

## **Copyright and Related Rights Law**

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**WEEK - 08**

**LECTURE – 38**

**Resale Royalty Right**

Welcome back to this course on copyright and related rights law. In the previous sessions of this week, we discussed broadcasting rights after seeing the definition of broadcasting under the UK Copyright Act and the Indian Copyright Act. We have now seen how broadcasting rights are provided under the Indian Copyright Act. What we will see in this session is a specific type of right called the resale royalty right. In the Indian Copyright Act, this particular right is referred to as the resale share right. We will first understand how this right figures under the scheme of copyright and then look at the specific iteration of the resale share right in the Indian Act.

Let us understand a basic doctrine under copyright law called the doctrine of first sale. As is understood from its literal meaning, the doctrine is connected to the sale of copyrightable content wherein the content is part of some fixation. Therefore, if a book carrying copyrighted content is sold by the copyright holder, then such a sale will come within the purview of the doctrine of first sale. The underlying consideration that must be kept in mind is that the doctrine of first sale is concerned with unjust enrichment.

How do we understand this? Upon a legitimate sale, the monetary consideration that is received by the right holder is not something for which he should be eligible in respect of subsequent sales of that specific unit. You would recall that we had discussed there can be a million books carrying the same content. For these million books to have been purchased legitimately from the right holder would then mean that these units can be sold subsequently, to which the right holder would not have any claim. To understand this better, let us look at what section 14 of the Indian Copyright Act says. You can see, for the purposes of this Act, copyright means the exclusive right, subject to the provisions of this Act, to do or authorize the doing of any of the following acts in respect of a work or any substantial part thereof.

In the case of a literary, dramatic, or musical work, which is not a computer program, to issue copies of the work to the public, which are not copies already in circulation. The explanation to section 14 reads, "For the purposes of this section, a copy that has been sold once shall be deemed to be a copy already in circulation." What does this tell us? that the right holder has the copyright to control the issuance of copies. But once a copy is sold, according to section 14, this copy is now in circulation and does not fall within the sphere of control of the right holder. Thus, we can say that the doctrine of first sale, which is fueled by the justification that a right holder should not be unjustly enriched from his copyright, mandates that upon the sale of a legitimate copy, any further control over that copy in terms of any claim towards a subsequent sale is denied.

Which is where we are going to look at a very interesting right that is part of the copyright law of many countries. Expressed in its French terminology, it is termed *droit de suite*, and it is provided for works of art and manuscripts. We must ask ourselves how a work of art is any different in terms of its commercial utilization. And how is it similar to manuscripts when we compare it with the example that I took earlier, which was of a million books or a thousand books having the same content? The difference is that, as you can see, the manuscript is a reference to the author's handwritten or typed text that has not yet been published. In other words, it is the work from which copies have emerged, or it is the expression from which copies have emerged.

It is the first of its kind. In terms of art as well, we understand that artists do not deal in copies like there could be a thousand or a million books having the same content. Rather, the expression in the form of a painting will be sold as such. And therefore, when we look at *Droit de Suite*, the first thing that we must keep in mind is that *Droit de Suite* is not concerned with copies; rather, *Droit de Suite* is concerned with the first of its kind. Such a manner of commercial utilization is not based on earning revenue from mass production.

It is literally translated as the - right to follow. Right to follow what? We understand that under the doctrine of first sale, once consideration has been received for that sale, no claim can be made by the right holder on the subsequent sale. What *Droit de Suite* introduces is the possibility for such a claim on subsequent sales, which is why this is called a right to follow. Let us look at an article from the Berne Convention which is an international legal instrument dealing with intellectual property, more than a century old to which India is a party, as are many other countries. Provisions of the Berne Convention have mostly been taken within the broad framework of the TRIPS Agreement, which is the agreement on the trade-related aspects of intellectual property rights under the WTO, and the provisions of which are mandatory to be included in the intellectual property legislation of member countries.

This particular provision talks about Droit de Suite and explains that such a provision is not mandated, and there is nothing contrary to this stance within the TRIPS agreement either. Therefore, the application of Droit de Suite, which is an exception to the doctrine of first sale, is a completely optional inclusion within the Copyright Act of a particular country. You can see the provision reads: 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. It then says, "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 in which this protection is claimed.

Further, it states that the procedure for collection and the amounts shall be matters for determination by national legislation. This provision, we can see, places a lot of discretion in the hands of the member, which is introducing Droit de Suite into their copyright legislation. Once this provision is inserted, how it will apply in terms of the claim and the amount is something that countries can decide. What is interesting is how this will play out in terms of a claim made by a particular painter whose painting is sold in another country. It poses interesting questions and is something that we will look at in the following slides.

But before that, let us understand what is fueling the need for such a right. We are going to take a look at some of the pages. In the official guide to the Berne Convention issued by the World Intellectual Property Organization (WIPO). Under this guide, it is stated that the right aims to look after the interests of artists and other creators of artistic works. A painter or sculptor often sells his work cheaply in order to make ends meet.

The work may pass through a number of hands, and in doing so, may considerably increase in value. It becomes a source of revenue for those engaged in sales, such as dealers, experts, and art critics, and it is often bought as a good investment. This provision, therefore, allows the artist to follow the fortunes of his work and to profit from the increase in its value each time it changes hands. You can see that the need for droit de suite, or the right to follow, arises from an unfortunate situation that an artist may find himself in. In order to earn his livelihood, the artist would engage in an inexpensive sale of his artwork.

But this very piece that he has sold would become a highly valued piece of art over a period of years. In fact, this piece will travel to many buyers. What this provision states is that it would be unfair for a painting by a particular painter, to be bringing in a fortune to a purchaser while the artist himself is living in poverty. It is then a right that is generated from equity. In the name of fairness, it would only be appropriate if the painter whose painting is bringing in such fortunes is given a certain share from that subsequent sale.

This guide then says that these are usually sales by public auction or through art dealers. The Berne Convention covers both works of art and original manuscripts of authors and composers, although sales of the latter are seldom of major importance as producers of revenue. On the other hand, it is through sale that works of art are usually exploited. An important distinction is made by the guide, which explains that such an application would usually be seen with respect to works of art, such as paintings. But it's not just restricted to painting.

It could be a sculpture as well. It could be an engraving as well. But specifically with respect to manuscripts, although this provision extends to them, we understand that the mode of commercial exploitation is usually through mass production. This particular right, as expressed under the Berne Convention, states that it is an inalienable right. It is not possible to waive the resale royalty rights.

As the guide explains, this is to prevent the artist from being forced to part with it in order to make a living. But it is not personal to him in the sense that it follows the normal rules of succession to property, and the artist heirs of such institutions, as those rules prescribe, may benefit from it. Imagine a right such as this, to a share from a subsequent sale, being denied to the artist on account of a contract. Therefore, because this right serves the goal of fairness and justice, it would not be right to allow for its assignment or waiver. What could be important is that such a right should, in fact, be flowing from the artist onto his heirs as well.

Just like copyright does. Importantly, this provision bases its operation on reciprocity when we consider its application in different countries. Therefore, if a painter from India had his painting sold in some other country, what would be relevant is knowing whether that country is providing a resale share right. We can see, as the guide explains, that the enjoyment of this right, unlike most other rights, depends on reciprocity. It is optional in the sense that Union countries are free to decide whether or not to introduce it, and it can only be claimed if, and to the extent that, it forms part of the law where it is claimed. There are two examples that this guide provides.

Let us take a look at them. An artist from Czechoslovakia, where the right covers all sales, seeks to assert his rights in Italy, where the right only exists if the proceeds of the sale in question exceed those of the previous sale. These rights are governed by Italian law. A British artist cannot claim rights under this article in Belgium since British law does not recognize *Droit de suite*. We understand the scope of this article, to mean that both countries, one from which the painter hails and the second where the painter is going to claim the resale royalty right, must have such a provision in their copyright law. The extent of the share will be decided based on the laws of the country where the claim is made.

I hope this is understood. The guide explains. The majority of the countries in the union recognize the Droit de Suite, and in those that do, conditions vary. Usually, its scope is confined to sale by public auction or through dealers. That is, those sales that are reasonably simple to detect. It has been possible without insuperable difficulty to prescribe in such cases that the authors, often represented by a collecting society, receive a percentage, usually 5%, of the sale price.

This brings to our understanding an answer to a complex question: considering that a piece of art is going to be sold many times, how is it that this share is going to be identified at all? It is therein that the guide explains that the artist will benefit from a collecting society, that will have the kind of networking ability to conduct such an exercise. But because this is such a difficult endeavor, it is much easier to identify such sales when they are happening through public auctions. Or happening through dealers, and in such situations, such legislation prescribes a set percentage, such as 5% of that sale price. At the same time, there is no limitation on the number of subsequent sales to which the resale share right will be allowed. There are also laws that will apply only if there has been an increase in price beyond the price of the previous sale.

And if that's the case, then the percentage that we discussed would apply to the increase. Let us now consider how the Indian Copyright Act deals with resale royalty rights. Under Section 53A, the provision is concerned with resale share rights in original copies. Let us see what this provision states. In the case of resale for a price exceeding 10,000 rupees of the original copies of a painting, sculpture, or drawing or of the original manuscript of a literary, dramatic, or musical work, the author of such work, if he was the first owner of rights under Section 17, or his legal heirs shall, Notwithstanding any assignment of copyright in such work, [the author] has a right to share in the resale price of such original copy or manuscript in accordance with the provisions of this section. Some very important considerations that we can highlight here are, that the resale share right will apply to all subsequent sales. It is not restricted to public auctions or sales by dealers. It applies to all subsequent sales where the price is greater than 10,000 rupees. Second, this particular provision does not apply to all kinds of works of art.

It only applies to painting, sculpture, or drawing. Third, this is an inalienable right. There is no possibility of such a right being waived or assigned. We must understand that this right is based on fairness and justice. And as I explained earlier, this is not something that can be given away by way of assignment.

And fourth, just like copyright, this particular right will vest with the heirs of the author. The provision states that such right shall cease to exist upon the expiration of the term of copyright in the work, and thus it works similarly in terms of the duration of copyright. Clause 2 states that the share referred to in subsection 1 shall be as the commercial court may fix, and the decision of the commercial court in this regard shall be final. Provided

that the commercial court may fix different shares for different classes of work. Provided further that in no case shall the share exceed 10% of the resale price.

The Act explains that the calculation of such an amount would be something that the commercial court is going to decide. But in no scenario can it exceed 10% of the resale price. As provided under the WIPO guidelines, most countries in fact provide no more than 5%. So, for India to state that it should not exceed 10% is actually a higher standard that can be allowed by the commercial court in specific scenarios. And lastly, the provision says that if any dispute arises regarding the right conferred by this section, it shall be referred to the commercial court, whose decision shall be final.

Let us ask ourselves: is this Indian provision restricted to some particular type of sales? Are you able to answer this question now? I'm sure you are all able to say that the Indian provision is not restricted to the types of sale. Whether it is by public auction, private sale, or through dealers, the Indian artist can, in fact, claim resale share in any subsequent sale. The unfortunate condition that Section 53A finds itself in is that it has not been given the attention it deserves. Under the Copyright Act, copyright under Section 14, performers' rights under Sections 38 and 38A, and broadcasters' rights under Section 37 have received most of the attention. This specific right has been swept under the rug, and to my understanding, does not have the kind of knowledge among interested persons that it should.

In the next session, we will take a look at another right granted under the Copyright Act in India, which is the right to receive royalties. Since this is an extended topic that requires a subjective understanding, we will split this explanation into two parts. Thank you for joining me. See you all in the next session. Thank you.