

## **RESEARCH ON THE EFFECTS OF DROIT DE SUITE ON THE FIRST SALE DOCTRINE: AN ECONOMIC ANALYSIS OF LAW\***

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### **ABSTRACT**

“Droit de Suite” was adopted in the Second Draft of the Amendment to the Copyright Act of China (hereafter, the Copyright Act Amendment of China) on July 6, 2012, and Clause 1, Article 12, of the Copyright Act Amendment of China regulated that authors, their successors, or the legatees of artistic, photographic, and musical works or drafts are eligible to obtain the rights of benefit sharing after their works or drafts are auctioned. From this amendment, we can understand the Chinese government’s attempts to ensure healthy auctions and factor in European laws. In fact, Droit de Suite initially emerged from a special law in France in 1920; it was formally ruled in Article 14ter of the 1948 Brussels Amendment of Berne Convention for the Protection of Literary and Artistic Works in 1886. Droit de Suite is designed to protect the interest of authors of artistic works so that they can obtain a certain percentage of the rewards from the proceeds of the auction of their works. However, the “First Sale Doctrine,” which is a primary part of the “Right of Distribution” in copyright laws, indicates that authors exhaust their control and rights of distribution over their original and later reproduced works after the initial sale or transfer of ownership of these works. The “First Sale Doctrine” aims to ensure free exchange of works and flow of information to reduce the search costs within the transaction costs. Because, “Moral Rights” (including Droit de Suite) cannot be transferred or inherited by successors, they occupy a dominant status when they conflict with “Economic Rights.” Hence, it follows that Moral Rights

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can supersede the limits of Economic Rights, including the First Sale Doctrine. In this manner, Droit de Suite blocks the maximum use of copyrighted works, thereby narrowing down the application of the “First Sale Doctrine” using economic analyses. Although Droit de Suite protects the personal benefits gained by authors from auction rewards internally, courts and auction winners bear high external transaction costs, including the high enforcement and control costs of Droit de Suite. Consequently, this study evaluates whether Droit de Suite added under Moral Rights is viable from legal and economic perspectives. In addition, it suggests restricted approaches for Droit de Suite by considering contracts and limited terms in order to internalize its external costs in case states plan to add it within the ambit of Moral Rights in copyright laws.

Keywords: Droit de Suite, First Sale Doctrine, Right of Distribution, Moral Rights, Economic Rights, External Costs.

## I. Roles of “Droit de Suite” and the “First Sale Doctrine” in Copyright Law

In the majority of countries’ laws and in the primary international copyright conventions, copyright consists of two major factors, “Economic Rights” and “Moral Rights.”<sup>1</sup> If we globally effectuate the “Economic Rights” and “Moral Rights” incorporated in copyright law worldwide, we would see that common law countries do not consider the protection of “Economic Rights.” However, civil law countries recognize both “Economic Rights” and “Moral Rights.” Thus, common law countries and civil law countries differ in how they view the interactions between “Economic Rights” and “Moral Rights” in their copyright laws.<sup>2</sup>

Furthermore, legal copyright systems throughout the world consist of a “Copyright System” (hereafter “former system”) and an “Author’s Right System” (hereafter “latter system”).<sup>3</sup> The former system stresses property value and copyright is used as a tool to protect authors’ economic benefits. Countries categorized as former systems include the US, the UK, and others.<sup>4</sup> The latter system emphasizes personality spirits and copyright is used to protect authors’ economic benefits from a personality rights perspective. Countries categorized as later systems consist of Germany, France, and others.<sup>5</sup>

Although “Economic Rights” and “Moral Rights” vary in common law countries and civil law countries, “Droit de Suite” is a type of hidden “Moral Right.”<sup>6</sup> In fact, “Droit de Suite” was originally designed to secure authors’ economic benefits after an auction.<sup>7</sup> Hence, does “Droit de Suite” destroy orders limiting “Economic Rights” such as “Fair Use,” the “First Sale Doctrine,” etc.? What are the roles of “Droit de Suite” and the “First Sale Doctrine” in copyright law? In order to answer these two important questions, we present the following two subsections of this chapter entitled “What is ‘Droit de Suite?’” and “Why is the ‘First Sale Doctrine’ Important for the Right of Distribution?”

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<sup>1</sup> CHI-YU CHIEN, CASES ANALYSES OF COPYRIGHT LAW 21 (3d ed. 2014).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Cheng-Lin Tsai, A Study on the Droit de Suite under Copyright Law and its Implementation into Taiwan 79 (Jul. 7, 2011) (unpublished LL.M. thesis, Feng Chia University) (on file with author).

<sup>7</sup> Li-Chih Lin, *International Recent Developments of the Resale Royalty Right and It’s Future Prospects in the Copyright Law*, 171 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS 132, 135-36 (2013).

## A. What is “Droit de Suite?”

“Droit de Suite” is also called the “Resale Royalty Right”<sup>8</sup> and was first introduced by French scholar Albert Vaunois in 1893, who proposed that artists should own the “Droit de Suite” related to their work.<sup>9</sup> In particular, “The Angelus,” by Jean-Francois Millet, was sold for only 1,200 Francs but a collector resold the painting for 1,000,000 Francs while Jean-Francois Millet’s granddaughter was so poor that she sold flowers in streets. Thus, the French enacted special laws to regulate “Droit de Suite” in 1920.<sup>10</sup> Furthermore, authors of literary works or musical works can earn income long after their works are performed but authors of artistic works seem not to share in the economic benefits when economic value is added to their work.<sup>11</sup>

Whether “Droit de Suite” is an “Economic Right” or a “Moral Right” is a significant issue for its legal effect. Traditionally, “Droit de Suite” was considered a “Moral Right,” a perpetual personality right completely separate from the “Economic Rights” of authors.<sup>12</sup> In Germany, a majority of scholars and legal practitioners think that “Droit de Suite” is a special “Economic Right,” not merely a “Moral Right” or an exclusive right.<sup>13</sup> In the UK, scholars believe that “Droit de Suite” is an “Economic Right” because it aims to protect economic benefits and that it is actually not a “Moral Right.”<sup>14</sup>

Another question is to which subjects does “Droit de Suite” apply? Take the Germany Copyright Act for example. “Droit de Suite” applies to artistic works, which excludes architectural works and applied artistic works because they do not concern aesthetic artistic factors.<sup>15</sup> Contrarily, Section 1, Article 14 of the Berne Convention authorizes member states to freely adopt “Droit de Suite”<sup>16</sup> and new copyright works (e.g., photographic works) are increasing. A majority of German scholars argue that “Droit de Suite” can also applied to “original” copies of literary works and musical works but they should be personally created by the author.<sup>17</sup>

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<sup>8</sup> *Id.* at 132.

<sup>9</sup> *Id.* at 135.

<sup>10</sup> *Id.* at 135.

<sup>11</sup> *Id.* at 136.

<sup>12</sup> *Id.* at 135-36.

<sup>13</sup> Kung-Chung Liu, *A Comparative Study of Moral Rights in Copyright*, 31 NATIONAL TAIWAN UNIVERSITY LAW REVIEW 1, 15 (2002).

<sup>14</sup> Tsai, *supra* note 6, at 77-78.

<sup>15</sup> Liu, *supra* note 13, at 15.

<sup>16</sup> *Id.* at 15.

<sup>17</sup> *Id.* at 16.

Although there have been different approaches to “Droit de Suite” proposed by scholars and legal practitioners in France, Germany, and the UK, the Berne Convention and 59 countries throughout the world had officially recognized “Droit de Suite” by November 2010.<sup>18</sup> “The European Union (hereafter EU), promulgated ‘Droit de Suite’ legislation in September 2001 and has 27 member states that recognize ‘Droit de Suite.’”<sup>19</sup> On July 6, 2012, the National Copyright Administration of the People’s Republic of China (PRC) proposed the Second Draft of the China Copyright Act and it included regulations for “Droit de Suite.”<sup>20</sup> This indicates that art markets are active in China and in other countries throughout the world.

## **B. Why is the “First Sale Doctrine” important for the “Right of Distribution”?**

The “Right of Distribution” is unlike “Droit de Suite” because it is ambiguous and is purely an “Economic Right.” In fact, copyright laws in the world’s most influential countries, including the US, Germany, and Korea, regulate the “Right of Distribution.”<sup>21</sup> Moreover, the “Right of Distribution” primarily aims to prevent the transfer of pirated and stolen goods but legally duplicated copies are not within its scope.<sup>22</sup>

Theoretically, the “First Sale Doctrine” means that once a legitimate consumer buys a copyrighted work, the copyright holder has exhausted all rights to control the work’s downstream distribution. A legitimate consumer is free to give away, lend, or discard a copyrighted work only if he/she does not make copies.<sup>23</sup> Therefore, the scope of the “Right of Distribution” is limited by the “First Sale Doctrine,” which is also known as the “Exhaustion Doctrine.” However, sound recording rentals and computer programs are not included in the “First Sale Doctrine” due to their frequent exchange or trade in the market.<sup>24</sup> In other words, the “First Sale Doctrine” permits libraries, used bookstores, and record stores to legally exchange or trade these goods. Hence, copyright laws in major countries have relevant regulations concerning the “First Sale Doctrine” such as Section 1,

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<sup>18</sup> Lin, *supra* note 7, at 139.

<sup>19</sup> *Id.* at 137-139.

<sup>20</sup> *Id.* at 141.

<sup>21</sup> HSIUNG-LIN HSIAO, COPYRIGHT LAW 201 (8th ed. 2015).

<sup>22</sup> *Id.*

<sup>23</sup> Reese, R. Anthony, *The First Sale Doctrine in the Era of Digital Networks* 577 (U of Texas Law, Public Law Research Paper No. 57; U of Texas Law, Law and Econ Research Paper No. 004), available at <https://ssrn.com/abstract=463620>.

<sup>24</sup> HSIAO, *supra* note 21, at 204.

Article 109 of the US Copyright Act; Section 2, Article 17 of the German Copyright Act of 1965; and Article 43 of the Korea Copyright Act of 1987.<sup>25</sup>

There are three types of worldwide “First Sale Doctrine” legislation. The first involves the concept of national exhaustion. This prohibits copyright owners from controlling the commercial exploitation of goods in domestic markets, even with their consent, but they can oppose the importation of original goods marked abroad<sup>26</sup> (e.g., Article 59-1 of the Taiwanese Copyright Act).<sup>27</sup> The second type involves the concept of regional exhaustion. This prohibits copyright owners from controlling the commercial exploitation of goods throughout the entire region. Thus, copyright owners cannot stop parallel importations within the region (i.e., EU laws).<sup>28</sup> The final type involves the concept of international exhaustion. Here, copyrights are exhausted once goods have been sold by copyright owners or with their consent in any region in the world<sup>29</sup> (e.g., see the 2013 US Supreme Court case, *Supap Kirtsaeng, dba Bluechristine99 v. John Wiley & Sons, Inc.*<sup>30</sup>). As a result, the legality of the parallel importation of copyright works is decided by various legal policies regarding the “First Sale Doctrine” or the “Exhaustion Doctrine” as adopted by different countries.

Of course, implementation of the “First Sale Doctrine” is to secure a consumer’s right to freely give away, lend, or discard copyrighted works if they legally obtain these works. In other words, this diminishes the “search costs<sup>31</sup>” and “bargaining costs<sup>32</sup>” for the users/new owners/licensees of copyrighted works because they do not need to search for the authors to bargain for licensing or to get permission to use copyrighted works. However, national copyright laws that adopt international exhaustion legislation ensures legal parallel importation and this also ensures that “search costs” and “bargaining costs” for market importers and consumers are low. On the other hand, national copyright laws that adopt national

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<sup>25</sup> *Id.* at 201-202.

<sup>26</sup> World Intellectual Property Organization, International Exhaustion and Parallel Importation, [http://www.wipo.int/sme/en/ip\\_business/export/international\\_exhaustion.htm](http://www.wipo.int/sme/en/ip_business/export/international_exhaustion.htm) (last visited Nov. 12, 2016).

<sup>27</sup> Article 59-1 of the Taiwanese Copyright Act regulates that, “A person who has obtained ownership of the original of a work or a lawful copy thereof within the territory under the jurisdiction of the Republic of China may distribute it by means of transfer of ownership.” See Ministry of Justice, Laws & Regulations Database of The Republic of China: Copyright Act, <http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=J0070017> (last visited Nov. 12, 2016).

<sup>28</sup> World Intellectual Property Organization, International Exhaustion and Parallel Importation, *supra* note 26.

<sup>29</sup> *Id.*

<sup>30</sup> 568 U.S. \_\_\_\_ (2013).

<sup>31</sup> ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 92 (5th ed. 2007).

<sup>32</sup> *Id.*

exhaustion or regional exhaustion legislation only ensure parallel importation within national or regional territories. This results in high “search costs” and “bargaining costs” for market importers and consumers.

## II. Conflicts between “Droit de Suite” and the “First Sale Doctrine”

The relations between “Economic Rights” and “Moral Rights” can be described by the theories of “monism” and “dualism” and “Economic Rights Theory.”<sup>33</sup> In the orbit of history, personality right theory was proposed by the German scholar Otto Friedrich von Gierke, who stressed that copyrighted works originate from the author’s personality and thus, economic benefits are less important than personality.<sup>34</sup> Then, another German scholar, Josef Kohler, argued that copyright is different from personality rights and that there is economic value in a copyright that should be removed from personality interests. These arguments are the fundamental aspects of “dualism,” which is utilized in France.<sup>35</sup>

On the other hand, German scholar Eugen Ulmer proposed that a copyrighted work should contain a single type of rights. Thus, “Economic Rights” and “Moral Rights” were combined. Like the trunk of a tree that takes nutrients to the branches, “Economic Rights” and “Moral Rights” are like the trunk of a tree but in the terms of copyright and we cannot tell them apart. For example, Austria was the first country to adopt “monism” in its copyright act in 1936. Then, Germany enacted a copyright act adopting “monism.”<sup>36</sup>

Nevertheless, “Economic Rights Theory” seems so extreme that “Moral Rights” are not included in copyright law because they are not special rights.<sup>37</sup> However, copyright law in civil countries include both “Economic Rights” and “Moral Rights” regardless of whether their copyright laws are “monistic” or “dualistic.” Moreover, common law countries pay more attention to “Economic Rights” than to “Moral Rights.” Take those in the US copyright industry for example. They believe that enforcing the “Right of Dissemination,” the “Right of Attribution,” and the “Right of Integrity” can prevent the exchange or trade of copyrighted works and thus, they oppose the enforcement of “Moral Rights.”<sup>38</sup>

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<sup>33</sup> HSIAO, *supra* note 21, at 1.

<sup>34</sup> Ming-Wei Yen, The study of inherent conflict between in economic rights and moral rights by the way of economic analysis of law 79 (Jul., 2014) (unpublished LL.M. thesis, National Dong Hwa University) (on file with author).

<sup>35</sup> *Id.* at 79-80.

<sup>36</sup> *Id.* at 81.

<sup>37</sup> HSIAO, *supra* note 21, at 1.

<sup>38</sup> Chung-Hsin Chung, *The Analysis and Amend Suggestion to the Moral Rights*, 185 JOURNAL OF

Based on its meaning and legal nature, “Droit de Suite” was traditionally accepted as a type of “Moral Right” in European copyright systems (i.e., France) and it secured the right of authors to receive a certain percentage of benefits each time an artistic work was auctioned or resold. Not only cannot “Droit de Suite” be transferred and succeeded and be ruled in copyright laws, but also is “First Sale Doctrine” violated. Because people legally own or obtain licenses to copyrighted works, people can freely give away, lend, or discard them. Thus, why do people need to share the benefits of copyrighted works with the original authors? This chapter attempts to analyze the advantages and disadvantages of enforcing “Droit de Suite” and discusses the impacts of “Droit de Suite” that are superior to those of the “First Sale Doctrine” in order to understand the impacts of enforcing “Droit de Suite” in the implementation of the “First Sale Doctrine.”

### **A. Advantages and disadvantages of enforcing “Droit de Suite”**

Because there is an increasing trend of investing in artist works, the purpose of establishing “Droit de Suite” is to secure the implementation of the “Rights of Duplication” and “Rights of Distribution” of an original author’s rare and characteristic works to avoid unfair benefit-sharing for original authors.<sup>39</sup> In other words, “Droit de Suite” provides authors with a method to receive economic compensation each time their works are sold or auctioned. Although “Droit de Suite” seems to bring economic benefits to authors, is it actually good for authors? Does “Droit de Suite” really balance the benefits among professionals, buyers, and authors?

If we observe the enforcement of “Droit de Suite,” we find two advantages. The first is the fair treatment of authors in regards to their copyrighted works. A majority of states (e.g., the UK, New Zealand, Australia, the US, and China) enacted and proposed special laws or copyright laws for the protection of “Droit de Suite.”<sup>40</sup> For example, in the EU, selling prices for “Droit de Suite” works range from 3,000 Euros to 500,000 Euros and rates for sharing benefits with authors range from 0.25% to 4%.<sup>41</sup> Therefore, a higher selling price results in a lower rate for “Droit de Suite” in the EU.<sup>42</sup> Even though rates for sharing with authors are different, benefit-sharing is a fair reward for artists whose creations have gained value.<sup>43</sup> The second advantage is that the enforcement of “Droit de Suite”

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INTELLECTUAL PROPERTY RIGHTS 5, 15 (2014).

<sup>39</sup> Lin, *supra* note 7, at 162.

<sup>40</sup> *Id.* at 140-148.

<sup>41</sup> *Id.* at 138-139.

<sup>42</sup> *Id.* at 138-139.

<sup>43</sup> *Id.* at 162.



promotes the development of “Copyright Collective Management Groups.” Due to decreased control or related costs, states that adopt “Droit de Suite” need a “Copyright Collective Management Group” to pay resell compensation to artists or professionals in the market.<sup>44</sup>

On the other hand, the implementation of “Droit de Suite” also has three disadvantages. First, artists do not get fair resell compensation. When galleries and dealers that purchase copyrighted works need to pay resell compensation, they force artists to reduce the prices of their work. Hence, artists will decrease the production of copyrighted works.<sup>45</sup> A US study indicated that most of the auction benefits will go to a few important artists. Thus, artists will not get fair economic benefits as a result of the enforcement of “Droit de Suite.”<sup>46</sup> The second disadvantage is that resale compensation results in a shrinking art market. Due to increased transaction costs and the complicated process of enforcing “Droit de Suite,” sellers may decide to exchange, trade, or auction in countries that have not adopted “Droit de Suite” to avoid paying resell compensation.<sup>47</sup> The third disadvantage is that “Droit de Suite” is not equally applied to artists, writers, and composers. France was the first country to adopt “Droit de Suite” as a national law. The French congress enacted “Droit de Suite” legislation to reward artists for the value added to their work.<sup>48</sup> Contrarily, the German copyright act excludes architectural works and applied artistic works from “Droit de Suite” because the value added to these works is not relevant to the art world.<sup>49</sup> We cannot simply consider “Droit de Suite” by this meaning but must examine it through its actual operation in the art market.

## **B. What “Droit de Suite” impacts are superior to those of the “First Sale Doctrine?”**

As we know, “Droit de Suite” is a type of “Moral Right” and the “First Sale Doctrine” is a restriction of the “Right of Distribution,” which is a type of “Economic Right.” From the perspective of “dualistic” legislation in copyright law, people or licensees who use copyrighted works should not only obey the “First Sale Doctrine,” they should also follow “Droit de Suite.” There may be conflicts

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<sup>44</sup> Po-Ju Chen, The study of copyright collective management groups in digital era 18 (Jan., 2002) (unpublished LL.M. thesis, National Taiwan University) (on file with author).

<sup>45</sup> Tsai, *supra* note 6, at 85-89.

<sup>46</sup> *Id.* at 86.

<sup>47</sup> *Id.* at 88.

<sup>48</sup> Lin, *supra* note 7, at 136.

<sup>49</sup> Liu, *supra* note 13, at 15.

between the two because “Droit de Suite” is superior to the “First Sale Doctrine.”<sup>50</sup> How do we explain such a phenomena? We must review the legal history and interactions between “Moral Rights” and “Economic Rights.”

The German scholar Josef Kohler argued that authors’ personality interests are different from the economic value of copyrighted works and that personality rights and economic interests become “Moral Rights” and “Economic Rights,” respectively, in copyright law.<sup>51</sup> Based on this “dualistic” legislation, copyright is composed of both “Moral Rights” and “Economic Rights” and they are separate and independent from each other.

Compared with “dualistic” legislation, “monistic” legislation supports the idea that “Moral Rights” and “Economic Rights” are not two separate parts of copyright law because they both function together within the legal framework. However, copyright laws that adopt “monism” reveal that even “Economic Rights” cannot be transferred and these laws are not in accordance with the legislation in most countries, which have adopted “dualism.”<sup>52</sup> Although the “Economic Rights” in copyright laws that adopt “dualism” can be transferred, “Moral Rights,” which are exclusive to authors, cannot be transferred. Due to the ability to transfer “Economic Rights,” owners of “Economic Rights” vary and conflicts between “Moral Rights” and “Economic Rights” inevitably occur.

Furthermore, the key value of a copyrighted work is focused on the author’s personality interests. Thus, the use of copyrighted works not only causes damage to “Economic Rights” but also causes damage to “Moral Rights.” Based on “dualistic” copyright legislation, it goes without saying that “Moral Rights” are superior to “Economic Rights.”<sup>53</sup> Take the conflicts between “Rights of Integrity” and “Adaptation Rights” for example. As stated above, “Moral Rights” and “Economic Rights” are independent rights in copyright law. Therefore, users of copyrighted works are authorized to adapt or people getting adaptation rights, which cannot be violated authors’ “Moral Rights” and reputation.<sup>54</sup>

Moreover, users of copyrighted works must avoid damaging “Moral Rights,” which naturally implies that “Moral Rights” are superior to “Economic Rights” in “dualistic” copyright legislation. In the majority of countries worldwide, “dualistic” copyright legislation indicates that users of copyrighted works should first stress

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<sup>50</sup> Yen, *supra* note 34, at 127-129.

<sup>51</sup> *Id.* at 127.

<sup>52</sup> *Id.* at 80-81.

<sup>53</sup> *Id.* at 127-129.

<sup>54</sup> CHIEN, *supra* note 1, at 195.

“Droit de Suite” rather than consider limiting the “First Sale Doctrine” because “Droit de Suite” is superior to the “First Sale Doctrine.”

### **III. Application of Legal and Economic approaches to contradictions between “Droit de Suite” and the “First Sale Doctrine”**

In order to analyze the contradictions between “Droit de Suite” and the “First Sale Doctrine,” we must understand the pursuit of law and economics. How does law and economics apply to a copyright law analysis? Economics is related to how “efficient” resources are allocated for various alternative uses.<sup>55</sup> Compared with economics, law focuses on “equity” rather than “efficiency.”<sup>56</sup> In other words, to apply law and economics methods to conflicts between “Droit de Suite” and the “First Sale Doctrine” is to examine how “Droit de Suite” and the “First Sale Doctrine” are allocated. Thus, in what sense do authors/creators maintain their “Droit de Suite” and the “First Sale Doctrine?”<sup>57</sup>

In 1998, Michael Rushton’s study put forth the notion that “moral rights should be kept independent of financial incentives, and they should not be tradable.”<sup>58</sup> Rushton’s study even pointed out that “the idea that legal restrictions on the transfer of moral rights can be socially efficient relies on the existence of heavy negative externalities that would be created along with the transmission of moral rights.”<sup>59</sup> The problem is that keeping “Moral Rights” with authors’/creators’ their own, which is prohibited by copyright law yet is the best allocation for alternative use. Do such transfer restrictions on “Moral Rights” really reduce heavy negative externalities for users of copyrighted works? Do we need to impose enforcement/control costs on owners of “Moral Rights” that cause heavy negative externalities for the practical or potential use of copyrighted works?

Furthermore, “Coase Theorem” states that an “efficient” allocation is the result of the distribution of property rights, so long as these rights are properly defined and protected and can be exchanged without transactions costs.<sup>60</sup> In other words, the implication of “Coase theorem” is that the initial allocation of copyrights should be assigned to those members of society that are able to transfer them at low costs. In this way, how does the “First Sale Doctrine,” which is the allocation of copyrighted works to users, result in transaction costs? Above all, this

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<sup>55</sup> RICHARD WATT, COPYRIGHT AND ECONOMIC THEORY 15 (2000).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 134.

<sup>59</sup> *Id.* at 134-135.

<sup>60</sup> *Id.* at 17.

chapter attempts to discuss the contradictions between “Droit de Suite” and the “First Sale Doctrine” based on “efficiency,” “external costs,” and “transaction costs” from legal and economic perspectives.

### **A. High External Costs of enforcing “Droit de Suite”**

One factor that that causes “market failure” is “externalities” (also known as “external costs”).<sup>61</sup> Generally speaking, transacting parties must share all of the benefits and costs but certain transaction costs are sometimes covered by other parties. These costs are called “external costs” or “externalities” and include costs related to air pollution or water pollution.<sup>62</sup>

Furthermore, an important question that we must answer is what public policy or legislation promotes the production of “external costs” so that we may reduce them? The answer is that public policy or legislation should support those who seek to maximize their profits and to decrease their reproductions to afford reproductions with social optimal situation.<sup>63</sup> In other words, public policy or legislation must support producers who follow “social marginal cost” lines rather than “private marginal cost” lines. If we implement these actions, such “externalities” will be “internalized.”<sup>64</sup>

To apply “Droit de Suite” with an “external costs” approach is important in the analysis of related legislation. Actually, “Droit de Suite” could ensure that authors/creators obtain a certain price after the resale or auction of copyrighted works but people who enforce or control “Droit de Suite” force their reproductions to follow “private marginal cost” lines without considering socially optimal situations in “dualistic” copyright legislation. Nevertheless, “Droit de Suite” secures the basic economic benefits of copyrighted works/art after resale or auction but authors/artists enforce or control “Droit de Suite” from their perspectives without considering social needs. In particular, enforcing or controlling “Droit de Suite” is to inflict “external costs” on society. For example, authors/creators will receive economic benefits by enforcing or controlling “Droit de Suite” but authors/creators must do so through the court system. Thus, users/purchasers of copyrighted works are not willing to use or buy these works due to high enforcement or bargaining costs.

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<sup>61</sup> COOTER & ULEN, *supra* note 31, at 43.

<sup>62</sup> *Id.* at 44.

<sup>63</sup> *Id.* at 45.

<sup>64</sup> *Id.* at 45.

In this way, “external costs” are not “internalized” and are not socially optimal. Thus, we must enforce or control “Droit de Suite” in an optimal way without imposing “externalities” on society, which can be significant if a country’s copyright laws recognize “Droit de Suite” as a “Moral Right.”

## **B. To enforce the “First Sale Doctrine” is to ensure low Transaction Costs**

When it comes to discussing “Coase Theorem,” “transaction costs” play an important role in property exchanges. In short, “Coase Theorem” indicates that property assignments do not affect the “efficiency” of resource allocation if there are no transaction costs in property exchanges because people who use these properties efficiently will obtain property rights through free exchanges.<sup>65</sup> Actually, property assignments do influence the “efficiency” of resource allocation because in real life, there are transaction costs. Hence, laws should assign property rights to people who use them “efficiently,” which would result in “efficient” resource allocation.<sup>66</sup>

When we examine the 1984 US Supreme Court case, *Sony Corp. of America v. University City Studios, Inc.*,<sup>67</sup> we see that the “Fair Use Doctrine” permitted the sale of video recorders to record TV shows without paying copyright fees to owners because it broadened the audience of those TV shows. Therefore, the greater the number of people who watched the TV shows, the higher the royalties advertisers had to pay to copyright owners. Obviously, this not only benefitted copyright owners but also reduced transaction costs for users of copyrighted works by implicating the “Fair Use Doctrine,” which limits “Economic Rights.”<sup>68</sup>

The “First Sale Doctrine” also restricts the “Right of Distribution,” which is a type of “Economic Right.” In other words, legal owners/licensees of copyrighted works can give away, lend, or discard copyrighted works without limitation. If we observe the “First Sale Doctrine” from the perspective of transaction costs, the implementation of the “First Sale Doctrine” reduces bargaining costs between later users of copyrighted works and the copyright owners; thus, these works can be frequently exchanged<sup>69</sup> and copyright owners will benefit from these frequent exchanges in the market.

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<sup>65</sup> Che-Sheng Hsieh, *General Principle*, in LAW AND ECONOMICS 4, 26 (Che-Sheng Hsieh ed., 2007).

<sup>66</sup> *Id.* at 27.

<sup>67</sup> 464 U.S. 417 (1984).

<sup>68</sup> RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 43 (Chih-Chieh Yang trans., Wu-Nan Book, Inc. 2010) (2007).

<sup>69</sup> WATT, *supra* note 55, at 108.

### **C. Whether “Droit de Suite” or the “First Sale Doctrine” is more “Efficient” in the enforcement of Copyright Laws**

As we know, economic analyses are synonymous with “efficiency”; thus, legal and economic approaches are pursued from the perspective of the “efficient” use or enactment of laws.<sup>70</sup> In other words, when resources are allocated in the most efficient manner, it results in at least one member of society in a worse position.<sup>71</sup> Moreover, how “Droit de Suite” and the “First Sale Doctrine” are allocated and in what sense authors/creators retain full ownership of their “Droit de Suite” and the “First Sale Doctrine” after copyrighted works/creations have been exposed to the public should be analyzed from the perspective of “efficiency” using legal and economic approaches.

In fact, “Droit de Suite” ensures that authors/creators obtain certain percentage of the selling price from buyers/auctioneers every time the work is resold or auctioned. Of course, ensuring that authors/creators maintain their “Droit de Suite” is not the best allocation of copyright protection because only authors’/creators’ economic benefits are secured and the majority of users, buyers, and auctioneers of copyrighted works/creations are worse off due to high bargaining costs and reduced selling prices.

Although the implementation of the “First Sale Doctrine” restricts the “Rights of Distribution” of the authors/creators of copyrighted works/creations, it does not deprive them of their “Rights of Distribution.” It goes without saying that “Droit de Suite” can result in the first buyers/successful bidders being afraid to purchase copyrighted works/creations because they must pay a certain percentage of any resale price to the authors/creators. Because “Droit de Suite” is traditionally categorized as a type of “Moral Right” that is exclusive to authors/creators, “Droit de Suite” maintains a superior status to the “Rights of Distribution,” which are referred to as “Economic Rights” in “dualistic” copyright laws. Above all, enforcing “Droit de Suite” is not more efficient than the “First Sale Doctrine.” Thus, determining how to limit and manage “Droit de Suite” is significant for balancing the implications of “Droit de Suite” and the “Rights of Distribution” in “dualistic” copyright laws.

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<sup>70</sup> *Id.* at 15-16.

<sup>71</sup> *Id.* at 15.

#### **IV. Potential Ways to Manage the Contradictions between “Droit de Suite” and the “First Sale Doctrine”**

In order to discuss how to limit “Droit de Suite” to achieve social “efficiency,” we must determine whether “Droit de Suite” is an “Economic Right” or a “Moral Right.” Some English scholars believe that “Droit de Suite” did not traditionally exist in “Moral Rights” systems. In particular, they believe that “Droit de Suite” is an “Economic Right” because it protects an economic interest.<sup>72</sup> On the contrary, German scholars argue that “Droit de Suite” is not based purely on “Moral Rights,” is not an exclusive right, and is a right where authors/creators can ask the owners of copyrighted works/creations for certain royalties.<sup>73</sup> Nevertheless, there are different opinions about whether “Droit de Suite” is a “Moral Right” or an “Economic Right.” Actually, based on the orbit of history, “Droit de Suite” should be a type of “Moral Right.”<sup>74</sup>

Because “Moral Rights” are exclusive to authors/creators and cannot be transferred or passed down to others, it is very difficult to limit “Droit de Suite” by the “Fair Use Doctrine,” the “First Sale Doctrine,” and so on. However, “Economic Rights” can be restricted or transferred through the “Fair Use Doctrine,” the “First Sale Doctrine,” limited terms, licensing, or contracts.

Although “Moral Rights” and “Economic Rights” have the above-referenced differences, in essence, “Droit de Suite” is still a type of “Moral Right.” In other words, the key point to managing the contradictions between “Droit de Suite” and the “First Sale Doctrine” is to restrict “Droit de Suite” by the use of contracts and limited terms in order to balance the interests of authors/creators and users/buyers of copyrighted works/creations if countries adopt “dualistic” legislation.

##### **A. Drafting contracts that limit “Droit de Suite”**

“Droit de Suite” is traditionally classified as a type of “Moral Right” and “Moral Rights” cannot be passed down or transferred due to their exclusive characteristics. However, when contracts are executed between the users, buyers, and auctioneers of copyrighted works/creations and their authors/creators, are inconvenient uses for copyrighted works/creations reduced by enforcing “Moral Rights” (i.e., “Droit de Suite”)?

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<sup>72</sup> Tsai, *supra* note 6, at 77.

<sup>73</sup> *Id.* at 78.

<sup>74</sup> *Id.* at 79.

Of course, there are supporting and opposing arguments regarding whether contracts can regulate authors'/creators' enforcement of "Moral Rights" such as "Droit de Suite." However, "Moral Rights" in copyright law, unlike "Personality Rights" in civil law, protect both "Moral Rights" and "Economic Rights." Thus, it is reasonable for authors/creators to enforce "Economic Rights" more than "Moral Rights" (i.e., "Droit de Suite"). Furthermore, contracts in which authors/creators are restricted from enforcing "Moral Rights" (i.e., "Droit de Suite") are valid.<sup>75</sup>

On the other hand, the application of the legal and economic analyses of contracts should be focus on the questions presented in the following two sections:

### **1. Why do parties agree to contracts that restrict the enforcement of "Droit de Suite?"**

In the agency game, we assume that there are two players in a business setting.<sup>76</sup> The total revenues of the two players are highest when they invest and cooperate with each other and the wealth of the two players is unchanged if they choose not to invest.<sup>77</sup> However, the wealth of Player 1 is transferred to Player 2 when Player 2 chooses to encroach on Player 1's wealth. In other words, laws should enforce contracts where parties have cooperated with each other to maximize profits but laws must also create incentives for people to trust and enforce contracts.<sup>78</sup>

Hence, contracts that restrict the enforcement of "Droit de Suite" are valid and provide incentives to trust and enforce them. If users/buyers/auctioneers (for the purposes of this paragraph, "the former") and authors/creators (for the purposes of this paragraph, "the latter") of copyrighted works/creations cooperatively execute such contracts, the former must not to reduce the price of these works/creations in order to pay a lower amount to the latter. Of course, the latter still owns, enforces, and controls the "Economic Rights." Most importantly, the latter can also earn profits after the former and the latter reach an agreement to reduce bargaining costs.

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<sup>75</sup> Sheng-Chen Tseng & Feng-Rung Huang, *The Research of Moral Right – A Comparative Approach of Taiwan, US and Canada*, 19 PROPERTY AND ECONOMIC LAW JOURNAL 1, 17-20 (2009).

<sup>76</sup> COOTER & ULEN, *supra* note 31, at 203.

<sup>77</sup> *Id.* at 205.

<sup>78</sup> *Id.* at 205.



## **2. What damages can result from the breach of a contract that restricts the enforcement of “Droit de Suite?”**

We assume again that there are two players in the agency game of a business setting, the promisor and the promisee.<sup>79</sup> Theoretically, “Perfect Expectation Damages” are the typical damages for a breach of contract and they refer to the expected revenue that the promisee actually promised in the enforcement of the contract. Furthermore, “Perfect Expectation Damages” provide promisors the incentive to efficiently enforce or breach contracts when the contracts only impact the promisor and promisee. Of course, “Perfect Expectation Damages” also encourage promisors to take measures to avoid breaching contracts. However, “Perfect Expectation Damages” cannot always provide adequate compensation for the contract promisee.<sup>80</sup> Therefore, these imperfect contracts need the courts to efficiently fill the gaps and fix any market failures through the “Default Rules” in order to reduce transaction costs.<sup>81</sup>

On the other hand, “Perfect Expectation Damages” are a good type of damages for the breach of a contract that restricts the enforcement of “Droit de Suite,” regardless of whether the authors/creators (for purposes of this and the following paragraph, “the former”) or users/buyers/auctioneers (for purposes of this and the following paragraph, “the latter”) of copyrighted works/creations are promisors. In particular, the former has the incentive to make a profit through agreements with the latter regarding copyrighted works/creations. In addition, the latter cannot choose to reduce the sale price in order to pay sufficient fees to the former.

Moreover, courts should interpret clauses in ambiguous contracts that restrict “Droit de Suite” enforcements by using the “Default Rule” when the former or the latter is the promisee. However, “Perfect Expectation Damages” are not good damages for breach of contract if the former or the latter is promisee. Thus, courts need to efficiently promote cooperation between the former and the latter. In other words, the former can obtain profits and the latter cannot decrease the sale price to avoid paying the former. Courts should make good use of their judgments to promote cooperation between the former and the latter.

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<sup>79</sup> *Id.* at 203.

<sup>80</sup> *Id.* at 212.

<sup>81</sup> *Id.* at 244.

## B. Limited terms for the protection of “Droit de Suite”

Although Article 14 of the Berne Convention for the Protection of Literary and Artistic Works (hereafter “Berne Convention”) regulates “‘Droit de suite’ in works of art and manuscripts” regarding the “right to an interest in resale,” “applicable laws,” and “procedures,”<sup>82</sup> it does not mention the protection term for “Droit de Suite.” This is likely because “Droit de Suite” is traditionally a type of “Moral Right.” In other words, we must refer to the term of protection for “Moral Rights” when we want to discuss the term of protection for “Droit de Suite.”

Moreover, Article 6bis of the Berne Convention states that “Moral Rights” (i.e., “Droit de Suite”) shall be maintained after an author’s death and at least until the expiration of the “Economic Rights.”<sup>83</sup> However, countries whose legislation at the moment of ratification or accession to the Berne Convention does not provide for the term of protection for “Moral Rights” after an author’s death, cease to be maintained.<sup>84</sup> Therefore, the world’s copyright guidelines, the Berne Convention, indicate that “Moral Rights” (i.e., “Droit de Suite”) are not to be enforced after an author’s death but they are at least not protected until the expiration of the “Economic Rights.”

Take the legislation of the EU and California in the US as an example. The EU member countries’ laws state that the term of protection for “Droit de Suite” is the life of the author and 50 or 70 years after his/her death.<sup>85</sup> France was the first

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<sup>82</sup> Article 14ter of the Berne Convention rules that “**Droit de suite in Works of Art and Manuscripts:** 1. *Right to an interest in resales;* 2. *Applicable law;* 3. *Procedure,*” and its regulations are that, “(1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work. (2) The protection provided by the preceding paragraph 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. (3) The procedure for collection and the amounts shall be matters for determination by national legislation.” See World Intellectual Property Organization, WIPO-Administered Treaties: Berne Convention for the Protection of Literary and Artistic Works, [http://www.wipo.int/treaties/en/text.jsp?file\\_id=283698](http://www.wipo.int/treaties/en/text.jsp?file_id=283698) (last visited Nov. 12, 2016).

<sup>83</sup> Article 6bis(2) of the Berne Convention regulates that, “(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.” See *id.*

<sup>84</sup> *Id.*

<sup>85</sup> Tsai, *supra* note 6, at 76.

country to adopt “Droit de Suite” as a national law and its copyright law regulates that the “Droit de Suite” for artistic works is protected from when an artist begins selling his/her works/creations to 70 years after his/her death. In the California Resale Royalties Act, the term of protection for “Droit de Suite” is the life of the author and if an author died after January 1, 1983, his/her legal successors and estate managers continue to own the rights of “Droit de Suite” 20 years after the author’s death.<sup>86</sup>

On the other hand, the regulations of the Berne Convention do not clearly mention the term of protection for “Droit de Suite” but they state that the term of protection for “Moral Rights” (i.e., “Droit de Suite”) is not triggered until the expiration of the “Economic Rights.” To sum up, the terms of protection for “Droit de Suite” in the above countries’ legislation are equal to or less than the terms of protection for “Economic Rights.” Compared with the majority of civil law countries, the term of protection for “Moral Rights” is deemed to be the life of the author. Thus, the terms of protection for “Moral Rights” are obviously longer than those of “Droit de Suite.”

Whether or not the terms of protection for “Droit de Suite” are equal, less, or more than those of “Economic Rights,” are they “efficient”? We will analyze this question in the following two subsections.

### **1. Analyzing the terms of protection for “Economic Rights” using legal and economic approaches**

Stephen Breyer’s research in 1970 supported the argument that there are no moral justifications to support an increase in the legal protection of copyright and that copyright laws create monopolies in creations and distribution of original works, which raise market prices and reduce the consumption of protected works.<sup>87</sup>

In fact, a majority of books are retired from print due to a lack of profits after three to five years and only one book in every one hundred remained in print beyond the fifty six-year maximum protection period. Therefore, increasing the

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<sup>86</sup> California Civil Code Section 986(a)(7) (California Resale Royalties Act) rules that, “Upon the death of an artist, the rights and duties created under this section shall inure to his or her heirs, legatees, or personal representative, until the 20th anniversary of the death of the artist. The provisions of this paragraph shall be applicable only with respect to an artist who dies after January 1, 1983.” See California Legislative Information, California Law, Text Search, Code Section, Text Search: CIVIL CODE - CIV, [http://leginfo.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=CIV&sectionNum=986](http://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=CIV&sectionNum=986) (last visited Nov. 12, 2016); *Id.*

<sup>87</sup> WATT, *supra* note 55, at 120.

protection periods for “Economic Rights” would result in greater social costs than benefits.<sup>88</sup> Furthermore, transaction costs for “Economic Rights” will also increase if the term duration for the protection of “Economic Rights” is increased. Extending the term for the legal protection of “Economic Rights” is necessary to get permission to reproduce books and this may impose obstacles to the transaction of copyrighted works/creations.<sup>89</sup>

## **2. Analyzing the terms of protection for “Droit de Suite” using legal and economic approaches**

Of course, in examining the terms of protection for “Droit de Suite” using legal and economic approaches, we can refer to the discussion above regarding the terms of protection for “Economic Rights.” In particular, the enforcement of “Droit de Suite” (“Moral Rights”) only ensures that the original authors/creators can receive profits after the resale or auction of their copyrighted works/creations.

However, the externalities of implementing “Droit de Suite” not only allow authors/creators to obtain certain benefits from resale or auction but they also impose social costs on users/buyers/auctioneers of copyrighted works/creations. On the other hand, limited terms for the protection of “Droit de Suite” are “efficient” in copyright law and this balances the rights and interests between authors/creators and users/buyers/auctioneers of copyrighted works/creations.

## **C. Summaries**

The purpose of enforcing “Droit de Suite” is to compensate for the unfair treatment of artists and other copyright owners such as composers and musicians through resale royalties.<sup>90</sup> However, there are gaps between ideals and realities. In other words, adopting legal and economic methods to analyze “Droit de Suite” is not only from the perspective of “equity” but also from the perspective of “efficiency.”

First, “Perfect Expectation Damages” are excellent damages for the breach of contracts that limit “Droit de Suite” and these damages provide incentives for users/buyers/auctioneers of copyrighted works/creations when they are promisors. Such incentives mean that users/buyers/auctioneers of copyrighted works/creations do not need to reduce the sale price in order to pay royalties to the authors/creators. On the other hand, these damages also provide incentives for authors/creators of

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<sup>88</sup> *Id.* at 121.

<sup>89</sup> *Id.* at 121-122.

<sup>90</sup> Lin, *supra* note 7, at 136.

copyrighted works/creations if they are promisors. These incentives mean that authors/creators of copyrighted works/creations can continue to enforce their “Economic Rights” and obtain other benefits through agreements with users/buyers/auctioneers of their copyrighted works/creations. As a result, choosing to execute contracts that limit “Droit de Suite” is “efficient.”

Second, increased terms for the protection of “Economic Rights” may result in high transaction costs because author/creator permission is necessary before reproducing copyrighted works/creations. Thus, longer terms for author/creator monopolies present obstacles to the transaction of copyrighted works/creations. In the same way, legislation for terms of protection for “Droit de Suite” should adopt limited protection terms regardless of the terms of the Berne Convention or the law of other countries. Because enforcing “Droit de Suite” results in externalities, social costs are imposed on the users/buyers/auctioneers of copyrighted works/creations. To sum up, adopting legislation with limited terms of protection for “Droit de Suite” is “efficient” for copyright law.

## **V. Conclusion**

The main goals of enacting copyright laws are not only to promote the protection of the rights of copyright owners but also to achieve national, cultural progress. In other words, determining how to balance public interests (i.e., users/buyers/auctioneers of copyrighted works/creations) and private interests (e.g., authors/creators of copyrighted works/creations) is important for copyright legislation. The “Fair Use Doctrine,” the “First Sale Doctrine,” and “Limited Term Protection” are the primary methods of restricting the “Economic Rights” of authors/creators of copyrighted works/creations.

In addition, authors/creators of copyrighted works/creations own both “Economic Rights” and “Moral Rights.” Compared with common law countries’ copyright legislation, copyright laws in civil law countries focus more on “Economic Rights” than “Moral Rights.” For example, France was not only the originator of “Moral Rights” but was also the first country to introduce “Droit de Suite” as a type of “Moral Right.” In fact, “Droit de Suite” ensures that authors/creators of copyrighted works/creations can obtain royalties after resale or auction. For example, Clause 1, Article 12 of the 2012 Copyright Act Amendment of China ruled that authors, successors, or legatees of artistic, photographic, and musical works or drafts can obtain the rights of benefit-sharing after the works or drafts are auctioned.

Regardless of the national exhaustion, regional exhaustion, or international exhaustion adopted in “First Sale Doctrine” legislation, the “First Sale Doctrine”

secures the right of consumers to freely give away, lend, or discard copyrighted works/creations if they legally obtain such works/creations. However, it is pity that “Droit de Suite,” as a type of “Moral Right,” cannot be bequeathed or otherwise transferred. Thus, “Droit de Suite” is superior to the “First Sale Doctrine” in the enforcement of conflicts where they are implicated.

Actually, enforcing “Droit de Suite” ensures that authors/creators of copyrighted works/creations can obtain royalties after their works/creations are resold or auctioned but this results in high external costs because of long and/or complicated procedures (i.e., litigation). On the other hand, enforcing the “First Sale Doctrine” limits the “Rights of Distribution” of copyright owners and prohibits them from abusing these rights. Hence, the distribution of works/creations does not require author/creator permissions. This keeps transactions costs low for the distribution of such works/creations in the market. With regard to legal and economic analyses, “Droit de Suite” enforcement is not more “efficient” than enforcement of the “First Sale Doctrine.”

Thus, the advantages of enforcing the “First Sale Doctrine” and not enforcing “Droit de Suite” consist of preventing external costs and decreasing transactions costs. Due to the “efficiency” of restricting “Droit de Suite” enforcement, balancing interests between authors/creators and users/buyers/auctioneers of copyrighted works/creations is significant.

“Perfect Expectation Damages” are excellent damages for the breach of contracts that limit “Droit de Suite” and they provide incentives for users/buyers/auctioneers (for purposes of this paragraph, “the former”) and authors/creators (for purposes of this paragraph, “the latter”) of copyrighted works/creations when they are promisors. Moreover, the former does not need to reduce the sale price in order to pay royalties to the latter when the former is the promisor. In addition, the latter continues to enforce its “Economic Rights” and receive benefits through agreements with the former. As a result, this essay proposes that executing contracts that restrict “Droit de Suite” is “efficient” in the exchange of copyrighted works/creations in the market.

Furthermore, legislation for the terms of protection for “Droit de Suite” should adopt limited protection terms. Because “Droit de Suite” enforcement results in externalities, this imposes social costs on all users/buyers/auctioneers of copyrighted works/creations. Above all, adopting legislation with limited terms of protection for “Droit de Suite” is “efficient” in copyright law.

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