

DROIT DE SUITE AND HOW IT OPERATES OVERSEAS

Droit de suite is the right of an artist to claim a share of the proceeds of each successive resale of the original of his works. It was first put into operation in France as early as 1920. In those countries which have adopted the right it is incorporated into copyright law. The exception is Belgium which has separate legislation modelled on the original French regulations.

Droit de suite is viewed as a right parallel to those rights enjoyed by authors and composers. What it attempts to do is to give the artist who creates a single object whose value derives chiefly from its uniqueness, a means of exploiting his works similar to that enjoyed by an author or composer for whom such value is derived principally from the number of copies sold or the number of public performances given. It gives the artist what is in effect the counterpart of the right of reproduction or performance. Although the debate over droit de suite often includes a discussion about the financial hardship of practising artists, the right was not originally intended as a means of assisting needy artists.

In a 1983 survey conducted by UNESCO and WIPO (the World Intellectual Property Organization), the bodies administering the two international copyright conventions (Universal Copyright Convention and the Berne Convention), and their later study of guiding principles on the operation of droit de suite (1985), thirty countries (and California in the USA) were identified as having droit de suite legislation. More recent literature identifies at least five other countries which have passed droit de suite regulations. However, as the 1985 study points out, at least eighteen of the thirty countries identified lack implementing legislation or procedures for levying the moneys due to the artist, so in several instances, the right is recognised in principle only.

As the legislation implementing droit de suite takes various forms, it is very difficult to give a summary of how the many systems operate in practice. The following is a brief outline only.

The Works

As a general rule droit de suite regulations do not apply to all categories of copyright works. The study conducted in 1985 indicates that droit de suite applies to all categories of intellectual works only in Czechoslovakia and Uruguay. In most countries it operates only in relation to original works of art. The traditional forms of artistic works such as paintings, drawings and sculpture are invariably included. The inclusion of other works is more controversial and varies between countries, for example, droit de suite may extend to original literary and musical manuscripts, and artistic works of which a small number of reproductions are made (tapestries, some sculpture, engravings). Architectural works and works of applied art (works that are not purely a means of expressing the artist's message but also serve a utilitarian purpose and are intended to be mass-produced) are often expressly excluded.

A comparison of droit de suite regulations is difficult because there is no internationally accepted terminology in this area and too often the legislation incorporates generic terms such as 'works of art' (eg Belgium), or 'works of the graphic and plastic arts' [plastic in the sense of arts concerned path modelling or with the representation of solid objects (eg France). In some countries the works of art are particularised (eg Chile specifies paintings, sculptures, drawings and sketches) but this is not the general rule.

The Sales

It is very rarely the case that droit de suite regulations apply to all types of sales whether by public auction or sales through dealers and private sales (see eg Brazil, Portugal and Uruguay), although in theory it should apply to all transfers of ownership (except of course the initial sale of the work by the artist). The reason is the impossibility of enforcement. Private sales in particular would be impossible to police without a formal registration system for all transactions involving art works. Public auctions on the other hand, and some sales through dealers appear in published material including advertising used to attract prospective purchasers. Consequently, public sales constitute the minimum field of application recognised by all droit de suite countries.

A large number of droit de suite countries also extend its application to sales made 'through dealers.

The 1955 study indicates that in the very few countries which have extended droit de suite to sales between private persons this "extreme position" had led to a "total paralysis" of droit de suite,

The Calculation

There are two general approaches taken by droit de suite regulations as to the basis on which the droit de suite levy is imposed. The simplest approach (and the most common) is to give the artist a right to a specified percentage of the total sale price, whether that sale price is above or below the price at which he originally sold his work (eg France). A more complex approach is to impose a percentage levy but only on that part of the sale price which represents the increase in price from the immediately preceding sale (eg Italy).

The problem in the latter approach is to determine who will bear the onus of proof that the work has increased in value. To place the onus on the artist makes the application of droit de suite impossible where there is no obligation on each vendor or purchaser to disclose the sale price. Another problem is whether or not provision will be made for inflation and currency depreciation.

In both approaches there is often a threshold sale price below which no levy is imposed. This avoids administrative costs which might in some cases exceed the income derived. Examples of the minimum prices are: DM 100 - Germany, 1,000 Belgian francs - Belgium, 100 French francs - France and \$US1,000 - California.

The percentage rate varies, but in most instances is 5% in systems adopting the total resale price calculation. A higher percentage rate (varying from 5% to 25%) is used by the value-added systems (those calculating droit de suite on the increase in price). In some instances the percentage rate is not fixed but is a progressive rate, the increases in the total sales price or the successive increases in the value of the work allowing a greater share to the artist. Belgium currently imposes a progressive rate. France adopted graduated rates in 1920 but abandoned them for a fixed rate in 1957,

The droit de suite payment is in general viewed as a levy deducted from the selling price rather than an obligation to be met by the purchaser and it is therefore chargeable to the seller. The exception is Hungary where the levy is payable by the purchaser, sales of works of art being a state monopoly.

As a vendor and purchaser may wish to remain unidentified, the auctioneer or dealer will be the only public face through which droit de suite may be imposed, and he is often charged with the responsibility to levy the sum due (eg Italy, France). In Belgium additional protection is given to artists by making all participants in the sale (vendor, purchaser and the public official conducting the sale) jointly answerable for the levy.

Who Benefits

The primary beneficiary of the droit de suite is the individual artist as the creator of the work and in some instances the right ceases on his death (eg Chile). However, most droit de suite regulations provide for the right to operate during the full term of copyright (usually life of author plus fifty years).

Droit de suite regulations invariably limit the author's ability to transfer this right during his lifetime, some (but only rarely) to the extent of limiting its transmission on death to the artist's heirs. The view is taken that if the right to receive the droit de suite payment was transferable by the artist, he would too often be pressured into assigning the right. The same argument is applicable to renunciation or waiver of the right by the artist, and some countries seek to limit even these acts.

Many countries extend the benefit of the right to foreign artists but most do so on the basis of reciprocity, that is, where their own nationals would benefit from droit de suite in that foreign country. The international copyright convention which includes a droit de suite provision (the Berne Convention) incorporates this principle of reciprocity (as opposed to the principle of national treatment more generally applied in the convention to authors' rights). Australia is a signatory to this convention.

Collection and Distribution

The primary difficulty seen by the opponents of droit de suite is the enormous task of collecting and distributing the payment to the individual artist. Indeed in some countries droit de suite is recognised only in principle because no procedure has been provided for the levying of the dues (eg Algeria, Czechoslovakia, Peru, Portugal) or where provided for, has not been implemented by the necessary further regulations (eg Luxembourg). In France, although the droit de suite legislation extends to both

auction sales and sales through a dealer, the failure to publish necessary regulations has prevented its extension in practice to sales made through a dealer.

It is recognised that the most efficient system is for collection and distribution to be handled by a central organisation, be it a government agency (eg Belgium) or, more frequently, an artists' organisation (collecting society). Commonly the auctioneer or dealer, as the party primarily responsible to impose the levy, forward the sums due to the collecting society for subsequent distribution. Reciprocal arrangements between national collecting societies allow local societies to represent foreign as well as national artists for collection purposes.

A more streamlined system has been developed in Germany after initial difficulties in implementing a system of collection. It was agreed to between the local artists' society and the art dealers' organisations in 1980. The agreement provides for an annual payment to the artists' organisation of a lump sum based on a percentage of the art dealer's turnover for twentieth-century works. The droit de suite levy is not calculated as a direct percentage of the selling price of each work. Galleries and auctioneers voluntarily provide information on works sold and sale prices which the artists' organisation then uses to distribute the levy. The 1985 study notes that at the time of the study more than 300 galleries and auctioneers had agreed to implement this system.

THE ISSUES

Set out here in brief outline only are some of the arguments raised for and against the introduction of droit de suite. They are intended merely to stimulate discussion and do not represent all the arguments nor any of the arguments in detail .

The Case for Droit de Suite:

(French theory) The artist's share in the proceeds of each resale of his works is viewed as a share in the exploitation of his works, a right parallel to the royalty an author receives when his work is reproduced and published, and the royalty received by a composer for public performances of his works. The present copyright provisions are seen as unfairly prejudicing the visual artist, the value of whose work depends upon its uniqueness rather than its mass production. Droit de suite is a way to ensure that the visual artist is fairly rewarded for his labours and is encouraged to create further works.

(German theory) This is the theory of "intrinsic value". It argues that the later increased value of the art work has always existed in the work, but in latent form, and is due solely to the artist's earlier labours. According to this argument it is unfair for speculators to benefit from this enhanced value to the exclusion of the creator of the work. Therefore, the artist should share in this recognition of the true value.

As works of art have an economic value which varies considerably according to public taste, droit de suite is inspired by a desire to compensate for the variations in public taste (that is, a lag in popular appreciation of the works).

Droit de suite is a method whereby remuneration is given to artists who sold their works under special circumstances, usually the pressure of necessity and without realising the true value of their work.

A system of copyright royalty such as droit de suite provides an attractive supplement (or alternative) to public subsidy. Allied to this concept is the argument that droit de suite provides in part a form of 'social security' for the artist who is given some economic return for his work in his post-productive life.

The knowledge that an artist would share in the profit gained from the exploitation of his art would encourage many artists to sell their works at a lower price and at an earlier stage in their careers. Increased sales could make more art publicly available and perhaps at prices more could afford.

A system of droit de suite would encourage artists to keep track of their works. This would be particularly important also for accounting, cataloguing, copyright, restoration and exhibition purposes.

The Case Against Droit de Suite

Droit de suite is based on the belief that a young artist sells his works at below their true value because of a slow popular understanding and appreciation of the artist who is ahead of his time. The problem with this argument is the relatively brief time period over which droit de suite operates (the copyright period of life plus fifty years) as compared with the time it takes for popular appreciation of works to catch up. Droit de suite assumes that works of art change hands rapidly enough to benefit artists who are still living or have been dead for less than 50 years. This likelihood may be small.

Droit de suite is a "favour" based on purely sentimental considerations which takes the form of a special 'private' tax.

At the time of the initial sale by the artist the value of the work is its true market value, that is, what it should have fetched at that time.

The effect of droit de suite is reduced in the modern art market with the increasing number of works held by single owners for longer periods, for example, the increase in corporate purchasers and in acquisitions by government.

Droit de suite does not assist those who really need help but those who are popular and who would be commanding high prices for their current works. Therefore it rewards the wrong people with probably inconsequential amounts at the wrong time of their lives. (Counter arg: this argument assumes the artist is still working in the same medium or style which has attracted critical acclaim or that his newer style is also acceptable. This may not be so. It also presupposes that the artist (or his family) has retained a large inventory of his works from which to profit.) (Another counter arg: droit de suite is a copyright right and the fact that only a small number of popular artists may benefit does not undermine the reasons for its implementation. It is a characteristic of copyright that the successful author obtains an appropriate income

for his work. Those who criticise this aspect of droit de suite are in effect criticising copyright.)

Droit de suite runs counter to usual notions of property ownership, that is, what a purchaser buys belongs to him, the purchaser assuming the risk of its value decreasing and taking the profit if its value increases. (Counter arg: an aspect of copyright is that it persists even after the physical object is sold. It is a right which is separate from the ownership of the physical object.)

If it is fair that the artist should share in the profit made from the exploitation of his works, the artist should also share in any loss.

Droit de suite is difficult to police and the administrative costs would be high. These difficulties may not be outweighed by the benefits to artists.

Droit de suite will inhibit the local art market and will encourage art sales to go "underground" or offshore. (Counter arg: The amounts collected under droit de suite are so small in relation to the sales price that they do not in practice serve to limit art sales. The indications from France, where droit de suite has operated since 1920, are that droit de suite has not hindered the French art market.)

Droit de suite. would discourage artists (or their families) from selling (often at a lower fee) to public bodies so that their works will be accessible to the public. To sell to such bodies would mean that the artist will lose out on further remuneration because it is very rare that these bodies resell their art works.

Artists could be better off making contractual arrangements with their purchasers providing for a droit de suite-like payment on subsequent resale. (Counter arg: this system has been tried unsuccessfully in the US, the main problem being the unequal bargaining strength of the artist and prospective purchaser and the difficulties in binding subsequent purchasers.)

Droit de suite discriminates against artists working in some mediums, for example works of monumental scale, too large or too expensive for normal resale, works in multiples~

Social Welfare measures for artists in need cannot be replaced by droit de suite.

Droit de suite is haphazard in its operation. Whereas the royalty payable to an author or composer is directly related to the number of books sold or the number of public performances, droit de suite operates only when works change hands, and when and how this occurs is entirely arbitrary. (Counter arg: the author's and composer's royalty is no less haphazard.)

The modern art market shows an increasing popularity for multiple art works, for example prints and posters, which goes further towards approximating the exploitability of multiple copies or performances characteristic of the other forms of works. Consequently there is a decreasing need for droit de suite regulations.

The Practical Issues of Implementation

Is a system of droit de suite desirable and feasible in the Australian art market, the relevant factors including:

- the size of the art market for resales of art by living artists and those deceased in the last 50 years;
- the nature of the Australian art market (whether most sales are private, at auction, through a dealer; the percentage of foreign works resold etc)~
- the possible effect of droit de suite on the Australian art market.

Which types of art works should be included in a droit de suite system?

To which sales should a droit de suite system be attracted - public, sales by dealers, private sales?

How should the levy be calculated - as a percentage of the sale price or a percentage of the increase in value?

Who should benefit from droit de suite - the artist and after him his heirs (if droit de suite operates for the full term of copyright)? Should foreign artists enjoy the right (only on the basis of reciprocity)? Should part of the moneys received be paid into a fund for the benefit of artists in need?

What should be the system of collection and distribution? - including issues such as the cost-effectiveness of the collection process.

Is there at present a society of artists which could take on the role of collecting society?

Is it appropriate that any such right be Incorporated into the copyright legislation or should it be regulated by special legislation? Should the legislation apply to works purchased before it came into effect?

Are there practical alternatives to droit de suite?

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