

Standing Committee on Copyright and Related Rights

Forty-First Session
Geneva, June 28 to July 1, 2021

CLARIFICATIONS PROVIDED BY THE TASK FORCE ON THE ARTIST'S RESALE ROYALTY
RIGHT IN RESPONSE TO QUESTIONS RAISED BY THE JAPANESE DELEGATION

prepared by Ms. Marie-Anne Ferry-Fall, Chair of Working Group 1 "Galleries and the resale right" and Professor Sam Ricketson, President of Working Group 2 "Management of Art Resale Royalty Rights and Concrete Modalities in Selected Jurisdictions"

Task Force on the Artist's Resale Royalty Right

During the fortieth session of the Standing Committee on Copyright and Related Rights, held from November 16 to 20, 2020, the Delegation of Japan raised several questions in relation to the resale right.

Given their respective expertise, task force members Marie-Anne Ferry-Fall and Sam Ricketson prepared a response to these questions, which they divided between them.

1. A) Transactions subject to the artist resale right - resales covered and exclusions under national systems

In the great majority of the national ARR systems studied by the task force, only resales involving an art market professional of some kind, such as an agent or gallery, are covered, with private resales and some others, for example by museums, remaining outside the scheme. These restrictions are framed in different ways in different national laws, as the examples outlined below illustrate. This reason for excluding private sales may appear obvious enough – the difficulty of identifying and tracking such transactions, but presumably this does lead to a significant gap in artists' income from such resales.

Minimum resale prices are usually set in most national ARR systems, which operates as a further filter on the numbers of resales that are covered. In addition, difficult issues may arise in defining what is actually resold, for example, where multiple items are included in a single transaction (diptychs, collages, and so on). These and other matters, for example, the treatment of value added tax and buyers' premiums, may therefore be treated differently under each ARR system, as the more detailed national accounts below illustrate.

UK

In this country, ARR applies to any transfer of ownership of a work subsequent to the first transfer of ownership where the buyer or seller (or their agent) is acting in the course of a business of dealing in works of art. Consignment of a work to auction or through a gallery, however, does not usually involve a transfer of ownership under UK law and therefore is exempted.

Further points to note:

- The sale price of a work must be for €1000 and above, or the equivalent in pound sterling on the date of sale.
- A sale containing multiple items may be considered as a single work, such as a diptych, triptych, or collage. If a sale contains multiple items which are not considered as a single work, the value of each individual item should be determined by the art-market professional. If any items are deemed to exceed the value of €1000 then they are subject to ARR.
- Entitlement to claim: The 2006 Regulation stated that ARR applied to artists who were "qualifying nationals", which was defined in s.10 as "a national of an EEA state", or a national of a country listed in a schedule to the Act. This list included over 25 countries outside of the EEA where a form of resale right existed in their jurisdiction. When the law was updated in 2011 to include the right of heirs of artists to receive resale royalties, s.10 was amended. It stated instead that ARR could apply to the national of an EEA state or a "state the legislation of which permits resale right protection for authors of EEA states". It also disposed of the schedule containing the additional non-EEA states. The reality, however, is that UK art-market professionals refuse to pay ARR royalties for

artists who do not hold an EEA nationality. They consider the removal of the schedule as indication that ARR was and is a European law only affecting EEA nationals.

The ARR Regulations also contain a so-called 'bought as stock' exemption: where a seller has bought directly from the artist and resells the work within three years for a sale price of €10,000 or less, no ARR royalty will be due to the artist. This is to encourage sellers investing in up-and-coming artists, who are in turn building professional relationships with art-market professionals.

France

For a sale to be eligible for ARR, it has to meet the following cumulative conditions relating, first, to the artist, and, second, to the resale:

Conditions relating to the artist:

- The artist must be a citizen of a member state of the European Union or a country that is part of the European Economic Area. However, other artists or their beneficiaries can benefit from the resale right if their country's legislation recognizes the resale right of artists of the European Union or if the artist has participated in French artistic life and lived in France for 5 years, with the agreement of the Culture Minister and after consulting a commission (assimilation).
- The artist must be alive or have been dead for less than 70 years. This is calculated from the end of the calendar year of the death. For example, the works of an artist who died on 22 March 1949 are covered by the resale right until 31 December 2019 inclusive. In practice and if the date of death of the artist is not known, AGADP advises that it considers that works after 1860 are likely to be eligible for ARR.

Conditions relating to resale :

- ARR is due on any sale for 750 Euros or more, other than the first sale of the work, in which an art market professional – auction house, auctioneer, gallery, antique dealer, framer, on-line dealer – is involved as seller, buyer or broker.
- As an exception to this, sales for a price under 10 000 Euros made by a seller who bought the work directly from the artist less than three years before the sale are exempt (a 'bought in stock' exemption similar to that in the UK).
- The sale must have taken place in France or be covered by the French VAT law.

Sales breakdown

Figures for the years 2015-2019 indicate that the largest number of declared art resales (86%) was at auctions, with 14% in galleries. The respective shares of total resales were 72% and 29% while the respective shares of resale right royalties were 75% and 25%.

Australia

Under s 6 of the RRA, the ARR is the right to receive resale royalty on the "commercial resale of an artwork". This essentially means any resale that involves an 'art market professional acting in that capacity' (s 8(2))¹. The term "art market professional" is then defined in wide ranging terms in s 8(3) as meaning:

- (a) an auctioneer; or
- (b) the owner or operator of an art gallery; or
- (c) the owner or operator of a museum; or
- (d) an art dealer; or
- (e) a person otherwise involved in the business of dealing in artworks.

Exclusions from the scheme include:

¹ In a style typical of Australian legislative drafting, "commercial resale" does not include a resale falling within an 'excluded class' (s 8(1)(c)), and a resale not involving an art market professional is then explicitly defined in s 8(2) as being an "excluded class of transfer".

- private sales from one individual to another, that is where no art market professional is involved
- the work resells for \$A999 or less incl GST (value added tax): s 10(1). This minimum level may be varied by regulation. The term “sale price” is defined in s 10(2): see further below.
- works in existence at the time the scheme started, where the last change of ownership was before 9 June 2010: s 11.
- the artist is not an Australian citizen or resident (note in time this will change when reciprocal arrangements are introduced): ss 12 and 14.
- the artist has been deceased for more than 70 years from the end of the year of death: s 32.
- the artist is deceased, and their beneficiary does not have the requisite connection to Australia (as above for reciprocal agreements): s 12(4).²

The “sale price” on the commercial resale of an artwork means “the amount paid for the artwork by the buyer on the commercial resale including GST, but does not include any buyer’s premium or other tax payable on the sale”: s 10(2), RRA. “Buyer’s premium” is a term used to describe a practice associated with auction sales, and is intended to refer to the fee charged to buyers by auction houses (usually between 17-25% of the selling price). By contrast, gallery commissions (usually between 40-60%) are included in the sale price for the purpose of calculating RRR (information supplied by CA-).

Hungary

All transfers of the ownership for a consideration are affected when such transfer is done “with the assistance of an art dealer”: s 70(1), Law of 1999. “Art dealer” is defined as any natural or legal person trading with works of art: s 70(3). Any other resales fall outside of the scope of ARR.

There is only one exclusion for cases where a museum takes part in the sale of the art works, s 70(8) implementing recital (18)³ of the ARR Directive.

Czech Republic

Where the original work of art that has been transferred by its author to the ownership of another person is subsequently sold for a purchase price of EUR 1,500 or more, the author is entitled, in respect of any resale of the work, to the royalty as set out in the Annex No. 1 to Copyright Act, provided that a gallery operator, auctioneer or any other person who consistently deals in works of art (hereinafter the “dealer”) takes part in such sale as a seller, purchaser or intermediary: s 24(1), Copyright Law 2000 (as amended).

Slovakia

ARR applies to any further sale of the original of work, after the first sale by the author. A further condition is that an auctioneer, organiser of sales exhibition, operator of exhibition hall or other person conducting business in trade with works of fine arts (the “trader”) must have taken part in such a resale as a seller, a buyer or a broker: s 23(1), Act of 2015.

Poland

Only “professional resales” after first sale by the original author are covered, with “professional resale” being defined as “all resale activities carried out as part of the business, by sellers, buyers, agents and other entities professionally involved in the sale of works of art or manuscripts of literary and musical works”: Article 19.2, Law of 1994 (as amended).

² See further pages 5 and 15 of the Guide to the Artists’ Resale Royalty Scheme (June 2015) for information on what is a commercial resale and eligibility criteria for a royalty.

³ Recital (18) of the Directive: “This right should not extend to acts of resale by persons acting in their private capacity to museums which are not for profit and which are open to the public.”

Sweden

All resales that have been preceded by a previous sale, exchange or gift.

The only exclusions are sales between two private individuals without the use of an intermediary (if an intermediary is involved, s/he pays the resale fee), as well as those mentioned above (manuscripts and copies of a work of architecture). It also does not apply to a sale from a private person to a non-profit museum without the use of intermediaries: Article 26n, Law of 1960 (as amended).

Russia

No exclusions apply.

Brazil

The resale right is due to the author in every resale of the artwork or manuscript that he/she disposes of.

Uruguay

Resale right applies in principle to the resale of all plastic or sculptural works of art carried out at public auction, in a commercial establishment or with the intervention of an agent or merchant. In practice, and mainly in auctions, the only resales covered are those in relation to paintings and sculptures and there are few instances reported in relation to manuscripts or other works, and the same appears to be the case in relation to works of photography.

PICTORIGHT (a collective management organization based in the Netherlands), DACS (a collective management organization based in the United Kingdom) and VEGAP (a collective management organization based in Spain) were also consulted to respond to the two questions raised by the Delegation of Japan.

1.B) How do you ensure the traceability of the transactions that are eligible for the resale right when they are undertaken in contexts other than sales by public auction?

In addition to sales by public auction, works of art can be traded privately, notably through voluntary sales operators and art galleries, or through any other art market professional.

The traceability of such private transactions which, by nature, are not publicly accessible to third parties, can be achieved by other means.

- **(i) Maintenance of a register by art market professionals and consultation of the accounting records of art market professionals:**

The traceability of the transactions carried out by art businesses, notably for second-hand goods, works of art and collectable objects is a major concern that goes far beyond the issue of the resale right, as it also plays a crucial role in research into looted and stolen works, as well as the sale of stolen works, particularly in countries with significant cultural heritage.

Thus, several countries have made it mandatory for individuals trading furniture, objects and works of art to **maintain a register to allow incoming and outgoing goods to be traced** when they have been transited through them. The professionals concerned must provide access to the register to the judicial or police authorities who assure controls. The register may be in paper form, following a regulatory protocol (coordinated and initialled register with fixed and numbered pages, which must be signed and stamped by a supervisory authority) or it may

be in electronic form (register for which automated treatment must guarantee the integrity, intangibility and security of registered data).

In France, for example, art market professionals (whether voluntary sales operators, art galleries, or second-hand dealers) are obliged to keep registers, called “*livres de police*” (police books), in which they keep an inventory of all of the objects they receive. **In addition to the general police book, they also keep a register for weapons and another for jewellery and precious metals.** Failure to comply with this obligation is punishable by law. The data which must be entered into the police register (identity of the filing party; nature, origin and description of the objects; purchase price and payment method; etc.) are kept for 10 years after their registration. Public auction houses are obliged to keep this register solely in electronic form; this remains an option for other professionals, on the condition that it is cannot be modified. **The primary purpose of this police book is to ensure an inventory and the traceability of movable goods.**

In addition to the maintenance of a police register in proper and due form, **access to the accounting records of the art market professionals by an authority that is independent and authorized to exercise judicial power** would also allow transactions eligible for the resale right to be traced.

- **(ii) Reporting obligations of art market professionals:**

Legislation may provide for a sales reporting system.

Thus, Europe has a legal regime through which, in accordance with Directive 2001/84/EC of September 27, 2001 relating to the resale right for the benefit of the author of an original work of art, transposed into the domestic law of the member states of the European Union, art market professionals acting as sellers, purchasers or intermediaries are obliged to provide all information necessary for the settlement of the sums due under the resale right.

In order to facilitate this mandatory reporting and to alleviate the administrative burden it places on art market professionals, collective management organizations (hereafter “CMOs”) have created **standard simple forms to be completed and returned to the CMOs and/or online reporting mechanisms** available on the CMO website.

- **(iii) Other ways of ensuring traceability:**

In addition to the elements presented above, the following actions will also ensure the traceability of transactions generating the resale royalty right for the artists and for their beneficiaries:

- Organizing **events and meetings between art market professionals on the one hand and rights holders and CMOs on the other hand**, allowing the links between the parties concerned with the resale right to be strengthened and mutual trust to be established in the long term;
- Establishing **national information campaigns** aiming to attract attention and give a clear explanation of the collective management operations pertaining to the resale right;
- Developing and distributing **information tools** recalling the purpose of the resale right and the fundamental aspects of the application of this right and the related obligations;
- Encouraging artists and the professional organizations that represent them to **inform the CMOs in the event of a failure to respect the legal obligations relating to the**

resale right (failure to report transactions, failure to pay the resale right invoices), in order to allow the CMOs to respond accordingly, by taking legal action if necessary, with a view to ensuring respect for the rights of the beneficiaries of the resale right.

2.) With regard to the distribution of the sums pertaining to the resale right, how is the transparency of this distribution guaranteed, and how are the sums distributed when the beneficiary of the resale right has not been identified?

Transparency related to the distribution of sums pertaining to the resale right

When it comes to the distribution of the sums payable under the resale right that are collected by the CMOs authorized by the beneficiaries of this right, transparency is key.

Europe has specific regulations in this regard, as seen in the adoption of the Directive 2014/26/EU of the European Parliament and of the Council of February 26, 2014, regarding the collective management of copyright and related rights. It provides for the requirements applicable to the CMOs with a view to **guaranteeing a high level of governance, financial management, transparency and the communication of information**, it being specified that the European Union and its member states remain free to maintain or to impose stricter regulations.

The abovementioned Directive provides for different levels of control that **allow for the guarantee of transparency in the management of royalties, which includes the resale right**, by the CMOs:

- The obligation to provide **rights holders**, individually and at least once a year, with information relating to the management of their rights (allocations and repayments of sums, deductions made in relation to management fees, etc.), in order to strengthen their confidence in the management of rights by a CMO;
- Obligation to provide **other CMOs that manage rights through representation agreements** with sufficient information, notably of a financial nature;
- Obligation to **publish an annual transparency report** including comparable and verified financial information that is specific to their activities (income from rights and deductions made to this income, cost of rights management and other services provided to rights holders, operational fees, etc.), as well as a special report on the use of sums allocated to social, cultural and educational services. This annual transparency report is submitted to the general assembly of CMO members for approval, in order to guarantee that the rights holders are able to supervise and compare the relative performances of the CMOs, and it is also subject to an audit.

Member states must **establish a supervisory authority to review the compliance of the CMOs with the relevant legal regulations**. This control is carried out by **an auditor**, as well as by **a competent national authority** (a Court of Auditors, for example).

In addition, the European regulations make sure to distinguish the category of CMOs, which are defined in the abovementioned Directive as organizations that *“manage copyright (...) on behalf of more than one rightholder, for the collective benefit of those rightholders, as [their] sole or main purpose (...) and which (...) [are] organised on a not-for profit basis”*, in the category called “independent management entities”, defined as organizations that have the same objective but which are *“neither owned nor controlled (...) by rightholders [and are] organised on a for-profit basis”*. It is therefore clearly established that the **activities of the CMOs that collect**

royalties, including the resale right, do not have a commercial purpose, in contrast to other rights management entities.

Distribution of the resale right in the event that the beneficiary is unknown

Some states have found solutions and implemented specific provisions in cases where royalties (arising from the resale right, reproduction rights, performing rights, etc.) have been collected but cannot be distributed for various reasons.

For example, in the United Kingdom, British CMOs have six years to find the beneficiary of the sums payable under the resale right that they have collected under mandatory collective management. When that period expires, DACS, for example, in its capacity as a British CMO, puts the use of these sums (in line with the applicable local regulations) to a vote by its members during its annual general assembly. In the past, DACS members have voted in favour of a **repayment of these sums to the art market professionals who initially received them.**

In Spain, mandatory collective management entered into force on March 4, 2019, allowing Spanish CMOs to collect royalties payable under the resale right that applies in the case of the resale of works of art for authors from countries that recognize this right, whether or not the authors or their beneficiaries are represented by said CMOs. In accordance with the applicable local provisions, art market professionals must declare the sale of works benefiting from the resale right to the CMOs within two months of the date of sale and pay the applicable amount pertaining to the resale right within two months of the notification. Once this amount has been received, the CMOs have one year to make the payment to the beneficiary. **In the event that the beneficiary is not identified within this period, the amount of the collected resale right royalties is transferred to an aid fund for the Visual Arts through the Spanish Ministry of Culture. In fine, the sums collected have an economic benefit as a result of public action in favour of the community of artists in Spain.**

In the Netherlands, when sums payable under the resale right are received for Dutch nationals by organizations abroad, within the framework of mandatory collective management, and when the beneficiary remains unidentified following significant research (contact with museums, online research, review of testaments in cases of successions, etc.), **the sums in question can either benefit all visual artists or can be made available for artistic projects undertaken for social and cultural purposes.**

Moreover, in Scandinavia, CMOs have a legal obligation to research artists and successions for artists beyond national borders in order to repay the royalties collected in their name and for their benefit, not only for the resale right but also for other income resulting from royalties.

In France, when CMOs receive the mandatory sales declarations from art market professionals, they implement **different methods aiming to identify the beneficiary of the resale right and to inform them that sales generating the resale right have taken place.** They therefore undertake active research to locate the beneficiary and to contact them, by consulting genealogists, publishing research notifications in specialized press, or through communications on their website. As an example, the ADAGP (French CMO) published a search notification on its website allowing any individual concerned to know whether sales eligible for the resale right have taken place, inviting those individuals to make themselves known if appropriate. When such research proves fruitless and the beneficiary remains unknown, **the sums payable under the resale right are not lost or unduly kept by the CMOs.** The Code de la propriété intellectuelle français (French Intellectual Property Code) provides that "*in the absence of a*

known beneficiary, or in the case of vacancy or unclaimed assets, the competent court can grant the benefits of the resale right to a collective management organization (...) approved for this purpose by order of the minister for culture” and that “the sums received by the approved organization are allocated to cover a fraction of the fees due from graphic and visual artists as supplementary pensions”. **This system, implemented by the French legislature, allows the entire community of artists to benefit from these sums as a supplement to their pensions.**

3.) Justifications for art resale royalty rights

A number of arguments based on sentiment, equity and justice, and economics have been advanced in favour of art resale royalty rights.

Arguments based on sentiment or compassion

Much of the early argument in favour of ARR was presented simply in terms of a humanitarian concern for the plight of poor starving artists, seeing it as a means of securing for them and their families some form of social security during and after the artists' lifetime. The case of Jean-François Millet whose painting 'The Angelus' was sold for 800,000 gold francs after his death as the result of a bidding war between US and French collectors while his family was left in poverty provided a potent image for advocates of *droit de suite* in late nineteenth century France.⁴ A more robust, but equally compelling image is provided by the example of the US artist Robert Rauschenberg confronting the collector of one of his early paintings when it was resold at a considerable profit some years later.⁵ Certainly, the empirical evidence is that visual artists, as a group, have low incomes and must usually rely upon supplementing these in other ways.⁶ A US Copyright Office study in 2013 also has found that the incomes of visual artists are lower than those of other categories of creators.⁷ Whether the grant of an RRR is a means of redressing the imbalance between artistic endeavour and low income is a more difficult question, and its utility in doing so has been strongly contested by some commentators, notably in the USA.⁸ There are certainly some artists who do live long enough to reap a handsome financial reward from their later works, even if they received very little for the sales of their earlier ones. Indeed, death often leads to an upsurge in the resale of artists' works, as there is no longer a continuing supply of them, as revealed by auction sales.⁹ If familial poverty is a strong argument in favour

⁴ As captured in the lithograph of Jean-Louis Forain on the opening page of J Farchy, *Le droit de suite est-il soluble dans le analyse économique?* March 2011 ('Farchy'). See further C M Vickers, 'The Applicability of the *Droit de Suite* in the United States' 3 B C Int & Comp L Rev 433, 438, n 16 (1980).

⁵ See further M. Elizabeth Petty, 'Rauschenberg, Royalties, and Artists' Rights: Potential *Droit de Suite* Legislation in the United States', (2014) 22 *Wm. & Mary Bill Rts. J.* 977, at <http://scholarship.law.wm.edu/wmbrj/vol22/iss3/8>; MB Reddy, 'The *Droit de Suite*: Why American Fine Artists Should Have a Right to a Resale Royalty', (1995) 15 *Loy. L.A. Ent. L. Rev.* 509, note 4. Available at: <http://digitalcommons.lmu.edu/elr/vol15/iss3/2>

⁶ See further D Throsby and A Zednik, *Do you really expect to be paid? An economic study of professional artists in Australia*, Australia Council for the Arts, Sydney, 2010, available at http://australiacouncil.gov.au/workspace/uploads/files/research/do_you_really_expect_to_get_paid_54325a3748d81.pdf and see also an earlier study by D Throsby and V Hollister, *Don't give up your day job: an economic study of professional artists in Australia*, Australia Council, 2003. See further the excellent study by E Hudson and S Walker, 'Droit de Suite downunder: Should Australia introduce a Resale Royalties Scheme for Visual Artists?' Intellectual Property Research Institute of Australia, Working Paper No 11/04, September 2004.

⁷ USCO 2013 Report, pp 31-36.

⁸ See, for example, M E Price, 'Government policy and economic security for artists: the case of the *droit de suite*' (1968) 77 *Yale LJ* 1333;

⁹ In this regard, see the table of the top 100 auction sales in Farchy, p 48. With a few exceptions, such as Jeff Koons and Damien Hirst, the vast majority of these artists were deceased, ranging from Francis Bacon, Pablo Picasso, Claude Monet, Andy Warhol, Mark Rothko, Fernand Leger, Edvard Munch, and

of a post mortem RRR, this might provide a good reason for according the right, except that it is often the case that the deceased artists were also doing well, indeed, extremely well, before their death. Limited information from one country (Australia) that introduced RRR in 2009 suggests that the amounts collected in the early years went mainly to the best known Australian artists or their estates, with miniscule distributions to the great bulk of practising artists.¹⁰ It is also clear that there are many artists, perhaps the great majority, whose works increase very little in value, or even decrease, both during and after their lifetime. Indeed, if resale is the trigger point for imposition of RRR, this may never occur or may only do so many years after the death of the artist.¹¹ In this respect, RRR will do little, if anything, to address artistic poverty in the present, as compared with other methods such as state subsidies or awards or even better regulation of artists' agreements with agents and galleries.¹² Justifying RRR as a humanitarian gesture may therefore be nothing more than sentimentalism,¹³ notwithstanding its strong emotional appeal. One might warn here against formulating a general proposition (the adoption of RRR) on the basis of notorious particular examples.

The visual artist's entitlement to share in increases in value – avoiding unjust enrichment

There are more reasoned, that is, less sentimental and perhaps more philosophically satisfying, arguments that can be advanced in favour of ARR.¹⁴ Unjust enrichment theories were deployed in support of at least one early law (Belgium¹⁵), while another (Czechoslovakia) accorded a right to the author of a share in the net profit on resale where this was 'disproportionate'.¹⁶ Such arguments look at the increase in value of the original work (where this occurs), and assume that this is, at least in part, due to the subsequent work and fame of the artist, and that he or she should therefore be entitled to a share in this increased value. In such cases, the purchasers of these works have done little personally to bring about this increase, although their astuteness in purchasing those particular artists' works at early stages of their careers can be likened to the skill of the canny investor who has done the necessary market research and is therefore deserving of reward.¹⁷ There may also be other external factors relating to the development of the market for those kinds of works that should not be overlooked, for example, such matters as larger cultural and artistic trends or changes in public taste. Nevertheless, it can be argued that the collector here is in the position of a speculator reaping windfall profits on resale, and

Edouard Degas, were all deceased. Of interest also is the fact that all these sale were in countries with no RRR, namely the UK (London) and USA (New York).

¹⁰ Several such artists were the late Fred Williams and the late Brett Whitely: see N Rothwell, 'Royalties schemes cast sharp light on divided landscape', *The Australian*, 8 August 2013.

¹¹ See, for example, C McAndrew, *The EU Directive on ARR and the British Art Market*, Study prepared for the British Art Market Federation by Arts Economics, pp 12-13 (finding that RRR benefited only 1% of living British artists in 2013).

¹² This was certainly the view of a recent inquiry in Australia, which recommended adoption of other measures, together with RRR: *Report of the Contemporary Visual Arts and Crafts Inquiry*, Commonwealth of Australia, 2002 (the 'Myers Report'), pp 11-20.

¹³ See, for example, M E Price, 'Government policy and economic security for artists: the case of the droit de suite' (1968) 77 *Yale LJ* 1333; ME Petty, 'Rauschenberg, Royalties, and Artists' Rights: Potential Droit de Suite Legislation in the United States', (2014) 22 *Wm. & Mary Bill Rts. J.* 977.

<http://scholarship.law.wm.edu/wmborj/>

vol22/iss3/8; GA. Rub, 'The Unconvincing Case for Resale Royalties' (2014) 124 *Yale L J F* 1, <http://www.yalelawjournal.com/forum/the-unconvincing-case-for-resale-royalties>.

¹⁴ See generally J-L Duchemin, *Le Droit de Suite des Artistes* (1948), pp 19ff; P Katzenberger, 'The Droit de Suite in Copyright Law' [1973] 4 *IIC* 361, 364ff; R E Hauser, 'French *droit de suite*: the problem of protection for the underprivileged artist under the copyright law' (1959) 6 *Bull Cop Soc USA* 94, 103ff.

¹⁵ USCO 2013 Report, p 31.

¹⁶ Czech Law of 1926, Art 35.

¹⁷ See the example of Robert Rauschenberg and the collector Robert Scull in M E Petty, 'Rauschenberg, Royalties, and Artists' Rights: Potential Droit de Suite Legislation in the United States', 22 *William and Mary Bill of Rights Journal* 977 (2014) ('I've been working my ass off just for you to make that profit') and, see further, Pierredon-Fawcett, pp 12-14.

therefore that some part of these profits should be returned to the artist whose efforts have helped bring about this state of affairs (this is to say nothing of the often large fees that have been earned by the market intermediaries, such as galleries, agents and brokers, along the way). This has been the approach adopted in some national laws which have adopted RRR,¹⁸ with the consequence that the artist receives nothing if her work is resold at the same or a lesser price. This is a kind of 'swings and roundabouts' argument, which can be seen as postulating the artist as a co-venturer in the later exploitation of his or her work. In a free market economy, this may have some intuitive appeal, but inevitably faces the practical difficulty of estimating the profit earned if sellers and intermediaries adopt creative accounting practices to disguise what has been earned – identifying the extent of profit on any transaction is always a fraught exercise. Nonetheless, it does have the virtue of inviting attention to the respective contributions of artist, collector and intermediary in creating the later value attached to a work. On the other hand, it is not immediately clear why works of art should be differentiated from other property rights which are traded in a resale market, such as land, equities, wine or antiques, and where the original owner will usually have no entitlement to a share of increased profits along the line. There is also another side of the argument to consider here: if there is an entitlement to a share in increases in value (on the basis that this would not have occurred without the artist's contribution), why should the artist not bear a share of any loss that is sustained on resale? No suggestion of this latter kind has ever been seriously advanced, but the reality seems to be that most works of visual art decrease in value over time rather than the opposite.

ARR as an 'author's right' – a matter of fairness to visual artists

There is a different justificatory argument that shies away from notions of fairness or unjust enrichment in relation to particular transactions (although these may still linger in the background). Rather, it is concerned with notions of parity or fairness as between groups of creators and looks at the position of the visual artist *qua* other categories of author, and the way in which authors' rights should be formulated with respect to this particular kind of creative production. It proceeds on the basis that the visual artist, by reason of the peculiar nature of her work, is disadvantaged in the exploitation of her authors' rights in comparison with other categories of author. Thus, the reproduction right may not be as of great value as in the case of a writer or composer (although this may not always be true¹⁹), while the artist also lacks the same opportunities of exploitation through such forms of public communication as performance and broadcasting. Her main source of income derives from her sale of the initial work as an artefact in its own right, and, after the first sale, her scope for receiving continuing income from the licensing of her reproduction and public communication rights is usually more restricted than for her literary and musical colleagues. The grant of a RRR can therefore be seen as a way of redressing the imbalance, and the question of whether the resale occurs at a profit becomes irrelevant, as the artist is receiving a 'royalty' on the resale of her work in the same way as the writer receives a royalty on the sale of a further copy of her work. The purpose of the RRR, then, is to make more effective the artist's exploitation of her work as a *work*, and to redress the imbalance that otherwise exists.²⁰ This 'exploitation' approach is now to be found in the greater number of national laws on RRR, which usually treat this right as part of the author's general

¹⁸ See, for example, the Italian Law of 1941, arts 144–145 (2 to 10 per cent of the increase in value); the Brazilian Law No. 9610 of February 19, 1998, on Copyright and Neighboring Rights, art. 38 ('The author has the irrevocable and inalienable right to collect a minimum of five per cent of any gain in value that may be achieved in each resale of an original work of art of manuscript that he has disposed of.').

¹⁹ In this regard, in the UK it appears that the right to make engravings was of great value to painters and other artists who did not receive copyright protection for their works until as late as 1862 under the *Fine Arts Copyright Act* of that year. But more than 120 years earlier, they had been given a right to make engravings of their works and this had proved particularly profitable for painters and engravers such as Hogarth: see the *Engravers' Copyright Acts 1735* and 1766.

²⁰ See Katzenberger, 367–368; Hauser, 106–107.

copyright, rather than as something separate. This approach is reflected in recital 3 of the EU Resale Right Directive:

The resale right is intended to ensure that authors of graphic and plastic works of art share in the economic success of their original works of art. It helps to redress the balance between the economic situation of authors of graphic and plastic works of art and that of other creators who benefit from successive exploitations of their works.²¹

Viewed in this way, the ARR can be seen as one of the exclusive economic rights to be accorded to artists, no different in kind from the rights of reproduction, public performance, and so on, albeit one that is specially tailored to meet the peculiar working circumstances of visual artistic practice and production (an analogy here might be drawn with rental rights which are often limited to particularly 'vulnerable' kinds of works such as computer programs and cinematographic works²²). The fact that RRR is usually inalienable under national laws may appear to complicate this analysis – this is obviously not the case for other economic rights which are freely tradeable in the marketplace. Nonetheless, rather than being an attribute more usually associated with moral rights, inalienability can be justified in this context as an essential measure of 'consumer protection' – protecting the artist against unscrupulous and/or undeserving purchasers and agents who would otherwise seek to get around the right through requiring its waiver in the initial contract of sale. Arguing for protection of visual artists on the ground of fairness and parity as between different categories of authors therefore feeds into the wider arguments based on justice to authors and the need for incentives that are advanced in favour of intellectual property rights generally.²³

An alternative way of viewing ARR as an author's right is, of course, to align it to moral, rather than economic, rights (easy to do in view of the characteristic of inalienability just mentioned). On this view, the projection of the work into the marketplace on resale is also a projection of the artist's personality, with the artist's reputation and honour being as much at stake as the need for attribution and respect for integrity. On closer inspection, however, the assimilation to moral rights breaks down. Under none of its national manifestations does ARR involve any potential power of veto or correction: it is simply a right to payment at some future, undefined, time, while moral rights in the strict sense have a more absolute application. Accordingly, it is more appropriate to characterise ARR as an economic, rather than moral, right of visual artists. By contrast, under the 'increase in value' approach outlined in the preceding section, the ARR moves away from authors' rights, whether economic or moral, and assumes more of the character of a tax or levy that is levied on resales of artistic works. The appropriate legal resting place for the ARR on this approach would therefore be within the national tax or even social welfare regime.

Practical justifications for ARR

How important actually is ARR to visual artists? As already noted, it is open to the objection that sums collected tend to be relatively small and concentrated among a narrow band of artists and their descendants. Moreover, the costs of administration of administration can be high, at least in some jurisdictions, and there are obvious practical difficulties in identifying and tracking those sales that will attract RRR and then collecting and distributing these receipts back to the artists

²¹ Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, Recital 3, *Official Journal L 272*, 13/10/2001 P. 0032 – 0036.

²² See, for example, WCT, article 7(1)(i) and (ii).

²³ See further the excellent discussion of these issues in M Spence, *Intellectual Property*, Clarendon Law Series, Oxford University Press, 2007, Ch 2.

affected.²⁴ In some instances, it also appears that ARR laws have not been enforced and have lain dormant.²⁵

None of the above objections, however, is peculiar to ARR, or rather they apply just as readily in the case of any of the other exclusive rights accorded to authors, whether these be rights of reproduction, public performance, or communication, or moral rights. Authors' rights generally provide no guarantee of return to the author or that these returns will be equitably shared. At most, they provide the promise of return, subject to the vagaries of public taste and need. Arguments based on fairness, the need to avoid free riding and to provide incentives tend to come together here to provide cumulative justifications for their protection, and are equally applicable in the case of RRR, which makes the case for seeking parity with other categories of creators, however approximate this may be, a more compelling one.

Arguments for parity of treatment not only apply as between different categories of creators, but as between visual artists in different countries, or blocs of countries, as well. Thus, within the European Union, the move towards harmonization under the Directive was also based on the need to remove distortions within the internal market that arose from the fact that not all member states recognized ARR, with the consequence that art resales might move to those EU countries without such a right.²⁶ Harmonization within the EU has now shifted attention to the possibility that arts resales might move outside the EU to countries without ARR, such as the USA, China or even Switzerland. While there appears to have been some loss of market share for the EU post 2010 (chiefly by the UK which was the second largest global art market up to this time²⁷), it is hard to identify ARR as being the main, or even a minor, factor here, given the limits that apply to ARR under the EC Directive as distinct from other costs and external factors, such as taxes, agents' fees and the like, to say nothing of the effect of the global financial crisis of 2008 and the emergence of a growing art market in a country the size of China. If there is such a shift from ARR countries to those without, this simply repeats on a broader scale the distortions that previously applied within the EU. More importantly, from the perspective of visual artists, wherever situated, the inequality of treatment becomes more apparent: European artists receive no ARR within the USA and China (now the two largest art resale markets in the world), while US and Chinese artists are unable to claim ARR within Europe.

Furthermore, as noted above, ARR is scarcely the exclusive province of EU members, given that the number of countries with some form of RRR has increased to nearly half the membership of the Berne Union. This suggests that there is growing support for the concept as a matter of principle, and points, in turn, to the need for the development of uniform standards that can apply globally.

²⁴ This, of course, is a potential problem in the administration of other authors' rights as well.

²⁵ This appears to be the case in a number of countries with RRR on their statute books, including India, Turkey, the Russian Federation and other former Soviet republics. It also appears to have been the case in Italy until 2002.

²⁶ This does not in fact appear to have happened in the case of the UK, an important art resale market, since its initial adoption of RRR and up until full implementation in 2010: see further European Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Report on the Implementation and Effect of the Resale Right Directive (2001/84/EC)*, Brussels, 14.12.2011, COM(2011) 878 final, Chapter 5 (Conclusions). See also See further the studies done by Chanont Banterngansana & Kathryn Graddy, *The Impact of the Droit de Suite in the UK: An Empirical Analysis*, Centre for Economic Policy Research Discussion Paper No. DP7136, 5 (Jan. 2009), available at <http://ssrn.com/abstract=1345662> and by Katy Graddy, Noah Horowitz and Stefan Szymanski, *A study into the effect on the UK art market of the introduction of the artist's resale right*, Intellectual Property Institute, London, January 2008.

²⁷ See further the studies by C McAndrew, *The EU Directive on ARR and the British Art Market*, Study prepared for the British Art Market Federation by Arts Economics, pp 3-4; C McAndrew, *The British Art Market in 2014*, Study prepared for the British Art Market Federation by Arts Economics, 2014, pp 1-2.

Notwithstanding the frequent objections of inadequacy of remuneration and difficulty of collection, there is also growing evidence that ARR is of identifiable benefit to some artists in those countries where it is now well established. While the sums collected may still be relatively modest, they are not insignificant and their distribution is becoming more widely dispersed among living artists. Thus, in France, €12,443,901 was collected for the year 2013, from 24,293 relevant transactions affecting 1,938 artists of whom 45% were still living; as between 2015 and 2019, €37,456,560 was distributed among 2,355 artists represented by the French collecting society with respect to 72,098 resales.²⁸ In the UK, in 2013 £8.4 million was distributed to over 1,400 artists and artists' estates:²⁹ this was the second year of full implementation of the EC Directive in that country and represented almost a doubling from the previous year (£4.7 million),³⁰ while in 2020 it was reported that over £80 million had been distributed since 2006. Italy, another country where ARR has only recently been fully introduced, reported gross collections of €6,088,771 in 2013, with this representing the lion's share of royalties collected for plastic, graphic and photographic works generally.³¹

In some instances, where ARR has only been relatively recently established, such as Australia, it is still too early to estimate the real benefit of the scheme for artists.³² And while it seems true, as in the case of France, that the greater share of royalties is distributed to the descendants of deceased artists, significant numbers of living artists benefit, even if only to a small degree from ARR distributions. In this respect, it is easy to be dismissive of the smallness of some of these individual payments,³³ but it needs to be remembered that artists generally are poorly remunerated overall and ARR can provide a useful supplement to pay for materials, rent, and the like. This is particularly so in remote indigenous communities, such as in Australia, where other sources of income are very limited. Anecdotal evidence from artists themselves also indicates that the fact of payment, however small, represents recognition of their continuing link to their work as well as providing a measure of transparency as to its destination and ownership.³⁴ Furthermore, the relative significance of ARR payments overall in comparison with payments received for the exercise of other authors' rights, such as reproduction and communication should not be overlooked: in the case of Italy, referred to above, ARR receipts in

²⁸ Figures supplied to the author by AGADP.

²⁹ Design and Artists Copyright Society (DACs), *Annual Review 2013*, pp 10 and 13.

³⁰ Design and Artists Copyright Society (DACs), *Annual Review 2012*, p 9. In 2011, prior to full implementation, the amount was £2.7 million going to 750 artists: Design and Artists Copyright Society (DACs), *Annual Review 2011*, p 14,

³¹ See Società Italiana degli Autori ed Editori, *Report on Transparency – 2013*, p 30, available at http://www.siae.it/documents/Siae_Documentazione_RelazioneDiTrasparenza2013_en.pdf?647289

³² In Australia, the RRR scheme has only been in operation since 10 June 2010 and has been restricted to resales of works of works acquired after the commencement of the scheme. Nonetheless, within the 35 months between 10 June 2010 and 15 May 2013, there have been 6,801 eligible resales that have generated over \$A1.5 million in royalties for 650 artists: Australian Government, Department of Regional Australia, Local Government, Arts and Sport, 2013 Review of the Resale Royalty Scheme Discussion Paper and Terms of Reference, June 2013, p 3 (the first three years of the scheme are now under a departmental review which was still in train at the time of writing).

³³ See, for example, the dismissive comment of one critic, as 'Much ado about nothing': V Ginsbergh, 'The Economic Consequences of Droit de Suite in the European Union', European Center for Advanced Research in Economics and Statistics, Université Libre de Bruxelles and Center for Operations Research and Econometrics, Louvain-la-Neuve, March 2006, p 10.

³⁴ See the Artists' Testimonials in CISAC, EVA and GESAC, *What is the Artists Resale Right*, 2014, pp 6-7 and also at www.resale-right.org Further testimonials from living artists, though not all in favour, are to be found in submissions to the current Australian review of RRR at <http://arts.gov.au/visual-arts/resale-royalty-scheme/review>

2013 were 10 times those for paper reproduction rights,³⁵ while in the UK the ARR sums collected in 2013 were significantly more than the sums collected for other uses.³⁶

Finally, objections as to the administrative costs and burdens in collecting and distributing royalties can be met by collective administration, which can keep these costs down and provide for relatively speedy procedures. In this regard, there is now considerable expertise and experience to be found in countries with long-established ARR systems, such as France, Germany and now the UK, which can be drawn upon. Costs of administration by galleries, auction houses and other intermediaries can also be kept down,³⁷ while there are various ways in which collection and distribution procedures can be streamlined, for example, through the setting of minimum resale prices and caps on the total amount royalty payable.

The arguments for ARR - summarised

By way of summary, it is submitted that the 'parity rationale' for recognizing ARR is the most powerful argument in favour of establishing protection for these rights, both at the national and international level. This is for the following reasons:

1. ARR is now clearly established at the international level as one of the authors' rights belonging to visual artists. It has been recognized as an optional obligation under the Berne Convention for the Protection of Literary and Artistic Works since first adopted as part of the Brussels Revision of 1948 (as Article 14*bis*, now Article 14*ter*). It is now part of the national laws of nearly half the present membership of the Berne Union.
2. The fact that such protection is presently optional and subject to the requirement of reciprocity under Article 14*ter* does not affect the recognition of ARR as an authors' right under the Berne Convention. This has also been the experience of other exclusive rights now protected as 'rights specially granted' to nationals of Berne Convention countries, the most notable of these historically being the translation right.³⁸
3. The fact that ARR might relate to the first physical embodiment of the artistic work and its subsequent disposal rather than to the making of copies or the communication of the work – that is, subsequent utilisations in which the first physical embodiment becomes irrelevant – does not present a barrier to this being used as a means of aligning the rights of visual artists with those of other categories of authors. In this regard, rights of distribution and rental of copies, not recognized under Berne, are equally seen as being authors' rights that have now received protection under later international agreements.³⁹ This has been on the same basis as argued for here in favour of ARR, namely to correct the imbalance that might otherwise arise because of perceived limitations in the scope of the reproduction right.
4. The fact that ARR, if recognized, may only benefit some visual artists, rather than all, is neither here nor there. This is the case for all categories of literary and artistic work: the grant of exclusive rights provides no guarantee of reward or continuing income, but simply the prospect of receiving some share of the proceeds of the exploitation of the work if it subsequently receives public recognition and demand. In this regard, the ARR simply reflects the particular character of visual works of art and their form of exploitation, but it does not differ in kind from the reproduction right which will only be of benefit to the struggling author in the event that his or her manuscript is chosen for publication out of the thousands that cross the desk of the publisher daily.
5. There is a further argument that ARR can be of specific benefit to indigenous artists whose works may have both a national and international market. This was certainly a factor in the

³⁵ See Societa Italiana degli Autore ed Editori, *Report on Transparency – 2013*, p 30, available at http://www.siae.it/documents/Siae_Documentazione_RelazioniTrasparenza2013_en.pdf?647289

³⁶ The figures were as follows: £8.4 million for RRR, £4.2 million for 'Payback', and £1.5 million for copyright licensing: Design and Artists Copyright Society (DACS), *Annual Review 2013*, pp 9 and 10.

³⁷ *Ibid*, p 8.

³⁸ See further Ricketson and Ginsburg, [11.15] ff.

³⁹ WCT, Articles 6 and 7.

adoption of RR legislation in Australia in 2009,⁴⁰ and similar arguments have been advanced in a number of developing countries which have recently passed ARR laws. In this regard, it may be noted that provision for RRR was made by WIPO and UNESCO in the Tunis Model Law on Copyright Law for Developing Countries that was adopted nearly 40 years ago.⁴¹

6. Given the gradual adoption of ARR regimes by nearly half the membership of the Berne Union, there is now a clear imbalance in protection for visual artists globally as between RRR and non-RRR countries. At the moment, this bears particularly harshly upon US and Chinese artists, who gain nothing from the resales of their works in ARR countries; likewise, there is a shortfall for artists from ARR countries in the growing Chinese and US resale art markets. Yet their art is experienced and enjoyed universally without regard to borders. In the age of digital technologies and networked communications, this point hardly needs repetition.
7. ARR is readily susceptible to treatment under a separate international agreement consistently with the requirements of Article 19 of the Berne Convention, which provides for the making of 'special agreements' among Berne Union members. This has already occurred in the area of public communication and other rights under the WIPO Copyright Treaty 1996 ('WCT') and in relation to limitations and exceptions in favour of visually impaired persons under the Marrakesh Treaty 2013.
8. Apart from the additional revenue stream that ARR may provide to living artists and their descendants, such regimes can provide other benefits: a means of following the ownership and destinations of artists' works and providing artists with a continuing link to their works, particularly if the growth of their professional and artistic reputation has led to an enhancement in the resale price of the same.

[End of document]

⁴⁰ See the second reading speech of the Minister for the Environment, Heritage and the Arts (Hon P Garrett MHR) in introducing the Resale Royalty Right for Visual Artists Bill 2008 in the Australian Parliament on 27 November 2008: see at [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3Ar4010%20Title%3A%22second%20reading%22%20Content%3A%22I%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20\(Dataset%3Ahansardr%20%7C%20Dataset%3Ahansards\);rec=1](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3Ar4010%20Title%3A%22second%20reading%22%20Content%3A%22I%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20(Dataset%3Ahansardr%20%7C%20Dataset%3Ahansards);rec=1). A similar view is to be found in a recent Canadian report: Canadian Artists Representation and Le Regroupement des Artistes en Arts Visuels du Quebec, *Recommendations for an Artist Resale Right in Canada*, April 2013, Appendix C.

⁴¹ WIPO and UNESCO, *Tunis Model Law on Copyright Law for Developing Countries*, Geneva, 1976, Section 4bis.