

Research on Resale Right System

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Abstract

Droit de suite, named resale right in English, refers to the renewal right enjoyed by the author of the artwork of drawing a certain proportion of the increased value of the original work in the subsequent public resale of the work that has been sold. The establishment of resale right is based on the principle of fairness to protect the rights and interests of the authors of the artworks. But the establishment of resale right is bound to affect the interests of the middlemen and investors, and even the development and stability of the art market. Resale right originated in France, known as artist's resale right. Most civil law countries have provisions on resale right. Resale right has not been introduced into our country for the time being, and the debate on the legislation of resale right still exists. The focus of the debate lies in the balance of personal and social interests between the creator and the stability of the art market. Based on a systematic exposition of the basic theory of the system of resale right, the status quo of legislation at home and abroad, the value of the focus of controversy, and the development of the art market and the status quo of the legal norm in our country, this paper tries to present the theoretical research and the status quo of the system of recourse objectively and comprehensively, and to provide the reference of the necessity and rationality of the system of resale right in China.

Keywords: Droit de suite, resale right, artworks, copyright law

1. Introduction

The "poor artist" has always been regarded as a wound on intellectual property rights. Good artists suffer from hard life while creating artworks that are handed down from generation to generation. Most artists at the beginning of their artistic careers are unknown and have no other financial resources, even if the value of their works soars later, they have nothing to do with the creators. For example, in 2005, Huang Binhong's painting *Sleep-walking in Mountains and Rivers* was sold for 6.38 million yuan on the Chinese auction market, while in 2012, the auction price of the work was as high as 52.9 million yuan. Qi Baishi's landscape paintings was sold for only 4.7 million yuan in China Jiade (Weibo) autumn auction in 1994, and reappeared in Jiade autumn auction in 2011, with a drop hammer price as high as 169 million yuan. (Wang, C.-Y., 2012) Such a large price difference has nothing to do with the original author. On the one hand, the artistic level of the world varies with time, on the other hand, the absence of relevant systems for intellectual property rights is also an important reason.

Article 14 of the Copyright Law of China (Revised Draft for Review) stipulates the resale right system. After the first transfer of originals of art or photographic works or manuscripts of written and musical works, the author or his heirs or legatees shall enjoy the share of the value-added part obtained by resale of the originals or manuscripts through auction to the owner of the originals or manuscripts rights, which belong exclusively to the author or his heirs or legatees. The protection measures shall be separately prescribed by the State Council. However, there are many problems in this provision, such as the lack of clear relevant obligatory subjects, the narrow scope of application, the unclear calculation method of the resale payment, the uncertainty of the realization method of rights, the lack of relevant safeguard measures, etc., which may make it difficult to realize the resale right. It also fails to achieve the intended legislative purpose. (Li, H.-J., 2019) In the end, the 2020 revised version of the Copyright Law deleted the system setting of the resale right. Regarding whether our country should introduce the resale right system, we must consider two factors: 1. The development of the art market; 2. The value pursuit and stability of intellectual property law.

The good development of the art market itself will feed back to the art creators, and how to measure the interests of the two will be the key to deciding whether to introduce the resale right system. The introduction of the resale

right should not only pay attention to market development, but also consider the legal value of the resale right system itself. The decline of the market caused by the fear of middlemen and the escape of investors will sacrifice the interests of creators, which is undoubtedly contrary to the pursuit of fair value, and will condone speculation and speculation. A market that pays attention to speculation and despise creators is tantamount to rootless duckweed, which is difficult to last.

2. Overview of Resale Right

2.1 The Concept and Legal Attributes of Resale Right

There are different names of resale right. Professor Zheng Chengsi believes that the word of resale right originated from the French *droit de suite*. It was originally a term of the law of tangible property, which refers to the "resale right" of the original owner of the real right to his real property as the subject matter of pledge. Later, this term was used in the field of copyright and became a special right in the copyright law of some countries of the civil law system. (Zheng, C.-S., 2009)

Professor Li Mingde believes that the resale right is the right of continuation, which is the right of the artist and his heirs to obtain a certain percentage of income from the resale of the original artwork. The word comes from the French *droit de suite*, which means the right of following works. (Li, M.-D., 2010) Regarding the name of the resale right, Professor Zheng Chengsi also believes that the "continuation" in the right of continuation includes the meaning of interruption, but the right of resale refers to the interruption of things, the disappearance of rights, the reoccurrence of things, and the restoration of rights, which has no meaning of continuation. The resale right actually refers to the right to be re-exercised due to the occurrence of legal reasons after the right is interrupted for a period of time, so the use of the resale right is not accurate. Professor Wu Handong defines the resale right as: after a work of art is resold, if the buyer resells it to others at a price higher than the amount paid at the time of purchase, the author of the work has the right to share a certain percentage of the difference. (Wu, H.-D., & Hu, K.-Z., 2005) The definitions in the Glossary of Copyright and Neighboring Rights published by the World Intellectual Property Organization are as follows. The author, his heirs, or an organization designated by law, to claim a share of the right in each resale of the original work of art during the term of protection. This right may also apply to the resale of manuscripts. (Liu, B.-L., 2007) The general theory calls this system the resale right.

At present, the academic circles mostly classify the pursuit right into the category of copyright. There are four views on the legal nature of Copyright: the theory of moral rights, the theory of economic rights, the theory of comprehensive right (dual attribute theory) and the theory of legal creditor's rights.

2.1.1 Theory of Moral Rights

The theory of moral rights holds that resale right is a kind of moral rights. Resale right can not be transferred, abandoned or deprived. It protects the author's spiritual interests, and mainly reflects the personal dependence of rights. (Dai, Z., 2019) At present, there are still a few scholars, countries and regions that adopt the theory of moral rights. According to Article 57 of the original Macao copyright law, resale right has the attribute of personal rights, but this article was deleted in the subsequent legal amendment. The representative scholars in China who hold this view are Professor Wang Qian and Professor Yang Lixin. Professor Wang Qian believes that resale right is generally closer to the moral rights (Wang, Q., 2011). Professor Yang Lixin believes that resale right appears to be the economic right of artworks, but it is actually moral right. (Yang, L.-X., 2006)

2.1.2 Theory of Economic Rights

The theory of economic rights considers that resale right is a kind of economic rights, which is based on the protection of the economic interests of the author of the artworks to compensate the author's economic interests. The interests have the characteristics of inheritance and divisibility, which is essentially an economic claim based on copyright. Scholars who hold this view include Professor Li Mingde (Li, M.-D., & Xu, C., 2009) and Professor Wu Handong (Wu, H.-D., 2019).

2.1.3 Dual Attribute Theory

The dual attribute theory, also known as the comprehensive right theory, holds that resale right has the dual attributes of moral right and economic right. However, the dual attribute is not a simple addition of the moral right and economic right of works. The dual attribute is a subordinate concept parallel to the moral right and economic right. The attribute of moral right comes from non-transferability, and the attribute of economic right comes from the fact that the copyright owner can obtain property income based on the value-added of the original works in the process of circulation. Chinese scholars who hold this view include Zheng Chengsi (Zheng, C.-S., 2009) Ding Liying (Ding, L.-Y., 2007).

2.1.4 Theory of Legal Creditor's Rights

The theory of legal creditor's right holds that resale right is a claim right to enjoy the right to future economic interests, which is expectable. It is a legal creditor's right and belongs to a kind of claim right for remuneration. (Zhang, J., & Sun, L.-L., 2013) The future economic benefits of the resale right do not refer to the expenses paid by others for using the work, but to the corresponding proportion of the income obtained from the value-added part of the original work in the process of circulation. This is completely different from the traditional copyright, which obtains benefits based on the use of works. In essence, it refers to the possession of expected benefits in the future, which is uncertain when the original is sold. It increases the difficulty of actually obtaining benefits from the right of renewal.

2.2 Subject and Object of Resale Right

Resale right aims to protect the interests of the creators of art works in a weak position. Therefore, the right subject should be the creator himself. However, based on the extension of the protection of the legitimate interests of the creator, the successor of the creator can also become the subject of the right. The heir is not the original author of the artworks, nor is he involved in the appreciation of the value of the artwork. However, the law stipulates that he can enjoy the right of copyright through inheritance, because of a basic rule of copyright law, which is the economic right of copyright can be inherited. (Liu, C.-L., 2013) At the same time, the subject of the resale right shall not include the legatee and the donee of the original artwork.

The object of the resale right is the artwork, and the scope of the object of the resale right is limited to the original of the artwork, but there is a great controversy about which works belong to the artworks. According to Article 2 of the Measures for the Operation and Management of Artworks, artworks refer to paintings, calligraphy, seal cuttings, sculptures, artistic photography works, decorative art works and crafts works, etc., as well as limited reproductions of the above-mentioned artworks. Article 14-3 of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act) states that the right of resale applies to original works of art and manuscripts of authors and composers, but does not define the scope of artworks. With reference to the legislative provisions of various countries, the object of the resale right is the original two-dimensional or three-dimensional plastic art work, that is, the original copy of the so-called fine artworks, including pictures, collages, paintings, drawings, engravings, prints, flat paintings, sculptures, tapestries, ceramics, glassware and photographs. The Berne Convention and the Tunisian Model Law add the manuscripts of authors or composers to the protection of the resale right. The regulations on the object of resale right are also the same in various countries. Some countries explicitly exclude applied artworks (Spain), and some countries exclude applied artworks and architectural works (Germany, Denmark). The EU Resale Rights Directive specifically does not grant authors and composers the right to continue manuscripts. (Thomas, R., 2012) Controversy continues as to whether architectural works and practical artworks should be included in the scope of the object of resale right.

Some scholars believe that it is necessary to distinguish famous writers from ordinary writers in the creation of manuscripts. The consideration is that the manuscripts of the two types of writers have huge differences due to the difference in the popularity of the writers. There is an obvious logical error in this kind of view, which is to confuse the price of the original work with the legal nature; the establishment of the resale right is to protect the interests of the creator in a disadvantaged position. Treating them differently is contrary to the purpose of establishing the resale right and the pursuit of fair value; in fact, the emphasis on the protection of well-known artists will prompt emerging writers to flee the specific art market.

In the complicated art system, it is actually quite difficult to reasonably define the object scope of the resale right. The pursuit of the value-added benefits of the original artworks is based on the special nature of the original artworks. The value of it is based on the original which is unique, and the value of the copy that is separated from the original can basically be ignored. The creator of the artwork's benefit to the artwork is also limited to the sale of the original rather than the sale of the reproduction. The factors considered in the definition of the object are unified with the interest measurement of the resale right: on the one hand, the disadvantaged artistic creators should be protected based on fair value, and on the other hand, the impact on other participants in the art market should be considered. In essence, it is the measure of interests between different groups and the trade-off between legal value and market development.

3. The Pursuit of Fair Value in the Resale Right System

3.1 Equal Protection of Art Creators and Non-art Creators

There are three basic values in the legal system: order, fairness and individual freedom, these three constitute the purpose of the law and become the main criterion for evaluating the law. Chinese scholars of civil law made an

extended discussion on the value of law, and summarized it into five aspects, namely, justice, safety, efficiency, flexibility and brevity. (Xu, G.-D., 2001) Fairness and justice have important institutional significance as the primary value pursuit in the establishment of the resale right system. The value pursuit of fairness and justice is reflected in whether the income earned by art creators for their works is equal to that of non-art creators. Through the comparison of income, the disadvantaged position of art creators and the insufficiency of interest protection are presented. Van Gogh's Sunflowers and Jin Yong's Tianlongbabu both have high artistic value, and the dissemination of oil paintings is similar to that of novels, that is, through reproductions. However, the value of the original copy of Sunflower is much higher than that of the copy, and although there is a certain gap in value between the original manuscript and the copy of Tianlongbabu, it does not reach the totally different proportion of oil painting. At the same time, the core values of the two are also different. The core value of works of art such as oil paintings lies in the combination of the artistry of their content and the uniqueness of the original, while the core value of literary works such as novels lies in the uniqueness of their content. The difference in core value determines the value difference of its copies.

Because of the special unity of its content and carrier, the value of oil paintings and other art works will continue to appreciate in the process of circulation; On the contrary, novels and other literary works will reduce their value due to wear and tear in the process of circulation because of the non difference or weak difference of their carriers. Most of the ways for the copyright owners of oil paintings and novels to make profits are to sell their copyright at one time and obtain the corresponding price. However, based on the different forms and characteristics of works, the value of oil paintings and other works will change in the later stage, while the value of novels and other works is relatively stable. If they both depreciate over time, they both yield the same benefit. But in fact, oil paintings and other works will gradually appreciate in value, while novels and other works will remain constant. At this time, the copyright owner of oil paintings and other works will not be able to benefit from the increased value of their works. In essence, the copyright owner of oil painting works cannot benefit from the full value of the work because of the particularity of the art work, while the copyright owner of the novel work can benefit from the full value of the work. The missing benefits of art creators are actually captured by art middlemen and investors. Obviously, the law applying the same rule to different types of works actually leads to substantial inequality due to formal fairness.

3.2 Interests Balancing of Artists and Investors

The fair value of the resale right is reflected in two aspects:

1. The legitimate interests of artwork creators and non-art creators are equally protected;
2. Improve the income level of creators in the art market, and promote the equal status of art creators, middlemen and investors. In fact, the balance of interests between the creator of the artwork and the intermediate investor is a key factor in realizing fair value.

According to the trading habits of works of art, the creator will get the corresponding price after transferring the original work. Because of the uniqueness or limitation of the original artwork, the price is actually the buy-out price, and the creator is paid at the buy-out price. After the creator sells the work, he no longer has the right to benefit from the value-added part of the original work. Although the price changes in the art market mainly depend on the circulation of middlemen and investors. But its value foundation is still based on the artistic expression of the creator. The value-added realized by the intermediaries and investors' circulation trading houses is actually the result of the joint action with the creators, and the creators should naturally enjoy some benefits from the value-added part.

4. The Market Impact of the Resale Right System

4.1 Influence on Artwork Creators

The purpose of introducing the resale right system is to protect the creators of artistic works fairly. Giving art creators the right to benefit from the value-added part of the original works of art in the circulation process can effectively improve the income level of creators for individual works, so as to enhance the creative enthusiasm of creators, accelerate the inflow of talents, increase the total market volume, and then feed the creators of art works to realize a virtuous circle.

However, the establishment of the resale right is not beneficial to all creators of works of art. As the first country in the world to establish the resale right, France has a history of nearly a hundred years. Generally speaking, the situation of "poor artists" does not seem to have changed much, but has inspired more new problems. According to statistics, in France, two-thirds of artists received a follow-up payment of less than 125 euros in 2001, and among the top 50 artists who sold their works, the heirs of the deceased artist received 95.2% of the follow-up

payment, They earn ten times as much as living artists. In 2010, a total of 1,696 artists in France could claim resale rights, and they received an average of 3,542 euros per person. These average numbers mask an unequal distribution: 68% of artists belong to the group with an average income of 1,114 euros, while 1% belong to the group with an average income of 15,908 euros. As a result, these inequalities reinforce the gains for a few artists, while the situation for most artists, especially young artists, is not improved. After the establishment of the resale right system, the proportion of income obtained by intermediaries and investors from a single art transaction will be reduced. This makes the art market appear "Matthew effect".

4.2 Impact on Artwork Market Participants

Based on the comparative analysis of the benefits of novel non art works and oil painting art works, this paper demonstrates the interaction between the interests of creators and market development. Artists enjoy the copyright of their works of art and the benefits arising from their works when they are completed. The artistic value of literary works lies in the uniqueness of their expression content. In terms of artistic expression, there are great differences between them; But the two are essentially the same, both in the uniqueness and creativity of their expression, including the intellectual achievements of the creator. The two are similar in communication mode, which can be transmitted through reproduction and distribution. However, based on the particularity of its nature, the value of art works lies not only in the uniqueness of its content, but also in the unity of content carrier. The value of the original is far greater than that of the copy. The value of literary works does not depend on the unity of its carrier

The equal protection of the copyright owners of works of art will inevitably make the art middlemen and investors return part of the value they have obtained from the works of art, which will reduce the profits of the art market and affect the development of the art market. And it is also the main reason for opposing the establishment of the resale right. The good development of the art market itself will feed the art creators, and the expansion of the total market will attract funds and talents and promote the improvement of the industrial system. However, the participants in the art market are not limited to creators, but also circulation subjects such as middlemen and investors, and such circulation subjects may play a greater role in improving the value of works. Protecting the interests of creators will stimulate the creative enthusiasm of creators and improve the level of works, so as to promote the development of art market; But at the same time, it will also reduce the willingness of other market participants, thus hindering the development of the market.

5. Conclusion

Whether China should introduce the resale right system must consider two factors: 1. The value pursuit and stability of intellectual property law; 2. Development of art market. The establishment of the resale right is essentially the equal protection of art authors. The establishment of this system will also affect the stability and value pursuit of the intellectual property legal system. The introduction of the resale right system can not only realize the equal protection of art creators and non art creators, but also promote the equal status between art creators, intermediaries and investors. The realization of the value of fairness and justice plays an important role in stabilizing the intellectual property legal system and promoting the development of the system.

At the same time, the introduction of the resale right can not ignore the market development, but take into account the impact of the resale right system on other market participants. On the one hand, the establishment of the resale right system will stimulate the creator's creative enthusiasm, attract talent inflow and promote industrial development, so as to feed the creator and realize a virtuous circle. On the other hand, the establishment of the resale right system will reduce the participation, number of participants and capital inflow of middlemen and investors, which may lead to the contraction of the market; Moreover, it may cause existing middlemen and investors to greatly reduce or even give up their attention to entry-level or ordinary artists, which is counterproductive; In this regard, we can attract the transaction volume by setting a lower proportion of follow-up payment than that of well-known artists. As for whether the reduction of the proportion of follow-up payment will reduce the actual income, we should always follow up the market research, and if necessary, we can support the development of new artists through government subsidies.

Considering comprehensively, it is necessary and feasible for China to introduce the resale right system. Although there will be a painful period, it can be solved by other auxiliary means. At the same time, we should always bear in mind that although the value of works of art will increase with the participation of investors and other subjects, the market price of works of art is not equal to its artistic value. In the benign and healthy development of the art market, the creator and decider of artistic value should be creators rather than speculators. The fear of market decline caused by the flight of middlemen and investors at the expense of the interests of creators is undoubtedly contrary to the pursuit of fair value, and will condone speculation and speculation. The

market that pays attention to speculation and despises creators is no different from rootless duckweed, which is difficult to last for a long time.

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