

Resale Royalty Right for Visual Artists in the US and China: A Comparative Study

Wang Suchen

China University of Geosciences (Beijing) 100083 P.R. China

Abstract: *This article focuses on the comparative analysis of resale royalty right in the US and China. It is structured in several parts as follows: this article first provides definition and origination of resale royalty rights. The Berne Convention is also introduced in this part to display the global efforts in protecting the right of creators. Then the legislation struggles and efforts in the USA and China are stated. The article also provides insights into the influence of the legislation of this right to the current art market based on the surveys conducted in different nations. Subsequently, the article contrasts the considerations of implementing resale royalty in China and the US. It concludes with a discussion of the future development of resale right legislation.*

Keywords: *Comparison Analysis, Royalty Resale Right, Legislation*

1. Introduction

The royalty right of resale, commonly known as the *droit de suite*, benefits creators for original artwork. As the name implies, this right entitles artists to share the proceeds from the resale of their successful works in the secondary art market, thereby offsetting any disproportionate differential price when works are sold by auction houses and galleries or private dealers.

This right first attracted many civil law countries which pay much attention to the protection of creators. Then many common law nations also codify this right into law. In 2001, a European Union (EU) directive codified the right in member countries, ensuring visual artists effectively benefit from the right in the whole EU. While as the first and third largest art markets in the world, neither the US nor China recognize resale royalty for visual artists in legal level.

This paper would mainly focus on comparing resale royalty in US and China from three major perspectives: the legal attempt carried out by US and China, the public perception as well as the attitude of the art market component about implementation of resale royalty legislation in both US and China. By comparing the struggle in implementing resale royalty in both the US and China, the article hopes to gain a comprehensive picture of the situation and indicate the future of legalized resale royalty for visual artists in the US and China.

2. Discussion

2.1 Resale Royalty Right in the Berne Convention

The Berne Convention for the Protection of Literary and Artistic Works, which was first adopted in 1886, offers sample language for the protection of works and the rights of their authors. It helps creators such as authors, poets and painters control how their works are used, by whom and on which terms. It includes provisions of minimum standard and also the special provision for developing countries to adapt to local conditions.

The resale royalty right originated in France at the end of the 19th century. The private sponsorship and state funding system declined, and artists were forced to turn to the open market to sell paintings in order to survive. Most artists are at a disadvantage in terms of information and bargaining power in transactions (Fatemeh, A., & Saeed, M, 2013.). Hence, it is necessary to sell their works at a lower price to a collector. Since the sale of the original artwork is often a one-off, the subsequently soaring price of the original artwork only benefits the middlemen, leaving the artist unable to benefit from the increasing value of his or her work.

In France in 1920, the system of resale royalty right was stipulated to guarantee the right of artists to benefit from the price when their works are sold again (Wang, G. H., 2010.). The German system is most complete and has become a necessary reference for the establishment of renewal rights in other countries.

The Article 14ter of Berne Convention contains language on how to implement resale royalty right. Over 179 countries have ratified, or signed onto the Bern Convention, including the USA and China, who did so in 1988 and 1992 respectively. But the Bern Convention is not self-executing, while it provides detailed information on resale right clause, actual integration of this provision in domestic law and the rules but be drawn up individually by different governmental councils.

2.2 Legislation Attempt of Resale Royalty Right in the United States

Implementation of the resale right in US was championed in the late 1960s when artists “began to consider alternatives to time-honored art world practices.” (Laurel, W. S, 2019) In 1973, prominent art collector Robert Scull famously sold a Robert Rauschenberg ‘combine’ artwork, entitled Thaw, at auction for \$85,000, at almost ninety-five times more than his original purchase price. Scull purchased the combine from dealer Leo Castelli about fifteen years earlier for only \$900. After the sale, Rauschenberg confronted Scull, exclaiming on the unfairness of Scull reaping profits from Rauschenberg’s artwork and artistic genius while the artist himself was left out of partaking in this money. As a result, the idea of offering resale royalties to visual artists gained a prominent new advocate and was placed in the spotlight in the U.S. However, the justifications provided for the right did not prove to be compelling for the country’s legislation or general market-oriented mindset. The notion of artists sharing in the profits of secondary market sales has been deemed of little importance, and the idea that “the resale right weakens the market” and places an undue burden on other art-market players has so far won out. (Laurel, W. S., 2019)

The only successful act in USA that introduced resale rights was the passage of the California Resale Royalty Act 1977 (CRRA). However, the law was later found unconstitutional in a case involving *Close v. Sotheby’s*. In 2018, the Ninth Circuit Court of Appeals virtually eradicated the law on the basis that it was preempted by federal law under the 1976 Copyright Act. Specifically, under the first sale doctrine (17 U.S.C. § 109(a)), a copyright owner has exclusive control over distribution of an artwork until he places it in the stream of commerce by selling it. Finding that the CRRA fundamentally reshaped the contours of federal copyright law’s existing distribution right, the Ninth Circuit held that the California law was preempted under 17 U.S.C. § 301(a). The CRRA is now only applicable to the sales of a small number of artworks sold between January 1, 1977 and January 1, 1978. (Laurel. W. S., 2019). The CRRA decision suggests that the implementation of Resale Royalty can only be achieved through federal legislation.(Laurel, W. S.,2019)

Congressman Henry Waxman submitted Visual Artist Residual Rights Act in 1978 and this act initiated an attempt to legislate at the federal level in the United States. In 1990, Visual Artist Rights Act (VARA) was finalized (Metzger, R. S., Richard, D. G., & Figueras, D. 2012.). It is worth noting that Article 608 of VARAs act requires the United State Copyright Office to research on the feasibility of resale royalty right protection laws.

The first feasibility study, concluded with the 1992 publication... Based on the provision below, the United State Copyright Office conducted a comprehensive study and published the research report in 1992. The U.S. Copyright Office pointed out that there is no sufficient economic and copyright policy justification to establish the resale royalty right law in the United States (Butler, R. P., 2002). The office was also worried that enacting a resale royalty may bring adverse effects to visual artists, because the sale price of art in the primary market may fall due to the influence of this right.

In 2013, the U.S. Copyright Office (the “Office”) published *Resale Royalties: An Updated Analysis* to summarize the development and practice of resale right protection since the 1990s. The Office believes that visual artists are at a disadvantage compared to other authors. Generally speaking, even if the works created by visual artists are popular, they cannot share the long-term benefits brought by the success. However, literary works and musical works can be copied in large quantities and sold to consumers, thus sharing proceeds for a long time.

The United States has not yet mandated resale royalty right at the federal level. The latest efforts to establish resale royalty rights in the U.S. have been made through the proposal of the American Royalties Too (ART) Act. (Laurel. W. S, 2019) Nevertheless, American artist organizations, legislators and scholars have been discussing this for a long time.

2.3 Legislation Attempt of Resale Royalty Right in China

The first copyright law in China was formulated in the early 90s. China joined the Berne Convention in 1992, but the recognition of the resale royalty right in the Berne Convention is conditional and not enforceable, that is, only when the author's domestic law recognizes this protection may be claimed in member states. And the degree of protection shall be limited to the degree permitted by the law of the country in which protection is requested.

In China, the first person to propose the resale right was Zuoren Wu, who was the former chairman of the Chinese Artists Association. After the copyright law was promulgated in September 1990, Zuoren Wu solemnly proposed to conduct research on renewal rights at a symposium organized by the National Copyright Administration. China's first copyright law took effect in 1991; the latest draft with revisions to the copyright law includes language regarding *droit de suite* legislation to this country (Zhe, D., School, L. & University, A. M. 2017). However, the draft has not been further reviewed only if the draft is proved by the State Council, it could be presented to the National People's Congress Standing Committee for consideration.

2.4 Comparison of Resale Royalty between China and US

1) The Public Perception of Resale Royalty in US and China

In the United States, the public perception regarding resale royalty seems to be favoring the interests of artists. Art experts and lawyers recognize resale royalty as a basic right for creators and they argue that artists are ought to enjoy certain economic interest in exploiting their works, which is protected by intellectual property law. (Tarsis, I, 2020) Additionally, resale royalty right intends to address the perceived injustice of not being able to reap benefits from the increase in the value of their artworks, that might have been sold for a lower price in the first sale of their works. (Tarsis, I, 2020) But the public opinions also argue for a more convening access to the information about its real implementation. The US House of Representatives and the US Senate introduced the Equity for Visual Artists Act which would require the bill which would amend the existing copyright law to include a resale royalty provision. Specifically, the public points out that an informational deficit, which it terms the information problem, looms over the resale royalty right. In addition, the scholars and lawmakers must have access to information about sales of artwork in order to evaluate the effect and efficacy of the right in practice (Turner, S. B, 2017).

The majority of public opinion in China turns to have a gloomy expectation towards implementation of a resale royalty right. Although it is not clear how many artists or their descendants would benefit from the proposal but give that 20th-century Chinese painting and calligraphy have comprised one the most active categories at auction in recent years, observers say it would have a negative impact on the market. Similarly, Eugene Low, a Hong-Kong based intellectual property lawyer at Mayer Brown JSM, says that the legislation could address the problem of fake works coming up for auction in China. "The auction companies will have trace the original creator or their work is genuine." However, some experts also deem it as a positive development of cultural market in China: Rogier Creemers, an expert of Chinese copyright law at the University of Oxford's Center for Socio-legal Studies states that increased protection for artists reflects China's desire to move up the value chain, away from mass-produced goods, instead, China wants to foster an 'advanced cultural market. (Katie, H, 2013).

2) The Legislation Attempt Carried out in US and China

In the USA, the objective is to develop a unified legal work for local exchanging. The main element would be the appearance in the demand for this intermediary function has been stimulated by the increasing fragmentation. The legislation this right would need to be based on the current situation of designing scientific resale royalty (Ran, Y.,2015).

When it comes to the Chinese legal attempt, the National Copyright Administration would release the first draft in 2012 and ask for public comments openly. If it received the ideal outcome, it would be the first time that the first copy right of pursuit would be introduced into the field law, which aroused heated discussion among Chinese art-world. Moreover, once the details of the right are further drawn up by the State Council, there would be a quite positive expectation on better implementation of resale royalty in China. (Chun-Xin, L. U., 2014).

3) The Art Market Components

The art market components (galleries, auction houses and private dealers) in China share the same attitude with the public perception towards resale royalty. Xuejin Gan, the chairman and general manager of Huachen Auction commented that the move to impose a resale royalty is “absurd”, “unfair” and “unwise”. “It will limit the trading interest and enthusiasm of collectors and artists” in his post on the popular microblogging site Sina Weibo (China’s counterpart of Twitter). Two of China’s biggest auction houses—China Guardian and Beijing Poly declined to comment on this issue. (Katie, H., 2013) The auction industry expert, Ji Tao also stated that “droit de suite may stifle the development of the market” in the China Culture Daily newspaper in December 2013. However, he added that: “From the point of view of the artists and authors, droit de suite is a good thing, because every transaction means gains”. (Katie, H., 2013)

On the other hand, in the US, the attitude held by auction houses, galleries as well as art dealers towards resale royalty is almost the same with China. As the implementation of resale royalty would require large action houses (those that sell over \$25 million in artwork annually) to pay a royalty upon selling an artist’s at auction for more than \$10,000. These auction houses would have to pay seven percent of the total price of the artwork to a collecting society, which would be established to monitor sales and to collect and distribute royalties. Consequently, auction houses and galleries strongly defend their interest by standing against the implementation of resale royalty in the US. (Turner, S. B, 2012). The fight put up against enforcement of the California resale royalty in the case involving *Close V. Sotheby’s* shows how much opposition the initiative faces from the members of the art trade.

3. Conclusion

On the whole, the implementation of resale royalty has gradually become a legislative trend. The Berne Convention provides support for resale royalty right, but the protection standards are loose and can be decided by member states. The European Union promotes the regional unification of the resale rights system with the EU Resale Rights Directive. Even the UK was able to integrate with the EU norms and begin collecting resale royalty from sales that took place through public auctions. Different countries have different attitudes towards resale rights, and discussions are intense (Gao, Y, 2016).

Common law countries advocate the free movement of property and have reservations about the right to renewal. For example, the United States believes that this system will hinder the circulation of works of art and improve efficiency and deviate from the basic principle of the free circulation of property, and thus reject it. California included the resale royalty right into the "California Right of Renewal Royalties Act", which was deemed unconstitutional in 2012. But it has not yet been recognized (Stanford, J. D., 2003).

China is still in the beginning session of implementing resale royalty. There are plenty of similarities existing in both China and the US’s attitude towards implementation of resale royalty. The legal attempt of its final establishment is still in its process. With the further development of China’s art market as well as the globalized art market, the implementation of resale royalty would not remain to be a conception.

References

- [1] Butler, R. P. (2002). *How to register your work with the U.S. copyright office*. *Knowledge Quest*, 30, 47-48.
- [2] Chun-Xin, L. U. (2014). *On the controversial issues of resale royalty and legislative responses*.
- [3] Fatemeh, A., & Saeed, M. (2013). *Artist's resale royalty (comparative studies in european union law, france and uk)*.
- [4] Gao, Y., Stoner, K. J., Lee, A. T. L., & Clark, S. G. (2016). *Rhino horn trade in china: an analysis of the art and antiques market*. *Biological Conservation*, 201, 343-347.
- [5] Irina Tarsis. (2020). *Droit de Suite: Let's talk about Artist's Resale Royalty Right*.
- [6] Laurel, W. S. (2019). *It's Not That Easy: Artist Resale Royalty Rights and The ART Act*
- [7] Metzger, R. S., Richard, D. G., & Figueras, D. (2012). *When more produces less: california's it terms and conditions produce less competition and lower value*. *Procurement Law*.
- [8] Ran, Y. (2015). *Discussion on the necessity and feasibility of the resale royalty legislation*. *Journal of Shandong Youth University for Political Science*.
- [9] Stanford, J. D. (2003). *Economic analysis of the droit de suite– the artist's resale royalty*. *Australian Economic Papers*, 42(4).

- [10] Turner, S. B. (2017). *The artist's resale royalty right: overcoming the information problem*. *UCLA Entertainment Law Review*, 19(2)
- [11] Wen, L., & University, Z. G. (2017). *International legislation on resale right and its influence on China's follow-up law*. *Journal of Zhejiang Wanli University*.
- [12] Wang, G. H. (2010). *The resale royalty right and its economic effects*. *Journal of Economic Research*, 15(2), 171-82.
- [13] Zhe, D., School, L., & University, A. M. (2017). *Application scope of droit de suite in china—comments on the draft amendment of "copyright law"*. *Journal of Dalian University of Technology*.