

MORAL RIGHTS IN EUROPEAN COPYRIGHT LAW

- ☐ In **all European countries**, authors enjoy **moral rights**
- ☐ These rights are **non-assignable** in all countries, in most they are **non-waivable** and unalienable, and in some they are **perennial**, that is, they do not expire after the end of the copyright term
 - ☐ Right of **paternity** (or attribution): The right to be credited as the author by any third party.
 - ☐ Right of **integrity**: The right to approve alterations of a work, and to oppose derogatory uses of the work.

And in **most European countries** also

- ☐ Right of **disclosure**
The right to publish or keep unpublished a work
- ☐ Right of **withdrawal**
Right to take the work out of circulation (subject to payment if licenses had been granted or rights assigned)

General rationales for inalienable rights

- ❑ **Negative external effects** reaching outside those involved in the transaction (Calabresi-Melamed)
- ❑ **Imperfect information** when there is **correlation** between external **harms** and the **transfer of rights** (some buyers of moral rights would misuse them, and it is costly to separate the good from the bad buyers)
- ❑ **Asymmetric information**: when sellers have superior information over the quality of the good, prohibiting sales and relying on gifts eliminates low-quality, for-profit sellers (Arrow)
- ❑ **Inequality of bargaining power** between buyers and sellers
- ❑ **Avoid commodification** of certain precious goods: some goods should be kept outside the realm of the marketplace, because allowing them to be treated as commodities causes a loss in value (Radin)
- ❑ **Paternalism**: protect the prospective buyer against his own present preferences (maybe because **present preferences** will diverge from **future preferences**)

Specific rationales for each moral right

1. Right of **integrity**

- **Creating divided property rights** in highly movable assets: without specific provisions in Copyright Law, general rules of Contract and Property Law would not allow such subdivisions, which may serve to better adjust legal rights to the interests of all the parties involved
- **Avoiding non-pecuniary harm to author:** authors often feel sentimental attachment to their works, and value the right to protect their integrity, even at the price of reduced income
- **Avoiding harm to the reputation** (and thus to future income) of the author: empirical evidence shows a high **complementarity** (variable across fields of copyright subject matter: plastic art > music > literature) **between different works** from an author → prejudice to one work prejudices income from other works
- **Avoiding harm to owners of author's works** (only likely for plastic arts) **or to the public at large**, who have a pecuniary and/or non-pecuniary interest in integrity of works

- Serving as **substitute for a display right** for plastic artists (in some European Copyright Laws authors enjoy a display right, although limitedly and subject to transfer). Such a right
 - i. involves **substantial costs for 3rd parties**
 - ii. is **unnecessary** in most cases: interests of author and owner of work are aligned – due to complementarity between works-
 - iii. gives rise to **anti-commons** and hold-up situations in some cases

- **Concentrating enforcement in the author** serves to
 - i. **economize in enforcement** costs
 - ii. **avoid anti-commons** problems if multiple enforcers were allowed
 - iii. but it may create **underenforcement**

- Making the right **unalienable** might serve to

- i. Protect the author from **future regret** about unexpected aggressions to the work
- ii. **Protect 3rd parties** from immediate economic needs of author
- iii. Allow the author to pre-commit not to disengage himself from his work→ increases the revenue from the work in the first place by **credibly offering a warranty of integrity**

2. Right of **attribution**

- **Negative right** of attribution (right to disregard false attributions) clearly makes economic sense
 - i. **Avoids deception** among consumer of the same type of informational goods
 - ii. **Avoids free-riding** on the reputation of other authors
 - iii. **Avoids congestion** in the reputation of more reputed authors (like the right of publicity or the anti-dilution protection of reputed brands)
 - iv. **Avoids over-investment in protective measures** against misattribution

- ☐ The **positive right** of attribution (right to claim authorship)
 - i. Shares some of the rationales of the negative right: avoid **confusion**, avoid **over-investment**
 - ii. **Problems** with pseudonymous works, work for hire and ghost writers

3. Right of **disclosure**

- ☐ Right of **disclosure** can also be explained in economic terms based on the important **complementarity** between different works of the same author:
 - i. **Avoids damaging the reputation** of the author and the interests of previous owners by **premature publication**
 - ii. **Avoids** extortions and **pressures** by buyers or commissioners to take **advantage of loss of reputation**
 - iii. **Avoids** **costly** **self-protecting** measures against premature publication

- iv. Subject to **damage compensation for bad-faith exercise**: damages to buyer are easier to assess than damages to author's reputation
- v. In some instances, the **waiver** might fulfil a valuable purpose (urgent or very specific commissions)

4. Right of **withdrawal**

- Right of **withdrawal**

- i. might be justified based on the important **complementarity** between different works of the same author→, avoiding **harm to reputation from earlier works** that do not correspond with current work
- ii. Should always be **subject to compensation**→ a sort of private power of eminent domain
- iii. Should also imply the right to eliminate the work from **public knowledge**?

RESALE ROYALTIES OR DROIT DE SUITE

☐ **Directive 2001/84** has introduced for **all EU** countries a **resale royalty** for works of plastic arts (traditionally called, following the French term, Droit de suite)

☐ **Droit de suite** is

- i. right to collect **royalties from second or later sales** of the work
- ii. Applies only to **original works of art** (paintings, sculptures, drawings, ceramics, photographs etc.)
- iii. Applies only where **resale** occur through a **professional**: dealers, galleries, auction houses
- iv. Can be **excluded** for sales

< 3,000 €,

and those combining

{
< 10,000 €
< 3 years from direct first sale from
the artist

- v. Right is **inalienable** and unwaivable
- vi. Royalty is 4% for resale price up to 50,000€, and **scales down** to 0.25% for sales over 500,000€
- vii. Royalty is formally **payable by the seller**

☐ Economists have tended to view Droit de suite with hostility. Major **economic criticisms** of Droit de suite:

- i. **Inefficient time allocation of revenue** for artists: droit de suite reduces the initial price the artist can ask for the work of art, to reflect the discounted expected value of royalties → the artist receives less money when needed in exchange for payments when already an established artist
- ii. **Inefficient risk allocation**: the future stream of royalties is a more risky compensation than a higher initial sale price → given that artists are probably more risk-averse than buyers, this implies an inefficient allocation of risk

- iii. **Negative insurance:** resale royalties entail negative insurance → if the bad outcome occurs it pays nothing, and if the artist is successful, it pays
- iv. **Perverse redistribution:** transfers income from less successful artists to the winning ones → artists whose works appreciate and resale well receive a royalty exceeding the expected value (and the initial reduction in price), while the reverse is true for the failed ones
- vi. **Disincentive to promote** the works of the artist: if dealers have to share with authors the proceeds of their sales, they will invest sub-optimally in promotional effort

■ **Traditional arguments** supporting Droit de suite

- i. **Inequality of bargaining power** between artists and buyers in the initial sales of art → need to compensate it through the right to participate in gains if the work is sold for profit
- ii. **Analogy with reproduction and communication to the public rights** → resale royalties assimilate plastic

artists to other authors, who enjoy communication to the public rights

iii. **Subsidy** to the arts

■ **Economic arguments** supporting Droit de suite

- i. **Protection of the later self** of the artist against the younger self→ avoids regret for too cheap and easy sale of works at the initial stages of an artistic career
- ii. **Signaling future success** in the arts: talent and commitment to own art are **private information of the artist** in the early stages of a career. Resale royalties serve as a signalling device of these unobservable characteristics to uninformed buyers, because this **signal is less costly for authors who know they are more likely to be successful**
- iii. Later good works of the artist provide an **external benefit to the existing owners of works**→ the author has **suboptimal incentives** to provide good later works if he is not able to capture the external benefits→ **taxing all owners** to pay the artist is costly to do, it is easier to collect a tax when a public resale occurs. Moreover, higher prices

of existing works are in part the product of later works, so the **sellers are the ones who most clearly enjoy the external benefit** (more than a museum, say)

iv. **Commitment device to restrict or expand future artistic output:**

1. If **future work is a substitute** product for existing work, the artist would maximize profit by convincing early buyers that he would not expand production in later periods→ but without an interest on the resale prices of existing works, the author has an incentive to later expand output (a temptation that early buyers will anticipate, absent a commitment device). Droit de suite gives him this ongoing interest→ **allows the artist to restrict output maximizing profits**
2. If **future work is a complement**, artist would like to convince early buyers that he will produce more in the future→ resale royalties give the artist the interest to do so in the future, providing a commitment device→ **allows the**

**artist to expand output
maximizing profits**

- v. **Overcoming the dealers monopoly power** with respect to an artist in the primary and secondary markets: without the artists share, the dealer would charge too higher prices compared to the jointly optimal ones→ **dubious** because dealers have no monopoly in the resale market