

# Questioning Rationality of and Necessity for Incorporating *Droit de Suite* in Copyright Law

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The “*droit de suite*” is a legal system to balance the interests between copyright proprietors and owners of original works. In theory, *droit de suite* has an origin rationally based as it conforms to the value of fairness and justice. The third amendment to the Copyright Law is now underway in China, and the three Drafts thereof issued for comments all cover the content of *droit de suite*. It seems to be a trend of development that the *droit de suite* system will be incorporated in the Law. This article will first present an overview of the *droit de suite* system and the present situation of foreign and international legislation regarding it, then examine the reason, necessity and feasibility for introducing the *droit de suite* system. Also, this article will question the rationality of and necessity for incorporating *droit de suite* in the Copyright Law of the People’s Republic of China.

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## I. Introduction

Ever since the work on the amendment to the Copyright Law for the third time was initiated in China, the *droit de suite* system, incorporated in the three versions of the Amendment to the Copyright Law issued by the competent authority for

public comments in 2012, has been drawing wide attention and causing heated discussions within certain groups of the public. Some experts and scholars argue that the *droit de suite* system is compatible with the value and concept of fairness and justice the law seeks, is theoretically based on the “rules of exceptional losses or *lacsio enormia*” in the civil

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law theory and poses limitation on the traditional ownership absoluteness theory and the IP rights exhaustion system.<sup>1</sup> While it seems fairly reasonable and necessary to add the *droit de suite* system to the Chinese Copyright Law, whether it is sufficiently rational and whether it is now necessary and feasible to incorporate *droit de suite* in the Copyright Law when the Copyright Law is under amendment for the third time still require our further in-depth consideration.

## II. Concept and nature of *droit de suite*

The *droit de suite*, having its origin in French, is also known as the right of copyright royalties, continuing right or follow-up right in re-selling. The *droit de suite*, originally a legal term in the tangible right law, refers to the “continuing” when a real right owner takes his real property as pledged subject matter. Later introduction of the term to the realm of the Copyright Law has produced the legal meaning to be discussed in this article.<sup>2</sup>

By the *droit de suite* mentioned in the drafts of amendment to the Chinese Copyright Law issued for comments is meant that when within a period, the price of the original of a fine art or photographic work, or the manuscripts of a literary or musical work in a following transfer is higher than in the first transfer or the added value reaches a certain amount, the author or his heir, devisee or legatee has the right to obtain a certain amount of money in the certain proportion from the total amount or the amount of the added value in the later transfer. This right is exclusively owned by the owner of the copyright in the work. It is unassignable and inalienable.

On the nature of the *droit de suite*, there are three views in the academic community: it has the nature of the “author’s personal right”, “property right of copyright” and “comprehensive right”.

Scholars, advocating the nature of the property right of copyright mainly on account of the value and content of the *droit de suite* system, argue that the *droit de suite* system mainly stresses the protection and compensation of the economic benefits of copyright owners, and what they possibly or actually obtain are mainly property, not spiritual, benefits. This doctrine represents a main view in the present-day international legislation. In the first version of the amendment to the Chinese Copyright Law issued for comments, the *droit de suite* was included in the property rights of the copyright.

Scholars, advocating the nature of the author’s personal right mainly by highlighting the character of personal ap-

pendage of *droit de suite* and by taking it as authors’ spiritual benefits, believe that *droit de suite* has been put in place to specially protect authors’ interests, and the right is unassignable and inalienable. Therefore, the right only goes to an author himself or his or her lawful heir and devisee or legatee.

Scholars, advocating the nature of the comprehensive right on account of the character of the property right and characteristics of personal right of *droit de suite*, embodying integration of rightholder’s property and spiritual interests, believe that *droit de suite* is a comprehensive right independent of the personal right of an author and falling outside the property right of copyright. In the second and third versions of the Amendment to the Copyright Law issued for comments, *droit de suite* is provided for outside the scope of personal right and property right owners, showing conformity with the view.

The different choices made in the three versions of the Amendment to the Copyright Law issued for comments reflect immature research made on the *droit de suite* system in the academic and practice communities in China. This is also one of the important reasons for the writers to question the addition of *droit de suite* to the Chinese Copyright Law.

## III. An overview of legislation on *droit de suite* system abroad

As the legislation of some typical nations along the line shows, the *droit de suite* system resides mainly in the legislation of nations adopting the civil law system. The common law countries take a relatively conservative attitude toward it. A relatively prudent attitude is taken in the Berne Convention, which provides for the *droit de suite* in the seven property rights an author is entitled to.<sup>3</sup>

In France, from which the *droit de suite* system was originated, the *droit de suite* system put in place in its Copyright Law is comparatively fair. Article L. 122-8 of the French Intellectual Property Code provides: “Although the original works have been made by the author or his right after being transferred, if the art market professional intervention with the seller, the buyer or the mediation, plane and three-dimensional works of the original members of the European Union or European economic area member states citizens author, shall enjoy the right of droit, namely to any resale have inalienable the work proceeds. As an exception if the reseller purchased directly from the author works, the resale in three years, and

the price is not more than 10000 euros, these rights are not applicable.” After the *droit de suite* system was established in France, the *droit de suite* system was carried to and developed in Germany and Italy, and gradually accepted by such civil law countries as Czech, Belgium, Poland, Brazil and Russia.

Unlike the civil law countries, the common law countries have comparatively conservative or dubious attitude toward the *droit de suite* system. Take the U.S.A. for example, while a provision similar to the *droit de suite* system was once included in the Visual Artists Rights Act drafted by the U.S. Congress, the later “feasibility study” put the Act to a halt, and the *droit de suite* system was not recognised in the end.<sup>4</sup> Although *droit de suite* is recognised in the legislation of a very few states, *droit de suite* is not generally recognized in the Federal legislation of the country. The United Kingdom’s attitude is even more conservative. The U.K. and U.S.A. generally believe that putting the *droit de suite* system in place is likely to weaken their position in the international artistic work market, and do harm to their national interests.

Article 14ter (1) of the Berne Convention provides: “The author, or after his death, the persons or institutions authorised 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.” While the Convention has accepted the *droit de suite* system in a given sense, Article 14ter (2) and (3) stringently limit it: “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. The procedure for collection and the amounts shall be matters for determination by national legislation.” This shows that provisions on the *droit de suite* system in the international legal documents is nothing but a result from the game play and compromise among countries, and by no mean represents an international trend of development.

## IV. Rational foundation for establishing *droit de suite* system in China

### 1. Value and concept of fairness and justice

For some scholars in China, the value of the *droit de suite* system lies in or embodies the value of fairness and justice in law.<sup>5</sup> If, as these scholars say, the *droit de suite* is be-

lieved to be a rightholder’s right to obtain a given amount of money from the total amount of the added value in subsequent transfer, and embodies the concept of the value of justice of law, is it a paradox. That is, if within the *droit de suite* system, a copyright owner is entitled to a given amount of money from the total amount of the added value in the subsequent transfer, benefits and risk should co-exist for the fairness and justice in law; then if a work is devaluated in subsequent transaction, should the copyright owner compensate for the losses to the collector of the work in the transaction thereof? Nonetheless, any provision to this effect seems unrealistic, or unreasonable. That a copyright owner only receives benefits from added value of his work, and does not have to take the risk of devaluation of the work mean that the gains of added value of a work are shared by the work collector and copyright owner, but the work collector would alone bear the burden caused by the risk of devaluation of the work and losses. Does this go against the concept and value of justice of law?

### 2. Rules of extraordinary losses

Some scholars argue that the *droit de suite* system, theoretically based on the rules of extraordinary losses in the Roman Law,<sup>6</sup> which, theoretically based on the value of fairness, is set forth in direction to the unfairness in transaction or trade in civil commercial contracts, and is, to date, embodied as the system of exorbitant profiteering, obvious unfairness, etc. in the civil law, and as the system of obvious unfairness and taking advantage of others’ difficulties in China, which is essentially different from the *droit de suite* system.

First of all, a legitimate work-related trade contract is reached by both parties on voluntary terms through equal consultation, with free and full expression of their own will and without fraud or coercion, which would otherwise render the contract invalid, alterable or revocable. Therefore, transfer of the real right effected by an act of delivery is legitimate and valid, and the assignee has legally obtained the right to own the original. The seller cannot deny the validity of the contract on account of the so-called “rules of extraordinary losses”.

Next, some scholars argue that after first transaction of a work, its price is likely to rise drastically, knocking the interest of the copyright owner and that of the re-seller seriously out of balance, which constitutes extraordinary losses as far as the copyright owner is concerned. For this reason, it is necessary for him to obtain a part of profits out of the added val-

ue the other party has gained from selling the related work, as economic compensation for the “extraordinary losses” of the copyright owner. These measures both ensure that the transaction is safe and orderly, and balance as much as possible of the interests that have been knocked out of balance.<sup>7</sup> If we interpret the rules of extraordinary losses according to such understanding, can we also deduce that after a fixed property transaction is concluded, the seller may, with the constant rise in value of the property, share the benefits obtained from the added value or any follow-up transfer? This is also obviously unfair, and unrealistic.

### 3. Theory of absoluteness of right of ownership and system of right exhaustion

Many scholars pointed out that it is the special character of the subject matter of *droit de suite*, such as artistic works that makes it necessary to establish the *droit de suite* system to enhance the protection thereof.<sup>8</sup> Indeed, the subject matter of *droit de suite* has some special character compared with ordinary subject matter of the copyright. In a certain sense, the subject matter of *droit de suite* represents integration between the copyright and real right. We have found, however, that both the theory of absoluteness of right of ownership in real right and the right exhaustion theory in the IP rights deny a rightholder’s entitlement to the right to gain benefits from transaction following transfer or assignment of a subject matter of his right. In any fixed property transaction, can a former owner or initial owner gain benefits from any follow-up transfer and added value after the property is assigned to someone else? The answer is definitely negative. Accordingly, while the subject matter of *droit de suite* as integration between the copyright and real right has its own special character, how to construct a rational *droit de suite* system in relation to such special subject matter yet requires in-depth study.

The rationality of a *droit de suite* system is not so clear and definite as some scholars argue, nor is it possible for it to reasonably explain its stimulation and adjustment of the conventional theory of right of ownership and IP rights.

## V. Puzzlement on reality of incorporating *droit de suite* in Copyright Law

### 1. Question on realistic necessities

#### 1) Protection of copyright owners’ right

In almost all writings advocating the necessity for establishing a *droit de suite* system is invariably argued that

*droit de suite* promotes the protection of copyright. In a long run, the *droit de suite* system seems to be of significance to the protection of copyright owners’ right and interests. But now and in a considerable period of time in the future, these writers are doubtful and puzzled as to the realistic necessity to add the *droit de suite* system to the Copyright Law in China.

A close study of the current Chinese Copyright Law shows that the provisions on copyright protection are so many and so detailed as to be well developed though not perfect. However, the cruel reality tells us that the Copyright Law has provided for the many relatively well-formulated rights of copyright owners, but it is very much complained for failure of all these rights to accord sufficient protection of copyright owners’ rights and interests. In situation like this, if we are to make the legislation “look good and perfect” by rigidly and inflexibly incorporating *droit de suite* in the Chinese Copyright Law, we are badly afraid that it would give copyright owners some empty or non-enforceable right. The result of the incorporation would lead to temporary support and praise from rightholders. In the course of implementing the provision, how would copyright owners react when they find *droit de suite* is nothing but a right written on paper? Improvement of a right system is based on that of the system to protect the right, and a right to which timely remedy is available is a true right. In the absence of protection of the existing rights, is it a socially responsible, wise decision to continue to add new rights to see the so-called “good-looking and perfect” legislation?

Next, the present situation of the art market and the reality of the auction industry in China also show that if the *droit de suite* system applies only to works transferred by way of auction under the provision of the second and third versions of the Amendment to the Copyright Law issued for comments, it is difficult for the *droit de suite* system to perform its role and achieve its value.<sup>9</sup> In practice, copyright owners who can sell their works at auction are artists of sound capability and popularity, whose economic interests seem not at all to be protected by virtue of the added *droit de suite*. Those who need protection by *droit de suite* are not capable and popular enough to sell their works at auctions. This means that it is difficult for them to be protected through *droit de suite*. As a result, the *droit de suite* provision is likely to lead to a situation where those who need to be protected are not protected, and those who do not need to obtain extra interests.

#### 2) Development of artistic work market and auction in-

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For some scholars, establishing a *droit de suite* system will be conducive to the prosperity and development of the artistic work market in China. Is it a right judgment? With the economic development and rising of the people's living standard in China, the market for artistic works has been thriving in recent years here in China. As we have mentioned above, the U.K. and U.S.A. did not accept the *droit de suite* system mainly because of the need for the protection of their own markets for artistic works. The market for artistic works in China is a far cry from that in the U.K. and U.S.A.. These two countries do not establish a *droit de suite* system to bring prosperity to their own market for artistic works, it is rather hard to understand why China is in such a hurry to introduce and embrace it. Relatively speaking, the markets for artistic works in European countries are relatively thriving, with relatively well-developed relevant systems put in place there. In spite of this, the *droit de suite* system is not very effective in Europe as interested parties can easily make inapplicable, and stay away from, the *droit de suite* in such a way as changing the place of transaction of artistic works.

The Amendment to the Copyright Law of China issued for comments has evoked strong repercussion in the industry of artistic works, with voice against it much louder than that for it. What's more, confining enforcement of *droit de suite* to transfer at auction in the second and third versions of the Amendment to the Copyright Law issued for comments has brought it open to serious doubts and questions: does there exist industrial discrimination? As artistic works collectors or other interested parties can easily circumvent legal liability by choosing other forms of transaction, is this devastating to the entire industry of artistic works auction? People concerned from the China Auction Association point out: "Objectively, the *droit de suite* system is likely to inhibit the development of the artistic works market as it is shown by the most direct evidence that a relatively well-developed *droit de suite* system is absent in the U.S.A. and U.K., where the world centers of artistic works reside, while it just in Germany and France with relatively well-developed *droit de suite* system that there is no international trade center of artistic works established there."<sup>10</sup>

Enforcing *droit de suite*, in theory, stimulates creation, but it also increases cost of transaction in artistic works market, and inhibits the development of artistic works market, so it has more disadvantages than advantages in the artistic works market that is developing in China. Besides, in China,

systems of right affirmation, appraisal and evaluation relevant to trade of artistic works are yet to be established. Also, the first-level artistic works market is immature at present, and the industry of appraisal of artistic works chaotic, which will inhibit construction and implementation of the *droit de suite* system.

From discussion on the practical necessity for and feasibility of incorporating *droit de suite* system in the Copyright Law, we've found that with the IP protection faced with difficulties and the protection of copyright owners' existing rights under the Copyright Law inadequate in China, rashly putting *droit de suite* into the Copyright Law will cause doubts and complaints from copyright owners, detriment to the interests of artistic works collectors, and make it possible for the artistic works market and the auction industry to run into a hard situation.

## 2. Doubts on feasibility

1) Inadequate theoretical research on the system of rights under copyright

As the comparison of the three versions of the Amendment to the Copyright Law issued for comments shows, theoretical study on the *droit de suite* system in China is immature, and sparks controversy over the scope of subject matter of such a right grant. As, in terms of the scope of exercise of the right, the second and third versions of the Amendment issued for comments confine it only to auction, which makes it irrational and infeasible. In terms of exercise of the right and condition for rightholders to share benefits, the versions are obviously different.

2) Matter of organisation for collective administration of copyright

In the West, it is generally for organisations for collective administration of copyright or other organisations to uniformly enforce the *droit de suite*. For some scholars, the establishment and development of the relevant organisations for collective administration of copyright in China, such as the China Literary Copyright Association and China Music Copyright Association, have had considerable experience in collective administration of copyright in China, which is good for the collective administration of the *droit de suite*. But, in reality, there is incessant controversy over organisation for collective administration of copyright in China, the construction of the system of organisations for collective administration of copyright in China is faced with arduous tasks, and has a long way to go. In situation like this, how can we ensure the enforceability of the *droit de suite*?

### 3) Likelihood of law circumvention

While the Berne Convention has provided for the *droit de suite*, a party in such a transaction can easily circumvent the law provision by changing place of transaction of artistic works or choosing to carry on trade in countries where protection of the *droit de suite* is absent. It is exactly out of this consideration that the common law countries are quite reluctant to introduce the *droit de suite* system. The possible circumvention poses challenge to the establishment and implementation of the *droit de suite* system, and urgently requires good coping solutions.

## V. Conclusion

This article is not meant to deny the relatively considerable theoretical value and realistic significance of the *droit de suite* system to the protection of copyright and balanced interests of all interested parties. However, from analysis of the theoretic basis of the *droit de suite* system and the necessity and feasibility for incorporating the *droit de suite* in the Chinese Copyright Law, these writers conclude that the foundation for the theoretic research on *droit de suite* system is weak, sufficient, necessary conditions for the construction of *droit de suite* system absent, and the necessity and feasibility for introducing *droit de suite* lacking. Accordingly, in the absence of both subjective and objective conditions, it is undue to incorporate *droit de suite* in the Chinese Copyright Law now under amendment for the third time. ■

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<sup>1</sup> Chu Shuijiang, On Droit de Suite, carried in the Journal of Jurisprudential Study, 2008, issue 6; Ding Liying and Zou Guoxiong, Theoretical Foundation and System Construction of Droit de Suite, carried in the Science of Law of Northwest University of Political Sciences and Law Journal, 2005, issue 3.

<sup>2</sup> Zheng Chengsi, Copyright Law, Remin University of China Press, 2009, P. 46 and P. 154.

<sup>3</sup> Possibly due to different understanding, another Chinese word is used for it in some other translations.

<sup>4</sup> Duboff. L. D and King. K. O, Art Law in a Nutshell, translated by Zhou Lin, Ren Yunzheng and Gao Hongwei, the Publishing House of China Academy of Social Sciences, 1995, P. 162.

<sup>5</sup> Ding Liying and Zou Guoxiong, Theoretical Foundation and System Construction of *droit de suite*, carried in Science of Law of Northwest University of Political Sciences and Law Journal, 2005, issue 3.

<sup>6</sup> Li Yufeng, Necessity for Establishing Droit de Suite System in China carried in the China Copyright, 2012, issue 6; Ibid., and Chu Shuijiang, On Droit de Suite carried in the Journal of Jurisprudential Study, 2008, issue 6.

<sup>7</sup> Supra Note 5.

<sup>8</sup> Chu Shuijiang, On Droit de Suite, carried in the Journal of Jurisprudential Study, 2008, issue 6.

<sup>9</sup> Droit de Suite of Artistic Works: Shield or Killing Gun? at <http://topic.artron.net/newtopic/zxq/>, last visited on 6 June 2013.

<sup>10</sup> Jin Ye, Droit de Suite: Progress or Inopportuneness carried on the Guangzhou Daily of 3 December 2012 at <http://collection.sina.com.cn/yjjj/20121203/090594604.shtml>, last visited on 6 June 2013.