

## **Standing Committee on Copyright and Related Rights**

**Forty-Third Session**  
**Geneva, March 13 to 17, 2023**

WIPO TOOLKIT ON ARTIST'S RESALE RIGHT

*prepared by Professor Sam Ricketson*

# Part 1 – legislative design of an ARRR scheme

## IN GENERAL

1. In normal usage, ARRR refers to the author's right to a share in the proceeds of subsequent sales of his or her original work— "ARRR" being the abbreviation for "author's resale royalty right" and "original" used here to refer to the first or original material embodiment of the work. Other expressions that may be used to describe this right are "resale royalty right" and "droit de suite"<sup>1</sup>, but for the purposes of this toolkit, the abbreviation "ARRR" will be used throughout.<sup>2</sup>
2. In general, ARRR schemes at national level are directed at works of visual arts – paintings and other graphical works, sculptures and other three-dimensional works – but in some instances, protection may also be extended to the original artefacts of works more usually categorised as literary, dramatic or musical works, for example, original manuscripts of books, plays, musical compositions and so on. For this reason, it is preferable to refer to this as an "author's right", rather than an "artist's right".
3. ARRR is recognized as a right that members of the Berne Union may recognize at their option under article 14<sup>ter</sup> of the *Berne Convention for the Protection of Literary and Artistic Works 1886* (last revised in 1971). In varying forms, ARRR is now recognized in nearly half the present membership of the Berne Union, and the number of ARRR schemes recognised under national laws has increased significantly over the past two decades.
4. Article 14<sup>ter</sup> provides a general framework for any proposed ARRR scheme at the national level and leaves considerable flexibility to national legislators as to how they may implement

---

<sup>1</sup> Now translated in WIPO documentation as "resale right": see WIPO, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms*, WIPO Publication 891, 2003, p 284. but historically (and literally) this meant the "right of following on" and was derived from French real property law; see generally 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, 97. Interestingly, the English version of the recently adopted resale right in Saudi Arabia describes this as the "right to trace": Saudi Arabia, *Executive Regulation of the Copyright Protection Act 1443H/2022*, article 6.

<sup>2</sup> The literature on *droit de suite*, and its history and development, is extensive. For present purposes, see generally, 'Du droit à la plus-value des oeuvres artistiques' [1914] *Le Droit d'Auteur* 34, 57; J-L Duchemin, *Le Droit de Suite des Artistes* (1948) ('Duchemin'); F Hepp, 'Royalties from works of the fine arts: origin of the concept of *droit de suite* in copyright law' (1959) 6 *Bull Cop Soc USA* 91 ('Hepp'); 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 ('Hauser'); J-L Duchemin, 'Droit de suite' (1967–1968) 54–55 *RIDA* 369; R Plaisant, 'Droit de suite' [1969] *Copyright* 157; J-L Duchemin, 'Le droit de suite aux artistes' (1969) 62 *RIDA* 78; P Katzenberger, 'The Droit de Suite in Copyright Law' [1973] 4 *IIC* 361 ('Katzenberger'); W Duchemin, 'Le droit de suite' (1974) 80 *RIDA* 4; W Nordemann 'The 1972 Amendment of the German Copyright Law' (1973) 4 *IIC* 179; E Ulmer, 'Le droit de suite et sa réglementation dans la convention de Berne' in *Hommage à Henri Desbois, études de propriété intellectuelle* (1974), 89; E Ulmer, 'The *'Droit de Suite*' in International Copyright Law' (1975) 6 *IIC* 12 ('Ulmer'); W Nordemann, '*Droit de Suite*' in Art 14<sup>ter</sup> of the Berne Convention and in the Copyright Law of the Federal Republic of Germany' [1977] *Copyright* 342 ('Nordemann'). US Copyright Office, *Droit de Suite: The Artist's Resale Royalty* (1992 Report), summarized at 16 Colum.-VLA J. L. & Arts 318 (1992); Shira Perlmutter, 'Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report, 16 Colum.-VLA J. L. & Arts 157 (1992); L de Pierredon-Fawcett, *The Droit de Suite in Literary and Artistic Property: A Comparative Law Study* (translated from the French by L Marin-Valiquette), Center for law and the Arts, Columbia University School of Law, New York, 1991 ('Pierredon-Fawcett').

such a right. The purpose of this part of the Toolkit therefore is to provide national legislators with sample provisions that may provide a useful guide as to how an ARRR scheme might be legislated for and implemented, or an existing scheme modified, in Berne member states, having regard to the local legal traditions and practices of each state as well as to the framework of international obligations under Berne. Part 2 of the Toolkit then deals with problems of operationalising such schemes, particularly where this is done through the medium of a collective management organization (CMO).

## THE ORIGINS OF ARRR SCHEMES AND THEIR RATIONALE<sup>3</sup>

5. Historically, arguments in favour of ARRR schemes were based on notions of justice, and unjust enrichment. Appeals to sentiment also played an important role, highlighted by the anomalous situation that were perceived to arise where the descendants of a now deceased visual artist might be found languishing in poverty while subsequent purchases of artistic works originally sold for a pittance during the artist's lifetime were now fetching vastly higher prices in the resale market with no benefit flowing to the artist or his or her dependants.<sup>4</sup>
6. The first country to recognise the need for an ARRR law was France, where the legal concept of a *droit de suite* for visual artists was introduced by Albert Vaunois in an article in the *Chronique de Paris* in 1893<sup>5</sup>, and a campaign for its recognition then began in that country<sup>6</sup>. This culminated in the passing of special legislation in 1920<sup>7</sup>, under which artists were given an inalienable right to claim a sliding scale of 1 to 3% percent of the gross sales price on each public sale of their original works<sup>8</sup>. The works sold had to be "original" and to represent a "personal creation of the author". In this context, the word "original" appeared to be used in the sense of the first embodiment of the work, thereby excluding such works as lithographs, engravings and the like where the original plate or block was seldom sold on its own. The exclusion of private sales also meant that the scope of the new right was subject to a significant potential restriction, but this made collection far easier if it were carried out by an authors' society that entered into arrangements with galleries and auction rooms<sup>9</sup>.
7. The French example provided inspiration for the adoption of similar laws, each with its own national variations, by a small number of other Berne members in the following two decades: Belgium in 1921 (with a more generous sliding scale),<sup>10</sup> Czechoslovakia in 1926,<sup>11</sup> Poland in

---

<sup>3</sup> The following section draws on material in S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights*, Oxford University Press, Oxford, 3<sup>rd</sup> ed, 2022 ('Ricketson and Ginsburg'), [11.59] ff. See also S Ricketson, "Proposed International Treaty on Droit de Suite/Resale Royalty Right for Visual Artists" (2015) 245 *Revue Internationale du Droit d'Auteur* 3-263 ('Ricketson').

<sup>4</sup> As captured in the famous lithograph of Jean-Louis Forain of Millet and his family on the opening page of J Farchy, *Le droit de suite est-il soluble dans le analyse économique?* March 2011 ('Farchy'); see also Katzenberger, pp 364ff; Duchemin, pp 17ff. Other famous but deceased artists cited in this regard are Degas and Bollin,

<sup>5</sup> *Chronique de Paris*, 25 February 1893; see also Hauser, pp 96ff, Duchemin, pp 35ff, and Pierredon-Fawcett, pp 2-3 and the other sources cited in note 2.

<sup>6</sup> See further Pierredon-Fawcett, pp 2-5. For an early draft proposal that would have provided artists with a quarter share of the added value of a resale of an original artistic works, see [1914] *DA* 34 at 36.

<sup>7</sup> Law of 20 May 1920; reproduced in [1920] *Le Droit d'Auteur* 61 and for an analysis of the law, see A Vaunois, [1920] *Le Droit d'Auteur* 161. See further Duchemin, pp 36ff.

<sup>8</sup> Law of May 20, 1920, Article 2. The scale was 1% for works sold between 1,000 and 10,000 francs; 1.5% for works sold between 10,000 and 20,000 francs; 2. % for works between 20,000 and 50,000 francs; and 3% for works above 50,000 francs. A further implementing decree was adopted on 17 December 1920: [1921] *Droit d'Auteur* 4.

<sup>9</sup> See further Vaunois, [192] *Le Droit d'Auteur* 106-107; Hauser, 99–101.

<sup>10</sup> Law of 25 June 1921 (reproduced in [1921] *Le Droit d'Auteur* 97. The scale ranged from 2% to 6%: Article 2.

<sup>11</sup> Law of 24 November 1926, Article 35 (reproduced in [1926] *Le Droit d'Auteur* 33-34.

1935<sup>12</sup> and Italy in 1941<sup>13</sup> (the last three providing that the share should be based on an increase in value of the work sold). Uruguay, at this time a non-member of Berne, adopted an extremely generous form of ARRR in 1937,<sup>14</sup> and, following World War II, the number of states which recognised ARRR increased slowly but steadily.<sup>15</sup>

8. Recognition of ARRR within the context of the Berne Convention also occurred. The international Literary and Artistic Association (ALAI) and the International Institute for Intellectual Cooperation (a forerunner of UNESCO) were early proponents and the French government put it on the agenda for the Rome Revision Conference in 1928.<sup>16</sup> A resolution recommending that Berne members consider the adoption of an art resale right was adopted by that Conference, although a number of countries expressed some reservations about it.<sup>17</sup> Further studies continued through the 1930s<sup>18</sup> but it was not until the Brussels Revision Conference in 1948 that an optional provision on this subject was introduced into the Convention as article 14*bis* (now article 14*ter*). Thereafter, the number of Berne countries with provisions on ARRR has slowly but steadily increased.<sup>19</sup> The requirements of article 14*ter* (as revised slightly at Stockholm in 1967) are discussed further below at paragraph 13. There can be little doubt that these developments at the national level (and in Berne itself) were inspired, and bear the imprint, of the original French legislation on the subject (this is notably the case with respect to the EC Directive of 2001).
9. Fairness and justice to the artist and his or her descendants provide strong moral, as well as practical, justifications for recognition of ARRR, as reflected by the following comment in the UNESCO/WIPO Tunis Model Law on Copyright for Developing Countries (1976), which contains such a provision (article 4*bis*):

This provision arises from a practical consideration, namely, that at the beginning of their careers little-known authors often dispose of their works at a ridiculously low price. These works may subsequently assume considerable value, and it therefore seems equitable that the author should share in the fortunes of his work and collect a percentage of the sale price for the work each time it changes owners<sup>20</sup>.

As can be readily understood, these arguments are often contested vigorously on the part of purchasers, galleries and other intermediaries, who assert they often take significant risks “investing” in artists at the beginning of their careers and that the latter will be rewarded

---

<sup>12</sup> Law of 22 March 1935, new Article 29, modifying the Law of 29 March 1926 (reproduced in [1935] *Le Droit d’Auteur* 63.

<sup>13</sup> Law of 22 April 1941, Articles 144–155.

<sup>14</sup> Law of 17 December 1937, Article 9 (a share of 25%).

<sup>15</sup> See further Ricketson, 17-19.

<sup>16</sup> Ricketson and Ginsburg, par 11.64.

<sup>17</sup> See further Ricketson and Ginsburg, par 11.64. The resolution read as follows:

The Conference expresses the desire that those countries of the Union which have not yet adopted legislative provisions guaranteeing to the benefit of artists an inalienable right to a share in the proceeds of successive public sales of their original works should take in to account the possibility of considering such provisions.

<sup>18</sup> Including a draft convention on the subject drawn up by the Director of the Berne International Office, Fritz Ostertag, in 1939: see further Duchemin (1948), pp 299-301, and [1940] DA 138. See further Ricketson, 65-67, and Ricketson and Ginsburg, pars 11-65 and 11.66.

<sup>19</sup> See further Ricketson, 19. Written in 2015, this study calculated the number of countries with some kind of ARRR system as 81. As of 2023, this number is probably now 95. It should also be noted that, while many countries may have ARRR provisions in their laws, this may not mean that there is a system for collection and distribution of ARRR receipts operating on the ground.

<sup>20</sup> UNESCO and WIPO, Tunis Model Law on Copyright for Developing Countries, 1976, WIPO Publication 812 (E), p 8.

sufficiently as they grow older and develop their markets. Fierce arguments on both sides can be readily advanced.<sup>21</sup>

10. However, it is also possible to advance principled arguments for ARRR based on the need for parity between different categories of creators, particularly when the position of visual artists is considered: this 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 authors. 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 true<sup>22</sup>), while the visual 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; after the first sale, her opportunities for receiving continuing income from the licensing of her reproduction and public communication rights are usually more restricted than for her literary and musical colleagues. The grant of an ARRR can therefore be seen as a way of redressing this imbalance, also making irrelevant the question of whether the resale occurs at a profit, 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 ARRR, then, is to make more effective the artist's exploitation of her work *as a work*, and to redress the imbalance that otherwise exists.<sup>23</sup> This "exploitation" approach is now to be found in the greater number of national ARRR laws, which usually treat this right as part of the author's general 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.<sup>24</sup>

11. Viewed in this way, ARRR can be seen as one of the economic rights to be accorded to artists, no different in substance 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 other "vulnerable" kinds of works such as computer programs and cinematographic works). The fact that ARRR 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. But 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 on this basis then becomes an argument for intellectual property rights across the board, drawing on the usual mixture of justice, fairness and incentive grounds.

---

<sup>21</sup> See further Ricketson, 23-27. This material is drawn upon in the next two sections of this Toolkit.

<sup>22</sup> In this regard, in the UK it appears that the right to make engravings could be 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 William Hogarth: see the *Engravers' Copyright Acts 1735 and 1766*, and see further Deazley, R. (2008) 'Commentary on the Engravers' Act (1735)', in *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org) and see also Deazley, R. (2008) 'Commentary on *Fine Arts Copyright Act 1862*', in *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org)

<sup>23</sup> See Katzenberger, 367–368; R E Hauser, 106–107.

<sup>24</sup> 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*.

12. In addition to this “parity rationale” for recognizing ARRR, the following arguments in support can be advanced:

- (a) ARRR is now clearly established at the international level as one of the authors’ rights belonging to visual artists. This is to be seen in the history of the adoption of the ARRR into the Berne Convention for the Protection of Literary and Artistic Works, where this has been the case since the adoption of Article *14bis* (now Article *14ter*) as part of the Brussels Revision. This point is developed more fully in the next section.
- (b) The fact that such protection is presently optional and subject to the requirement of reciprocity under Article *14ter* (see further below) does not affect the recognition of ARRR 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.<sup>25</sup>
- (c) The fact that ARRR relates to the first material 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 material 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.<sup>26</sup> This has been on the same basis as argued for here in favour of ARRR, namely to correct the imbalance that might otherwise arise because of perceived limitations in the scope of the reproduction right.
- (d) The fact that ARRR, 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 works: 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 ARRR simply reflects the particular character of visual works of art and their usual form of exploitation, but it does not differ in kind from the reproduction right which will only be of benefit to the struggling author of a book in the event that his or her manuscript is chosen for publication out of the many that cross the desk of the publisher daily.
- (e) There is a further argument that ARRR 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 adoption of ARRR legislation in Australia in 2009,<sup>27</sup> and similar arguments have been advanced in several developing countries that have recently passed ARRR laws. In this regard, it should be remembered that provision for ARRR was made by WIPO and UNESCO in the Tunis Model Law on Copyright Law for Developing Countries that was adopted nearly 40 years ago.<sup>28</sup>

---

<sup>25</sup> See further Ricketson and Ginsburg, [11.15] ff.

<sup>26</sup> WCT, Articles 6 and 7.

<sup>27</sup> 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 [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\(Dataset%3Ahansard%20%7C%20Dataset%3Ahansards\);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%3Ahansard%20%7C%20Dataset%3Ahansards);rec=1). A similar view is to be found in a 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.

<sup>28</sup> WIPO and UNESCO, *Tunis Model Law on Copyright Law for Developing Countries*, Geneva, 1976, Section 4*bis*.

- (f) Given the gradual adoption of ARRR regimes by nearly half the membership of the Berne Union, there is now a clear imbalance in protection for visual artists globally as between ARRR and non-ARRR countries. 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.
- (g) Leaving aside the additional revenue stream that ARRR 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.
- (h) The preceding discussion has focussed on works of visual art, as these are the subject of all national ARRR laws. However, also included in some national laws are "original manuscripts" of the works of writers and composers. As is well known, such artefacts may well command high prices on resale, particularly in the case of celebrated authors and composers. The arguments in favour of ARRR, however, may not be as compelling as for works of visual artists as it will not usually be the case (with the possible exception of medieval illuminated manuscripts) that authors and composers will receive their highest returns from sales of their original manuscripts: they will typically have had the full benefit of their reproduction and communication rights and the value attached to an original manuscript may only increase over time, and even posthumously, as the author's reputation rises. Accordingly, the 'imbalance' argument, so potent in the case of visual artists, does not have the same force here. Without denying the value of original manuscripts as authentic records of the writer or composer's original intentions, infused as they may be by the fact of their intimate link to the well-known creator's person, the arguments for linking ARRR here to authors' rights may not be so persuasive for national policy and law makers in devising their own ARRR schemes.

#### **THE INTERNATIONAL FRAMEWORK: ARTICLE 14 *TER* OF THE BERNE CONVENTION**

13. It is useful at this point to outline the framework for ARRR that is contained in article 14*ter* which entered the Berne Convention at the time of the Brussels Revision in 1948 (then numbered as article 14*bis*). Slightly amended in Stockholm in 1967 and retained in the 1971 Paris revision, article 14*ter* provides:

- (1) 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.
- (2) 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.
- (3) The procedure for collection and the amounts shall be matters for determination by national legislation.

14. This is far from providing a comprehensive framework for an ARRR scheme, but the following aspects of article 14*ter* should be noted, as these provide the general guidelines within which a national ARRR scheme should operate so as to ensure overall Berne-consistency:

- (a) As with moral rights, ARRR is to be an inalienable right of the author, that is, one that cannot be transferred or assigned by the author or his or her heirs. In this respect, it differs from the other exclusive economic rights guaranteed under the Convention. On the other hand, ARRR is still an economic, rather than a moral, right that is intended to provide a means of

compensating authors in circumstances where it may be argued that their other economic rights in the work (reproduction, broadcasting, etc) will not give them sufficient return where the real value of work attaches to the original artefact in which the work is embodied, rather than in the revenue that can be earned from the sale and distribution of copies or online dissemination. ARRR therefore has a particular appeal in the case of visual artists but may also be relevant for other kinds of creators (see sub-par c below).

- (b) ARRR only applies to subsequent sales of the work, not to the first sale which is presumed to be made by, or on behalf of, the author.
- (c) ARRR can be applied to original manuscripts of “writers and composers” as well as works of art.
- (d) There is no prescription laid down as to how the “interest” in subsequent sales is to be assessed. Thus, it would be open for national legislation to assess this as a share of the net increase in value of the work (if any) or as a share in the total amount of the resale price. Both approaches are to be found in national laws, but the second is the one mostly preferred.
- (e) It is unclear whether subsequent sales include all sales, or only some, for example, only sales made at public auctions or non-private “commercial resales” effected through an intermediary, such as a gallery, an agent or broker (sometimes referred to as an “art market professional”). Again, different approaches to this question are to be found under national laws.
- (f) Paragraph (1) provides that, after the death of the author, the right may be exercised by an “institution” authorised by national legislation, as well as by any person so authorised. This would permit national laws, for example, to devolve the exercise of ARRR after death upon some public body, which could then collect the resale royalty and apply it more generally to the welfare of artists and their dependants, rather than to the direct heirs and dependants of the particular artist concerned. Nonetheless, it is arguable that the spirit of paragraph (1) requires that at least some of the proceeds of such royalties should find their way back to the descendants or heirs of the deceased author. Again, there are differences in existing national ARRR schemes as to how this issue is to be approached.
- (g) Paragraph (2) indicates that there is no obligation on Berne countries to introduce ARRR: it may only be claimed in those countries that accord such a right, and to the extent which that country's law allows, and only where the legislation of the author's country provides such protection. In other words, recognition of ARRR is subject to a requirement of substantive reciprocity and is not covered by the national treatment principle under article 5(1) of the Convention.
- (h) Paragraph (3) indicates that it is a matter for national laws to determine the amount of the ARRR and procedures for collection.



## **ISSUES FOR CONSIDERATION IN DRAWING UP A NATIONAL ARRR SCHEME**

15. The following sections set out the principal matters that need to be considered in designing a national ARRR scheme and contain suggested legislative provisions that might be adopted in order to implement such a scheme or enhance an existing one.
16. The matters to be considered are:
  - (a) The objectives of an ARRR scheme
  - (b) ARRR defined
  - (c) Works covered by ARRR
  - (d) Works excluded from ARRR
  - (e) Resales covered by ARRR
  - (f) Resales excluded
  - (g) What is included in the (re)sale price
  - (h) Rate charged
  - (i) Who is liable for ARRR
  - (j) Administration of ARRR
  - (k) Duration of ARRR
  - (l) Other characteristics of ARRR – alienation and waiver
  - (m) Entitlement to ARRR and foreign claimants
  - (n) Succession issues – authors' heirs and successors
  - (o) Some other useful provisions
    - i. Joint entitlements
    - ii. Proof of authorship and useful presumptions
    - iii. Right to request information
    - iv. Time of implementation of ARRR scheme and transitional issues.

## **OBJECTIVES OF AN ARRR SCHEME**

17. It is often desirable to have a statement of objectives for any new legislative scheme that is introduced. National legislative styles may differ here as to the amount of detail to be included in such statements – some countries may prefer to have none or simply to refer to it in title of the legislation. Others may opt for a brief statement of objectives, while others again may adopt a longer statement to outline the reasons or justifications for the new scheme. Depending upon the legislative traditions of the country, such statements may be helpful to national courts when interpreting the substantive provisions of the scheme.
18. Table 1 contains several draft statements that may be of assistance to national policy and law makers.

TABLE 1

Kind of provision	Suggested text	Comments
Short statement (may be included in the title of the enactment)	The object of this Act/Law is to create an author's right in relation to resales of their original works of art [original manuscripts of literary, dramatic and musical works] and for related purposes	<ul style="list-style-type: none"> <li>• Brief and to the point.</li> <li>• The detail of the right to be conferred is obviously left to the provisions of the legislative scheme that follow, e.g. in relation to the kinds of works covered, the nature and duration of the right, and so on.</li> <li>• The fact that this is an author's right is still highlighted.</li> <li>• "Related purposes" indicates that other matters are dealt with in the scheme (follows the style used in Australia and some other common law countries).<sup>29</sup></li> </ul>
More specific statement where artworks alone are to be covered	The object of this Act/Law is to create an exclusive and inalienable right of authors to a resale royalty in relation to original artworks	<ul style="list-style-type: none"> <li>• Limited to "artworks" but could be extended to original manuscripts of works if desired.</li> <li>• Specifies the exclusive and inalienable nature of the right.</li> </ul>
Longer, more explanatory, statement	<p>The Parliament/Legislature...:</p> <p><i>Recognizing</i> that authors generally have no pecuniary interest in the further exploitation of their works after the initial transfer of the original embodiments of those works, and</p> <p><i>Recognizing further</i> that this puts authors of original works of art [and manuscripts] at a material disadvantage compared with other authors whose works are more readily exploited through the rights of</p>	<ul style="list-style-type: none"> <li>• This places the proposed ARRR squarely in the context of an author's right and therefore squarely within the framework of the Berne Convention, the premier authors' rights convention.</li> <li>• It postulates that the proposed RRR is an economic, rather than a moral right, and that its primary justification is to be found in its potential to redress the balance between visual artists and</li> </ul>

<sup>29</sup> Some countries with a common law tradition may not even refer to objects in their amending legislation that introduces an ARRR scheme, eg Kenya, which did so in legislation introduced in 2019 and which is entitled simply *Copyright Amendment Act 2019*.

	<p>reproduction, adaptation and public communication, and</p> <p><i>Recognizing further</i> that the right of authors of original works of art and original manuscripts of writers and composers to an interest in any sale of the work subsequent to the first transfer by the author of the work is already acknowledged as an author's right under Article 14<sup>ter</sup> of the Berne Convention, albeit on an optional basis and subject to the requirement of reciprocity, and</p> <p><i>Recognizing further</i> that such a right is of particular value with respect to works that are traditional cultural expressions of indigenous communities,</p> <p>Enacts this Act/Law with the following objectives:</p> <ul style="list-style-type: none"> <li>• to develop and maintain the protection of the rights of all authors in their literary and artistic works in a manner as effective and uniform as possible, and</li> <li>• to establish fully in national law the exclusive and inalienable right of authors of original artworks [and manuscripts] to a resale royalty right, to be called the author's resale royalty right (ARRR) with respect to the proceeds of resales of such original artworks [and manuscripts] that occur subsequently to the first transfer of ownership in those artworks [and manuscripts].</li> </ul>	<p>other categories of authors.</p> <ul style="list-style-type: none"> <li>• It highlights that the proposed ARRR may be of particular significance to indigenous communities in the context of traditional cultural expressions.</li> <li>• It includes original manuscripts as being potentially the subject of the proposed RRR.</li> </ul>
--	--	--

## ARRR DEFINED AND OTHER TERMINOLOGY

19. It is useful in any legislative scheme to begin with a clear definition of the subject matter covered, in this case ARRR. The level of detail here may differ according to the legislative style and tradition of each member country. Some of the provisions to be found in existing or

model laws define the right and its scope almost completely in one provision, eg the EC Directive and the WIPO Model Law; others require reference to definitions contained in other provisions of their laws in order to flesh out the scope of the right, eg as in the Australian provision. Others again, such as the original French law of 1920 and its successors, contain several broad provisions in the principal legislation which are then elaborated upon in implementing decrees or regulations.<sup>30</sup> There is no right or wrong approach here: national legislators should proceed in the way that is most familiar to them in terms of drafting and format. Furthermore, even the most detailed kinds of definitions will inevitably require further provisions to give proper content to their schemes or else will need to rely upon judicial interpretations within their national court systems.

20. An example of a detailed definition of ARRR that contains within it most, but not all, of the main elements of the legislative scheme is that in Article 1.1 of the 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 ('EC Directive'). This provides:

Member States shall provide, for the benefit of the author of an original work of art, a resale right, to be defined as an inalienable right, which cannot be waived, even in advance, to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author.<sup>31</sup>

21. Even more detailed is the provision contained in the WIPO Tunis Model Law on Copyright for Developing Countries 1976 (article 4*bis*(1):

Notwithstanding any assignment of the original work, the authors of graphic and three-dimensional works [and manuscripts] shall have an inalienable right to a share in the proceeds of any sale of that work [or manuscript] by public auction or through a dealer, whatever the methods used by the latter to carry out the operation.

22. To similar effect is the provision in Guatemalan law which comprises almost all elements of the ARRR within one provision:

In case of resale of original works of art, carried out by public auction or through a professional dealer in works of art, the author or, where applicable, their heirs or legatees, enjoy the right to charge the vendor ten percent (10%) of the price of the sale. This right shall be collected and distributed by a collective management organization, if any, to unless the parties agree otherwise do so. This provision also applies to the sale that is made of the original manuscripts authors or composers.<sup>32</sup>

---

<sup>30</sup> See now France Intellectual Property Code, article 122-8, and Decree No 2007-756 of 9 May 2007.

<sup>31</sup> Compare the French provision in article 122-8(1) immediately prior to French implementation of the EC Directive (as at September 2003):

Authors of graphic and three-dimensional works shall have an inalienable right, regardless of any transfer of the original work, to participate in the proceeds of any sale of such work by public auction or through a dealer (in near identical terms to its predecessor, article 42 of the French Law of 1957). Article 122-8(1) of the Intellectual Property Code has now been amended to implement the EC Directive.

<sup>32</sup> Guatemalan Law on Copyright and Related Rights, Decree No 33-98, article 38. In similar terms, see Dominican Republic, Law No 65-00 on Copyright, article 78 paragraph, which provides:

In the event of resale of a pictorial work, sculpture or three dimensional artistic work in general by public auction, at an exhibition or through a professional dealer, the author and, on his death, his heirs or successors in title, shall, for the period of protection of works established in this Law, enjoy the inalienable right to receive from the seller a percentage of the resale price, which shall not, under any circumstances, be less than two per cent (2%) of the resale price. The collection and distribution of this remuneration shall be the responsibility of a collective management society constituted and authorized in accordance with the provisions of this Law.

23. At the other end of the scale is the Australian provision (s 6, *Resale Royalty Right for Visual Artists Act 2009*) which requires reference to other interpretative provisions:

Resale royalty right is the right to receive resale royalty on the commercial resale of an artwork.

24. The Kenyan provision is in similar form, but more expansive in that it refers to the persons entitled to ARRR:

"resale royalty right" means the right of an artist or group of artists or successors to receive resale royalty on commercial resale of an artwork;<sup>33</sup>

25. From the perspective of potential beneficiaries of any ARRR scheme, the most important objective with any definitional provision is that it highlights the key aspects of the right, which is the right to receive a royalty on each commercial resale of the work following the first transfer of ownership by the author (artist).

26. Suggested model provisions here are:

TABLE 2

Kind of provision	Suggested text	Comments
More general	Author's resale royalty right or ARRR is the right to receive resale royalty for each commercial resale of an original artwork [and manuscript] following its first sale or transfer of ownership by the author.	Has brevity and clarity, but various expressions here will require further definition, such as "resale royalty", "commercial resale", what is meant by "original artwork" and who is to enjoy the right, and the nature of the right.
More detailed	The author of an original work of art [and manuscript] shall enjoy the inalienable right, which cannot be waived, even in advance, to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of ownership of the work by the author.	This highlights the inalienable character of the right, who is to receive it, and when it arises. The nature of the resale is not indicated, eg whether it includes private or non-commercial resales. These matters are elaborated upon in further provisions that are discussed in the following sections of this Toolkit.
Some useful definitions (for all legislative schemes)	<p>"Author" means the creator of an original literary or artistic work within the meaning of the Berne Convention.</p> <p>"Berne Convention" refers to the Berne Convention for the Protection of Literary and Artistic Works 1886, as revised to 1971</p> <p>"Original artwork" means the first material embodiment of an artistic work within the meaning of the Berne Convention.</p> <p>"Original manuscript" means the first material embodiment of a literary,</p>	"Material embodiment" is suggested here, rather than "physical" or "tangible in order to cover fixations in digital formats.

<sup>33</sup> Kenya, *Copyright Act No 12 of 2001*, s 2.

	<p>dramatic or musical work within the meaning of the Berne Convention.</p> <p>“Resale royalty” refers to the royalty payment due to the author of an original artwork [or original manuscript] on commercial resales of the work occurring after the first transfer of ownership of the first material embodiment of that work.</p> <p>“Commercial resale” – see further the suggested definitions set out in Table 5.</p>	
--	---	--

## WORKS COVERED BY ARRR

27. As noted above, article 14<sup>ter</sup> of the Berne Convention leaves considerable flexibility as to the kinds of works may be the subject of ARRR, as well as those that may be excluded. National ARRR schemes therefore vary greatly as to what is covered and the degree of detail adopted in defining the categories of works protected. As a starting point, it should be made clear that ARRR attaches to the first material embodiment of the original artwork and/or manuscript (see “useful definitions” in preceding table).
28. Issues then calling for attention in designing any new ARRR scheme include the following:
- (a) Should the legislative drafter use a general, inclusive expression to cover what works are to be subject to ARRR, for example, “all graphic and three-dimensional works” which might leave it ultimately as a matter for a national court to determine whether a particular kind of work that falls at the margin is within or outside the scope of this expression?<sup>34</sup>
  - (b) Is it preferable to provide a detailed list of the kinds of works covered, perhaps with some residual category that can be specified under a later subordinate legislative instrument or through administrative direction?
  - (c) Should all categories of photographs be included? For example, should this include simple photographs taken with a digital telephone or documentary or news photographs? In this regard, it is worth noting that Berne itself (in article 2(1)) refers to “photographic works to which are assimilated works expressed by a process analogous to that of photography” and this leaves member states with some flexibility as to how they draw the line with respect to the protection of photographs as artistic works.
  - (d) Should craft works, and more generally, works of applied art be included within the broader category of “artistic work”? Once again, Berne leaves some flexibility here to member countries as to the extent to which they should protect works of applied art as artistic works or under some other regime such as designs or model laws (see articles 2(7) and 7(4), Berne). The view of some countries, such as France, is that works of applied art should be interpreted broadly as falling within the general category of artistic work, while other countries have a more limited approach as to what should be

<sup>34</sup> For example, the French law refers to “original graphic and plastic works” (‘œuvres originales graphiques et plastiques’ in article 122-8, first para), while a more detailed list is provided in Art R 122-2 of the Decree of 2007: ‘paintings, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware, photographs and plastic creations on audiovisual or digital media’. (‘Les œuvres mentionnées à l’article R. 122-1 sont les œuvres originales graphiques ou plastiques créées par l’auteur lui-même, telles que les tableaux, les collages, les peintures, les dessins, les gravures, les estampes, les lithographies, les sculptures, les tapisseries, les céramiques, les verreries, les photographies et les créations plastiques sur support audiovisuel ou numérique.’)

included here, e.g. some kinds of craft works but not all kinds of works of applied art. In devising a Berne-compliant ARRR scheme, national legislators therefore have some latitude as to how far they extend protection to all categories of applied art or only some.

- (e) Should non-artistic works such as manuscripts of literary, dramatic or musical works be covered?
- (f) How are works produced in a series of copies or reproductions to be treated and likewise works produced by a team of assistants working under the direction of an author?
- (g) How are digital works to be treated, including those which are computer-generated? Can the notion of ARRR be extended to natively digital art works where the requirement of a first material embodiment may require some reconceptualization?

29. Different answers to these questions are to be found in existing national schemes and may give rise to lively debates among policy and law makers. However, Berne allows for this flexibility and it is suggested that national policy and law makers should be guided here by the particular circumstances of their art markets as well as their legal and cultural traditions. Thus, protection of craft works (as a species of works of applied art) may be of particular importance in some countries, but not others, while group-created works may be common in some but not in others, and likewise with digital productions. Perhaps the best guidance here is to allow for some mechanism in any legislative scheme which can make adjustments for new situations as they arise.

30. Some suggested sample provisions here are:

TABLE 3

Kind of provision	Suggested text	Benefits and drawbacks
Most general	The first material embodiment of all original graphic and three-dimensional works <sup>35</sup> ["and manuscripts of original literary and dramatic works and musical compositions"].	<ul style="list-style-type: none"> <li>• Covers all artistic works and manuscripts</li> <li>• They must be "original"</li> <li>• From a drafting perspective this may be the easiest approach, as there is no list of accompanying examples and it will therefore be a matter for national courts to determine how far the expression "all original graphic and three-dimensional works" extends. For instance, does this include works of applied art and photographic works (to say nothing of other kinds</li> </ul>

<sup>35</sup> For a similar national provision, see Senegal, Law No 2008-09 of January 25, 2008, on Copyright and Neighbouring Rights, article 38 which refers to "original works of art" and to "original manuscripts of authors or composers". Another is to be found in s 31(1) and (2) of the Malawi, Copyright Act 2016, which refers to the "originals" of a "graphic work, three dimensional work and manuscript", while the recent Saudi Arabia provision refers to "original fine art works and products and those of the original musical manuscripts"

		<p>of artistic work, such as sculptures, drawings, etc).</p> <ul style="list-style-type: none"> <li>• The virtue of a general provision such as this is that it should ensure congruence between ARRR and national copyright laws on these questions (although it might be preferable to include a specific reference here, such as “under the Copyright Law/Act etc of ...”.</li> <li>• Provision is made for extension of ARRR to original manuscripts.</li> <li>• “First material embodiment” should cover digital works.</li> </ul>
<p>Inclusive list (original artistic works only)</p>	<p>1. “Original work of art” means works of graphic or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs, provided they are made by the artist himself or are copies considered to be original works of art.</p> <p>2. Copies of works of art which have been made in limited numbers by the artist himself or under his authority, shall be considered to be original works of art. Such copies will normally have been numbered, signed or otherwise duly authorised by the artist.<sup>36</sup></p>	<ul style="list-style-type: none"> <li>• While expressed in general terms (“works of graphic or plastic art”), the list of examples beginning with “such as” may suggest some limitations, eg with respect to some kinds of craft works not listed or, more generally, to works of applied art.</li> <li>• Par 2 deals with the issue of works produced in limited numbers and suggests useful criteria that might be adopted here.</li> <li>• As a general comment on par 1, the adjectives “graphic” and “plastic” may be sufficient on their own to cover all two-dimensional and three-dimensional artistic works, making it unnecessary to have the list of illustrative examples that then follow. (Although it may be argued that the latter is still useful as demonstrating the scope of each expression).</li> <li>• It is therefore suggested that each national scheme should work with the terminology adopted in its</li> </ul>

<sup>36</sup> Follows EC Directive, article 1(1) and (2).



		own national copyright law and should try to correlate its ARRR scheme with the general definition of “artistic” work used in that law.
More detailed list for artistic works or ‘artworks’	<p>(1) An artwork is an original work of visual art that is either:</p> <p>(a) created by the artist or artists; or</p> <p>(b) produced under the authority of the artist or artists.</p> <p>(2) Works of visual art include, but are not limited to, the following:</p> <p>(a) artists’ books;</p> <p>(b) batiks;</p> <p>(c) carvings;</p> <p>(d) ceramics;</p> <p>(e) collages;</p> <p>(f) digital artworks;</p> <p>(g) drawings;</p> <p>(h) engravings;</p> <p>(i) fine art jewellery;</p> <p>(j) glassware;</p> <p>(k) installations;</p> <p>(l) lithographs;</p> <p>(m) multimedia artworks;</p> <p>(n) paintings;</p> <p>(o) photographs;</p> <p>(p) pictures;</p> <p>(q) prints;</p> <p>(r) sculptures;</p> <p>(s) tapestries;</p> <p>(t) video artworks;</p> <p>(u) weavings;</p> <p>(v) any other things prescribed by the regulations.<sup>37</sup></p>	<ul style="list-style-type: none"> <li>• Covers works produced jointly as well as singly</li> <li>• Covers works created with assistants, so long as this occurs “under the authority of the artist”</li> <li>• Provides a detailed, but not exhaustive, list of works covered, with the possibility of adding to this through some form of subordinate legislation, eg through regulations, or through some form of administrative or ministerial direction (this will be a matter for each country to decide, in accordance with its internal constitutional and legislative arrangements).</li> <li>• The problem with lists, even if not exhaustive, is that items may be left out and give rise to arguments as to whether they are still “works of visual art”</li> </ul>
Original manuscripts	<p>As per Table 1 above</p> <p>Alternatively: “Original manuscript” means the first material embodiment of a literary or dramatic work, including novels, plays</p>	<ul style="list-style-type: none"> <li>• The inclusive list of examples of what may be an “original manuscript” may be useful.</li> </ul>

<sup>37</sup> Follows Australia, Resale Right Act s 7. For a shorter list, see France, Decree of 2007, article 122-2.

	and other writings, or of a musical composition.	
--	--	--

## WORKS EXCLUDED FROM ARRR

31. It has been indicated under the preceding section that important decisions need to be made as to the categories of works that should be subject to ARRR, for example, whether this should include craft works or works of applied art and manuscripts. Countries may also decide to exclude other sub-categories of works on the basis that their original embodiments bear little relationship to the original embodiments of more traditional kinds of artistic works such as paintings and sculptures.
32. Examples of such exclusions are buildings and architectural works, technical drawings, layout designs (topographies) for integrated circuits, computer-generated works, and simple and/or documentary (news) photographs<sup>38</sup>. Legislative techniques to deal with these matters include specific legislative exclusions or the provision of a general power to specify such exclusions in the future through some kind of subordinate legislative instrument or administrative direction.

TABLE 4

Kind of provision	Suggested text	Comments
Specific legislative exclusions	ARRR does not apply to the resale of:  (a) architectural works, or drawings, plans or models for such works;  (b) technical drawings for useful articles;  (c) layout designs (topographies) of integrated circuits; or  (d) computer-generated works. <sup>39</sup>	<ul style="list-style-type: none"> <li>This has the virtue of certainty, meaning that what is not excluded may well fall within the scope of ARRR even if not specifically included in any list previously provided (as in Table 3)</li> <li>Issues may arise with respect to ephemeral or transient artworks, such as sand and water sculptures, laser-produced images and the like, although as a practical matter it may be very difficult for these to have anything other than a “first embodiment”</li> </ul>
Power to exclude by regulation or administrative direction	Add on to preceding text: ... (e) any other category of artistic work [and manuscript] prescribed by the regulations [or listed in an administrative	<ul style="list-style-type: none"> <li>This may be a useful power to have in reserve.</li> </ul>

<sup>38</sup> This poses difficulties of a technical character requiring further analysis that is beyond the scope of the present Toolkit. It is simply highlighted here as a topic requiring further investigation. See, for example, Kenya, Copyright Act 2001, s 26D(6)(b) (“building or plan, drawing or model of a building...”); Senegal, LAW No. 2008-09 OF JANUARY 25, 2008 ON COPYRIGHT AND NEIGHBORING RIGHTS IN SENEGAL article 49 (“The droit de suite shall not apply to architectural works or works of applied art.”)

<sup>39</sup> A model for this kind of provision is to be found in s 9 of the Australian Resale Right Act, s 9.

	direction from the Minister, Agency, etc..]	
--	--	--

## RESALES COVERED BY ARRR

33. Not all resales are, or can be, covered by ARRR. In general, national ARRR schemes apply only to resales involving an intermediary of some kind, such as an agent or gallery, with private resales occurring between parties remaining outside the scheme. This reason for such an exclusion may appear obvious enough – the practical difficulties that arise in identifying and tracking private bilateral transactions (a crude analogy here may be drawn with the exclusive right of communication, which is limited to communications “to the public”). Essentially, the distinction to be drawn here is between what occurs in public and what takes place in private. However, drawing this distinction presents difficulties, when it is remembered that the exclusion of private sales in the case of ARRR may result in a significant gap in artists’ income from such resales. In this regard, it may be noted that *Article 14ter* of Berne provides no guidance, referring only to “any sale of the work subsequent to the first transfer by the author of the work”. National laws therefore must determine for themselves how best to draw the circle around what resales will be subject to ARRR and those which will not.
34. Some national ARRR schemes focus on the intermediary or institution involved in a resale as the determinant of whether a resale will be subject to ARRR. In some instances, this might mean referring to the involvement of an institution such as a salesroom, gallery, auction house or museum. In others, the focus is on the person of the intermediary involved in the resale, sometimes referred to as an “art market professional”, ie an agent, broker or negotiator. In others again, the emphasis is on the commercial character of the resale, with this element being provided by the involvement of such a professional. For example, in the Australian law the expression “commercial resale” is used to exclude transactions of a private nature not involving an “art market professional”, a term which is then defined in further detail.
35. Some sample provisions reflecting these different drafting approaches are set in the table below.

TABLE 5

Kind of provision	Suggested text	Comments
General provision	ARRR shall apply to all acts of resale involving as sellers, buyers or intermediaries art market professionals, such as salesrooms, art galleries and, in general, any dealers in works of art. <sup>40</sup>	<ul style="list-style-type: none"> <li>This refers to specific institutions or bodies (“sales rooms, art galleries”) but concludes with the broader notion of “any dealers in works of art” which is a wide, if open-ended, default category. Clearly, this would extend to auction houses and brokers who arrange for resales.</li> </ul>

<sup>40</sup> EC Directive, article 1.2. To similar effect, see also s 2 of the Kenya, Copyright Act 2001, which defines “art market professional” as including “an auctioneer, owner or operator of a gallery, museum, an art dealer or any other person involved in the business of dealing in artworks;” article 122-8(1), French Intellectual Property Code.

<p>More detailed provision</p>	<ol style="list-style-type: none"> <li>1. ARRR shall apply to all commercial resales of an original artwork [and original manuscript].</li> <li>2. Commercial resale of an artwork [and manuscript] means:             <ol style="list-style-type: none"> <li>(a) ownership of the artwork [and manuscript] is transferred from one person to another for a monetary sum or its equivalent; and</li> <li>(b) the transfer is not the first transfer of ownership of the artwork [and manuscript]; and</li> <li>(c) the transfer of ownership involves an art market professional acting in that capacity.</li> </ol> </li> <li>3. Art market professional means:             <ol style="list-style-type: none"> <li>(a) an auctioneer; or</li> <li>(b) the owner or operator of an art gallery; or</li> <li>(c) the owner or operator of a museum; or</li> <li>(d) an art dealer; or</li> <li>(e) a person otherwise involved in the business of dealing in artworks.<sup>41</sup></li> </ol> </li> </ol>	<ul style="list-style-type: none"> <li>• “Commercial resale” more aptly characterises the nature of ARRR, while the provision describes the character of the resale more precisely.</li> <li>• It then defines the legal character of “commercial resale” in more precise terms, as involving the transfer of ownership for money or its equivalent.</li> <li>• It then defines the expression “art market professional” in similar terms to the preceding provision.</li> <li>• Sub-pars (d) and (e) provide open-ended default categories to cover persons who do not fall within the more established categories, such as auctioneers, galleries or museums but who are still dealing in art works..</li> </ul>
--------------------------------	---	--

## RESALES EXCLUDED

36 In addition to the issue of defining the kinds of resales to be covered by ARRR, further limitations of a practical kind need to be considered. First, should there be minimum price limits on the resales covered? If all resales are covered, this may create difficulties in being able to operate collection and distribution of ARRR in an efficient and timely manner. Secondly, should ARRR apply to resales where the seller has directly acquired the work from the author within a given period before resale? In this instance, it might be thought that too short a time has elapsed before the value of the work has been properly tested in the marketplace and the purchaser therefore should not be disadvantaged (a maximum resale

<sup>41</sup> Based on Australia, Resale Royalty Act 2009, s 8.

price may be included here to keep the restriction within reasonable limits). Limitations of these kinds are to be found in many national laws, notably in the EC, and no guidance on them is to be found in the language of article 14*ter* of Berne. Some suggested sample provisions are given in Table 6 below.

37 A further possible question for consideration is whether a national ARRR scheme should provide for any exception from its application based on some public policy ground. Exceptions to other exclusive rights such as reproduction, performance, etc, are to be found elsewhere in Berne, for example, in articles 9, 10 and 10*bis*. It may be difficult to conceive of analogous kinds of exceptions or limitations that might be made in the case of ARRR, although one possible exception – resale by auction for charitable purposes – is to be found in one recently adopted national law.<sup>42</sup> Article 14*ter*, Berne, is silent on this issue, but, as a general matter, it can be argued that the inalienable right described there should not be subject to further exceptions or limitations other than those which might be necessary for practical reasons as described in the preceding paragraph.

TABLE 6

Kind of provision	Suggested text	Comments
Providing a minimum price threshold for ARRR	The minimum sale price for resales subject to ARRR is .... <sup>43</sup>	<ul style="list-style-type: none"> <li>The specification of a price threshold will depend upon the economic and social circumstances of the country adopting an ARRR scheme, eg in Australia a minimum of \$A1,000 is prescribed; in Kenya, it is 20,000 shillings; in Senegal, it is 200 000F CFA.</li> </ul>
More detailed provision	<p>No ARRR is to be charged on the commercial resale of an artwork for a sale price of less than:</p> <p>(a)\$. . . or, if the sale price is paid in a foreign currency, the amount worked out using the exchange rate applicable at the time of the commercial resale that is equivalent to \$. . .; or</p> <p>(b) if a higher amount is prescribed by the regulations [or Ministerial direction]—that higher amount.<sup>44</sup></p>	<ul style="list-style-type: none"> <li>Has a reference to exchange rates</li> <li>Allows for prescription of a higher threshold in the future</li> </ul>

<sup>42</sup> Kenya, Copyright Act 2001, s 26D(6)(c).

<sup>43</sup> Under the EC Directive, article 3, it is left to member states to set a minimum sale price but it may “not under any circumstance exceed EUR3,000.”

<sup>44</sup> Australia, Resale Right Act, s 10.

Time limits for ARRR	ARRR shall not apply to acts of resale where the seller has acquired the work directly from the author less than three years before that resale and where the resale price does not exceed ... <sup>45</sup>	<ul style="list-style-type: none"> <li>Legislators may feel that this is a fair provision for the purchaser where there is a ceiling set for the resale price within the given time limit.</li> </ul>
----------------------	--	---

## WHAT IS INCLUDED IN THE (RE)SALE PRICE

38 The (re)sale price is the price received for the work on the fall of the hammer in the case of an auction sale or the price otherwise agreed to be paid to the seller where there has been the involvement of an art market professional. As a general principle, there should be no deductions from this price for the purposes of calculation of ARRR, as this will make the task of calculation much simpler to carry out and is, of course, fairer to the author. This is not an issue directly addressed in article 14*ter*, Berne.

39 Under some national ARRR schemes, the sale price does not include any taxes that may be payable on the sale, for example, in the European Union<sup>46</sup>. In other countries, such as Australia, value-added tax (or goods and services tax) is included in the resale price, while other taxes are not.<sup>47</sup> A further issue for consideration is whether a buyer's premium payable by winning bidders in auctions (usually a percentage of the sale price) should be included in the sale price for calculation of ARRR. This is a contentious issue as this may be reported as the overall resale price but the buyer's premium component usually passes to the auction house rather than the seller.

40 In determining how the (re)sale price for ARRR is to be determined, each country will need to carefully interrogate the way in which the art resale market and tax system in their country operates, as these matters may be dealt with differently from one country to another. Bearing this in mind, some suggested sample provisions are set out in the following table.

TABLE 7

Kind of provision	Suggested text	Comments
Excluding taxes generally from resale price.	The resale price is the price obtained for the commercial resale of the work, net of tax. <sup>48</sup>	<ul style="list-style-type: none"> <li>Excludes all taxes payable on the sale, including VAT (the most usual)</li> <li>Reduces the amount of ARRR due to the author.</li> </ul>
Including tax but excluding buyers' premium	The sale price on the commercial resale of an artwork means the amount paid for the artwork by the buyer on the	<ul style="list-style-type: none"> <li>Includes value added tax in the calculation, which should augment the sale</li> </ul>

<sup>45</sup> Following EC Directive, article 1.3.

<sup>46</sup> EC Directive, article 5.

<sup>47</sup> Australia, Resale Royalty Act, s 10(2).

<sup>48</sup> Following EC Directive, article 5; see also Senegal, in DÉCRET N° 2015-682 DU 26 MAI 2015 PORTANT APPLICATION DE LA LOI N° 2008-09 DU 25 JANVIER 2008 SUR LE DROIT D'AUTEUR ET LES DROITS VOISINS, Titre VI, article 26.

	commercial resale including value added tax, but does not include any buyer's premium or other tax payable on the sale. <sup>49</sup>	price on which ARRR is calculated. • Excludes other taxes and buyer's premium.
--	---	---

## RATE TO BE CHARGED

- 41 Berne, article 14<sup>ter</sup> provides no guide here, apart from the general stipulation that the author is to have “the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work”. It is therefore left to each national scheme to determine how this “interest” is to be fixed.
- 42 Various approaches are to be found in the EU and national laws. These are generally based on a percentage of the resale price (between 2% to 10%), and there may be a minimum or threshold level set before ARRR becomes payable (see above). In some instances, such as in the EU a maximum level is also mandated as to the absolute amount that can be charged: while such a limitation is allowable under article 14<sup>ter</sup> which refers merely to “an interest” in any sale, leaving this as a matter for national legislators to determine for themselves, outside the EU such legislators may determine that there is no convincing reason of policy to impose such a ceiling (these do not appear to have been included in other national ARRR schemes to date).<sup>50</sup>
- 43 Leaving aside the matter of maximum amounts of ARRR that may be charged, a sliding scale of percentages according to the amount of the resale may also be adopted. Again, this is a feature of the EU scheme but may add to the complexity of administration of the scheme, and is not generally to be found in other non-EU schemes which apply a specified percentage of the resale price. The Tunis Model Law does not indicate a preferred percentage, but there is a note to article 4<sup>bis</sup> that, at the time of the Model Law (1976), the general average charged in the few countries that had ARRR systems in place was 5% of the resale price.<sup>51</sup>
- 44 A few countries also base their royalty on a percentage (5%) of the increase in value on resale, e.g. Brazil,<sup>52</sup> but this is now relatively uncommon. Although article 14<sup>ter</sup> does not directly address this matter (see par 14(d) above), it is submitted that this is not an advisable approach to be adopted in any new ARRR national scheme that is under consideration. Quite apart from anything else, such a system may be difficult to enforce in practice and will be dependent upon full disclosure of the details of each resale in order to determine the actual profit made on the resale. Furthermore, as a matter of principle, it is inconsistent with the notion of ARRR as a royalty on all commercial resales, and therefore inconsistent with the general approach suggested here of placing ARRR on the same basis as other exclusive economic rights of the author recognized under Berne. In effect, it makes the author a co-party in the “investment” made by the purchaser of the original artwork or manuscript, with payment only becoming due when a profit is made on resale.

<sup>49</sup> Following Australia, Resale Royalty Act, s 10(2).

<sup>50</sup> There may have been political reasons behind the adoption of the maximum amount in the EC Regulation, ie getting agreement between all member states on the minimum kind of ARRR scheme that could be adopted in each member state (many of which did have such a scheme at the time of the Directive's introduction). Such political considerations will not usually arise outside the EU.

<sup>51</sup> It may also be noted that in those EU countries which also grant ARRR to original manuscripts (not within the scope of the EC Directive), at least one country (Poland) has opted for a simple percentage (5%) of “professionally performed resale[s]”: Article 19<sup>1</sup>, Act of 4 February 1994, on Copyright and Related Rights (consolidated text)(Poland).

<sup>52</sup> And formerly Italy in its 1941 law.

45 Sample provisions reflecting these different approaches, other than the percentage share in any profits on resale, are set out in the table below.

TABLE 8

Kind of provision	Suggested text	Comments
Simple percentage of resale price	ARRR shall be five per cent of the sale price on the commercial resale of an artwork. <sup>53</sup>	<ul style="list-style-type: none"> <li>• This appears to be generally consonant with the rates adopted in non-EU jurisdictions.</li> <li>• Lower percentages, eg down to 2%, could also be justified – there is no restriction here under Berne or any other international instrument.</li> <li>• There is no upper limit set here on the resale price which can be subject to ARRR, ie it is 5% on a painting sold for \$10,000 or for \$1 million or more.</li> <li>• A fixed percentage is obviously easier to apply in practice.</li> </ul>

Sliding scale	<p>ARRR shall be set at the following rates:</p> <p>(a) 4 % for the portion of the sale price up to X...;</p> <p>(b) 3 % for the portion of the sale price from X.. to Y ...;</p> <p>(c) 1 % for the portion of the sale price from Y... to Z ...;</p> <p>(d) 0.5 % for the portion of the sale price from Z to M..;</p> <p>(e) 0.25 % for the portion of the sale price exceeding N....<sup>54</sup></p>	<ul style="list-style-type: none"> <li>• This follows the EC model in the EC Directive.</li> <li>• May be more complicated to determine in each case.</li> </ul>
---------------	---	--

<sup>53</sup> Following the Senegal Law, article 48; Australia, Resale Royalty Act, s 18.

<sup>54</sup> Following EC Regulation, article 4.1.



Cap on the total amount of ARRR	The total amount of ARRR may not exceed... <sup>55</sup>	See the arguments made above in par 42.
Minimum level for ARRR	No ARRR is payable if the resale price is less than....or such other amount that may be prescribed by regulation [direction from the Minister, etc] <sup>56</sup>	Having a threshold for payment of ARRR may make administration of the scheme easier, and the provision of a means to increase (or decrease) this amount by regulation etc may be useful in the future.

## WHO IS LIABLE FOR ARRR

46 As a starting point, this will usually be the seller of the work subject to ARRR, but there may be other parties who are secondarily, or additionally, liable for payment, including intermediaries and art market professionals and, as a last resort, the buyer. There is considerable flexibility here for national laws, as article 14~~ter~~ of the Berne Convention provides no clear prescription as to who is to be liable. In this regard, it is useful to note the following provision in article 1.4 of the EC Directive, which provides member states with various options in their implementation of this obligation:

The royalty shall be payable by the seller. Member States may provide that one of the natural or legal persons referred to in paragraph 2 other than the seller shall alone be liable or shall share liability with the seller for payment of the royalty.

[The persons referred to in paragraph 2 are as follows: ‘those involved in all acts of resales as sellers, buyers or intermediaries art market professionals, such as salesrooms, art galleries and, in general, any dealers in works of art.’

47 Various models are set out in the sample provisions in the following table. As will be seen, the question of who should be liable for ARRR can give rise to complex issues, meaning that it is not easy to devise simple legislative solutions here that will meet the likely permutations that may arise.

TABLE 9

Kind of provision	Suggested text	Comments
Vendor alone liable	ARRR shall be payable by the seller of the original artwork [and manuscript]. <sup>57</sup>	<ul style="list-style-type: none"> <li>This is the simplest solution, but provides no backup where the seller is unable to pay or cannot be located.</li> </ul>

<sup>55</sup> Ibid.

<sup>56</sup> See, for example, Kenya, *Copyright Act 2001*, s 26D(6)(a); Australia, *Resale Royalty Act 2009*, s 10(1).

<sup>57</sup> An instance of the vendor or seller alone being liable for payment of ARRR is to be found in article 38 of the Guatemalan Law on Copyright and Related Rights, Decree 33-98.

<p>Joint and several liability between seller and art market professional</p>	<p>Art market professionals involved in resales that are subject to ARRR will be jointly and severally liable with the seller for the payment of the ARRR.<sup>58</sup></p>	<ul style="list-style-type: none"> <li>• Joint and several liability refers to an obligation in respect of which proceedings may be taken in relation to the whole of the obligation against all of the parties (jointly) or against one of them (severally).</li> <li>• Joint and several liability here extends to art market professionals, but not the buyer (as in the next sample provision)</li> </ul>
<p>Joint and several liability between seller, art market professional and buyer</p>	<p>(1) The following shall be jointly and severally liable to pay the resale royalty due in respect of a sale—</p> <ul style="list-style-type: none"> <li>(a) the seller; and</li> <li>(b) the relevant person (within the meaning of paragraph (2)).</li> </ul> <p>(2) The relevant person is a person is—</p> <ul style="list-style-type: none"> <li>(a) the agent of the seller; or</li> <li>(b) where there is no such agent, the agent of the buyer; or</li> <li>(c) where there are no such agents, the buyer.</li> </ul> <p>(3) Liability shall arise on the completion of the sale; however, a person who is liable may withhold payment until evidence of entitlement to be paid the royalty is produced.</p> <p>(4) Any liability to pay resale royalty in respect of a resale right which belongs to two or more persons as owners in common is discharged by a payment of the total amount of royalty to one of those persons.<sup>59</sup></p>	<ul style="list-style-type: none"> <li>• This provides for a cascade of liabilities, down from the seller to the agent of the seller, the agent of the buyer, and, finally, the buyer.</li> <li>• Ultimate effect is that the author will not lose his or her entitlement to ARRR as long as any of these parties are still available.</li> </ul>

<sup>58</sup> Spanish Law No 3/2008 of 20 Dec 20, 2008 on the resale right for the benefit of the author of an original art work, art 10.

<sup>59</sup> Based on UK, Artists Resale Right Regulation, s 13.

<p>Joint and several liability – an alternative formulation</p>	<p>The following persons are jointly and severally liable to pay resale royalty on the commercial resale of an artwork:</p> <p>(a) the seller or, if there is more than one seller, all of the sellers; and</p> <p>(b) each person acting in the capacity of an art market professional and as agent for the seller; and</p> <p>(c) if there is no such agent—each person acting in the capacity of an art market professional and as agent for the buyer; and</p> <p>(d) if there are no such agents—the buyer or, if there is more than one buyer, all of the buyers.<sup>60</sup></p>	<ul style="list-style-type: none"> <li>• A slightly different cascade effect, down to the buyer at the end</li> <li>• Provides for multiple sellers, art market professionals and buyers</li> </ul>
---	--	---

## HOW IS ARRR ADMINISTERED?

- 48 No specific guideline on this is provided by article 14*ter*, which leave national legislators with a range of options: this may be framed as a right enforceable by the author alone, and/or may be done by a collective management organization (CMO) either on a voluntary or mandatory basis.<sup>61</sup> Countries with a long tradition of collective administration may argue that ARRR should be the subject of mandatory rather than optional collective management. This may well be persuasive from the perspectives of efficiency and effectiveness, but the present Toolkit does not express a view either way: it is a matter which national legislators and policy makers should determine for themselves, taking account of their particular legal, social and cultural conditions, but also noting the ready availability of advice from CMOs in countries where collective administration is well established, such as France and the UK. Part II of this Toolkit is intended also to address these important operational issues.
- 49 If collective management, either mandatory or optional, is allowed for in any existing or proposed national ARRR scheme, it may be practical to provide that this should be done by an existing organization rather than by establishing a new one specifically for this purpose (while ideally, a new CMO dedicated solely to ARRR may be the most desirable approach, in some countries this may not prove to be workable and it may be more practicable to give this role to an existing CMO that is operating in related areas).
- 50 CMOs may also be given powers to request certain information as to resales that is not available to individual authors (see further below at par 65). Depending upon legislative style, these matters might not be dealt with in the principal legislation itself but left to be determined in some form of subordinate legislation, such as in a regulation or decree.<sup>62</sup>

<sup>60</sup> Based on Australia, Resale Royalty Act, s 20.

<sup>61</sup> Thus, article 6.2 of the EC Directive provides that Member States may provide for compulsory or optional collective management of ARRR.

<sup>62</sup> This is the case in Senegal: see Senegal Law No 2008-09 of January 25, 2008, on Copyright and Neighbouring Rights, article 50. These matters are then dealt with in detail in DÉCRET N° 2015-682 DU 26 MAI 2015 PORTANT

TABLE 10

Kind of provision	Suggested text	Comments
Author's right alone	ARRR may be exercised only by the author of the original artwork [and manuscript](the ARRR holder). <sup>63</sup>	<ul style="list-style-type: none"> <li>• In principle, this is consistent with the notion of ARRR as an author's right (the "ARRR holder").</li> <li>• In practice, it may be almost impossible for an individual author to enforce on his or her own ARRR – hence, provision for some form of collective management represents the best way forward (see next two provisions)</li> </ul>
Simple provision requiring mandatory collective administration of ARRR	The author's ARRR may only be exercised through an approved collecting society.	<ul style="list-style-type: none"> <li>• This establishes the principle of mandatory administration, but more provisions will be required as to how the CMO is to be established and the powers it will require to carry out its functions.</li> </ul>

---

APPLICATION DE LA LOI N° 2008-09 DU 25 JANVIER 2008 SUR LE DROIT D'AUTEUR ET LES DROITS VOISINS, Titre VI, articles 23-29, in particular article 29 which makes collective administration compulsory.

<sup>63</sup> See, for example, article 38, Brazil, Law No. 9610 of February 19, 1998, on Copyright and Neighbouring Rights.

<p>More detailed provision on mandatory collective management</p>	<p>(1) ARRR may be exercised only through a collecting society approved for this purposes by...</p> <p>(2) Where the holder of ARRR has not transferred the management of his or her right to a collecting society, the collecting society which manages copyright on behalf of holders of ARRR shall be deemed to be mandated to manage his or her right.</p> <p>(3) Where there is more than one such collecting society, the holder may choose which of them is so mandated.</p> <p>(4) A holder to whom paragraph (2) applies has the same rights and obligations, in respect of the management of his right, as have holders who have transferred the management of their right to the collecting society concerned.</p> <p>(5) For those purposes—</p> <p>(a)“collecting society” means a society or other organisation which has as its main object, or one of its main objects, the administration of rights on behalf of more than one artist; and</p> <p>(b)the management of resale right is the collection of resale royalty on behalf of the holder of the right in return for a fixed fee or a percentage of the royalty.<sup>64</sup></p>	<ul style="list-style-type: none"> <li>• This places collection and distribution in the hands of an approved collecting society, with the holder of ARRR having no say in this.</li> <li>• “Approval” of the society and how this is to be done will need to be dealt with in other provisions of national law, e.g. it might be done by the relevant Minister or by a court, and there will need to be provision for oversight of its operations.</li> </ul>
---	--	---

<sup>64</sup> This is based on the UK, Artists Resale Right Regulation, s 14.

Optional collective management	<p>(1) Unless the holder of the ARRR on the commercial resale of an artwork notifies the collecting society in writing, within 21 days after notice of the commercial resale is published on the collecting society's website, that the collecting society is not to collect the ARRR, or enforce the ARRR, on the commercial resale on behalf of the holder, the collecting society must use its best endeavours to collect the ARRR payable under this law, and, if necessary, enforce any ARRR held under this Act, on the commercial resale of the artwork on behalf of the holder or holders of the ARRR.</p> <p>(2) The collecting society is not subject to the direction of any holder or holders of the ARRR in collecting the resale royalty or enforcing that right.<sup>65</sup></p>	<ul style="list-style-type: none"> <li>• This provides for optional collective management of ARRR, ultimately leaving the choice of whether to leave this to collective administration to the individual author (on an opt-out basis)</li> <li>• It provides for time limits within which the holder of ARRR is to indicate that he or she does not wish collective management of their ARRR to commence.</li> </ul>
--------------------------------	--	--

## DURATION OF ARRR

51 Generally, this is linked to the duration of the economic rights in the work subject to ARRR, noting that article 14~~ter~~ of Berne contains no prescription in this regard. Where a national law links ARRR to the other economic rights, there is no need for a specific term of protection to be indicated, as the general term of protection for literary and artistic works will apply – life of the author plus 50 years as the Berne minimum and life plus 70 years in the EC and in some other countries such as Australia (and longer again, in some others).

<sup>65</sup> Following section 23, Australia Resale Royalty Act 2009. Other provisions of the Act provide for the appointment of the collecting society and oblige the collecting society to publish on its website details of commercial resales of artworks of which it becomes aware. The society is given further powers of collection and enforcement of ARRR.

52 Nonetheless, national law makers may wish to stipulate the term of protection for ARRR as a matter of transparency. A notable example here is Mexico, with a term of one hundred years after the death of the author.<sup>66</sup> Sample provisions are contained in the table below.

TABLE 11

Kind of provision	Suggested text	Comments
Simple provision linking ARRR to economic rights	ARRR in a work shall continue to subsist so long as copyright subsists in the work. <sup>67</sup>	ARRR continues for as long as the copyright subsists in the work subject to ARRR, e.g. this might be between 50 to 100 years <sup>68</sup> after the death of the author, depending on the provisions of national copyright laws.
Provision specifying a specific term (which may be the same as for other rights) but also addresses the case of works with multiple authors	<p>Resale royalty right continues to subsist in relation to an original artwork [and/or manuscript] until the end of 50/70 years after:</p> <p>(a) if there is only one author of the artwork [or manuscript]—the end of the calendar year in which the author dies; or</p> <p>(b) if the artwork [or manuscript] is a work of joint authorship —the end of the calendar year in which the surviving or last surviving author dies.</p> <p>(c) if there is more than one author of the artwork [or manuscript], but this is not a work of joint authorship, then in relation to the proportion of the resale royalty right held by or through a particular author – the end of the calendar year in which the artist dies.<sup>69</sup></p>	<ul style="list-style-type: none"> <li>• Begins with the usual case of a single author</li> <li>• Then deals with works with more than one author. Note, however, that the expression “more than one author” extends beyond works of joint authorship (works created by collaboration in which the contributions of individual authors cannot be distinguished from each other). Article 7bis of Berne suggests that the term for ARRR overall here should be linked to the death of the last surviving author.</li> <li>• It may then be necessary to provide for the case of a work with multiple authors which do not meet the requirements of a work of joint authorship, eg where their individual contributions are clearly identified. This situation is dealt with in par (c), with the result that the share of</li> </ul>

<sup>66</sup> Mexico, Federal Law on Copyright 1996, Article 93bis(II). This is the same as for economic rights which are dealt with in article 29.

<sup>67</sup> As in the UK, Artists Resale Right Regulation, s 3(2).

<sup>68</sup> As in Mexico: see article 92bis(II), *Federal Law on Copyright 1996*.

<sup>69</sup> A precedent for this kind of provision is to be found in s 32(b) of the Australian Resale Royalty Right Act 2009.

		ARRR where there are multiple artists will expire at different times, depending on when the artist dies.
--	--	--

## OTHER CHARACTERISTICS OF ARRR – ALIENATION AND WAIVER

- 53 Under article 14*ter*(1) of Berne, ARRR is to be an “inalienable right”, that is, a right of the author that cannot be sold or given away by him or her (there is an analogy here with moral rights). Various national laws describe this requirement in different ways, eg as “inalienable and unrenounceable” as in Uruguay and “absolutely inalienable” in Australia, and some, such as in the UK, seek to spell out this in more detail, eg by providing that ARRR cannot be mortgaged or made subject to a charge as a security for a debt. At the same time, such restrictions should not affect any ARRR arrangements that may be made for a CMO to manage the right where collective management of the right is provided for under national law. A further possibility provided for in at least one national law is that ARRR may be assigned to a charitable organization or other public cultural body<sup>70</sup>: while there may be good public policy reasons for such an exception, as a matter of principle it may be argued that this is inconsistent with the requirement of inalienability under article 14*ter*(1) and no provision along these lines is included below.
- 54 Another important issue is whether ARRR may be waived in advance by the author, that is, renounced by the author in relation to a particular transaction or more generally (this is not an issue addressed directly in article 14*ter* but in principle may operate to undermine the requirement of inalienability.) A number of national laws contain such an explicit restriction, and it is clearly one that protects the interests of the author.
- 55 Some sample provisions follow:

TABLE 12

Kind of provision	Suggested text	Comments
Simple provision barring both assignment and waiver	ARRR is an inalienable right, which cannot be waived under any circumstances. <sup>71</sup>	<ul style="list-style-type: none"> <li>• This prohibits both alienation or transfer of ARRR as well as waivers of exercise of the right in the clearest terms.</li> <li>• Query whether “alienation” needs further definition, eg it may be useful to indicate, as in the next example, that it includes transfers by way of gift as well as for value.</li> </ul>

<sup>70</sup> UK, The Artist's Resale Right Regulations 2006, s 7(3)-(5).

<sup>71</sup> Following Kenya, *Copyright Act* 2001, s 26D(2). To similar effect, see also EC Directive, article 1.1.



<p>More detailed provision barring assignment, charging and waiver.</p>	<p>(1) ARRR is not assignable or transferable, whether for value or by way of a gift.</p> <p>(2) Any charge on ARRR is void.</p> <p>(3) A waiver of ARRR shall have no effect.</p> <p>(5) An agreement to share or repay resale royalties shall be void, apart from any agreement made with a CMO for the purposes of management of the ARRR in accordance with this law.<sup>72</sup></p>	<ul style="list-style-type: none"> <li>• Clarifies that alienation (transfer or assignment) extends to gratuitous transfers by way of gift</li> <li>• Amplifies that the bar on alienation does not allow for the holder of ARRR to charge it by way of security.</li> <li>• Bars waiver of ARRR</li> <li>• Excludes agreements to share ARRR apart from arrangements made with CMO in relation to management of the right, eg management fees and the like.</li> </ul>
<p>Another detailed provision dealing with assignment and waiver</p>	<p>(1) Except as permitted by the rule of succession under this law, ARRR is absolutely inalienable, whether by way of, or in consequence of, sale, assignment, charge, execution, bankruptcy, insolvency or otherwise.</p> <p>(2) A waiver of ARRR is of no effect.</p> <p>(3) An agreement to share or repay a resale royalty, other than as permitted elsewhere in this law, is void.<sup>73</sup></p>	<ul style="list-style-type: none"> <li>• A variation on the preceding provision.</li> <li>• Sub-par (3) allows for arrangements made with a a CMO to manage the ARRR.</li> </ul>

## ENTITLEMENT TO ARRR AND FOREIGN CLAIMANTS

56 As ARRR is an optional requirement under the Berne Convention that may be extended, on condition of substantive reciprocity, to foreign authors, there is no obligation on national laws to make ARRR subject to national treatment or to extend it beyond national authors. Some countries may even accord protection to ARRR under separate legislation that are quite distinct from their national copyright laws (Australia is an instance of this).

57 So far as entitlement to claim ARRR is concerned, therefore, national laws will usually make this subject to a qualification of nationality and/or permanent residence at the time of the commercial resale. Applying the same criteria of nationality and/or permanent residence, provision could also be made to extend protection of ARRR to nationals and residents of a “reciprocating country”, bearing in mind that article 14<sup>ter</sup> of Berne proceeds on the basis of reciprocity.

58 Some sample provisions drawn and adapted from national laws and the EU are given in the table below.

<sup>72</sup> Derived from UK, Artists Resale Royalty Regulation, ss 7 and 8.

<sup>73</sup> Derived from Australia, Resale Royalty Right Act, ss 33 and 34.

TABLE 13

Kind of provision	Suggested text	Comments
Entitlement under law	The author of an original artwork [and manuscript] who is a national [or permanent resident] of ... at the time of the commercial resale of the work shall enjoy an exclusive ARRR in his or her work.	<ul style="list-style-type: none"> <li>• Entitlement to arise by reason of nationality at the time of resale (the clearest case)</li> <li>• Question whether this should extend to permanent residence at this time – the objection may be made that the nationality of an author generally remains constant whereas permanent residency may frequently change and be harder to ascertain in relation to the date of resale.</li> <li>• An alternative to a requirement of permanent residence may be one of “assimilation” of non-nationals as in France and Senegal (see next example).</li> </ul>
Assimilation rather than permanent residence in the case of non-nationals	Authors who are not nationals of ...who, during their artistic career, have participated in the artistic life of ... and have had, for at least five years, even non-consecutive, their residence in ... may, without any requirement of reciprocity, benefit from ARRR, together with their beneficiaries. <sup>74</sup>	<ul style="list-style-type: none"> <li>• This requires an active connection to the artistic life of the country in which the author has been resident (a five-year minimum is required)</li> <li>• Unclear whether this connection and residence is required at the time of commercial resale, but if these requirements have previously been satisfied it might be thought that this legacy should entitle the author to ARRR even if no longer resident, eg consider the case of a French artist long resident in Senegal but now living in France at the time of resale.</li> </ul>

<sup>74</sup> Based on Senegal, DÉCRET N° 2015-682 DU 26 MAI 2015 PORTANT APPLICATION DE LA LOI N° 2008-09 DU 25 JANVIER 2008 SUR LE DROIT D'AUTEUR ET LES DROITS VOISINS, Titre VI, article 25(1) and (2). To similar effect, see French decree of 2007, article 122-3 (second para).

<p>Entitlement, including by successors in title</p>	<p>(1) ARRR may be exercised in respect of a commercial resale of an artwork [or manuscript] only by the author of that work who, at the date of the contract of resale, is a national [or permanent resident] of...</p> <p>(2) Following the death of an author who is a holder of ARRR, this ARRR shall vest in the author's successor in title of the author who may exercise that ARRR in the same way as the author.<sup>75</sup></p>	<ul style="list-style-type: none"> <li>• Specifies date at which nationality or residence is to be satisfied.</li> <li>• Deals with successors in title to holder of ARRR, noting that succession issues in relation to ARRR are dealt with at ... below.</li> </ul>
<p>More detailed provision dealing with works created by single and multiple authors</p>	<p>(1) If an artwork [or manuscript] was created by a single author who is identified and living at the time of a commercial resale of the artwork, ARRR on the commercial resale is held and may be exercised by the author, provided he or she is a qualified person at the time of the commercial resale.</p> <p>(2) If an artwork [or manuscript] was created by more than one artist, ARRR on a commercial resale of the artwork is held and may be exercised by each author who is living at the time of the commercial resale, provided he or she is identified and is a qualified person at that time.</p> <p>(3) An individual is a qualified person at a particular time if, at that time, the individual is:</p> <p>(a) a national of ...; or</p> <p>[(b) a permanent resident of ...]; or</p> <p>(c) a national [or permanent resident] of a country prescribed as a reciprocating country.</p> <p>(4) ARRR may be held and exercised by successors in title to deceased authors who satisfy the requirements of the preceding paragraphs provided that the successor in title also satisfies the requirements of paras (1)-(3) and (5) at the time of commercial resale.</p>	<ul style="list-style-type: none"> <li>• Deals with individual and multiple authors (pars (1) and (2))</li> <li>• Leaves open the option of extending "qualified person" status to permanent residents (see objections to this above)</li> <li>• Provides for recognition of nationals [and permanent residents] of a "reciprocating country" (see next provision)</li> <li>• Applies to successors in title (par (4), who must also satisfy the same nationality [or permanent residency] requirements</li> <li>• Acknowledges that a successor in title may be a</li> </ul>

<sup>75</sup> Based loosely on the UK, Artists Resale Royalty Regulation, s 10.

	(5) In the case of a successor in title that is a corporate body, a body corporate satisfies the residency test at a particular time if it is incorporated under the law of ... or under the law of a country prescribed as a reciprocating country. <sup>76</sup>	corporation but note that the categories of corporate bodies that may be included here may be limited to charitable or other public institutions (see further Table 14 below).
Foreign claimants in particular	(1) Where a country that is a member of the Berne Convention protects the ARRR of authors of original artworks [and/or manuscripts] on a substantially similar basis to that under this law, regulations made under this law [or the Minister...by way of direction] may designate this country as a “reciprocating country”). (2) Where the author of an original artwork [and/or manuscript] is a national [or permanent resident] of a reciprocating country as designated under (1), he or she is entitled to receive ARRR in this country with respect to any resale that occurs there.	<ul style="list-style-type: none"> <li>• This provides for reciprocal protection of ARRR for nationals or residents of other Berne countries who have similar ARRR schemes.</li> <li>• Leaves open the option of extending this to permanent residents [as well as to manuscripts].</li> </ul>

## SUCCESSION ISSUES – AUTHORS’ HEIRS AND SUCCESSORS

- 59 This is an important issue, which article 14*ter*(1) of Berne leaves largely to national lawmakers to determine. If equated to other economic rights, succession to ARRR may simply occur in the same way as for these rights, for example, by bequest under will or in accordance with the national law in relation to intestate succession and will not need any further legislative disposition. Some laws therefore just refer to the author’s heirs and leave this as a matter for their general laws to determine together with the distribution of the rest of the author’s estate. Alternatively, article 14*ter* leaves it open to national laws to deal with succession issues by providing for the transfer of the ARRR to some national cultural or social institution (article 14*ter*(1)).
- 60 As a general matter, as ARRR is inalienable, apart from such arrangements that may be necessary to provide for administration by a CMO, it is only after the death of the author that the question of further dispositions of ARRR arises.
- 61 Several sample provisions drawn from national laws are given in the table below. The third of these, which is the most detailed, is drawn from the Australian law which seeks to deal with all eventualities arising on the death of the author, such as multiple authors and successors. They also use formulations such as “residency test” (to be satisfied at the time of commercial resale) as well as a “succession test”. National policy and law makers may find some assistance in this more detailed set of provisions which deal with the important question of what happens to ARRR after the author’s death.

<sup>76</sup> Derived, again loosely, from Australia, Resale Royalty Act, ss 13 and 14.

TABLE 14

Kind of provision	Suggested text	Comments
Simple provision leaving this as a matter for general law of country	ARRR shall be payable to the author of the work and, ... after his death to those entitled under him/her. <sup>77</sup>	<ul style="list-style-type: none"> <li>Essentially leaves this as a matter for national succession law.</li> </ul>
More detailed provision	<p>(1) ARRR in respect of a work is transmissible as personal or moveable property by testamentary disposition or in accordance with the rules of intestate succession; and it may be further so transmitted by any person into whose hands it passes.</p> <p>(2) ARRR may be so transmitted only to—</p> <p>(a) a natural person; or</p> <p>(b) a recognized charity or other public cultural body as provided for in this law.</p> <p>(4) Where ARRR is transmitted to more than one person, it shall belong to them as owners in common.<sup>78</sup></p>	<ul style="list-style-type: none"> <li>ARRR is a property right that may be transmitted by will or on intestacy in the same way as other property rights.</li> <li>An important point for authors here might be that they should give attention to making specific provision for the persons to whom their ARRR will pass on death and whether they wish this to pass in a different way than their other personal and real property.</li> <li>There is provision here for such transmission to be to a charity or other public institution – hence the need to indicate that the successor in title may be a body corporate.</li> <li>Where there is more than one person to whom ARRR is transmitted, they are to hold these as equal shares, ie as tenants in common who can then transmit this share to other persons in accordance with this law (not as joint tenants with a right of survivorship).</li> </ul>
An even more detailed provision	<p><i>Artwork created by a single artist who is no longer living</i></p> <p>(1) If an artwork was created by a single artist who is identified but no</p>	<ul style="list-style-type: none"> <li>This provision seeks to cater for almost all eventualities – single and multiple artists,</li> </ul>

<sup>77</sup> EC Directive, article 6.1.

<sup>78</sup> See further UK Artists Resale Royalty Regulations, regulation 9.

	<p>longer living at the time of a commercial resale of the artwork and who satisfied the residency test immediately before his or her death, resale royalty right on the commercial resale is held by:</p> <p>(a) if there is only one successor in title to the right—that entity, provided the entity satisfies the residency test at the time of the commercial resale and the succession test; and</p> <p>(b) if there is more than one successor in title to the right—each of those entities that satisfies the residency test at the time of the commercial resale and the succession test.</p> <p>....</p> <p><i>Artwork created by more than one artist</i></p> <p>(3)...</p> <p>(b) for each artist who is identified but no longer living at the time of the commercial resale, who satisfied the residency test immediately before his or her death, and through whom there is only one successor in title to the right—that entity, provided the entity satisfies the residency test at the time of the commercial resale and the succession test; and</p> <p>(c) for each artist who is identified but no longer living at the time of the commercial resale, who satisfied the residency test immediately before his or her death and through whom there is more than one successor in title to the right—each of those entities that satisfies the residency test at the time of the commercial resale and the succession test.</p> <p><i>Later successors in title</i></p> <p>(4) If an entity holds an interest in the resale royalty right on the commercial resale of an artwork by operation of subsection (2) or (3), or by an earlier operation of this subsection, but the entity is dead or has been wound up at the time of the next commercial resale of the artwork, resale royalty right is held on the next commercial resale of the artwork by:</p>	<p>single and multiple successors, and situations where there is a series of successors in title. It may therefore provide a useful check list for other national law makers who are contemplating adopting a new ARRR scheme or revising an existing one.</p> <ul style="list-style-type: none"> <li>• While detailed, it relies on compliance with two important tests: residence and succession (see further below in column 2).</li> <li>• Deals with the situation where there is a series of successors in title to the author or authors</li> </ul>
--	--	--

	<p>(a) if there is only one successor in title to the right—that entity, provided it satisfies the residency test at the time of the next commercial resale and the succession test; and</p> <p>(b) if there is more than one successor in title to the right—each of those entities that satisfies the residency test at the time of the next commercial resale and the succession test.</p> <p><b>Residency test</b></p> <p>(1) An individual satisfies the residency test at a particular time if, at that time, the individual is:</p> <p>(a) an .....citizen; or</p> <p>(b) a permanent resident of .....; or</p> <p>(c) a national or citizen of a country prescribed as a reciprocating country.</p> <p>(2) A corporation satisfies the residency test at a particular time if:</p> <p>(a) it is incorporated under the Corporations Act 2001, or under the law of a country prescribed as a reciprocating country; or</p> <p>(b) it carries on an enterprise, at that time, in ..... or a country prescribed as a reciprocating country.</p> <p>(3) An unincorporated body satisfies the residency test at a particular time if it carries on an enterprise, at that time, in ..... or a country prescribed as a reciprocating country.</p> <p><b>Succession test</b></p> <p>(1) An entity satisfies the succession test in relation to resale royalty right on the commercial resale of an artistic work, if the entity satisfies:</p> <p>(a) criteria 1 and 2 (in subsections (2) and (3)); or</p> <p>(b) criteria 3 and 4 (in subsections (4) and (5)).</p> <p><i>Criterion 1</i></p> <p>(2) The entity received its interest in the right by testamentary disposition, or in accordance with the rules of intestate succession, on the death of an individual.</p> <p><i>Criterion 2</i></p> <p>(3) The entity is one of the following:</p>	<ul style="list-style-type: none"> <li>• Includes nationality of both protecting and reciprocating countries (as in other sample provisions above); permanent residence is provided as a further criterion that countries may wish to adopt (noting possible practical difficulties to this that are noted above).</li> <li>• Defines corporations by reference to national law (in this case, Australia) but note that not all corporate bodies will meet the succession test (see below).</li> <li>• Albeit complicated, it provides criteria for the persons or entities that can succeed to ARRR, ie individuals and certain other entities, such as charities and community bodies which may or may not be corporations. It also provides for succession to the successor in title.</li> <li>• This is provided simply as a starting point for national law and policy makers to consider, having regard to their own legal systems and social and cultural</li> </ul>
--	---	---

	<p>(a) an individual with a beneficial interest in the right;</p> <p>(b) a charity or charitable institution with a beneficial interest in the right;</p> <p>(c) a community body with a beneficial interest in the right;</p> <p>(d) a person who holds an interest in the right in trust for:</p> <p style="padding-left: 40px;">(i) an individual; or</p> <p style="padding-left: 40px;">(ii) a charity or charitable institution; or</p> <p style="padding-left: 40px;">(iii) a community body.</p> <p><i>Criterion 3</i></p> <p>(4) The entity received its interest in the right on the winding up of a charity, charitable institution or a community body.</p> <p><i>Criterion 4</i></p> <p>(5) The entity is a charity, charitable institution or a community body formed for substantially the same purposes as the body that was wound up.<sup>79</sup></p>	<p>traditions, eg it might be possible to limit the reference to charities or community bodies to those directly concerned with authors' rights and stipulating that ARRR proceeds are to be directed to providing social support for artists, or these purposes might be drawn more generally.</p> <ul style="list-style-type: none"> <li>• Alternatively, a national scheme might be content to leave ARRR succession just to heirs of the deceased author.</li> <li>• Article 14ter(1) contemplates that any of these possibilities are open following the death of the author..</li> </ul>
--	--	--

## SOME OTHER USEFUL PROVISIONS

### *Joint entitlements*

62 Where there are multiple authors of a work subject to ARRR, it may be useful to have a provision in national law dealing with their respective entitlements. The following provisions drawn from UK and Australian precedents may be of assistance here (alternatively, it may be sufficient to rely upon provisions already contained in national copyright laws). By way of clarification, the references below to "owners in common" or an "equal share" mean that the author and his or her successors are entitled to an equal share in the ARRR unless they have agreed to the contrary. This is in contrast to the position that applies where co-owners of a right hold as "joint tenants" which, in common law systems, indicates that the surviving co-owner succeeds to the share of the deceased joint tenant.

TABLE 15

Kind of provision	Suggested text	Comments
More than one author	(1) In the case of a work with more than one author, ARRR	<ul style="list-style-type: none"> <li>• Equal shares appears to be a more equitable way of proceeding here rather than relying on notions of joint</li> </ul>

<sup>79</sup> Australia, Resale Royalty Right Act, ss 13 and 15.



	<p>shall belong to the authors as owners in common.</p> <p>(2) The right shall be held in equal shares or in such other shares as may be agreed.</p> <p>(3) Such an agreement must be in writing signed by or on behalf of each party to the agreement.</p>	<p>tenancy where the surviving author will receive all ARR.</p> <ul style="list-style-type: none"> <li>• As noted above, a work with more than one author may not necessarily meet the criteria for a work of joint authorship under some national laws, eg where collaboration is required and the contributions of individual authors are not readily severable from each other.<sup>80</sup> As a general matter, it is suggested that the sample provision here is appropriate for all multiple-authored works and that these need not be limited to those that are works of joint authorship under national law. However, this is a matter for each national ARRR scheme to determine for itself, having regard to its own national copyright law</li> <li>• An alternative formulation here might be to replace the expression “work with more than one author” is replaced with the expression “work of joint authorship” and to define this term in a further paragraph: <ul style="list-style-type: none"> <li>(4) “Work of joint authorship” means a work created by two or more authors.<sup>81</sup>.</li> </ul> </li> <li>• The only difficulty with this alternative drafting might be the possibility of confusion with any different definition of work of joint authorship that applied under national law.</li> </ul>
--	---	---

<sup>80</sup> See, for example, the Kenya Copyright Act 2001, s 2(1) (definition).

<sup>81</sup> See here UK Resale Royalty Regulations, reg 5(4).

<p>Joint authors – all surviving or some deceased at time of resale</p>	<p>(1) If all of the holders of the ARRR at the time of commercial resale of an artwork are authors of the artwork and are all living at the time of the resale, each author is entitled to an equal share of the ARRR on that commercial resale, unless:</p> <p>(a) the authors have agreed in writing signed by or on behalf of each party to the agreement to apportion shares in the ARRR differently; and</p> <p>(b) that agreement does not give a share of the ARRR to any other person (other than through testamentary disposition or in accordance with the rules of intestate succession on the death of an author).</p> <p>(2) If:</p> <p>(a) there is more than one author of an artwork; and</p> <p>(b) one of the authors is identified but no longer living at the time of a commercial resale of the artwork; and</p> <p>(c) the author satisfied the residency test immediately before his or her death;</p> <p>it is the share of the ARRR on the commercial resale of the artwork to which the author would have been entitled had the author been alive, identified and satisfied the residency test at the time of the commercial resale that passes to those holding ARRR on the commercial resale of the artwork through that author.<sup>82</sup></p>	<ul style="list-style-type: none"> <li>• Deals with the different situations that may arise where all or only one or more of joint authors are alive at the time of resale.</li> <li>• This could be extended to original manuscripts if thought desirable.</li> </ul>
---	--	--

*Proof of authorship and useful presumptions*

63 National laws may wish to make provision for the way in which authorship of the work for which ARRR is claimed is to be shown (it is assumed here that a system of registration of claims to ARRR would not be permissible under article 5(2), Berne, although it might be argued that this might be possible if it is optional or if ARRR was contained in stand-alone legislation rather than included within the general copyright law as is the case with the majority of Berne members with ARRR schemes).

<sup>82</sup> Based on Australia, Resale Royalty Act, s 16.

64 There may also be other evidentiary presumptions that will assist in collection and recovery of ARRR, and several useful sample provisions for consideration by national policy and law makers are contained in the table below.

TABLE 16

Kind of provision	Suggested text	Comments
Presumption in relation to authorship	If a mark or name purporting to identify a person as an author of an artwork appears on the artwork, it shall be presumed in the absence of any other mark or evidence, that the person is the author. <sup>83</sup>	
Stronger presumption of authorship	<p>(1) Where a name purporting to be that of the author appeared on the work when it was made, the person whose name appeared shall, unless the contrary is proved, be presumed to be the author of the work.</p> <p>(2) In the case of a work alleged to be a work of joint authorship, paragraph (1) applies in relation to each person alleged to be one of the authors.<sup>84</sup></p>	<ul style="list-style-type: none"> <li>• Provides a strong presumption in relation to authorship, requiring the person contesting this to prove the contrary (in common law systems, this would be on the balance of probabilities).</li> <li>• Deals also with the issue of joint authorship.</li> </ul>
Weaker presumptions in relation to authorship	<p>If a mark or name purporting to identify a person as an author of an artwork [or manuscript] appears on the artwork [or manuscript], then the presence of the mark or name is taken to be prima facie evidence for the purposes of this law that:</p> <p>(a) in a case where there is no other such mark or name on the artwork [or manuscript] —the person is the author the artwork [or manuscript]; and</p> <p>(b) in a case where there is another such mark or name on the artwork [or manuscript] —the person is one of the artists of the artwork [or manuscript].<sup>85</sup></p>	<ul style="list-style-type: none"> <li>• A prima facie presumption is more readily displaced than is the case with the requirement to prove the contrary.</li> </ul>

<sup>83</sup> Derived from s 26D(5), Kenya Copyright Act 2001 (this refers to the “artist” rather than the “author”).

<sup>84</sup> As per UK Regulation, reg 6.

<sup>85</sup> Australia, Art Resale Royalty Act, s 17.

*Right to request information*

- 65 Timely information as to the occurrence of resales of works is critical to the operation of any ARRR scheme, and provision for the obtaining of such information from art market professionals and other intermediaries on request by either the author or a duly appointed CMO is a very useful mechanism to have in place.
- 66 Some sample provisions are contained in the following table, but more detailed guidance may be more appropriately dealt with through subordinate legislation (regulations, decrees, etc). Suggested regulation-making provisions are therefore included below.
- 67 More operational aspects of ARRR schemes which arise where ARRR is administered through a CMO are considered further in Part II of this Toolkit.

TABLE 17

Kind of provision	Suggested text	Comments
Simple provision	<p>(1). For a period of three years after the resale, the persons entitled to ARRR under this law may require from any art market professional mentioned in ... to furnish any information that may be necessary in order to secure payment of royalties in respect of the resale.<sup>86</sup></p> <p>(2) Regulations/decrees/directions may be made that prescribe in more detail the matters referred to in (1).</p>	<ul style="list-style-type: none"> <li>Establishes the basic right to receive information but does not specify the kind of information the information that may be sought.</li> <li>"Persons entitled to receive ARRR" covers the situation where this person is a CMO.</li> <li>Effective implementation of par (1) may call for further prescription through regulation or administrative direction (according to the particular legal system of the country enacting the ARRR scheme): see par (2).</li> </ul>
<ul style="list-style-type: none"> <li>Additional powers where there is a CMO in place</li> </ul>	<p>Par (1) as above</p> <p>(2) Regulations/decrees/directions may be made that prescribe in more detail the matters referred to in par (1) as well as such other matters that are necessary to secure the effective collection and distribution of ARRR to authors under this Law.</p>	<ul style="list-style-type: none"> <li>This amplifies the scope of par (2) in the preceding sample provision.</li> <li>Such regulations, etc, could specify in more detail the operational aspects of any CMO, including any further powers to request information from other authorities, and include civil or criminal penalties</li> </ul>

<sup>86</sup> Based on EC Directive, article 9.

		where there is failure to comply.
More detailed provision	<p>(1) The author may require provision of information from an art dealer or an auctioneer as to which of the author's originals of works of art have been resold with the involvement of the art dealer or the auctioneer during the last three years prior to the request for information.</p> <p>(2) Where necessary for the assertion of his claim against the vendor, the author may require the art dealer or the auctioneer to provide information on the name and address of the vendor as well as on the amount of the selling price. The art dealer or the auctioneer may refuse to provide information on the name and address of the vendor if he pays the share due to the author.</p> <p>(3) The claims under subsections (1) and (2) may only be asserted through a collecting society.</p> <p>(4) Where there is reasonable doubt as to the accuracy or completeness of the information provided in accordance with subsection (4) or (5), the collecting society may require access to the account books or to other documents to be granted, at the choice of the person obliged to provide the information, either to the collecting society or to a chartered accountant or sworn auditor, designated by that person, to the extent which is necessary to ascertain the accuracy or completeness of the information. Where the information is found to be inaccurate or incomplete, the person obliged to provide the</p>	<ul style="list-style-type: none"> <li>• Contains more detail as to what may be sought and how this is to be done</li> <li>• Can only be done through a collecting society</li> <li>• May contain too much detail for inclusion in the principal legislation and may be better dealt with in regulations or decrees: see the preceding examples and see further Part II of this Toolkit on operational aspects of ARRR schemes.</li> </ul>

	information shall bear the costs of the examination. <sup>87</sup>	
--	--	--

*Time of implementation of ARRR scheme and transitional issues*

- 68 These are issues that will require careful consideration when formulating a new national ARRR scheme: is it to operate retrospectively to cover all works protected in the country concerned at the time of introduction or should it apply to works created after this time? If it applies to works already protected at the time of introduction, should it apply only to resales occurring after this time or should it reach back further in time? Should a transition period be allowed during which resales are not subject to ARRR because this might unnecessarily disrupt existing arrangements with galleries, agents, and so on? Should there be a transition period in which claims in relation to resales by the heirs of deceased authors are not to be covered?
- 69 As any proposed ARRR scheme should be consistent with the provisions of the Berne Convention, it is necessary to have regard to article 18 of that Convention which provides:
- (1) This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.
  - (2) If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew.
  - (3) The application of this principle shall be subject to any provisions contained in special conventions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, the respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle.
  - (4) The preceding provisions shall also apply in the case of new accessions to the Union and to cases in which protection is extended by the application of [Article 7](#) or by the abandonment of reservations.
- 70 Accordingly, the position is that any ARRR that is introduced into national law should be applicable to all artworks [and manuscripts] that are protected in that country at that time – it would be inconsistent with article 18(1), for example, to apply it only to works created after that time. However, article 18(1) does not require the application of ARRR itself retrospectively, ie to commercial resales occurring before this date, even if this was only a short period before: ARRR should apply only prospectively to commercial resales of works that are already protected under national law.
- 71 It should be noted that article 18(3) contemplates the possibility of transitional arrangements for the application of the new right, so it might therefore be allowable to exclude some commercial resales occurring after the commencement date of ARRR, although the adjective “transitional” suggests that this should be for a relatively short period.<sup>88</sup> In the case of ARRR, it might therefore be reasonable to provide some short period of time for commercial resales occurring after the commencing date of a national ARRR scheme where the work has been listed for sale before this date. A possible draft provision of this kind is included in the Table below. However, national policy and law makers may take the view that the simplest approach is to take the commencing date as the cut-off point with any commercial sale occurring after that date as being subject to ARRR.

---

<sup>87</sup> Germany, Copyright Act 1965 (as amended), s 26. See also French Decree of 2007, article 122 R 122-6 to R122-11.

<sup>88</sup> See further Ricketson and Ginsburg, [6.136-6.137].

TABLE 18

Kind of provision	Suggested text	Comments
Simple provision following article 18(1) Berne	This Law applies to all artworks [and manuscripts] protected under national law [ie the general copyright law of the nation in question] at the time of commencement of the Law, but applies only to commercial resales of those works where the contract date of the sale occurs after the commencement of the Law.	ARRR is to apply to all works protected at the commencement of the ARRR scheme but only to commercial resales occurring after this date
Alternative provision based on EC Directive	1) This law — (a) does not apply to sales where the contract date preceded the commencement of the Law; but (b) applies notwithstanding that the work sold was made before that commencement.	Achieves the same effect as the preceding one.
Possible transitional provision	ARRR does not apply where: (a) Within 6 months of the commencement of this Law an artwork [and manuscript] has been placed with an art market professional for the purposes of commercial resale; and (b) commercial resale takes place after the commencement of this Law.	<ul style="list-style-type: none"> <li>• Provides a time limit before commencement for the offering of the work for resale</li> <li>• Should a longer period be allowed, eg in the case of deceased estates?</li> <li>• Should there be a cut-off period for commercial resale after commencement, eg 6 months, a year, etc?</li> </ul>

[End of document]