

Fairness vs. welfare in the discussion of copyright laws and policies: royalties for the resale of artworks as a case study

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Abstract. The rules on resale royalties for authors of original artworks (*droit de suite*), such as in Europe, Directive 2001/84/EC of 27 September 2001 on the resale right for the benefit of the author of an original work of art, provide an excellent case study for testing the comparative advantages of using perspectives that revolve around notions of fairness and distributive justice vis-à-vis using economic oriented approaches to intellectual property rules and policies.

Distributive factors are worth considering beyond the usual economic or utilitarian approaches, especially in connection with EU copyright law, that does not completely adhere to a utilitarian framework for discussing its rules and policies. However a narrative based on fairness may sometimes be used to mask the real effects of a particular norm in social welfare or the well-being of different participants in the field at stake. A failure to distribute bargaining power between different undertakings in the creative industries; unintended transfers of wealth; or the accruing of most benefits to some particular well-organized social groups; are just some of the actual consequences that a fairness-oriented approach may obscure and conceal.

My paper aims at discussing how these two approaches can be employed when examining a particular institution of copyright law and how they interact in practice. Resale royalties are used as a case study of a particular right which has been advocated and finally established by resorting to notions of fairness and justice for visual artists and their heirs, but that at the same time has been fiercely criticized from a traditional law and economics perspective. After comparing the explanatory advantages of both perspectives, the paper addresses how more recent economic approaches have explored fairness preferences, reciprocity and altruistic behavior; and how they have integrated distributive justice concerns into behavioral models. These more-refined models can perhaps offer a more accurate account of copyright laws and policies in terms of both descriptive and predictive power.