Droit de Suite — The Artists' Resale Right

Anthony O'Dwyer

Faculty of Law, UCC, UCC

This article looks at the *droit de suite,* which is a legally recognised right that forms part of copyright law and more widely, intellectual property law. The article reviews the present restrictive application of the law, analyses the definition of the "artist" and discusses the merit of a wider interpretation and application of the *droit de suite*.

What is *droit de suite?*

The English translation of *droit de suite* literally means the 'right to follow' and, in the context of the artists' resale right, it allows artists to follow the future success of their artistic works. This future success involves an economic entitlement that the artist may participate in. In practical terms this means that, after the first sale of the artistic work, every subsequent public sale, for instance through a dealer or a gallery, is subject to a sort of royalty. Royalties in the traditional sense entitle various types of artistic creators, such as artists, musicians and writers, to receive a percentage of the profits arising from the use or exploitation of their creative work. It is in this sense that the artists' resale right operates. For every subsequent re-sale of the work, the artist has a right to claim a percentage of the price paid by the purchaser. In Ireland this percentage operates on a sliding scale starting at 4% and decreasing to 0.25% depending on how much the work is sold for. The amount recoupable is capped at €12,500 and the work must first be sold for over €3,000 before the right becomes active. For clarification, it should be pointed out that the resale right does not apply to the first sale of the work, only to re-sales there after, and that private sales are also excluded. In addition, the right cannot be assigned, waived or shared and there is no limit to the number of times that the resale right can be invoked, whether the work is re-sold once or a hundred times, the law enforces no limit.

Distorting the Market

At this point, those of us with a fleeting interest in the realities of the free market start to ask questions, such as, why should an artist be given this sort of economic advantage? And where should the line be drawn? What we're getting at here is that visual artists, musicians, composers, writers, and many more all benefit from the mass exploitation of their work through the collection of royalties. For every radio-play of a song, print

https://doi.org/10.33178/boolean.2012.16

reproduction of original art or theatrical performance of the writer's work etc., a royalty is collected. This monetary compensation for the creator's efforts reflects the economic value derived from each use of the creator's work in a given medium; whether, print, TV, radio or live performance. Where such diverse categories of creators benefit equally from the public's use of their work, there would appear to be no sense in creating an additional sort of tax on art. If anything, such a system creates disparity amongst creators and it would seem that the only way of correcting this disparity is to allow all creators to avail of the *droit de suite,* or artists resale right. But why stop there? Does a builder not fall within the definition of a creator? After all, he or she creates something of value which can be resold multiple times, enjoyed by many, but no such royalty system exists for the builder. If anything it is the builder who is in need of the resale right, as he does not even have the safety net of a publishing or performance royalty to rely on. Is it therefore not a meaningless and arbitrary distinction that separates the builder from the artist? To answer these questions we must look to the origins and the rationale for the *droit de suite* or artists resale right.

Origins of the *droit de suite*

As the name suggests, the right of the droit de suite originated in France. It was after World War I that French philanthropists lobbied the French government to create such a right for artists. The need was said to derive from the fact that visual artists were unable to exploit their work to the same extent as other creators. At that time, artists were returning from the war, often penniless. They and their children were starving on the streets of Paris, while their works sold at auction for exuberant amounts, which far surpassed the artist's original recompense. There was a clear inequality between what the artist received for his efforts compared to the savvy art dealer, who created nothing. So, the right was seen as a response to the inequities of the free market and a desire to better balance the fortunes of artists and encourage the production of fine art, which benefited all of society. In its truest form, the *droit de suite* began life as a social welfare initiative and its various incarnations throughout the world are not far removed from this ideal.

The rational behind the right

So why were visual artists less able to benefit from their work than other creators? The writer and the composer created works that could be mass-produced resulting in unlimited exploitation or utilisation by the public, while the artist could not do so. This was because the writer's book and the composer's music score contained both tangible and intangible elements or layers. The tangible being the material, physical embodiment of the work, i.e.,

the book, painted canvas or music score, and the intangible being the manner in which the work could be accessed by the public.

To simplify and to aid our understanding of this nuanced point, imagine that the writer writes a book on his typewriter, that the book is then put into production and that thousands of copies are produced. Now let us ask the question; is there any difference between the enjoyment that the reader receives from reading the first copy of the book or one of the multiple copies that follow? The answer is no and while collectors vie for a first edition of a book, their experience from reading the first or second print edition is not altered. This is the intangible element or layer in the work, the part that exists on another plane if you will. It is irrelevant to our enjoyment whether we read the book on our laptop, e-reader, or in paperback. The physical manifestation of the work, whether in paper or digital form, is merely the medium through which the author conveys his ideas to us the reader. The material embodiment of the work and its intangible element are not joined at the hip but are separable and thus the work can enjoy mass use or exploitation.

Logic would dictate that the same rationale must apply to works by visual artists. My appreciation of Van Gogh's "Starry Night" is surely not lessened by the print reproduction that I purchased at a poster fair? I still receive enjoyment from viewing it. But, if this is so, why do we travel to galleries and museums all over the world to see original works of art by our favourite artists? The reason is this, when we stand in front of an original work of art, we receive an unaltered communication from the artist which represents his thoughts and feelings in the purest form. The richness of colour, the layering of paint, seeing the painters brush strokes close up, these all form part of our experience, leading to an appreciation and enjoyment of the work that far surpasses the print reproduction. If you doubt me, buy a poster of your favourite painting, view it everyday, if you can, and then if you are fortunate enough to someday see the original, compare your experience. Ask yourself the question, which viewing, which representation of the artist's work, gave you the greatest enjoyment and most fully communicated to you the artist's thoughts and feelings, as expressed in the work. Most would choose the original. Lastly on this point, what we are missing in viewing a copy of the original masterpiece is the equivalent of pages missing from a book; we may get the general gist but not the full story.

Now to our builder friend. He creates something which we enjoy, the building does not have an intangible element that can be mass produced and exploited like the music contained in a CD, and he received no publishing or performance royalties from the public's use of the building. So why shouldn't he receive a *droit de suite*? The first point would be that, even if the work, i.e., the building, contained an artistic quality, that quality would originate in the architect and not the builder. The builder could be viewed as the equivalent of the starving artist, where the property investor gains the most from the builder's labours, similar to that of the artist, art dealer relationship. Based on this comparison the builder should be entitled to a similar royalty. But this is where the crux of the justification

for the *droit de suite* lies. The artist contributes to the increase in value of his work by continuing to paint, thus promoting his work and growing his reputation. Indeed, often an artist's later works are mere shadows of the earlier creations but still demand a handsome price because we will say, "but it's a Picasso". On the other hand, property buyers do not buy a house on the basis of the builder's reputation. Clearly we can delineate between the work of the visual artist and that of the builder, but what about the architect? Based upon the preceding arguments there is indeed a case for including architects within the remit of the *droit de suite* legislation.

Where will my research take me?

With all that has been said, it is about time to say where my own research is placed within this area of intellectual property law. As contradictory as it may seem, my research looks at the potential expansion of the *droit de suite* to include multiple creators. Based upon the above analysis, it is clear that no justification exists for such an expansion, but it has been said that, when you don't like the answer to your question it's time to ask another question. With this in mind, my research looks at an alternative justification for the *droit de suite,* a justification which derives from a moral rights theory that focuses on protecting the personhood of the creator. This theory provides a basis for economic and non-economic rights that protect the creator. In light of social and economic changes affecting how musicians and writers now make a living, such an expansion may be necessitated. Once this necessity is framed within the context of a wider theoretical justification, a plausible paradigm for an expanded *droit de suite* or 'creators' resale right' may be extrapolated. The challenge, however, is to base the right on a legally sound theory that creates both a sustainable environment for all creators in which creative output can be maximised for the benefit of society, while ensuring that its parameters to do not extend so wide as to create perverse anomalies.

My research will critically assess whether this 'necessity for change' exists by comparing the social and economic conditions of these creators. Analysing revenues derived from royalties and then comparing these with published reports by the ESRI (The Economic Social Research Institute — Ireland) on the social and living conditions of such creators will provide a broad overview and basis for the research. The research will also compare two income streams of the visual artist, royalties from publishing and royalties from the *droit de suite.* This part of the research is timely as, to-date, no data has been collected which confirms the rights' efficacy and efficiency. After all, why argue to expand a right that is dead in the water?

Finally, the research will have significant consequences for the Irish and E.U. legal system as it will highlight any inequalities in the existing legislation by firstly questioning the limited application of the *droit de suite* to visual artists only. Secondly, the research will

explicate the successes and failures of the current *droit de suite* model in Ireland and the E.U. and in turn look to international experiences in an attempt to provide a more inclusive and effective model of best practice.

Anthony O'Dwyer is a Ph.D student in the Faculty of Law, under the supervision of Dr. Louise Crowley, Director of *LLM (Practitioner)* at University College Cork. The research has been funded to-date by the Ronan Daly Jermyn Bursary and UCC.