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Droit de Suite

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An economic perspective for a recurrent issue: the legitimacy of the resale right.

“I’ve been working my ass off for you to make all this profit. The least you could do is send every artist in this auction free taxis for a week. “

Robert Rauschenberg to Robert Schull

NB: Schull originally bought the artwork 900\$ in 1958 and resold it for 85000\$ in 1973

(quoted by Wu 1999: 531)

Synonyms Resale right, droit de suite, follow-up right

Definition* Resale right consists of a small percentage of the resale price that art market professionals pay to artists at each resale of their works with the involvement of an auction house, gallery or dealer.

Introduction

The Resale right was the subject of much debate in Europe at the turn of the 21st Century when, the legal framework was harmonized. In the rest of the world, some leading art-market countries such as the United States or China are still reluctant to adopt it. Debate about the opportunity to implement a resale right is commonly structured around two main axes. The first discusses whether visual artists get or not profit from the resale right. The second deals with distortions of trade and competition within different countries this right could give rise to. Whereas numerous governmental reports and academic researches concern these two axes, focussing on the effects and consequences of the implementation of a resale right, fewer works deal with its economic rationale. It appears that no real market failure affects the art market. Probably, the record of lower costs of its implementation than initially expected and the symbolic reward given to the artist through the resale right contribute to explain the movement for its implementation on an international level.



Fig 1 Jean Louis Forain (1852–1931) ‘Un tableau de Papa.’ Lithography

[\(http://bibliotheque-numerique.inha.fr/collecton/12406-un-tableau-de-papa-1ere-planche/\)](http://bibliotheque-numerique.inha.fr/collecton/12406-un-tableau-de-papa-1ere-planche/)

According to the legend, the story began in France with an engraving by Forainⁱ untitled ‘Un tableau de Papa’, depicting two ragged children observing through a window a painting. This scene, which is said to have inspired the resale right, referred to the sale of the Angelus by Millet at a record priceⁱⁱ whereas his granddaughter lived in the greatest poverty, selling flowers in the street.

The resale right was at first established in France by the law of the 20 may 1920ⁱⁱⁱ. According to the law, artists and their beneficiaries recover from a small percentage of the resale price of their creation, for a limited period of time, each time their artwork is re-sold through an art market professional^{iv}. Moreover, this right is non transferrable and inalienable.

Belgium (1921) and Czechoslovakia (1926) followed soon the French legislation adopting similar rules. Internationally, the Berne Convention for the Protection of Literary and Artistic Works included

this right^v in 1948 after the proposal in 1928^{vi} by the French to add it to the convention. Nevertheless, its implementation remains optional and reciprocity between countries is required for the right to be claimed: “(the right) may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed”. Moreover, the convention pointed out “the procedure for collection and the amounts shall be matters for determination by national legislation”.

Practically, until the new millennium, the resale right was implemented in a small number of countries. In Europe, the resale right was enforced just in nine countries^{vii} of the 15 European Union (EU) Member States, moreover practices were very dissimilar regarding the minimum threshold, the rate in force, the sales concerned (only public auctions in Belgium and France) and even the management of the rights (mandatory, collective or individual) (Raymond and Kancel 2004). Outside Europe, some countries had introduced the right in their law but without an effective implementation^{viii}. This right was not recognised in leading places for the art market, notably the United States (excepted in California). Mexico and Venezuela were the rare countries outside Europe where the right was implemented.

At the turn of the millennium, different events reactivated the debate. In 1996, the European commission proposed a new directive to harmonise the practices in Europe and the Council adopted it in July 2001 (article 48 of the DAVSI Law implementing the directive 2001/84/EC). It plans the payment of royalties on the basis of a scale beginning at 4% for works of art over 3,000 Euro to 0.25% for works worth over 500,000 Euro or up. All professional resale are affected (auctions and galleries sales). Moreover, the right is transferred to the heirs for a period up to 70 years after the artist's death. The total amount of the right payable to the artist or his family cannot exceed 12,500 euro. Some adaptations had been allowed in some countries that did not recognise the right previously, notably the UK^{ix}. The new law brought many discussions either in countries that had supported previously the law such as France because of its extension to art galleries. Obviously, the debates had been even stronger in countries such as the United Kingdom, a crucial area for the art market, where the right was not recognised theretofore (Dallas Conte and Mc Andrew 2002; Ginsburgh 2005, 2008; Kirstein and Schmidtchen 2001; Pfeffer 2004). Despite the stormy discussions surrounding its implementation in the UK at the start of the 21st century, Britain's exit from the European Union some twenty years later - the Brexit - did not lead to a reconsideration of its existence across the Channel.

European harmonization sent out a signal and since then, a growing number of countries have followed. According to the DACS report, in 2023 over 90 countries have implemented some form of resale rights. New-Zeland was one of the last to adopt it. China and the United States are among the diehards, although discussions were opened at one point. During the revision of the copyright law^x in China in 2013, the resale right was introduced in a draft amendment but this attempt finally failed. The United States, major place for the contemporary art market, which was against the resale rights (Landes 2001), opened briefly a discussion. A report published in December 2013 by the US Copyright Office recommends Congress to consider enacting a resale royalty for visual artists. The latest efforts to establish resale rights in the U.S. have been made in 2014 through the proposal of the American Royalties Too Act. (ART Act), but it failed (Petty, 2014). It does not exist a resale right at a Federal level. California which was only the state to apply this right since 1977 in a soft version was struck down in a 2018 court decision, on the grounds that the California Resale Royalties Act (CRRRA) is preempted by federal copyright law^{xi}.

The debate about the opportunity to implement a resale right is commonly structured around two main axes presented below. The first discusses whether visual artists get or not profit from the resale right. The second deals with distortions of trade and competition within different countries this right could give rise to. Whereas numerous governmental reports and academic researches concern these two axes, focussing on the effects and consequences of the implementation of a resale right, fewer works deal with its economic rationale as it is shown in the last section.

Resale rights: fortune or lacklustre profit for visual artists?*

Discounting effect*

Resale rights are introduced in order to increase the artist earnings; nevertheless, such an introduction tends to lower the level of prices on the market of first sale. Under an hypothesis of rational expectation, it is showed that the buyer takes into account the resale royalty he will pay in the future, and then deducts its discounted value from the initial price he would have accepted to pay without such a right. Thus, the wealth an artist can expect from his initial sales is lowered, (Filer 1984, Karp and Perloff 1993, Mantell 1995, Perloff, 1998).

In the long term, the profitability of the situation depends on artist behaviour towards risk. If he is risk adverse, then the introduction of a resale right can induce two bad consequences. Firstly, the artist has no choice but to accept a risky lottery instead of a sure income. And usually, it is easier for collectors compared to artists to bear the risk, because there are often wealthier than the artists, they are more able to diversify their portfolio (Filer 1984, Karp and Perloff 1993, Mc Cain 1994). Secondly, there is what Kirstein and Schmidtchen call a paradox of 'risk-aversion', that is to say the artist's lifetime utility may be lowered even if the resale royalty and the incentive effect had a positive net effect on his monetary lifetime income. This result appears when the income of the artist increases over time: because of risk aversion the utility function is concave, then an additional euro when the income is low can bring more utility compared to a situation where the income is already high (Kirstein and Schmidtchen 2001).

Nevertheless, the hypothesis of risk adversity is controversial: many works show that a growing number of artists enter the occupation even if the income distribution is strongly biased towards the lower end of the range. An explanation could be that artists are true risk lovers^{xii} or that there is a probabilistic bias (Menger 2006), artists overestimate their chance as players use to do in a lottery. More recently, Wang (2010) showed that the introduction of a resale rights increases the artist profit but lowers the consumer surplus, the whole effect on the social welfare being negative.

Perception costs*

The costs of the implementation of the system are usually deducted before the distribution of royalties then, the benefit for the artists might be lowered by important costs of perception. According to some authors these costs are quite high (Ginsburgh 2008; Graddy et al. 2008) whereas others underline the equivalence with perception costs for other intellectual rights, between 12 and 14% in France (Adagp 2022, 2021, 2020) and 15% in the United Kingdom (DACs 2021). A similar fuzzy conclusion is done by a European Commission report (2011). Whereas some inefficiency in the administration of the system in some countries is recorded, the conclusion remains optimistic, underlying the necessity for an exchange of best practices.

Few winners*

Moreover, as just underlined, cultural markets are structured as stardom markets, that is to say small differences in talents lead to huge differences in earnings: "sellers of higher talent charge only slightly higher prices than those of lower talent, but sell much larger quantities; their greater earnings come overwhelmingly from selling larger quantities than from charging higher price" (Rosen 1981). An immediate consequence for the art market is that a large percentage of artists will never benefit from the resale market. Available data about the resale rights distribution among artists supports this phenomenon in Australia (Stanford 2003). A study about the UK art market in 2006/2007 showed an average payment by work of £693; nevertheless for 85% of the items, the average payment by work was only £249 versus £3,430 per item for the remaining 15% (Graddy et al. 2008). In 2021, the median royalty payment per month was 298€ (DACs, 2023). In France the average amount is 3,218 euros per author with large inequalities in distribution: 70% of artists earn less than 1,000 euros, and 5% 15,000 euros or more. In 2016, eight artists earned more than 100,000 euros from droit de suite, and only two living artists feature in the top 20. (Farchy 2017).

Unwaivability, two sided effects*

Another ambiguity lies in the unwaivability of the resale right (Hansmann and Santilli 2001). Some people argue that this unwaivability is necessary for protecting the artist against an unbalanced negotiation with gallerists. A limited number of gallerists face the vast population of artists. Then, because of an asymmetry of bargaining power, gallerists pay the minimum to the artists who have no choice but to accept. According to this reasoning, the discounting effect described in the previous section cannot happen, gallerists cannot lower the price on the first market with a resale right as it is yet fixed at the minimum. Consequently, resale right is finally helpful for artists. The difficulties of the Projansky agreement could illustrate this unbalanced negotiation and the need for unwaivability. According to this agreement, the artist benefited from some moral rights and would receive 15% of the appreciated value each time a work was transferred; nevertheless, despite a large publicity this agreement did not encounter a large success. There is also a dark side of unwaivability. Notably, it deters artists to signal the quality of their artwork. According to the theory, the more an artist trusts in his production, the higher would be the amount of the resale right he requires (Hansmann and Santilli 2001). Nevertheless, as the authorities fix the latter, the signal is no longer relevant.

Visual artists earning regarding other cultural workers*

A central claim for the resale rights rationale is that visual artist cannot benefit from usual protection provided by copyright (reproduction, representation, etc.) as other artists do. A comparison is not easy to conduct, the business models of the different cultural areas being different because of the nature of the product. Income for visual artists is globally low. Data shows that the total income of visual artists in the UK in 2015 was £16,150 a year -of which £6,020 comes from their artistic practice- while the national living wage was £16,302 a year. But visual artists are not the worst off the cultural professions. While the median income for authors and writers in Canada in 2016 was \$40,000, that for visual artists was \$20,000, but it was \$17,900 for musicians and singers and \$15800 for dancers. Recent data from the NEA (2019) show much higher earnings for American artists and confirm that visual artists' earnings are not worse than others creators; from 2012 to 2016, the median annual wage was \$48,670 for visual artists, \$57,100 for writers and authors, and \$42,240 for musicians.

Resale right: gravel or sand in market mechanisms?*

Distortions of competition on the international art market

*

The implementation of a resale right increases transaction costs and theoretically possibly reduces the competitiveness of a given country if its competitors do not apply such a right. Indeed, for valued artworks, the expected resale right may overstep sometimes transportation fees so that delocalization of sales appears as profitable.

This argument was at the heart of the European community concerns in 2006 when she decides the harmonization of the resale right in Europe. Indeed, resale right was considered as a crucial factor "which contributes to the creation of distortions of competition as well as displacement of within the Community"(European Commission, p. 3). The United Kingdom fought this extension. They did not apply the resale right previously and there existed a risk of loss of competitiveness compared to extra European countries, particularly the United States, leaders on the art market.

In practice, findings suggest that these concerns were ill founded. No evidence has been found of a weakened position of the United Kingdom on the international art scene. Surprisingly, according a study conducted by the IPO, just after the introduction of the resale right, the proportion of eligible works to the resale right in the UK increased, so did their prices (comparison of the period 2006/2007 with 2003/2004). In the short term, it appears that the implementation of the resale right in the UK did not have a negative impact on the relative position of its market compared to other countries (Banternghansa and Graddy 2011; Graddy et al. 2008). Conclusions of a EU report in 2011 are less optimistic because of the decrease of the UK's market share on the international scene between 2008 and 2010 from 34% to 20%. Between 2005 and 2010, U's market share decreased from 27% to

20%, nevertheless in the same period the US market share also declined from 54% down to 37%, whereas China increased its share from 8% up to 24% (European Commission, 2011). The UK's decision to maintain the resale right after leaving the European Union is another indication that the introduction of this right did not lead to a massive shift of transactions to the USA.

Distortions of competition between auctions and galleries?*

Resale right has also indirect effects. The international competition among auction houses depends on their ability to attract sellers and valuable items. Then, in 2007 Christie's France shifted the economic burden of the royalty from seller to buyer. Nevertheless, because of this change, a sale by auction appeared as more attractive to sellers than a sale through a French dealer and such a shift may appear as an anti-competitively behaviour. Indeed, at auction a seller would receive the hammer price without deduction of the resale royalty, the latter being paid by the buyer whereas with a French dealer, he would receive the price less the resale royalty, because dealers charged the resale royalty to the seller according with French law. According to this reasoning, the French Association of Antique Dealers took action against the auction house. After a ten years battle, the French Supreme Court ruled that it was possible for the seller of a work of art to agree with the buyer that he would be liable for the resale right, provided that the artist receives the royalty. Nevertheless, from an economic point of view, and according to auction theory, the amount earned by the artist when the resale right is paid by the buyer is slightly lower. This is because the rational buyer bids up to his reservation price. If he has to pay the resale right, he will reduce his reserve price by the amount of the royalty, and the hammer price will be lower than if the resale right was payable by the seller. As the royalty is calculated on the basis of the hammer price, the amount received by the artist will be lower.

Distortion of competition between the art market and financial market?*

The relative attractiveness of the art market compared to the financial one is reduced because of an increase in transaction costs. Whereas collectors act on a medium or a long-term basis, and do not necessarily plan to resell their artwork, speculators have short-term views and are motivated by the plus value they will obtain when reselling the item (Kakoyiannis 2006). Thus, an indirect effect of the introduction of the resale right could be to 'clean prices', bringing market prices of artworks closer to their fundamental artistic value.

Resale right: is there any need to correct a market failure?*

Consequences of the physical embodiment of the creation for visual art*

The idea originally puts forward, is that, because of the uniqueness of the creation they produce, visual artists do not benefit from reproduction rights in the same way as other artists do. Above all, the aim of the resale right is to "ensure that authors of graphic and plastic works of art share in the economic success of their original works of art" (European Directive).

Curiously, this idea is not really discussed. However, the economic rationale of the copyright precisely lies in the split existing between a work and its material embodiment. The monopoly given to the artist on his creation is due to a market failure; more precisely is due to the public good property (non rivalry and non exclusivity) of a creation. Once a creation is spread, anyone can appropriate it and reproduce it at a low marginal cost. Then, without protection, the risk is high for the creator not to recover his initial investment. For visual artist, this risk does not exist as the public good property of the creation disappears, no one can copy the creation without supporting an important marginal cost. It is not necessarily to create artificially a monopoly for the visual artist on its creation because, by nature, the creation and its physical embodiment are intertwined and the uniqueness is one of the major characteristics of the art market. Moreover, prices of different artworks produced by an artist are linked one another and depends on the artist reputation. Then, it does not seem necessary to protect an artist, if the value of one of his artwork goes up; he just has to sell another one on the market to increase his profit. It is a well-known law that on the art market, in the very beginning of an artist career, supply exceeds demand, whereas rationing can appear on the market with queuing phenomenon as the artist is obtaining fame. In other words, the market power

of the artist increases along with his ranking and his prices then, it will be easy for him to earn money selling another piece.

Externalities of future artworks on current ones**

If there is a need to correct a market failure with the resale right, it could be the externalities of further artworks on the current ones. Indeed, the artistic recognition of an artist depends on its whole production. Depending on the quality of future artworks, the prices of the current ones can evolve in the future, positively or negatively. These externalities are not taken into account. Because of such failure, there can be under-production in case of positive externalities. The introduction of a resale right could be a mean to internalize these externalities. Nevertheless, the law only considers positive externalities and increasing in prices but not negative ones. If in the future the artist produces artworks of bad quality, these will lower his global reputation and produce a negative externality for the future market of current artwork. The resale right does not take into account such a negative externality, thus a risk of over-production appears.

Visual art, a durable good monopoly issue?*

Some economists studied the issue from a symmetrical point of view, analysing if resale royalties have incentives effects on artist' output subsequent decisions. The artist produces a durable good, and when managing his market power he encounters a dynamic consistency problem of 'competing with one's future self' (Solow 1998). Resale right effects depend on the nature of future artworks: if they are substitutes of the current one's, then resale right will have a negative impact with a decrease of the artist's production and an increase in prices. Conversely, if future artworks are complementary, there is an incentive for the artist to increase its production (Solow 1998). In Solow's analysis, the artist is supposed to be 'price setter', *i.e.* only well-known artists are able to set their price in the first period. Wang extends the analysis considering not only well-known artists but also new artists (price taker). In both cases, the consequence of the introduction of a resale royalty is to lower the global production and to increase the artist lifetime profit. Nevertheless, the rise of the artist's profit remains questionable as globally the social welfare decreases (Wang, 2010).

Resale right, 'much ado about nothing'?*

Not only market failures are not obvious on visual art market, but also resale rights create disincentives for a crucial intermediary for artist recognition, the gallerist (Moulin 1994). Since the beginning of the XXth Century, the art dealer has become a crucial intermediary for the artist legitimating on the market. This changes a lot the analysis. Indeed, under the assumption that the promotion of the value of the artist's work depends both on the efforts of the artist and of the dealer, it is shown that a specific royalty, *i.e.* a "share cropping" contract, could be positive, but under the assumption that the promotion of the value of the artist's work depends only of the dealer, it is shown that the resale right is totally counterproductive (Kirstein and Schmidtchen 2001).

It's hard to draw up a clear conclusion. Both benefits and costs are lower than expected, and then a balanced between the two parts becomes thinkable. But at the same time, why discussing such a governmental intervention on the market as no real market failure affects the art market? Probably, the record of lower costs than initially expected and the symbolic reward given to the artist through the resale right contribute to explain the general movement for its implementation on an international level. Nevertheless, it's important to take into account the role of imitation, we know that imitating the actions of others can be a rational behaviour to improve his own information in case of uncertainty. Nevertheless, one must be careful and keep in mind that imitation can also lead to mistaken cascades, leading the vast majority of the population to take bad decisions (Bikhchandani and al.1992).

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ⁱ <http://bibliotheque-numerique.inha.fr/collection/12406-un-tableau-de-papa-1ere-planche/>

ⁱⁱ Millet originally sold this painting in 1860 for 1,000 francs to the Belgian painter Victor Papeleu. In 1889, the copper merchant Secretan sold it for 553,000 francs. (Fratello 2003).

ⁱⁱⁱ And then, reaffirmed in 1957 with the law on the literary and artistic property (article L122-8)

^{iv} At the beginning just auction houses were concerned, today gallerists, art dealers or auctioneers are concerned

^v Article 14 bis, and today article 14 ter because of different minor modifications.

^{vi} Revision conference in Rome about the Berne convention.

^{vii} Belgium, Denmark, Finland, France, Germany, Greece, Portugal, Spain, Sweden enforced the right. In Italy and Luxembourg it was not applied because of the lack of precisions for an implementation. Four countries did not apply the resale right: Austria, Ireland, Netherlands, and the United Kingdom.

^{viii} This was the case of Brazil, Paraguay, Uruguay, Asia, Mongolia and the Philippines.

^{ix} During a first period the right had to be applied only to living artists. It has been extended to heirs of deceased artists from the beginning of 2012.

^x China's first copyright law took effect in 1991, the latest draft brings the country closer into line with prevailing European and American standards.

^{xi} <https://www.nytimes.com/2018/07/11/arts/design/art-royalties-ruling-california-circuit-court.html>

^{xii} The other explanations are: artists are 'committed to a lobar or love' or 'rational fools'. (Menger 2006: 776)