

Research on the Legitimacy of the Resale Right

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Abstract

The resale right system, first created in France in 1920, has a history of one hundred years and has been confirmed by dozens of national legislations. In general, the introduction of the resale right has become a trend in the legislation of various countries. But the universal establishment of the resale right does not necessarily mean that it has legitimacy. On the issue of whether the introduction of the resale right is justified, the views of supporters and opponents are tit-for-tat, and several major points of controversy have formed. By sorting out the disputes involved in the resale right system, clarifying the core problems of introducing the resale right, and demonstrating its legitimacy, it is reasonable and feasible to introduce the resale right.

Keywords: resale right, artistic work, copyright

Resale right, that is, the right of the artist or his heirs and legatees to claim the benefit of the value-added part of the resale of the original or manuscript of the artistic work.

"The provisions of a law, although appearing to be well-founded and consistent with each other in the light of various circumstances and the current legal system, may still be absolutely unlawful and unreasonable" (Hegel, 1961). The research on the legitimacy of the resale right discusses the dispute and theoretical basis for the existence and abolition of the resale right.

1. Controversy Over the Introduction of the System of Resale Right

As a foreign legal system, the introduction of the resale right must fully demonstrate the legal basis, legal culture, legal value, risk theory, policy science and development trend, etc., and eliminate all reasonable doubts.

The purpose of this paragraph is to think about some of the controversial issues that introduced the resale right, and to list, or state, analyze, or ask questions, in order to repeatedly debate and seek evidence, so as to make the related issues of the resale right more clear. The following are some of the issues that may be involved in the resale right:

1.1 What Are the Core Factors for the Appreciation of Artistic Works? Who Should Enjoy the Added Value of a Work of Art?

There are many factors that increase the price of works of art. The inherent value of works of art, the investment and operation of art auctioneers and collectors, as well as the aesthetic concepts of the audience of works of art, changes in consumer demand and the level of purchasing power, all contribute to the appreciation of works of art. played a vital role. After all, what are the core factors that add value to a work of art? In this regard, scholars have formed different views. There is a view that there is no necessary connection between the value of art and the price, and the appreciation of art prices is determined by the structure of the art market. (Jing, 2013) The structure of the art trading market is a "supply-locked market", which is a special market structure. In this market structure, the first-level supply of the market is locked in a relatively stable state. The combination of market competition and monopoly results in asset premiums due to supply lock-in, which improves market efficiency. (Wang & Lu, 2010) There are also views that the appreciation of art resale is caused by the speculation, publicity, and promotion of investors, and the art intermediary has paid for it, and it is reasonable to obtain benefits. (Sun, 2016)

It is true that the investment behavior of art intermediaries has profoundly affected the formation and fluctuation of art prices, but the core factor of art appreciation should be the creative work of artists. Propositionally, the

intellectual labor of the artist is the source of the value of a work of art. Artists are entitled to share in the value-added proceeds from the resale of artworks.

1.2 What Are the Main Problems Solved by the Resale Right System?

Resale right was first invented in France in 1920. Through two short stories, we can vividly understand the situation of the French art market before and after the establishment of the resale right. One is the story of Miller's suspended animation. Mark Twain told Miller's story in "Is He On Earth?" When Miller was young, his paintings were ignored, and his "Vessers" could not be sold for 8 francs. So he followed the advice of his friend Carl and suspended his death. After that, the price of his paintings soared, and he could only remain anonymous. The other is the story of Jean-Louis Foran. The French Impressionist painter Jean-Louis Foran's painting "A Painting of a Father" shows a scene where two young boys in shabby clothes are looking at a picture sold for 100,000 francs in the auction house oil painting, the author of the painting is their father. This phenomenon has attracted widespread attention from all walks of life in France, and finally gave birth to "the right to grant artists the right to receive royalties from their works", that is, the resale right.

See that the establishment of the resale right was a policy choice at the beginning, with the nature of "poverty alleviation", to compensate and comfort impoverished artists.

The lives and economic conditions of artists today are very different from those of a hundred years ago. The introduction of a resale right requires new and stronger reasons. The author believes that the purpose of the resale right system is to protect the artist's legitimate right to remuneration and to stimulate creation, and the core is the redistribution of interests. The resale right should be part of the author's copyright, and the author has the right to receive remuneration from the work he creates.

1.3 How Do You View the Different Attitudes of the Two Legal Systems Towards the Resale Right System?

Two legal systems towards the resale right system can be described as distinct. So far, the dozens of countries that have introduced the resale right system are mostly civil law countries, while in contrast to the common law countries, very few have established this system. This is mainly related to the different copyright cultures of the two legal systems.

The copyright culture of the civil law system is the author's right system, with the author's right as the center, giving the author certain natural rights to control the use of every item in the work that may affect his interests. The authorship system treats the work as an extension of the author's personality. The common law copyright culture is a copyright system, and the focus of copyright is to protect the economic rights of authors. The core culture of the copyright system is a utilitarian consideration of balancing the needs of authors and audiences. It is precisely because of the difference between the two copyright cultures that its influence is not only philosophical, but also manifested in the economic field, that is, the art trading market. (Gostin, 2008) Therefore, the resale right system can be widely established in civil law countries represented by France and Germany.

1.4 Legal Risks of Introducing the Resale Right System

"Compared to the risks to be regulated by legislation, legislation itself also has risks." (He, 2016) The main legal risks to be considered when introducing the resale right system are:

Introduction of the resale right violate the value hierarchy of the law of liberty > justice > order? Is it a breach of contract? Is it inconsistent with the principle of exhaustion of rights? Can the resale right be integrated into the copyright system? Can the overall rights and interests of artists be protected? Will it hinder the development of the burgeoning art market? Is it possible to achieve the original legislative intention of balancing interests and stimulating creativity? Whether it will trigger the moral hazard of the right subject to confirm the authenticity of the artwork... All these, in addition to the legal argumentation and analysis, also need to use relevant data and empirical analysis to solve. The solution of these problems awaits further research by experts and scholars.

2. An Analysis of the Legitimacy of the System of Resale Right of Works

2.1 Analysis of the Theoretical Basis

2.1.1 The Doctrine of "Labor Property"

In 1690, Locke published "On the Government" (Part II), proposing a liberal philosophy of natural law, advocating the conclusion of a social contract and the separation of powers in the state to protect people's natural rights (life, liberty, property, etc., collectively referred to as property rights). (Zhang, 2008) The theory of "labor property" is based on natural rights, and it is prophesied that labor belongs to the laborer. Based on the idea of complete freedom in the natural state of man, Locke proposed that people can freely dispose of their own person and property, and the labor that each person engages in is legitimately his own and his property rights. (Locke,

2005) Although Locke speaks of tangible things in general rather than abstract property rights, and "Locke's metaphor of hybridity, once stripped of its metaphysical context, produces too much of a rationale for intellectual property uncertainties and intractable problems". (DeHose, 2017) However, this doctrine speaks of the intrinsic significance of intellectual labor for intangible property. Obviously, a work that embodies human intellectual labor is "out of the natural state". The author exerts labor on the art work and makes it increase in value. The author deserves the property rights of his work, and the state is obliged to respect and ensure the succession rights.

"Intellectual creation is the 'source' of rights, and law is the 'ground' of rights." (Wu, 2005) The appreciation of works of art is affected by many factors: the number of works of art in existence, the demand in the market, the hype in the market, the rarity of the material, the subject matter, design, time, and integrity of the work. But in the final analysis, the intellectual labor of the author is the core factor that adds value to the work of art. The original works of art embody the author's emotions, thoughts and skills." High-quality works of art are not achieved overnight, and require artists to accumulate and innovate over a long period of time. Some works of art are even created by the artist's entire life." (Zhang, & Sun, 2013) However, the originals of art and photographic works or the manuscripts of text and musical works have the characteristics of rarity or uniqueness, difficulty in reproduction, high cost, etc. In addition, the price of art works is a dynamic process of fluctuation and change. It is often difficult to recover the cost through the sale of the original artwork and realize his property rights over the works.

Resale right, its essence is the right to claim remuneration, that is, a legal obligation. Authors are the source of works of art. They do not respect their intellectual labor, and do not protect their property interests, which will damage the rights and interests of authors, and suffocate the author's enthusiasm for creation, making the construction of socialist spiritual civilization a passive source water. Therefore, the introduction of the resale right system can be regarded as a compromise solution, without changing the existing legal relationship of property rights, the buyer of the artistic work can still freely dispose of the ownership of the property; Share certain benefits and protect their copyrights. At the same time, confirming the legitimacy of the author's right to remuneration, in line with the distribution principle of distribution according to work, and distributing a small part of the appreciation of the artwork to the author or his heirs, so that the author can earn money, avoid hardship, and be respected, which can be said to be meritorious. Great.

2.1.2 "Abstract" Theory

In his book "The Philosophy of Intellectual Property Law", De Joss treats intellectual property as an "abstract". "Unlike movable property law, intellectual property law sets rights over abstractions". (DeHose, 2017) "The term 'abstract' is an assumed category, a fixed independent existence, or, to put it another way, proper intellectual thought". (DeHose, 2017) According to Dejos, intellectual property rights are legally classified as intangible property rights. "Things related to these powers and the relations between individual actors arising on their basis are abstractions". (DeHose, 2017) Abstractions have an obvious role: they are the objects of intellectual property relations. "From a legal point of view, tangibles are not objects of intellectual property. But according to the law, abstractions can be discerned by tangibles. To some extent, intellectual property law requires abstractions before property rights are attached to them. have some 'tangible form'". Intellectual property is made tangible by the material requirements defined by the law on abstractions. (DeHose, 2017) De Joss pointed out that "property is a privileged mechanism, and as far as intellectual property is concerned, it has the effect of privilege". (DeHose, 2017) That is, intellectual property is a franchise based on abstract objects. "Modern intellectual property is the creation of property rights in something and the creation of a series of relationships between individuals". (DeHose, 2017)

De Joss's theory of "abstracts" constructs the intellectual property system in the philosophical world of metaphysics, and provides a useful perspective for us to understand the nature and laws of intellectual property. He defined the author's right to remuneration as a temporary franchise. The object of copyright is not a thing, not a tangible material carrier, but the object is only the carrier of the object. The object of copyright has "intangibility", that is, immateriality, which is the intellectual achievement without tangible form. The original work of art has two attributes: the object of property rights and the carrier of the work. (Chu, 2008) The object and material carrier of copyright are separable. The artistic work will not be destroyed by the sale of the original, but only become public information when the protection period expires.

For the transfer of the original works of art, the copyrights other than the original exhibition rights still belong to the author. Unlike the author of a literary work, who may receive royalties from the reproduction of the work, the author of a fine art work can only be paid from the first sale of the original work. In the resale of art, it is usually

the dealers and collectors who obtain high profits, and the author is excluded from the chain of interests. To add value to artworks is completely market behavior. In addition, art has a strong positive externality: additional benefits not reflected in market transactions. This will lead to insufficient supply in the art market, lower than the optimal output in society, and inefficient allocation of resources by the market. In theory, society should compensate creators of works of art, adjust market supply, and optimize resource allocation. Based on this, the introduction of the resale right system to give artists an expected right to request remuneration is undoubtedly justified.

2.2 Legal Value Analysis

2.2.1 Balance of Interests

"There are three means of reconciling law and society, namely 'legal fiction', 'equity' and 'legislation'. Equity of remedy must precede legislation of remedy." (Main, 1959) Interest balance is the basic value of modern intellectual property law, which aims to coordinate and balance the conflict of interests among creators, disseminators and users, so as to achieve the optimal state. "In the right allocation in a balanced state, the creator's right is the first right, and it is the original right, that is, the original right. The rights of the disseminator and the user are other rights." The intellectual property of this right and other rights should be reasonably shared, taking into account the interests of all parties. (Wu, 2005) The original intention of the establishment of the resale right is to improve the poor and poor economic situation of artists and eliminate the inequitable phenomenon of disparity in income. The living conditions of today's artists are not what they used to be, and this kind of situation will hardly occur. However, the balance of interests is the basic content and goal orientation of introducing the resale right. There are conflicting and converging interests among artists, dealers, and collectors, who pin their hopes on the sale and circulation of works for profit. Properly protecting the property rights and interests of artists can more fairly coordinate the conflict of interests among the three, and also realize the orderly structure of interests by protecting the original rights of creators, thereby realizing substantial justice.

2.2.2 Incentivize Creation

Intellectual property law has dual value goals of protecting authors' private rights and promoting social and cultural development." This dual value goal is realized based on the incentive mechanism and the adjustment mechanism of the balance of interests". (Feng, 2007) "The basic idea of incentive theory is that if the work is not adequately protected, the creator will not have enough motivation to create the work." (Feng, 2006) Authors of works of art such as fine art cannot enjoy the same remuneration status as other authors, nor can they Get paid for the use of your work. However, through resale of artworks, it may be worthless to a sky-high price, and all the high dividends will fall into the pockets of the dealers. This situation is greatly unfavorable to stimulate the author's creative enthusiasm.

"It is the emergence of rational people that forms the autonomy of private law in the modern sense." (Xu, & Pan, 2004) And "everyone tries to obtain economic benefits from economic-related activities, which is in line with the assumption of 'economically rational people'". (Feng, 2006) According to this assumption, the author's creation is of a profit-seeking nature. If the income obtained from the work is less than the cost of creation, the author may switch to other occupations based on rationality and self-interest, weighing the pros and cons.

It is true that getting paid is not the only motive for creation. There are also many authors who love artistic creation all their lives and devote themselves to art without seeking knowledge. However, creating works is not a simple mechanical labor. The works embody the creativity and inspiration of the author. The creation requires years of material accumulation and skill polishing, which is a hard work. Art works can only be earned by selling the originals, and the author needs to continue to create new works to maintain the quality of life. With full enthusiasm for literary and artistic creation, the author creates excellent works with hard work, but does not get the due reward, which will inhibit his creative enthusiasm. The introduction of the resale right system is to protect the artist's legitimate status of remuneration, "putting what he deserves into his purse". The legitimate interests of the artist are guaranteed, which will encourage him to devote more minds to literary and artistic creation, which is also conducive to the prosperity of the art trading market and the development of cultural and artistic undertakings.

2.3 Policy Scientific Analysis

Discussing the establishment and theoretical basis of the resale right system, the instrumental theory of property should be used to analyze it.

Instrumental theory of property pays more attention to the behavior of property, and reveals the nature of property at the level that property is considered to be an institutional mechanism. It focuses on the links between

property and individual behavior and choices, and between property and patterns of economic growth and development. At the same time, the instrumental theory of property supports the cost-benefit analysis of property protection. Most intellectual property has obvious economic characteristics, and it is reasonable to apply social cost analysis. However, "there are some rights in intellectual property to institutionalize values that are regarded by individuals as a social group as important and meaningful beyond what may be derived about their usefulness in terms of cost. any conclusions". (DeHose, 2017) These rights contain specific cultural and symbolic values, and are rights beyond cost, such as authorship rights, rights to protect the integrity of works, etc. "The existence of works of art may be considered to have intrinsic value, and the right to promote or protect works of art may be justified". The resale (DeHose, 2017) right system, which imposes taxes on the resale of the original works of art, will theoretically inhibit the trade in works of art. It may not have social benefits, but it helps to promote a certain intrinsic value. It is still a manifestation of property instrumentalism. But not subject to certain rights cost-benefit analysis.

The 21st century is the era of knowledge economy, and comprehensively strengthening copyright protection is the proper meaning and inevitable requirement of building a powerful modern socialist country. The resale right has been widely established abroad and has a growing trend. The introduction of the resale right is also conducive to protecting the property rights and interests of artists, thereby stimulating creation, adjusting the disparity of interests, optimizing the allocation of resources, and promoting China's cultural prosperity and social and economic development. And based on the principle of substantial equivalence in the Berne Convention, the introduction of the resale right system can guarantee the qualification of Chinese artists to enjoy the resale right overseas and the expected benefits they deserve. At the same time, the introduction of the resale right system is of profound significance for enriching and improving the copyright system, strengthening copyright protection, and giving full play to the value of intellectual property law as a policy tool.

2.4 Analysis of Legal Culture

Intellectual property has the nature of private law, and one of its basic values is the standard of private rights, which aims to fully create and protect the rights and interests of authors. Western intellectual property is culturally oriented by individualism, rationalism and liberalism. Chinese traditional culture takes "self-restraint and revival of rites" as the code of conduct, attaching importance to the interests of the collective and the country, and downplaying the individual's awareness of rights. My country and the West have completely different cultural backgrounds, so the transplantation of intellectual property law needs to focus on the issues of "rational choice" and "legal localization".

Resale right system was introduced into China as an "imported product", and "rational choice" is to consider whether the system's legislative purpose, legal basis, legal nature, legal content, and implementation effects are advanced, scientific, and reasonable; "Transformation" refers to considering whether the resale right is coordinated and whether it can be internalized and absorbed according to the current situation of China's specific economic and cultural development, social and legal environment, public policies, copyright management systems and mechanisms, and supporting systems .

China's lack of social identity for the introduction of the resale right system is manifested in differences in understanding and limited demand for the system. According to Professor Zhou Lin's research report, the surveyed artists and galleries are very ignorant of the resale right, and the vast majority of surveyed respondents expressed concerns about the introduction and implementation of the system. (Zhou, 2014) It can be seen that the subjects closely related to the resale right still have insufficient understanding of this system, let alone ordinary people who have no direct interest in it.

The year 2022 marks the 32nd anniversary of the promulgation of the Copyright Law. China's intellectual property system has grown from nothing and has been continuously developed and improved. The intellectual property legal system has gradually been completed, and the public's intellectual property awareness has been significantly improved. Since the "13th Five-Year Plan", my country's copyright registration system has been continuously improved, the copyright registration work has become more standardized, and the number of copyright registrations has continued to grow. Our country has established copyright collective management organizations such as "Audio Authors Association" and "Writing Authors Association". Since 1992, my country has joined seven international conventions including the Berne Convention for the Protection of Literary and Artistic Works and the World Intellectual Property Organization Copyright Treaty. My country's active participation in the formulation of the "Beijing Treaty on Audiovisual Performances" is a major event in copyright protection in the new era and is of milestone significance. But these are not enough to prove that the conditions for introducing the resale right system have been met. My country's copyright laws and regulations

have been established, but the whole society's awareness of respecting and protecting copyright has not yet formed. The art trading market, on which the resale right depends, lacks a scientific and standardized management and operation mechanism, and has not yet established a system integrating copyright registration, management, transaction and service for the orderly transfer of property rights.

Resale right system is an author's privilege system established in France, Germany and other countries. It should be noted that most of the countries that introduce the resale right are civil law countries, and these countries have a higher realistic basis for copyright protection. The provisions of the Berne Convention on resale right are optional clauses and apply the principle of reciprocal protection. The introduction of the resale right system should also consider the level of economic and cultural development in our country. "The legislation at this stage should not be too high, as long as it reaches the minimum level of protection stipulated in international conventions, and maximizes the coordination between the localization and internationalization of the law." (Wu, 2013) In view of the fact that the two major legal systems have not yet formed a unified understanding of the resale right system and the provisions of international conventions, and in light of China's current level of economic and cultural development, "the drafting team believes that the time for China to provide resale right protection is not yet ripe, and it should be postponed. Protection of Resale Right". (Li, Guan, & Tang, 2012) The author also agrees with this point of view, but advocates that the research on the resale right system should not be stagnant.

3. Conclusion

The introduction of the resale right system is one of the important issues in the revision of the Copyright Law, which has aroused heated discussions among relevant experts and scholars. The resale right has not yet entered the law, but it reflects the value goal of the legislators to "respond to the development of the times, take into account the demands of all parties, stimulate creation, and integrate the rights system". Rome was not built in a day, and the transplantation of foreign legal systems such as the resale right was not done in a day. It requires a gradual and localized process. By sorting out the results of the research on the legitimacy of the resale right, this paper proposes some controversial issues that need to be solved urgently, and demonstrates the legitimacy of the resale right system itself and the lack of the introduction of the resale right system in our country. I secretly think that the theoretical research and empirical analysis of the resale right still need to be further in-depth, with a view to introducing this system when the time is ripe. It is true that the resale right system still needs to be repeatedly demonstrated and analyzed. The author does not try to be superficial, and put forward some humble opinions on the legitimacy of the resale right. It is only a one-of-a-kind opinion.

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