject to royalty

Paragraph (2) of *Section 26* of the UrhG requires that under payment this resale right does not apply if the sale price is less than 400 Euros.

5. Calculation basis and threshold

In subsection (1) of *Section 26* of the UrhG, the amount paid is a certain part of the selling price after deducting tax. Paragraph (2) of *Section 26* of the UrhG explains the *amount* of the price portion in the resale of a work. The amount of payment for this right is determined based on a percentage of the sale price of the artwork. The payout percentage of resale rights is determined as follows:

- 1) 4% for the portion of the selling price up to 50,000 Euros
- 2) 3% for the portion of the selling price from 50,000.01 to 200,000 Euros

- 3) 1% for the portion of the selling price from 200,000.01 to 350,000 Euro
 - 4) 0.5% for the portion of the selling price from 350,000.01 to 500,000 Euros
 - 5) 0.25% for the portion of the selling price exceeding 500,000 Euros
- With the total amount of royalty resale rights should not exceed 12,500 Euros.

6. Nature of resale rights

The right of resale has an *inalienable* nature and the creator is not allowed to release his share first as described in paragraph (3) of *Section 26* of the UrhG.

7. Right to information and filing a lawsuit

In its application, resale rights are also equipped with the right to obtain information on transactions that occur. This is provided for in paragraph (4) of *Section 26* of the UrhG which states that the creator may request the provision of information from an art dealer or auctioneer about the creator's original artwork that has been resold with the involvement of the art dealer or auctioneer during the last three years prior to the request for information. Then, in subsection (5) of *Section 26* of the UrhG in the event that it is necessary to declare his claim against the seller, the creator may ask the art dealer or auctioneer to provide information about the name and address of the seller and the value of the sale price. The art dealer or auctioneer may refuse to provide information about the name and address of the seller if he pays for the share to which the creator is entitled. It is explained again in paragraph (6) of *Section 26* of the UrhG that claims as referred to in paragraphs (4) and (5) can only be filed through a collecting society.

Paragraph (7) of *Section 26* of the UrhG states that if there is reasonable doubt as to the accuracy or completeness of the information provided pursuant to paragraphs (4) or (5), *the collecting society* may request access to the account book or to any other document to be provided, at the option of the person who is obliged to provide the information, either to the collecting agency or to an authorized accountant or sworn auditor, designated by the person, to the extent necessary to ensure the accuracy or completeness of the information. In the event that the information turns out to be inaccurate or incomplete, the person who provided the information bears all costs of the examination.

8. Resale rights for foreign nationals

Section 121 of the UrhG on Foreign Nationals paragraph (5) explains that *foreign nationals are entitled to resale rights as provided for in Section 26* only if, in accordance with the notification issued by the Federal

Minister of Justice and Consumer Protection in the Federal Law, the state in which they are the state grants German citizens appropriate rights. This is in accordance with the provisions of *Article 14ter* paragraph (2) of the Berne Convention.

The term of protection and the terms of transfer of resale rights are not provided for in *Section 26* of the UrhG. With regard to the period of resale rights protection is granted up to 70 years after the death of the creator, just like copyright protection in general regulated in *Section 64* UrhG. Resale rights are irrevocable, but they are transferable after the death of the creator to the author's heirs, as applicable to copyright in general, which is regulated in *Section 29* of the UrhG.

Thus, the author analyzes that based on paragraph (1) of *Section 26* UrhG a painting work is an object covered by the protection of resale rights in Germany. The painting in this case must be original in the sense that it is not a copy or reproduction. The resale of this painting work is one that involves art dealers or auctioneers. Paintings that are given royalties on resale are works of painting with a price of more than 400 Euros, and the total royalties of resale rights must not exceed 12,500 Euros.

C. *Regulation of Economic Rights for the Resale of Paintings in Australia*

Australia adheres to a *common law* legal system which does not recognize any legal codification. In general, copyright law in Australia is regulated in *the Copyright Act 1968*. The rules regarding resale rights are regulated through the Resale Royalty Right for Visual Artist Act 2009 or commonly referred to as the Resale Right Act (hereinafter referred to as RRA). This law came into force on June 9, 2010. The development of *droit de suite* in *Australia provides an interesting contrast with the development of droit de suite* in Europe. Australia's resale rights laws are a result of Australia's concern for its domestic market. Australia has been wanting to address the issue of resale since 2002, when the Contemporary Arts and Crafts Research Report (Myer Report) found that the incomes of contemporary visual artists and craft practitioners in Australia were lower than those of the general workforce, and artists in other fields. The report outlines that the disadvantageous position of indigenous visual arts and craft practitioners in the market, and the broad financial and social obligations of indigenous artists to communities arising from communal ownership of traditional cultural and imagery property, have strengthened calls for the

introduction of royalty resale in Australia as a tool to increase indigenous artists' incomes.²¹

Much of the debate around resale royalties in Australia has to do with the potential impact resale rights can have on indigenous artists and their communities. Proponents of the scheme assert that resale rights play a role in addressing the losses of indigenous peoples by returning a share of the profits associated with the appreciation of artworks to their creators and descendants. As noted by the *Arts Law Centre of Australia*, there are works that initially sold at very low prices and sometime later resold on the open market at prices that could even break records. The resale rights arrangements in RRA 2009 are as follows:

1. Definition

Resale rights in RRAs are known as Resale *Royalty Right*. *Section 6* states "*Resale royalty right is the right to receive resale royalty on the commercial resale of an artwork.*" Resale rights according to RRA are defined as the right to receive resale royalties for commercial resale of artworks. Then, *Section 7* paragraph (1) further explains what is meant by artwork in this law. A work of art is an original work of fine art that:

- 1) made by artists or artists; or
- 2) produced under the authority of the artist or the artists.
- 3) The commercial resale of artwork is described in *Section 8* paragraph (1), namely if:
 - a. ownership of works of art is transferred from one person to another for monetary considerations; and
 - b. The transfer was not the first transfer of title to the artwork; and
 - c. Transfer is not one of the excluded classes.

Subsection (2) explains that the transfer of ownership of a work of art from one person to another in circumstances that do not involve the art market acting professionally in that capacity, is an exempt class of transfer. Paragraph (3) explains what is meant by the professional art market, among others:

- 1) auctioneer; or
- 2) owner or operator of an art gallery; or
- 3) owner or manager of the museum; or
- 4) an art dealer; or
- 5) other people involved in the business of trading works of art.

²¹ Allison Schten, "No More Starving Artists: Why the Art Market Needs a Universal Artist Resale Royalty Right", *Notre Dame Journal International & Comparative Law* 7, No. 1, (2017): 115-137.

2. Covered works

Section 7 paragraph (2) RRA, explains that works of fine art include, but are not limited to *artists' books, batiks, carvings, ceramics, collages, digital artworks, drawings, engravings, fine art jewelry, glassware, installations, lithographs, multimedia artworks, paintings, photographs, pictures, prints, sculptures, tapestries, video artworks, weavings, and any other things prescribed by the regulations.*

The types of artworks that apply the scheme are works of art whose ability of the artist is limited to generate benefits by exploitation of his copyright through reproduction, public performance, or broadcast.²² While there are exceptions to covered works as described in *Section 9*, there is no right of resale royalties on commercial resale:

- 1) a building, or a drawing, floor plan or model of a building; or
 - 2) circuit layout within the meaning of the Circuit Layout Act 1989; or
 - 3) manuscripts (in any form) of literature, drama or musical works.
- ## 3. Subject of resale rights

Section 19 of the RRA outlines that resale royalties on the commercial resale of a work of art are debts payable to resale royalty holders right on commercial *resale* by those who have an obligation to pay resale royalties. *Section 20* describes the obligation to pay resale royalties. Those who are jointly liable to pay royalty resale on commercial resale of artwork are:

- 1) seller or, if there is more than one seller, all sellers; and
- 2) any person acting in the capacity of a professional art market and as a realtor; and
- 3) if there is no such agent—any person acting in his or her capacity as an art market professional and as a buyer's agent; and
- 4) If there is no such agent—buyers or, if there is more than one buyer, all buyers.

Section 12 of the RRA defines resale royalty rights holders, in the event that a work of art was created by an identified artist who was alive at the time the artwork was commercially resold, royalty rights on such commercial resale are held by the artist, provided that he or she meets the *recidency test* at the time of commercial resale. However, if an eligible artist specified in the RRA is no longer alive at the time the artwork is resold, royalties on the resale are held by his heirs, provided he meets the *recidency test* at the time of resale and *succession test*. If the artwork was created by

²² Robert Dearn and Matthew Rimmer, “The Australian Resale Royalty Right for Visual Artist: Indigenous Art and Social Justice”, Matthew Rimmer (ed.), *Indigenous Intellectual Property: A Handbook of Contemporary Research*. (Cheltenham: Edward Elgar, 2015), p. 213.

more than one artist, and each artist is identified and alive at the time the artwork is commercially resold, royalty rights to such commercial resale are vested in each such artist, provided they meet the *recidency test* at the time of commercial resale. However, if any eligible artist specified in the RRA is no longer alive at the time the artwork is resold, royalties on the resale are held by his or her heirs by fulfilling the *recidency test* at the time of resale and *succession test*. Further arrangements on what is meant by artist identification, *recidency test*, and *succession test* are contained in Sections 13-15 of the RRA. Section 14 specifies the persons, legal entities and unincorporated entities that can be holders of this right. One of them is the requirement regarding reciprocal states, in accordance with Article 14ter paragraph (2) of the Berne Convention.

4. Minimum selling price subject to royalty

Section 10 paragraph (1) of the RRA clarifies that there is no right of resale royalties on the resale of a work of art at a sale price less than:

- 1) AUD 1,000 or, if the sale price is paid in a foreign currency, an amount worked at the prevailing exchange rate at the time of commercial resale equal to AUD 1,000; or
- 2) a higher amount if the amount is determined by regulations.

5. Calculation basis and threshold

In Section 10 subsection (2) of the RRA, the sale price on commercial resale of a work of art means the amount paid for the artwork by the buyer on resale including GST (tax system), but excluding the buyer's premium or any other tax payable on the sale. Section 18 describes resale royalties paid at a rate of 5% of the sale price at the commercial resale of artworks.

6. Nature of resale rights

Section 33 of the RRA provides that except to the extent permitted under the succession test, resale rights are *absolutely inalienable*, either by way of, or in consequence of, a sale, assignment, encumbrance, execution, bankruptcy, or otherwise.

7. Term of protection of selling rights

Section 32 of the RRA explains that resale royalty rights continue to survive in relation to a work of art until the end of 70 years after:

- a. if there is only one artist from the artwork—the end of the calendar year in which the artist died; or
- b. If there is more than one artist of that artwork, in relation to the proportion of resale royalty rights held by or through a particular artist—the end of the deceased artist's calendar year.

8. Right to information

Section 29 paragraph (1) describes requests for information related to the commercial resale of artworks. If the *collecting society* believes that a person is:

- a. seller under commercial resale of a work of art; or
- b. buyer under commercial resale of a work of art; or
- c. realtors or buyers under commercial resale of artwork; or
- d. an art market professional engaged in the commercial resale of artworks;

The collecting society may, in writing, require the person to provide information to the collecting institution in relation to the relevant commercial resale in order to determine:

- a. the amount of each resale royalty payable; and
- b. who is responsible for making payments.

Paragraph (2) also stipulates civil sanctions if a person or legal entity does not comply with the request.

Thus, the author analyzes that based on *Section 7* paragraph (2) of the RRA, a painting work is an object covered by the protection of resale rights in Australia. Paintings in this case must be made by the artist or produced under the authority of the artist, in the presence of commercial resale of the artwork. The resale of this painting involves a professional art market, such as an auctioneer, an art gallery owner or operator, a museum owner or manager, an art dealer, or any other person involved in the art trading business. Paintings that are given royalties on resale are paintings with a minimum price of AUD 1,000.

Legal Transplant in Royalty Right Resale Arrangements in Indonesia

Legal transplant efforts are needed to carry out a legal reform in the Copyright Law in Indonesia. Legal transplantation cannot be done by simply imitating or taking a legal provision from another legal system, but must take into account the conditions and culture of the community where the new law as a result of the transplant will be applied.²³ Otherwise, it will certainly lead to the domination of foreign systems and create gaps that make the law not applicable.

²³ Ahmad Fauzi and Asril Sitompul, *Transplantasi Hukum dan Permasalahan dalam Penerapan di Indonesia*. (Medan: Pustaka Prima, 2020), pp. 37-38.

The economic rights of creators in each Copyright Law have different arrangements depending on the goals and understandings adopted. Unlike moral rights, which have received the same viewpoint from the member states of the Berne Convention, different countries tend to have different views regarding economic rights. This difference is visible both in the terminology and scope of economic rights in each country. As for according to Djumhana & Jubaedillah,²⁴ in general, every country at least recognizes and regulates economic rights which include *reproduction rights*, adaptation rights, *distribution rights*, public performance rights, *broadcasting rights*, *cable program rights*, *droit de suite*, *public lending right*

The following is a tabulation of economic principles associated with the Copyright Law of 2014:

TABEL 1. General Principles of Copyright in Positive Law

Economic Principles	Provision
Right of reproduction	Article 9
Right of distribution	
Rental and lending right	
Right of communication to the public (making available)	
Adaptation right	
Droit de suite/resale right	unregulated

The Table 1 shows that the regulation on the principle of economic rights is not entirely regulated in Indonesia's positive law. As a country that has also ratified the Berne Convention, when compared to the economic rights arrangements in Germany and Australia, in general the economic rights arrangements between the three have similarities. However, Germany included the resale rights arrangement in the section of other rights of *authors* as well as Australia which made resale rights a specially granted right. As for Indonesia, in the 2014 Copyright Law there is no regulation regarding other rights owned or special rights for creators regarding resale rights.

For Indonesia, legal transplantation of resale rights arrangements is needed to protect the economic rights of painting creators in particular and fine art creators in general when there is a resale in the secondary market. The prominent difference in development qualifications between developed and developing countries ultimately encourages developing countries to harmonize their national laws to align with western legal principles to protect countries' economic interests. In the context of resale rights, it is necessary to understand

²⁴ Muhammad Djumhana and R. Jubaedillah, *Hak Milik Intelektual: Sejarah, Teori, dan Praktikanya di Indonesia*, (Bandung: PT Citra Aditya Bhakti, 1993), pp. 67-73.

the *state of the art* market in each country. Germany has a fairly good global share of the public auction market. This is evidenced by Art Basel & UBS Report data in *The Art Market 2021*. The global share of the public auction market by value in 2020 showed Germany accounted for as much as 3% of transactions.²⁵ The German art market generated a total of around 2.2 billion Euros in 2019, of which visual artists accounted for the lion's share of the art market turnover at around 39%.²⁶ Similarly, in *Art Sales Digest* by Furphy in Archer & M. Challis²⁷ shows Australia's success in 2017 and 2021 in auction sales volume since the previous peak in 2007, where in 2021 auction sales reached AUD 121 million.

Indonesia as a developing country certainly has different art market conditions when compared to Germany and Australia. The Indonesian art market can be said to have not contributed to the global share. Therefore, the application of *royalty rights* in Germany and Australia cannot be adopted casually. The *royalty right resale* model in Germany, which tends to pay attention to the value of social welfare and not to increase wealth alone, has a suitable application in Indonesia. Germany can be said to have taken the historical aspects of *droit de suite* into account, so there are *Sozialwerk and Kulturwerk schemes*, tariff scales from several price ranges, and a maximum limit on royalties that can be received. Germany in this regard can be said to consider the conditions of lesser-known artists so as not to cause a sharp gap with well-known artists in terms of resale rights royalty receipts. In line with this, considering that the art market in Indonesia does not yet have strength in the global realm and there are still many artists who are not well-known enough, the *royalty right resale* model in Germany needs to be used as a reference.

Germany has implemented arrangements regarding resale rights with its own national characteristics. Germany was also the first country to establish that subjects of resale rights have the right to consult and *obtain information*.²⁸ The right to obtain information on resale is part of the moral right of the creator in which each work retains an integral relationship with its creator, so

²⁵ Clare McAndrew, *The Art Market 2021*. (Art Basel & UBS Report, 2021), p. 107.

²⁶ Federal Ministry for Economic Affairs and Energy, "Cultural and Creative Industries Monitoring Report", 2020, p. 28. Available online at <https://www.bmwk.de/Redaktion/EN/Publikationen/Wirtschaft/2021-cultural-and-creative-industries-monitoring-report.html>

²⁷ Anita Archer and David M. Challis, "The Lucky Country': How the COVID-19 Pandemic Revitalised Australia's Lethargic Art Market", *Arts* 11, No. 49 (2022): 1-17. <https://doi.org/10.3390/arts11020049>

²⁸ Yi-Shan Tang and Hwang Ki-Sik, "The Resale Right Policies of the UK, Germany, France and their Implications for China", *Academic Journal of Korean Society* 39, No. 2 (2021): 277-246.

the creator has the right to request the provision of information from an art dealer or auctioneer about the creator's work that has been resold with the involvement of an art dealer or auctioneer. In the future Indonesia also needs to adopt the same, the right to obtain information on resale must be given to facilitate tracking for the implementation of resale *royalty rights*. Moreover, both Indonesia and Germany are countries that embrace the concept of *droit d'auteur* which places great emphasis on recognizing the moral rights of creators. In line with the results of the interview which stated that *the royalty right resale* arrangement in Indonesia should refer to *civil law* countries and should be an established country in its royalty collection mechanism.

Then, Indonesia also felt the need to adopt *Australia's royalty rights resale arrangement in terms of recognition of communal ownership of artworks and protection of resale rights for traditional artists*. *Collecting society* Australia is able to optimally cover and monitor the sale of traditional artists' copyrights. Indonesia also has the potential in the form of the existence of traditional artists, so that the *royalty right resale* model in the future is also expected to be able to accommodate traditional Indonesian fine art works. Given that the *royalty right resale* provisions were made by WIPO and the United Nations Educational, Scientific, and Cultural Organization (UNESCO) in the *Tunis Model Law on Copyright Law for Developing Countries*. Most developing countries also emphasize the protection of traditional artists in the grounds of regulating *royalty resale rights* to their countries. In addition, the Australian resale rights model that can be applied in Indonesia is the provision of fines and fines that are regulated in detail if there are violations of royalty rights resale. Conversely, the Australian scheme that Indonesia needs to avoid in regulating *royalty rights resale* is that there is no maximum limit on royalties that can be received. The absence of a maximum royalty limit allows the creator to receive unlimited profits from the proceeds of resale of his work. This can create a sharp gap among artists.

Resale royalty rights should be regulated into the Indonesian Copyright Law as Germany contains it in the country's Copyright Law because resale royalty rights are a special economic right, so it is necessary to revise the Copyright Law of 2014. Royalty rights resale arrangements *in the Copyright Law* in the future must also be complemented by implementing regulations such as Government Regulations and Ministerial Regulations which further regulate the amount and procedure for collecting royalties along with the establishment of institutions authorized to carry them out.

The Urgency of Regulating Resale Royalty Rights on Painting Works in Indonesian Copyright Law

Copyright gives an exclusive right to both the creator and the copyright holder to exploit their economic rights. However, the exclusive rights granted through copyright are not all owned by the creator, as is the case with the creator of the painting. A creator of a painting cannot reproduce his painting as a songwriter or book author can. If a creator of a painting works wishes to obtain economic benefits from his painting, then the creator must sell the painting to another party which results in the creator no longer having control over the painting. On the other hand, buyers who have become owners of painting works have the right to use the painting, including the right to resell. This sale can occur more than once, and usually in the resale the value of the paintings sold will increase. This increase in economic value can be enjoyed by the owner of the painting, and vice versa the creator of the painting cannot enjoy it. In this case, the right of the creator who has put his personality into a painting has been injured.

This is in accordance with the statement of WIPO²⁹, in the *Guide to the Berne Convention*, namely:

“... The painter or sculptor often sells his work cheaply in order to make ends meet. The work may pass through a number of hands and, in doing so, may considerably increase in value. It becomes a source of revenue for those engaged in sales (dealers, experts, art critics, etc.) and is often bought as a good investment. This provision therefore allows the artist to follow the fortunes of his work and to profit from the increase in its value each time it changes hands...”

That the creator (painter or sculptor) often sells his work at a low price to make ends meet. The work can pass a number of sales, and therefore can increase its value significantly and become a source of income for those involved in the sale (dealers, experts, art critics, etc.) and is often purchased as a means of investment. Therefore, *royalty right resale* allows artists to follow the fortunes of their work and benefit from an increase in value each time it changes hands.

The *droit de suite principle* is one of the basic principles of property law, especially for countries that adopt a civil law legal system such as Indonesia. In law, the position of rights on copyright is based on the concept of property law. The *droit de suite* is part of the property rights. *Droit de suite* is one of the characteristics of material rights, which is a right that continues to follow the

²⁹ World Intellectual Property Organization, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)*, (Geneva: WIPO Publication, 1978), p. 90.

owner of the object, or a right that follows the object in the hands of anyone.³⁰ So through this principle allows the creator to track the success of his painting work in the secondary market. Thus, the legal principles behind royalty *rights resale* arrangements are actually well known in Indonesia. This recognition of *the droit de suite principle* is the legal basis of the royalty right resale arrangement. *Resale royalty* rights have been maintained as both economic rights because they provide a benefit to creators. Nor an extension of personality *theory* in copyright, which states that the creator of a work never really gives up all his ownership (*property interests*) in work, because it is actually part of the creator's personality, considering that this right is *inalienable* and cannot be ignored (*unwaivable*).³¹ So that the *droit de suite* principle in *royalty right resale* has given the creator the right to get compensation on every resale of his work. *The droit de suite* in this case provides recognition of the right of artists to participate equally and fairly in the enhancement of the value of works of art.

Historically, *the royalty right resale* was a welfare right in response to the failure of the French *droit d'auteur* system to adequately reward visual artists for their creative endeavors.³² So far, dozens of countries that have introduced *royalty right resale* systems are mostly countries that adopt *civil law* legal systems rather than *common law*. This is mainly due to the difference in the concept of copyright of the two legal systems. The concept of copyright of the *civil law* legal system is *droit d'auteur*, with creator rights at its center, giving the creator certain natural rights to control the use of each item in the work that may affect his interests. The concept of *droit d'auteur* treats the work as an extension of the creator's personality. While copyright in *common law* adheres to the concept of *copyrights*, and the focus of copyright is to protect the economic rights of creators. Therefore, *resale royalty rights* can be widely applied in *civil law countries* because they are in accordance with the concept of *droit d'auteur*. Thus, Indonesia as a country that adheres to the *civil law legal system* should give the right to the creator to control the resale of painting works for the benefit of their economic rights through *resale royalty rights*.

According to John Locke in Nainggolan³³ the creator is like a worker, in return for the results of his work they are rewarded. The royalties that the

³⁰ Frieda Husni Habullah, *Hukum Kebendaan Perdata (Hak-Hak yang Memberi Kenikmatan)*, (Jakarta: Ind-Hil-Co. 2005), p. 62.

³¹ Alexander Bussey, The Incompatibility of Droit de Suite with Common Law Theories of Copyright, *Fordham Intellectual Property, Media, and Entertainment Law Journal* 23, No. 3, (2013):1066-1067.

³² Anthony O'Dwyer, The Artist' Resale Right: "The Greatest Good?", *Edinburgh Student Law Review* 3, No. 2 (2016): 129: 141.

³³ Bernard Nainggolan, *Komentar Undang-Undang Hak Cipta*, (Bandung: Alumni, 2016), p. 255.

creator receives are the remuneration of his intellectual work. There are two economic rationales for *royalty right resale* according to Schmidtchen and Kirstein.³⁴ First, artwork tends to become more marketable over time and after several stages of resale, but without *royalty right resale*, artists cannot benefit financially from subsequent art sales. Second, because of the stronger bargaining position of art dealers, artists tend to receive lower prices for their work than would be expected with an equivalent bargaining position. In short, resale rights serve to give the creator a direct claim to a percentage of the profits from subsequent sales, and thus compensate for the creator's lack of negotiating power.

The nature of the creation and dissemination of works of fine art has differences with other types of copyrighted works. Fine art works often exist in only one copy (original) and are not produced or distributed en masse.³⁵ The value of a work of art is usually based on the name of the artist (or certain circumstances such as the scarcity of available works or the death of the artist, but the artist (or his family) does not benefit from this increase in value. The main beneficiaries are sellers and their intermediaries (such as auction houses, dealerships, and galleries). With the existence of resale rights that are irrevocable, it will guarantee the creator or his family to benefit, rather than the owner of the work or copyright holder. Resale rights are economic rights, because they provide incentives to create and the ability to benefit from a creation. The right of resale is also a moral right, because it recognizes the ongoing relationship between the creator and his work. Resale rights will reward the creator and will provide incentives to provide support to the creator to continue producing the artwork. Just like other intellectual property protections, one of the ideas behind *droit de suite* is also based on providing incentives for creativity. The core goal of *royalty rights resale* is to create a fair environment where artists feel their efforts are protected and rewarded.

An optimal level of copyright protection will balance encouraging the creation of new works with ensuring economic benefits for the creator, and costs that limit public access to the work. Landes and Posner in Rushton³⁶ suggest that striking the right balance between access and incentives is a major issue in copyright law. An important perspective on the potential of *royalty right resale* can be gained by understanding royalty payments for authors and

³⁴ Schmidtchen Dieter and Roland Kirstein, Die EU-Richtlinie zum Folgerecht: Eine ökonomische Gesetzesfolgenanalyse, *Discussion Paper Series Saarland University, Saarbrücken: CSLE (Center for the Study of Law and Economics)*, 2001, p. 5-6.

³⁵ Vitaliy Kalyatin and Erik Valdes-Martines, "Droit de suite convention: to be or not to be?", *Information & Communications Technology Law* 29, No. 2 (2020): 121-134.

³⁶ Michael Rushton, "The Moral Rights of Artist: Droit Moral ou Droit Pécuniaire?", *Journal of Cultural Economics* 22, No. 1 (1998): 15-32.

composers that exhibit many of the same costs and benefits.³⁷ The debate over *royalty rights* resale is often viewed in terms of artists' economics in terms of its historical aspect, but *royalty right resale* is not only intended to provide financial support to artists. Rather, it is a means of countering what some consider to be a form of discrimination against artists in the copyright system.

Different income structures can eventually lead to the emergence of artist discrimination in copyright law. This disparity becomes evident when comparing the copyright protection afforded to different forms of art, such as music and paintings. For instance, music is created and widely distributed on the market, allowing users to access it through various channels like compact disks or subscription services such as Spotify and Apple Music. Copies of music are considered equivalent to the original, and users can enjoy the same experience regardless of the medium they choose.

On the other hand, works of art, particularly paintings, follow a different income structure. The value derived from an original work of art and its copies is not equal. Paintings are often exclusively crafted in their original form and are not mass-produced or widely distributed. This unique characteristic of art results in a discrepancy in copyright protection, as copyright law mainly revolves around the right to control reproduction (copying). Consequently, it can be argued that copyright does not offer adequate protection for valuable original works of art.

The implications of this disparity are significant. Artists in the music industry, benefiting from widespread distribution and reproduction channels, enjoy greater copyright protection for their works compared to artists in the realm of visual arts, who may find their creations vulnerable to unauthorized reproduction and exploitation. As a result, the notion of artist discrimination emerges, raising concerns about the equitable treatment of various art forms within the realm of copyright law.

Furthermore, the art market operates in two distinct segments: the primary market and the secondary market. In the primary market, artists showcase their works in studios or galleries during exhibitions, and collectors purchase the art directly from the artist. However, in situations where a particular artist's work garners significant interest from numerous collectors, making it difficult to acquire in the primary market, collectors may turn to the secondary market. Here, they compete with each other at auction houses, willing to spend more money to obtain the artwork they desire.

³⁷ Henry Hansmann and Marina Santilli, "Royalties for Artist versus Royalties for Authors and Composers", *Journal of Cultural Economics* 25 (2001): 259-281.

It is important to note that for a work to enter the secondary market, it must first achieve success in the primary market. This implies that artists need to consistently and successfully participate in exhibitions, attracting collectors in the primary market to build demand for their work. This dynamic creates a symbiotic relationship between the primary and secondary markets, with success in the former influencing the opportunities and prices in the latter. The Indonesian painting market has experienced rapid growth and development, as evident from significant transactions between painters and painting collectors, both domestically and internationally, as shown on Table 2.

TABEL 2. Sales of Paintings in the International Secondary Market

Title	Creator	Auction Board	Selling Price
Bathing in the Shower	Hendra Gunawan (1918-1983)	Sotheby's, Hong Kong	18 billion Rupiah
Kehidupan Desa Indonesia	Sudjana Kerton (1922-1994)	Sotheby's, Hong Kong	15 billion Rupiah
Ayam Jago	Affandi (1907- 1990)	Christie's, Hong Kong	3,9 billion Rupiah
Man From Bantul	I Nyoman Masriadi	Christie's, Hong Kong	2,5 billion Rupiah
Power Struggle	Yarno	Masterpiece, Singapura	200 million Rupiah

Source: CNN Indonesia, Tempo.co, Bisnis.co, Antaraneews (data processed)

Based on the Table 2, Yarno's painting entitled "*Power Struggle*" has become the target of a number of collectors managed to sell for 20,740 SGD or around 200 million Rupiah, which when it was still in the exhibition with the painting was only at a price of 9 million Rupiah.³⁸ This painting by Yarno is predicted to be increasingly hunted by collectors, but as quoted through medcom.id,³⁹ Yarno as the creator actually does not know this, because in general after the painting is sold by art dealers to collectors, the painter no longer follows the development of sales of his creation. In this case, it can be said that there is no longer a relationship between the creator and his creation

Sotheby's and Christie's are large international auction houses, so the success of artists whose works can be presented at the auction house is usually

³⁸ Zita Meirina, "Lukisan karya Yarno tembus Rp200 juta di Singapura", *ANTRA News Online*, May 1 (2014). <https://www.antaraneews.com/berita/432108/lukisan-karya-yarno-tembus-rp200-juta-di-singapura>

³⁹ K. Yudha Wirakusuma, "Lukisan Yarno Dihargai Kolektor Mancanegara hingga Ratusan Juta", *Media Indonesia Online*, May 3 (2015). <https://www.medcom.id/hiburan/kultur/gNQLmynK-lukisan-yarno-dihargai-kolektor-mancanegara-hingga-ratusan-juta>

international, or at least regional Asia and Southeast Asia, because both auction houses operate in Hong Kong. Hong Kong and Singapore themselves have developed art markets. Although Hong Kong and Singapore are jurisdictions that have not implemented royalty right resale, *it is possible that the works of Indonesian artists who have successfully sold in the Hong Kong and Singapore secondary markets will be resold in other countries that embrace royalty right resale*. Thus, when the selling value increases, the creator of painting works in Indonesia cannot enjoy resale royalties, because this right adheres to the principle of reciprocity. In addition to sales in the international art market, here are some sales in the Indonesian national art market:

TABEL 3. Sales of Paintings in the National Secondary Market

Title	Creator	Auction Board	Selling Price
Memanen	Ida Bagus Made Poleng (1915-1999)	PT Balai Lelang Larasati, Indonesia	500 million Rupiah
Barong Dance Performing Calonarang	Ida Bagus Made Poleng (1915-1999)	PT Balai Lelang Larasati, Indonesia	230 million Rupiah
Jatayu Di Atas Hutan Dandaka	Ida Bagus Made Togog (1913-1989)	PT Balai Lelang Larasati, Indonesia	200 million Rupiah
Pan Brayut di Tanah Lot	Ketut Budiana	PT Balai Lelang Larasati, Indonesia	135 million Rupiah
Jatayu Menyelamatkan Sita dari Rahwana	I Gusti Ketut Kobod (1917-1999)	PT Balai Lelang Larasati, Indonesia	120 million Rupiah
Balinese Traditional Market	Anak Agung Raka Puja	PT Balai Lelang Larasati, Indonesia	40 million Rupiah

Source: djkn.kemenkeu.go.id (data processed)

The Table 3 shows some auction data of painting works by traditional Balinese artists held in Bali. Traditional Balinese painting still exists and is able to compete with the existence of contemporary art and modern art that is growing rapidly. Traditional artists in this case do not get royalties from the resale of their works at auction houses because Indonesia has not regulated *royalty right resale*. In fact, the royalty right resale scheme can be used to encourage the progress of painting in Indonesia, including traditional painting, as Australia lays down one of the urgency of regulating royalty right resale in its country to protect and support the work of traditional Aboriginal artists.

The provision of *royalty resale rights* in the Berne Convention is optional, but this right is subject to reciprocity. This reciprocal rule is intended to encourage the recognition of *royalty rights resale* to countries that have not

included it in their respective legal systems.⁴⁰ The development of royalty right resale in *Australia has differences with the development of* royalty right resale in Europe. From an economic point of view, European countries including Germany are drawing the urgency of regulating *royalty resale rights* from the constraints to manage economic markets that spread among many countries. Meanwhile, Australia views the urgency of *royalty right resale* as a form of concern for the condition of its domestic market.⁴¹ In addition, the main purpose of regulating *royalty right resale* in Australia is to increase transparency in the Australian art market and suppress the suspicious practices of auction houses and the exploitation of traditional artists.⁴² This shows that the vital reason for the urgency of regulating *royalty rights resale* is related to the internal and external interests of a country.

According to the German Government's publication on the status of the German art market, the *Resale Right Directive* generally strengthens the German art market. Two-thirds of the beneficiaries are heirs of artists.⁴³ Similarly, according to *the House of Representatives Standing Committee on Communications and the Arts, the*⁴⁴ creative economy managed to contribute 5.2% of Australia's national economy. Based on data published by *the Copyright Agency*, in ten years of its implementation (2010 to 2020), the *royalty right resale* scheme in Australia has generated royalties of more than AUD 9 million with more than 22,300 resales, has benefited more than 2,075 artists.⁴⁵ Thus, it can be said that the *royalty right resale* scheme can have a significant impact on a country's economy. In addition to Germany and Australia, *royalty rights resale* is also regulated in African countries. According to *The Economic Implications of The Artist's Resale Right*,⁴⁶ the African art market is not well developed and represents less than 1% of the world market. However, due to

⁴⁰ Carlos Manuel Díez Soto, "Algunas Cuestiones A Propósito Del Derecho De Participación Del Autor De Una Obra De Arte Original Sobre El Precio De Reventa (Droit de Suite): Some questions concerning the artist's resale right (droit de suite)." *Cuadernos de Derecho Transnacional* 9, No. 2 (2017): 209-254.

⁴¹ Schten, "No More Starving Artists: Why the Art Market Needs a Universal Artist Resale Royalty Right", p. 121.

⁴² Dearn and Rimmer, "The Australian Resale Royalty Right for Visual Artist: Indigenous Art and Social Justice", p. 222.

⁴³ Gaber, "The Resale Right Directive: A Comparative Analysis of Its Implementation in Germany and United Kingdom", p. 301.

⁴⁴ House of Representatives Standing Committee on Communications and the Arts, 2021, *Sculpting a National Cultural Plan: Igniting a Post-COVID economy for the arts*.

⁴⁵ Viglino, "The Reception of Droit de Suite in International Law: Diagnosis and Remedy", p. 179.

⁴⁶ World Intellectual Property Organization, *The Economic Implications of the Artist's Resale Right, Standing Committee on Copyright and Related Rights*, Geneva 13-17 November 2017, p. 30.

the existence of reciprocal rights under the Berne Convention, *royalty rights resale* became very important for African artists. Traditional African artworks became valuable and traded on international markets. As Australia, with its resale rights laws, has sought to allow indigenous people to participate in national and international popularity. So, if an African country adopts royalty rights resale, African artists can partake in artwork traded in any other country that has adopted *resale* rights laws. It can certainly be an important source of income for African artists.

Based on *Global Contemporary Art Sales in a Creative Economy Statistics 2020*, the growth rate of the global contemporary art market has increased from 2000 to 2019, where the contemporary art market has earned 2 billion USD in the last 20 years.⁴⁷ That is, the activity of the art market has promising prospects for a country's economy. Furthermore, it is said that by 2030 Indonesia is projected to experience world-class economic expansion, where the creative economy sector needs to take advantage of this economic expansion.⁴⁸ This shows an opportunity for Indonesia to implement a *royalty right resale scheme* in its country to increase the country's foreign exchange. The results of research by UNESCO *and the United International Bureau for the Protection of Intellectual Property* show that countries that currently have rapid development in achieving progress and intelligence in the lives of their citizens are due to prioritizing the regulation of intellectual creations in literary and artistic works.⁴⁹ In addition, according to *the Information Technology & Innovation Foundation*, comparing the level of intellectual property protection (through the *Global Competitiveness Report, World Economic Forum*) and creative output (through *the Global Innovation Index*) shows that countries with stronger IPR protection have more creative output in terms of intangible assets and creative goods and services. Thus, the regulation and protection of IPR, especially copyright, will make creators get proper appreciation and encouragement from both the community and the state. Further impact, citizens in the country will have the spirit to create high-quality creation. Conversely, the denial of economic rights and moral rights of creators can reduce the motivation of creators to create. The low motivation of creators will have a broad impact on the collapse of macro creativity of the Indonesian nation.⁵⁰

⁴⁷ Tim Penyusun Pusat Data dan Sistem Informasi, *Statistik Ekonomi Kreatif 2020* (Jakarta: Kementerian Pariwisata dan Ekonomi Kreatif, 2020), p. 44.

⁴⁸ Jewell, "The artist's resale right: a fair deal for visual artists".

⁴⁹ Nainggolan, *Komentar Undang-Undang Hak Cipta*, p. 259.

⁵⁰ Paramadina Public Policy Institute, *Peran Strategis Kekayaan Intelektual untuk Kemajuan: Tawaran Agenda Perubahan Bagi Negara ASEAN*. (Jakarta: PPPI, 2019), p. 7.

As part of the creative economy, copyright protection is important to be implemented in order to encourage the country's economic growth. According to 2020 Creative Economy Statistics data⁵¹, the GDP of Indonesia's creative economy sector in 2010 to 2019 always increases, until in 2019 the creative economy sector reached 1,153.4 trillion Rupiah. Then, in the national export balance, creative economy exports contributed 11.9%. As for 2019, the number of people working in the creative economy sector is 19.2 million people (15.21% of the national workforce). The percentage of labor growth in the creative economy sector from 2018 to 2019 was 4.02%. The data shows that the creative economy sector has a significant influence on national economic development. As Lydiate argues in Grumbo,⁵² for the art market to function properly, there must be a fair return on returns. So, to encourage art production, artists should be given fair treatment under IP law through increasing the value of their work. Similarly, Prof. Sam Ricketson stated in the 2015 ALAI colloquium,⁵³ that copyright generally does not guarantee returns to other parties or that the returns will be shared fairly. In this colloquium, the international consensus agreed that overall, royalty schemes provide benefits for artists.

The *royalty right resale* arrangement will provide benefits to creators, including, first, empowering artists by allowing them to enjoy direct financial benefits from the success of their work. This can increase their income and thus artists can assert their interest more effectively. Second, it provides a stream of income to the heirs of deceased artists. Third, it gives recognition of the relationship between artists and their work. And lastly, it allows artists to benefit from reciprocal provisions when *royalty resale rights* are applied in other countries. In addition, the implementation of *royalty right resale* in Indonesia can also support the development of traditional art through providing more optimal economic benefits to traditional artists. The benefits that can be obtained by these artists are what ultimately encourage them to work. In addition, as Landes and Posner explain in *The Economic Structure of Intellectual Property Law*,⁵⁴ statutory support for artists can signal to society at large that art is a highly valued social enterprise. This can lead to a greater interest in art.

⁵¹ Tim Penyusun Pusat Data dan Sistem Informasi, *Statistik Ekonomi Kreatif 2020*, p. 53-55.

⁵² Mara Grumbo, "Accepting Droit de Suite as an Equal and Fair Measure under Intellectual Property Law and Contemplation of Its Implementation in the United States Post Passage of the EU Directive", *Hastings Communications and Entertainment Law Journal* 30, No. 1, (2008): 357-376.

⁵³ Schten, "No More Starving Artists: Why the Art Market Needs a Universal Artist Resale Royalty Right", p. 129.

⁵⁴ William M Landes and Richard A. Posner, *The Economic Structure of Intellectual Property Law*. (Cambridge, MA: Harvard University Press, 2003), p. 291.

A more favorable social environment will attract other artists and may ultimately increase competition.

In the event that there is no regulation regarding *royalty right resale*, it can result in less protection of the economic rights of visual art creators in Indonesia, especially when compared to royalty protection in other copyright categories such as music and books. In addition, the non-regulation of *royalty right resale* can result in a higher inequality of bargaining position between art traders and artists. Artists who have poured intellectual abilities into a work should benefit no less than art dealers. These things can then in an economic point of view cause a decrease in the enthusiasm of artists to create a work. For a country, the non-regulation of *royalty rights resale* causes that country to be unable to receive reciprocal rights as stipulated in the Berne Convention. If Indonesia does not regulate *royalty resale rights*, *Indonesia cannot protect the right to resell works of its citizens who experience resale in foreign secondary markets in countries that have adopted royalty resale rights*. So that the Indonesian artists cannot claim resale royalties. In the end, this causes Indonesia to be unable to maximize its source of income.

Conclusion

This study concludes that Indonesia's economic rights to the resale of painting works have not been regulated in the Copyright Law. Thus, when a painting increases in price when it is sold on the secondary market, the creator cannot enjoy the benefits of the price increase. While Germany regulates resale rights in the *Urheberrechtsgesetz* 1965 and Australia regulates them in the *Resale Royalty Right for Visual Artist Act* 2009, both countries include paintings as works covered by *resale royalty rights*. The *royalty right resale* arrangement in Indonesia will provide benefits to the creator especially in this case the painter because it provides an opportunity for them to benefit financially from the success of their work, so as to increase income. The benefits that can be obtained by artists are what ultimately encourage them to work, thus Indonesia's macro creativity will increase and can become the capital of national economic development. Conversely, the non-regulation of *royalty rights resale* can result in the optimal unprotection of the economic rights of art creators in Indonesia, which in turn can result in reduced creator motivation to create a work. In addition, creators of fine art works in Indonesia ultimately cannot claim royalty resale rights *in other countries because reciprocity rights do not apply to countries that have not adopted resale royalty rights*. This can certainly harm the economic rights of the creator and the Indonesian

economy. Thus, *royalty right resale* is important to be regulated in the Indonesian copyright law system.

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Acknowledgment

None

Funding Information

None

Conflicting Interest Statement

There is no conflict of interest in the publication of this article.

Publishing Ethical and Originality Statement

All authors declared that this work is original and has never been published in any form and in any media, nor is it under consideration for publication in any journal, and all sources cited in this work refer to the basic standards of scientific citation.