

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

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**WIPO TOOLKIT ON ARTIST'S RESALE RIGHT (PART I)**

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## IN GENERAL

1. In normal usage, ARR refers to the artist's right to a share in the proceeds of subsequent sales of his or her original work— 'ARR' being the abbreviation for 'artist's resale 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', 'right of pursuit' and 'droit de suite'<sup>1</sup>, but, for the purposes of this toolkit, the abbreviation 'ARR' will be used throughout.<sup>2</sup>
2. In general, ARR 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 artifacts of works more usually categorized as literary, dramatic or musical works, for example, original manuscripts of books, plays, musical compositions and so on. For this reason, this might be better described as an 'author's right', rather than just as an 'artist's right. However, as most national laws recognizing ARR limit this to artistic works, the right to be considered in this Toolkit will be referred to as an 'artist's right', but it should be understood that in some circumstances this can be extended to apply to authors of literary, dramatic or musical works.
3. ARR is a right that member countries 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, ARR is now recognized in over half the present membership of the Berne Union, and the number of national ARR schemes has increased significantly over the past two decades.<sup>3</sup>
4. Article 14<sup>ter</sup> provides a general framework for any proposed ARR scheme at the national level and leaves considerable flexibility to national legislators as to how they implement such a right. The purpose of this part of the Toolkit therefore is to provide national legislators and

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<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. 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'); Michael B. Reddy, 'The Droit de Suite: Why American Fine Artists Should Have a Right to a Resale Royalty', (1995) 15 *Loyola of Los Angeles Entertainment Law Review* 509.

<sup>3</sup> As at 1 January 2024, the European Visual Artists (EVA) listed 106 countries as having ARR in their laws. These figures were derived from national laws on WIPO website: see at <https://www.resale-right.org/countries-with-arr/> (viewed 10 January 2025). Only one of these countries – Ethiopia – is not a Berne Convention country. See further note 20 below.

policy makers with sample provisions that may provide a useful guide as to how an ARR 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 overall framework of international obligations under Berne. Part 2 of the Toolkit then deals with practical issues that may arise in operationalising such schemes, particularly where this is done through the medium of a collective management organization (CMO).

## THE ORIGINS OF ARR SCHEMES AND THEIR RATIONALE<sup>4</sup>

5. Historically, arguments in favor of ARR 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>5</sup>
6. The first country to recognize the need for an ARR 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>6</sup>, and a campaign for its recognition then began in that country<sup>7</sup>. This culminated in the passing of special legislation in 1920<sup>8</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>9</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 easier if it were carried out by an authors' society that entered arrangements with galleries and auction rooms<sup>10</sup>.
7. The French example inspired 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

<sup>4</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>5</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 Dégas and Bollin,

<sup>6</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>7</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] *Le Droit d'Auteur* 34 at 36.

<sup>8</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>9</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] *Le Droit d'Auteur* 4.

<sup>10</sup> See further Vaunois, [192] *Le Droit d'Auteur* 106-107; Hauser, 99-101.

in 1921 (with a more generous sliding scale),<sup>11</sup> Czechoslovakia in 1926,<sup>12</sup> Poland in 1935<sup>13</sup> and Italy in 1941<sup>14</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 ARR in 1937,<sup>15</sup> and, following World War II, the number of states which recognised ARR increased slowly but steadily.<sup>16</sup>

8. Recognition of ARR within the framework of the Berne Convention also occurred during this period. 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>17</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>18</sup> Further studies continued through the 1930s<sup>19</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 ARR has slowly but steadily increased.<sup>20</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 by, 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 ARR, 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

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<sup>11</sup> Law of 25 June 1921 (reproduced in [1921] *Le Droit d'Auteur* 97. The scale ranged from 2% to 6%: Article 2.

<sup>12</sup> Law of 24 November 1926, Article 35 (reproduced in [1926] *Le Droit d'Auteur* 33-34.

<sup>13</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>14</sup> Law of 22 April 1941, Articles 144–155.

<sup>15</sup> Law of 17 December 1937, Article 9 (a share of 25%).

<sup>16</sup> See further Ricketson, 17-19.

<sup>17</sup> Ricketson and Ginsburg, par 11.64.

<sup>18</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>19</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>20</sup> See further Ricketson, 19. Written in 2015, this study calculated there were 81 countries with some kind of ARR system. As of 2023, the author estimated that this number was probably 95, but a significantly higher figure has now been provided by the European Visual Artists (EVA) which listed 106 countries as having ARR in their laws. These figures were derived from national laws on WIPO website: see at <https://www.resale-right.org/countries-with-arr/> (viewed 10 January 2025). Only one of these countries – Ethiopia – is not a Berne Convention country. However, it should also be noted that, while many countries may have ARR provisions in their laws, this may not mean that there is a system for collection and distribution of ARR receipts operating on the ground.

share in the fortunes of his or her work and collect a percentage of the sale price for the work each time it changes owners<sup>21</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 sufficiently as they grow older and develop their markets. Fierce arguments on both sides can be readily advanced.<sup>22</sup>

10. It is also possible to advance principled arguments for ARR based on the need for parity between different categories of creators of original works, 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 of as much value as in the case of a writer or composer (although this may not always be true<sup>23</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 artifact 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 ARR 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 ARR, 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>24</sup> This 'exploitation' approach is now to be found in the greater number of national ARR 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 EC 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>25</sup>

11. Viewed in this way, ARR 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 ARR is usually inalienable under national laws may appear to complicate

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<sup>21</sup> UNESCO and WIPO, Tunis Model Law on Copyright for Developing Countries, 1976, WIPO Publication 812 (E), p 8.

<sup>22</sup> See further Ricketson, 23-27. This material is drawn upon in the next two sections of this Toolkit.

<sup>23</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>24</sup> See Katzenberger, 367–368; R E Hauser, 106–107.

<sup>25</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* ('EC Directive').

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 circumvent 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.

12. In addition to this ‘parity rationale’ for recognizing ARR, the following arguments in support can be advanced:

- (a) ARR 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 ARR 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 in 1948. 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 ARR as an authors’ right under the Berne Convention. This has also been the experience of other exclusive rights now protected as ‘rights specially granted’ to nationals of Berne Convention countries, the most notable of these historically being the translation right.<sup>26</sup>
- (c) The fact that ARR 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>27</sup> This has been on the same basis as argued for here in favor of ARR, namely to correct the imbalance that might otherwise arise because of perceived limitations in the scope of the reproduction right.
- (d) The fact that ARR, if recognized, may only benefit some visual artists, rather than all, is neither here nor there. This is the case for all categories of literary and artistic 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 ARR 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. Whether or not the novelist’s book will be profitable to its author will then depend upon how it is received in the marketplace and the number of copies that are sold.
- (e) There is a further argument that ARR can be of specific benefit to indigenous artists whose works may have both a national and international market. This was certainly

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<sup>26</sup> See further Ricketson and Ginsburg, [11.15] ff.

<sup>27</sup> WCT, Articles 6 and 7.

a factor in the adoption of ARR legislation in Australia in 2009,<sup>28</sup> and similar arguments have been advanced in several developing countries that have recently passed ARR laws. In this regard, it should be remembered that provision for ARR 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>29</sup>

- (f) Given the gradual adoption of ARR regimes by more than half the membership of the Berne Union, there is now a clear imbalance in protection for visual artists globally as between ARR and non-ARR countries. Yet their art is experienced and enjoyed universally without regard to borders and, in the absence of other restrictions, resales of their works may occur anywhere in the world. In the age of digital technologies and networked communications, this point hardly needs repetition.
- (g) Leaving aside the additional revenue stream that ARR may provide to living artists and their descendants, such regimes can provide other benefits: a means of following the ownership and destinations of artists' works and providing artists with a continuing link to their works, particularly if the growth of their professional and artistic reputation has led to an enhancement in the resale price of the same.
- (h) The preceding discussion has focussed on works of visual art, as these are the subject of all national ARR laws. However, also included in some national laws are 'original manuscripts' of the works of writers and composers. As is well known, such artifacts may command high prices on resale, particularly in the case of celebrated authors and composers. The arguments in favor of ARR, 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 ARR here to authors' rights may not be so persuasive for national policy and lawmakers in devising their own ARR schemes.

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

13. It is useful at this point to outline the framework for ARR 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

<sup>28</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. Note also the specific reference to Māori artists in the recently adopted New Zealand legislation: Resale Right for Visual Artists Act 2023, s 3(1) (NZ).

<sup>29</sup> WIPO and UNESCO, *Tunis Model Law on Copyright Law for Developing Countries*, Geneva, 1976, Section 4*bis*.



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 ARR scheme, but the following aspects of article 14~~ter~~ should be noted, as these provide the general guidelines within which a national ARR scheme should operate to ensure overall Berne-consistency:

- (a) As with moral rights, ARR 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, ARR 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 artifact in which the work is embodied, rather than in the revenue that can be earned from the sale and distribution of copies or through public performance or online dissemination. ARR, 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) ARR 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) ARR can be applied to original manuscripts of 'writers and composers' as well as works of art, although this is an extension left to the discretion of national lawmakers.
- (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' authorized by national legislation, as well as by any person so authorized. This would permit national laws, for example, to devolve the exercise of ARR 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 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 ARR schemes as to how this issue is to be approached.
- (g) Paragraph (2) indicates that there is no obligation on Berne countries to introduce ARR: 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 ARR 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 ARR and procedures for collection.

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

15. The following sections set out the principal matters that need to be considered in designing a national ARR scheme and contain suggested legislative provisions that might be adopted to implement such a scheme or enhance an existing one. These 'sample' provisions are framed in Berne-consistent language and draw on provisions to be found in existing national laws, which are clearly indicated for the assistance of readers. Comments on the various provisions are also provided, bearing in mind that the legal and institutional backgrounds of Berne member countries may differ considerably.
16. The matters to be considered are:
- (a) The objectives of an ARR scheme
  - (b) ARR defined
  - (c) Works covered by ARR
  - (d) Works excluded from ARR
  - (e) Resales covered by ARR
  - (f) Resales excluded
  - (g) What is included in the (re)sale price
  - (h) Rate charged
  - (i) Who is liable for ARR
  - (j) Administration of ARR
  - (k) Duration of ARR
  - (l) Other characteristics of ARR – alienation and waiver
  - (m) Entitlement to ARR 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 ARR scheme and transitional issues.

## **OBJECTIVES OF AN ARR 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 the 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. An example of such an extended statement is to be found in the 30 recitals to the EC Directive on resale rights which provide a detailed exposition of the rationale for introducing such a scheme and outline its various components and their underlying justifications. 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 lawmakers.

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 [and 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 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>30</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>
A recent national provision (New Zealand)	<b>3 Purpose</b> The purpose of this Act is— (a) to provide a right for eligible artists and successive right holders to receive a royalty on qualifying resales of original visual artworks; and (b) to enable royalties to be administered in a way that— (i) acknowledges and respects the role of Māori as tangata whenua and provides culturally appropriate support to Māori artists; and	<ul style="list-style-type: none"> <li>• States the purpose of the Act clearly</li> <li>• Acknowledges further purposes with respect to the Māori community and the New Zealand community more generally.</li> </ul>

<sup>30</sup> Some countries with a common law tradition may not even refer to objects in their amending legislation that introduces an ARR scheme, e.g. Kenya, which did so in legislation introduced in 2019 and which is entitled simply *Copyright Amendment Act 2019*.

	(ii) is inclusive of, and recognises the different needs of, all peoples in New Zealand.	
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 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 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</li> </ul>	<ul style="list-style-type: none"> <li>• This places the proposed ARR 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 ARR 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 other categories of authors.</li> <li>• It highlights that the proposed ARR 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 ARR.</li> </ul>

	of original artworks [and manuscripts] to a resale royalty right, to be called the author's resale royalty right (ARR) 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].	
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## ARR 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, ARR. 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, e.g. the EC Directive and the WIPO Model Law; others require reference to definitions contained in other provisions of their laws to flesh out the scope of the right, e.g. 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>31</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 ARR 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>32</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

<sup>31</sup> See now France Intellectual Property Code, article L122-8, and Decree No 2007-756 of 9 May 2007.

<sup>32</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.

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 ARR 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>33</sup>

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 is more expansive in that it refers to the persons entitled to ARR:

"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>34</sup>

25. From the perspective of potential beneficiaries of any ARR 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 ARR 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. <sup>35</sup>	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	44. The authors of graphic and three-dimensional works shall have, notwithstanding any assignment of the original work, an inalienable right to a share in the proceeds from any sale of	This highlights the inalienable character of the right, who is to receive it, and when it arises but limits this to certain sales (by auction or through a dealer).

<sup>33</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.

<sup>34</sup> Kenya, Copyright Act No 12 of 2001, s 2.

<sup>35</sup> Based on Resale Royalty Right for Visual Artists Act 2009, s 6 (Australia).

	that work by auction or through a dealer, regardless of the procedures involved in the operation conducted by the latter. <sup>36</sup>	
Some useful definitions (for all legislative schemes)	<p>"Artwork"</p> <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.<sup>37</sup></p> <p>"author", in relation to-</p> <p>(a) a literary, musical, dramatic or artistic work, means the person who first makes or creates the work;</p> <p>...<sup>38</sup></p> <p>"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>39</sup></p> <p>"Commercial resale" – see further the suggested definitions set out in Table 5.</p>	<ul style="list-style-type: none"> <li>• Having a series of defined expressions that are then used in the rest of the law may allow for ease of drafting and avoid repetition.</li> <li>• The reference to 'original' in the definition of 'artwork' indicates that the right attaches to the first physical or tangible embodiment of the work 'made' by the artist or under the artist's authority.</li> </ul>

## WORKS COVERED BY ARR

27. As noted above, article 14<sup>ter</sup> of the Berne Convention leaves considerable flexibility as to the kinds of works that may be the subject of ARR, as well as those that may be excluded. National ARR 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 ARR attaches to the first material embodiment of the original artwork and/or manuscript (see 'useful definitions' in the preceding table).

28. Issues then calling for attention in designing any new ARR scheme include the following:

- (a) Should the legislative drafter use a general, inclusive expression to cover what works are to be subject to ARR, 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>40</sup>

<sup>36</sup> CÔTE D'IVOIRE, Law No. 96—564 of July 25, 1996 on the Protection of Intellectual Works and the Rights of Authors, Performers and Phonogram and Videogram Producers, art 44.

<sup>37</sup> Australia, Resale Royalty Right for Visual Artists Act 2009, s 7(1). See also NZ, Resale Right for Visual Artists Act 2023, s 8(1) which adopts a similar definition but uses the expression 'original visual artwork'.

<sup>38</sup> Kenya, Copyright Act 2001, s 2(1).

<sup>39</sup> Ibid.

<sup>40</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

[Footnote continued on next page]



- (b) Is it preferable to provide a detailed and inclusive 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 included here, e.g. some kinds of craft works but not all kinds of works of applied art. In devising a Berne-compliant ARR scheme, national legislators therefore have some latitude as to how far they extend protection to all categories of applied art or only some.
- (e) A question may arise with respect to designs for circuit layouts (topographies for integrated circuits): while 'artistic' in one sense, it may be thought these lie well outside the scope of ARR and should be specifically excluded, as in Australia (see Table 6 below).
- (f) Related to the question of works of applied art is whether works embodying traditional cultural expressions created by indigenous artists should be included. In several jurisdictions, such as New Zealand, this is expressly provided for.<sup>41</sup>
- (g) Should works of architecture, and artistic works relating to these, such as drawings, sketches and models, be included? The definition of 'protected works under article 2(1) of Berne includes 'works...of architecture' and, more broadly, 'illustrations, maps, plans, sketches and three—dimensional works relative to geography, topography, architecture or science'. Furthermore, some national laws include buildings and structures generally within the scope of artistic copyright without any qualification that these should be works of architecture.<sup>42</sup> On the other hand, there may be practical difficulties that arise in enforcing ARR in the case of resales of buildings, to say nothing of artistic works such as frescos, murals, and sculptures incorporated in the fabric of buildings. Thus, many national ARR laws exclude this category of artistic work.
- (h) Should non-artistic works such as manuscripts of literary, dramatic or musical works be covered? As noted above, only a few national laws at present go so far, although article 14~~ter~~ Berne allows for this and provides for limiting this to the 'original manuscripts of writers and composers'.
- (i) 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? How are requirements of originality' to be applied in such cases?

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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.')

<sup>41</sup> New Zealand, Resale Right for Visual Artists Act 2023, s 8(2)(i) and (ii), extracted in Table 29 below.

<sup>42</sup> See, for example, Australia, Copyright Act 1968, s 10(1) (definition of 'artistic work', para (b): 'a building or model of a building, whether or not the building or model is of artistic quality or not'); compare the UK Copyright, Designs and Patents Act 1988, s 4(1)(b) which refers to a 'work of architecture being a building or model for a building' and defines 'building' as including 'any fixed structure, and a part of a building or fixed structure'.

- (j) How are digital works to be treated, including those which are computer-generated? Can the notion of ARR be extended to natively digital art works where the requirement of a first material embodiment may require some reconceptualization? Recently, artistic works embodied in Non-Fungible Tokens have commanded very high prices at public auctions by well-known art auction houses.<sup>43</sup>

29. Different answers to these questions are to be found in existing national schemes and may give rise to lively debates among policy and lawmakers. However, Berne allows for this flexibility, and it is suggested that national policy and lawmakers should be guided here by the 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 be adjusted for new situations as they arise.

30. Some suggested sample provisions here are set out in Table 3 below; and further examples from national laws are contained in Table 29.

TABLE 3

Kind of provision	Suggested text	Benefits and drawbacks
Most general	All original graphic and three-dimensional works <sup>44</sup> ['and original manuscripts of authors and composers].	<ul style="list-style-type: none"> <li>Covers all artistic works and manuscripts</li> <li>They must be 'original', that is, first embodiments of the work.</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</li> </ul>

<sup>43</sup> See, for instance, the sale of Beeple's *Everydays: The First 5000 Days* (2021) for \$69.3 million, which was the first NFT sale at auction by a classic auction house (Christie's); see further J Kastrenakes, 'Beeple sold an NFT for \$69 million, Through a first-of-its-kind auction at Christie's, Mar 12, 2021, *The Verge*, at <https://www.theverge.com/2021/3/11/22325054/beeple-christies-nft-sale-cost-everydays-69-million> (viewed 31 January 2025).

<sup>44</sup> For a similar national provision, see Senegal, Law No 2008-09 of January 25, 2008, on Copyright and Neighbouring Rights, article 47 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>say nothing of other kinds of artistic works, 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 ARR 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 ARR to original manuscripts.</li> </ul>
Inclusive list (original artistic works only) (EC)	<p>1. For the purposes of this Directive, '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 authorized by the artist.<sup>45</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, e.g. with respect to some kinds of craft work not listed or, more generally, to works of applied art.</li> <li>• Paragraph 2 deals with the issue of works produced in limited numbers and suggests criteria that might be adopted here for these still to be treated as 'original' works of art.</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>45</sup> EC Directive, article 1(1) and (2).

		own national copyright law and should try to correlate its ARR scheme with the general definition of 'artistic work' used in that law.
More detailed list for artistic works or 'artworks' (Australia)	<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 jewelry;</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>46</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, e.g. 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 (suggested draft)	<p>As per Table 1 above</p> <p>Alternatively:</p> <p>'Original manuscript' means the first material embodiment of a literary or</p>	<ul style="list-style-type: none"> <li>• The inclusive list of examples of what may be</li> </ul>

<sup>46</sup> Follows Australia, Resale Royalty Right for Visual Artists Act 2009, s 7. For a shorter list, see France, Decree of 2007, article 122-2, extracted in Table 29 below.

	dramatic work, including novels, plays, and other writings, or of a musical composition.	an 'original manuscript' may be useful.
Another approach (Mexico)	The authors of three-dimensional and photographic works of art shall be entitled to receive from the vendor a share of the price of any resale...with the exception of works of applied art  (IV) The same right shall apply with respect to the original manuscripts of literary and artistic works. <sup>47</sup>	<ul style="list-style-type: none"> <li>Appears to exclude two-dimensional artistic works other than photographic works but includes original manuscripts; there is an exception with respect to works of applied art.</li> </ul>

## WORKS EXCLUDED FROM ARR

31. It has been indicated under the preceding section that important decisions need to be made as to the sub-categories of works that should be subject to ARR, for example, whether this should include craft works or works of applied art or works embodying traditional cultural expressions of indigenous creators. These are policy decisions that each country will need to make, having regard to their own particular circumstances. Countries may also decide to exclude other sub-categories of works on the basis that their original embodiments bear little relationship to those of more traditional kinds of artistic works, such as paintings and sculptures. In consequence, the extent of ARR protection may differ from country to country, even though the substance of the right is recognized in each and the variations that arise are only on the margin. In the case of foreign claimants for ARR, because of the reciprocity conditions applying under art 14~~ter~~(2) of Berne this may lead to differing levels of protection, where, for example, country A applies ARR to a category of work which is excluded from ARR in country B.<sup>48</sup>

32. Examples of such exclusions are buildings and architectural works, technical drawings, and layout designs (topographies) for integrated circuits.<sup>49</sup> Others that may call for consideration at the legislative level or which may be left to judicial determination as the ARR scheme develops are computer-generated works, and simple and/or documentary (news) photographs. Legislative techniques to deal with these matters include specific 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 exclusions (Australia)	9. ...There is no resale royalty right on the commercial resale of:	<ul style="list-style-type: none"> <li>This has the virtue of certainty, meaning that</li> </ul>

<sup>47</sup> Mexico, Federal Law on Copyright 1997 (WIPO trans), Art 92~~bis~~.

<sup>48</sup> Thus, art. 14~~ter~~(2) provides that protection can only be claimed 'to the extent permitted by the country where protection is claimed'. An obvious instance where this might occur is in the case of original manuscripts of writers and composers, which are only protected under the laws of a small number of countries with ARR. Another instance would be works of applied art.

<sup>49</sup> This underlines the flexibility which applies here under article 14~~ter~~ of Berne which allows national laws to work out such exclusions – or inclusions – for themselves. A suggested omnibus provision on this is included in Table 4, but it should be remembered that specific exclusions for certain categories might not be required in any event, for example in relation to computer-generated works.

	<p>(a) a building, or a drawing, plan or model for a building; or</p> <p>(b) a circuit layout within the meaning of the Circuit Layouts Act 1989; or</p> <p>(c) a manuscript (in whatever form) of a literary, dramatic or musical work.<sup>50</sup></p>	<p>what is not excluded may well fall within the scope of ARR even if not specifically included in any list previously provided (as in Table 3)</p> <ul style="list-style-type: none"> <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' which then disappears.</li> <li>• The exclusion of 'manuscripts' may seem unnecessary in that the ARR under the Australian Act applies only to 'artworks' but presumably will exclude manuscripts that could otherwise claim protection as artistic works because of the artistic elements involved.</li> </ul>
A different set of excluded categories (Senegal)	The <i>droit de suite</i> shall not apply to architectural works or works of applied art. <sup>51</sup>	<ul style="list-style-type: none"> <li>• Specific exclusions in the governing legislation itself.</li> </ul>
A further set of exclusions (Kenya)	<p>(6) There shall be no resale royalty payable on commercial resale of an artwork</p> <p>...</p> <p>(b) if it concerns the resale of a building, or drawing, plan or model of a building;</p> <p>...</p> <p>(d) if the works of fine art produced are of identical copies; or</p> <p>(e) if it concerns a manuscript of a literary, dramatic or musical work.<sup>52</sup></p>	<ul style="list-style-type: none"> <li>• The exclusion of identical copies may be contrasted with the position under some laws where copies made in limited numbers by the artist or under his authority may be entitled to ARR: see, for example, article 2(2), EC Directive.</li> </ul>

<sup>50</sup> Australia, Resale Royalty Right for Visual Artists Act 2009, s 9.

<sup>51</sup> As in article 49, LAW No. 2008-09 OF JANUARY 25, 2008 ON COPYRIGHT AND NEIGHBORING RIGHTS IN SENEGAL.

<sup>52</sup> Kenya, Copyright Act 2001, s 26D(6).

A suggested set of excluded legislative categories	<p>ARR does not apply to the resale of:</p> <p>(a) architectural works, or drawings, plans or models for such works;</p> <p>(b) technical drawings for useful articles;</p> <p>(c) layout designs (topographies) of integrated circuits; or</p> <p>(d) computer-generated works.<sup>53</sup></p>	<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 ARR 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> <li>• Exclusion of 'computer-generated works' may be unnecessary if these do not have an identifiable human author. Of course, it would be open for national laws to provide that the holder of rights in such a creation could nonetheless be entitled to ARR, but this would lie beyond the scope of article 14<del>ter</del>, Berne, in any event.</li> </ul>
Suggested power to exclude by regulation or administrative direction	<p>Add on to the preceding text:</p> <p>...</p> <p>(e) any other category of artistic work [and manuscript] prescribed by the regulations [or listed in an administrative direction from the Minister, Agency, etc..]</p>	<ul style="list-style-type: none"> <li>• This may be a useful power to have in reserve.</li> </ul>
Express exclusion of works of applied art (Mexico)	<p>...with the exception of works of applied art.<sup>54</sup></p>	<ul style="list-style-type: none"> <li>• See also Table 3 above.</li> </ul>

## RESALES COVERED BY ARR

33. Not all resales are, or can be, covered by ARR. Although, in principle, it might be argued that all resales after the first transfer of ownership by the artist should be covered, in practice this

<sup>53</sup> A model for this kind of provision is to be found in s 9 of the Australian Resale Royalty Right for Visual Artists Act 2009, s 9.

<sup>54</sup> Mexico, Federal Law on Copyright 1997 (WIPO trans), Art 92*bis*.



may prove to be impossible. In general, therefore, national ARR schemes usually 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 exclusion may appear obvious enough – the logistical 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, particularly when it is remembered that the exclusion of private sales in the case of ARR may result in a significant gap in artists’ income from such resales. In this regard, art. 14<sup>ter</sup> 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 ARR and those which will not.

34. Some national ARR schemes focus on the intermediary or institution involved in a resale as the determinant of whether a resale will be subject to ARR. 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’, i.e. 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. A further question that may need clarification is whether the first transfer of ownership of a work (by the artist) should be for money, that is, does it also cover situations where works are given away to the person later reselling or are transferred by the artist in return for other benefits such as provision of accommodation or other services. In principle, it may be thought that the expression ‘first transfer of ownership’ covers situations where money payments are not involved, and there is at least one national law (the UK) that makes this explicit: see Table 5 below.

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 (EC)	The right referred to in paragraph 1 [ARR] 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>55</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>55</sup> EC Directive, article 1.2. To similar effect, see also article 122-8(1), French Intellectual Property Code (‘any sale of ..[any graphic or three-dimensional] work by public auction or through a dealer’).

<p>More detailed provision (Australia)</p>	<p><b>8 What is commercial resale of an artwork?</b>  (1) There is a commercial resale of an artwork if:  (a) ownership of the artwork is transferred from one person to another for monetary consideration; and  (b) the transfer is not the first transfer of ownership of the artwork; and  (c) the transfer is not otherwise one of an excluded class.  (2) The transfer of ownership of an artwork from one individual to another in circumstances that do not involve an art market professional acting in that capacity, is an excluded class of transfer.  (3) Art market professional means:  (a) an auctioneer; or  (b) the owner or operator of an art gallery; or  (c) the owner or operator of a museum; or  (d) an art dealer; or  (e) a person otherwise involved in the business of dealing in artworks.<sup>56</sup></p>	<ul style="list-style-type: none"> <li>• “Commercial resale” more aptly characterises the nature of ARR, 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>• ‘excluded class’ refers to the categories of works excluded from ARR under s 9 of the Resale Royalty Act (see Table 4).</li> <li>• The involvement of an ‘art market professional’ then gives the transaction the character of a ‘commercial resale’ subject to ARR and excludes private party-to-party transactions.</li> <li>• The expression ‘art market professional’ is then defined in similar terms to EC Directive provision (see above).</li> <li>• Sub-pars (d) and (e) of the definition 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>
<p>Some useful definitions (Kenya and Malawi)</p>	<p><b>"art market professional"</b> includes an auctioneer, owner or operator of a gallery, museum, an art dealer or any other person involved in the business of dealing in artworks;</p> <p><b>"commercial resale"</b> means the subsequent re-transfer of ownership in artwork from one person to another for monetary consideration with the</p>	<ul style="list-style-type: none"> <li>• Definitions that are used in several African laws in their formulation of the right protected</li> <li>• A definition of ‘author’, in particular, may assist in focusing attention to the person making the initial fixation or embodiment of the artistic work</li> </ul>

<sup>56</sup> Australia, Resale Royalty Right for Visual Artists Act 2009, s 8.

	<p>involvement of an art market professional;</p> <p><b>"resale royalty right"</b> means the right of an artist or group of artists or successors to receive resale royalty on commercial resale of an artwork;<sup>57</sup></p> <p><b>"author"</b> means—</p> <p>(a) in case of any work other than an audiovisual work, the person who creates the work; or...<sup>58</sup></p>	
A different formulation (Poland)	<p>19.1 The author and his/her heirs, in the case of professionally performed resale of original copies of the artistic or photographic work, shall have the right to remuneration ...</p> <p>19. 1. Pursuant to Article 19(1) ..., the resale shall mean any sale effected after the first disposal of the work by the author.</p> <p>2. The professional resale pursuant to Article 19(1) and Article 191 shall mean any acts having the nature of resale performed, as a part of the activity carried on, by sellers, buyers, intermediaries, and other subjects professionally dealing with trading in works of art or manuscripts of literary and musical works.<sup>59</sup></p>	<ul style="list-style-type: none"> <li>• Formulates the right as being in relation to 'professionally performed' resales</li> <li>• Has a general definition referring to intermediaries and other subjects 'professionally dealing with trading in works of art or manuscripts..' [Poland has ARR with respect to manuscripts].</li> </ul>
First transfers not involving payment of money (New Zealand)	<p>12.—(1) The sale of a work may be regarded as a resale notwithstanding that the first transfer of ownership was not made for a money (or any) consideration.<sup>60</sup></p>	<ul style="list-style-type: none"> <li>• This provision makes explicit what might otherwise be assumed to be the case.</li> </ul>
Alternative formulation of the resales to be covered (Mexico)	<p>... any resale under similar conditions as at public auction, commercial establishment, or with the intervention of a trader or commercial agent,...<sup>61</sup></p>	<ul style="list-style-type: none"> <li>• Another way of confining the resale to one involving a commercial character, i.e. not private sales between parties.</li> </ul>

<sup>57</sup> Kenya, Copyright Act 2001, s 2 (definitions).

<sup>58</sup> Malawi, Copyright Act 2016, s 2.

<sup>59</sup> Poland, Act of 4 February 1994 on Copyright and Related Rights (Consolidated text), articles 19.1 and 19<sup>2</sup>.

<sup>60</sup> UK, The Artist's Resale Right Regulations 2006, reg 12(1).

<sup>61</sup> Mexico, Federal Law on Copyright 1996, Article 93bis(II).

## RESALES EXCLUDED

- 36 In addition to the issue of defining the kinds of resales to be covered by ARR, 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 ARR in an efficient and timely manner. Secondly, should ARR apply to resales where the seller has directly acquired the work from the artist 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 price may also 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 explicit guidance on them is to be found in the language of article 14<sup>ter</sup> of Berne. Some suggested sample provisions are given in Table 6 below.
- 37 A further possible question for consideration is whether a national ARR 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 the Berne Convention, for example, in articles 9, 10 and 10<sup>bis</sup>. It may be difficult to conceive of analogous kinds of exceptions or limitations that might be made in the case of ARR, although one possible exception – resale by auction for charitable purposes – is to be found in one recently adopted national law.<sup>62</sup> Article 14<sup>ter</sup>, 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 ARR (EC)	The minimum sale price may not under any circumstances exceed ..... <sup>63</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 ARR scheme, e.g. 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 (Australia)	There is no resale royalty right on the commercial resale of an artwork for a sale price of less than:	<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>62</sup> Kenya, Copyright Act 2001, s 26D(6)(c). See text extracted in Table 6.

<sup>63</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.”

	<p>(a) \$1,000 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 \$1,000; or</p> <p>(b) if a higher amount is prescribed by the regulations—that higher amount.<sup>64</sup></p>	
Time limits for ARR (EC)	<p>Member States may provide that the right referred to in paragraph 1 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 EUR10 000. ...<sup>65</sup></p>	<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>
List of resales excluded (Kenya)	<p>26D (6) There shall be no resale royalty payable on commercial resale of an artwork</p> <p>(a) if the sale price is less than 20,000 shillings;</p> <p>(b) if it concerns the resale of a building, or a drawing, plan or model of building;</p> <p>(c) if it is an auction for charitable purposes;</p> <p>(d) If the works of fine art produced are of identical copies; or</p> <p>(e) if it concerns a manuscript of a literary, dramatic or musical work</p> <p><sup>66</sup></p>	<ul style="list-style-type: none"> <li>These various exclusions include auctions for charitable purposes.</li> </ul>
Exclusion of certain resales and sales to museums (Sweden)	<p>Article 26n. ....</p> <p>The author has no right to remuneration if:</p> <p>...</p> <p>2. the sale concerns a copy of a work of architecture in the form of a building, or</p> <p>3. the sale is undertaken by a private person to a museum that is open for the public and that carries out its activity without profit-making</p>	<ul style="list-style-type: none"> <li>Further exceptions here for buildings that embody architectural works and private sales to public museums under certain circumstances.</li> </ul>

<sup>64</sup> Australia, Resale Royalty Right for Visual Artists Act 2009, s 10.

<sup>65</sup> Following EC Directive, article 1.3.

<sup>66</sup> Kenya, Copyright Act 2001, s 26D(6).

	purposes, if no art market professional took part in the sale. <sup>67</sup>	
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## 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 ARR, 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 ARR schemes, the sale price does not include any taxes that may be payable on the sale, for example, in the European Union<sup>68</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>69</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 ARR. 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 ARR is to be determined, each country will need to carefully consider 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 sale price referred to in Articles 3 and 4 are net. <sup>70</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 ARR 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 commercial resale including GST but does not include any	<ul style="list-style-type: none"> <li>Includes value added tax (general services tax or GST) in the calculation, which should augment the sale price on which ARR is calculated.</li> </ul>

<sup>67</sup> Sweden, Copyright Act, Act (1960: 729 on Copyright in Literary and Artistic Works (as amended up to Act (2020:54), s 26n.

<sup>68</sup> EC Directive, article 5.

<sup>69</sup> Australia, Resale Royalty Right for Visual Artists Act 2009, s 10(2).

<sup>70</sup> EC Directive, article 5 (Arts 3 and 4 establish which sales are eligible for ARR and set the rates for this). Along similar lines, 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.

	buyer's premium or other tax payable on the sale. <sup>71</sup>	<ul style="list-style-type: none"> <li>Excludes other taxes and buyer's premium.</li> </ul>
Public auctions and other sales, excluding taxes	The sale price of each work taken into consideration for the collection of the resale right is, excluding taxes, the hammer price in the event of a public auction and, for other sales, the transfer price received by the seller. <sup>72</sup>	<ul style="list-style-type: none"> <li>Refers to sales at public auction ('hammer price' or 'le prix d'adjudication') and 'other sales'</li> <li>Excludes taxes</li> </ul>

## 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 quantified, but it may be assumed that this is to be a share of the proceeds of the resale. Many national laws refer to this 'interest' as a 'royalty' and this is the term that is used in the present Toolkit.
- 42 Various approaches to the fixing of this royalty 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%)<sup>73</sup>, and there may be a minimum or threshold level set before ARR becomes payable (see Table 6 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 a ceiling (these do not appear to have been included in other national ARR schemes to date).<sup>74</sup>
- 43 Leaving aside the matter of maximum amounts of ARR 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 simply 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

<sup>71</sup> Australia, Resale Royalty Right for Visual Artists Act 2009, s 10(2).

<sup>72</sup> France, Intellectual Property Code, Art R-122-5.

<sup>73</sup> For example, in Australia and Senegal this is fixed at 5% of the resale price (see Table 8); in Uruguay, one of the earliest adopters of ARR it is fixed at 3% of the resale price: Uruguay Law of 1937, art 9. Guatemala is an instance of a higher rate (10%) that is charged: article 38 of the Guatemalan Law on Copyright and Related Rights, Decree 33-98.

<sup>74</sup> There may have been political reasons behind the adoption of the maximum amount in the EC Regulation, i.e. getting agreement between all member states on the minimum kind of ARR 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.



general average charged in the few countries that had ARR systems in place was 5% of the resale price.<sup>75</sup>

- 44 A few countries base their royalty on a percentage of the increase in value on resale, e.g. Brazil, where it is fixed at 5% of the increase in value,<sup>76</sup> but this is now relatively uncommon. Although article 14~~ter~~ 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 ARR 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 to determine the actual profit made on the resale. Furthermore, as a matter of principle, it is inconsistent with the notion of ARR as a royalty on all commercial resales, and therefore inconsistent with the general approach suggested here of placing ARR 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.
- 45 Sample provisions reflecting these different approaches, including a percentage share in any profits on resale, are set out in the table below.

TABLE 8

Kind of provision	Suggested text	Comments
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<sup>75</sup> It may also be noted that in those EU countries which also grant ARR 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>76</sup> And formerly Italy in its 1941 law.

Simple percentage of resale price (Australia, Senegal)	Resale royalty is payable at the rate of 5% of the sale price on the commercial resale of an artwork. <sup>77</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 ARR, ie it is 5% on a painting sold for \$10,000 or for \$1 million or more.</li> <li>• A fixed percentage will usually be easier to apply in practice.</li> </ul>
Sliding scale (EC)	<p>The royalty provided for in Article 1 shall be set at the following rates:</p> <p>(a) 4 % for the portion of the sale price up to EUR 50 000;</p> <p>(b) 3 % for the portion of the sale price from EUR 50 000 to EUR 200000;</p> <p>(c) 1 % for the portion of the sale price from EUR 200 000 TO EUR 350 000;</p> <p>(d) 0.5 % for the portion of the sale price from EUR 350 000 TO EUR 500 000;</p> <p>(e) 0.25 % for the portion of the sale price exceeding EUR 500 000.<sup>78</sup></p>	<ul style="list-style-type: none"> <li>• This sliding scale is applied in all EU member states.</li> <li>• May be more complicated to determine in each case, although this can be readily dealt with through collective administration of ARR.</li> </ul>
Cap on the total amount of ARR (EC)	However, the total amount of the royalty may not under any circumstances exceed EUR3 000. The total amount of ARR may not exceed... <sup>79</sup>	<ul style="list-style-type: none"> <li>• See the arguments made above in par 42.</li> </ul>

<sup>77</sup> Australia, Resale Royalty Right for Visual Artists Act 2009, s 18; see also Following the Senegal Law, article 48: ‘The *droit de suite* shall be five per cent of the sale price..

<sup>78</sup> EC Directive, Article 4.1.

<sup>79</sup> Ibid.

Minimum level for ARR (Australia, Kenya)	No ARR 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>80</sup>	<ul style="list-style-type: none"> <li>Having a threshold for payment of ARR 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.</li> </ul>
Percentage share in increase in value of the work (Brazil)	The author has the irrevocable and inalienable right to collect a minimum of five per cent of any gain in value that may be achieved in each resale of an original work of art or manuscript that he has disposed of. <sup>81</sup>	<ul style="list-style-type: none"> <li>May involve practical difficulties in working out what profit has been made on each resale. These difficulties may be compounded in the absence of collective management arrangements (se Part II of this Toolkit) if it is left to individual right holders to enforce for themselves.</li> </ul>

## WHO IS LIABLE FOR ARR

46 As a starting point, this will usually be the seller of the work subject to ARR, 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<sup>ter</sup> of the Berne Convention provides no clear prescription as to who is to be responsible for payment of ARR. 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 ARR can give rise to complex issues, meaning that it is not easy to devise simple legislative solutions here that will meet the factual permutations that may arise.

TABLE 9

<sup>80</sup> Based on Australia, Resale Right for Visual Artists Act 2009, s 10(1). (extracted in Table 6 above – the power to prescribe a higher rate by regulation is clearly helpful). See also Kenya, Copyright Act 2001, s 26D(6)(a)

<sup>81</sup> Brazil, Law No. 9610 of February 19, 1998, on Copyright and Neighbouring Rights, Article 38.

Kind of provision	Suggested text	Comments
Vendor alone liable (Guatemala)	ARR shall be payable by the seller of the original artwork [and manuscript]. <sup>82</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>
Initial liability on the seller but states may provide for further liability on other parties involved in resale (EC)	4. 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. <sup>83</sup>	<ul style="list-style-type: none"> <li>The parties referred to in Article 1.2 are 'sellers, buyers or intermediaries art market professionals, such as salesrooms, art galleries, and, in general, any dealers in works of art.'</li> </ul>
Joint and several liabilities between seller and art market professional (Spain)	Art market professionals involved in resales that are subject to ARR will be jointly and severally liable with the seller for the payment of the ARR. <sup>84</sup>	<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>
Joint and several liability between seller, art market professional and buyer (UK)	<p>(1) The following shall be jointly and severally liable to pay the resale royalty due in respect of a sale—</p> <p>(a) the seller; and</p> <p>(b) the relevant person (within the meaning of paragraph (2)).</p> <p>(2) The relevant person is a person is—</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>The ultimate effect is that the author will not lose his or her entitlement to ARR if any of these parties are still available.</li> </ul>

<sup>82</sup> Guatemalan Law on Copyright and Related Rights, Decree 33-98, art 38, which also applies to resales of original manuscripts of authors or composers.

<sup>83</sup> EC Directive, Article 1.4.

<sup>84</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. This is now article 24.16 of Royal Legislative Decree 1/1996, of 12 April 1996, approving the revised text of the Intellectual Property Law (our Copyright Act). This article 24 was amended by Law 2/2019 of 1 March 2019 amending the revised text of the Intellectual Property Law (...) and transposing Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 and Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 into Spanish law.

	<p>(a) the agent of the seller; or</p> <p>(b) where there is no such agent, the agent of the buyer; or</p> <p>(c) where there are no such agents, the buyer.</p> <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>85</sup></p>	
Joint and several liability – an alternative formulation (Australia)	<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>86</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>
Art market professional responsible as the starting point (France)	<p>I. - In the event of the sale of an original graphic or plastic work at public auction, the art market professional responsible for payment of the resale right is, depending on the case, the voluntary sales</p>	<ul style="list-style-type: none"> <li>• An alternative way of fixing liability for payment of ARR, starting with the art market professional.</li> </ul>

<sup>85</sup> UK, The Artist's Resale Right Regulations 2006, reg 13.

<sup>86</sup> Australia, Resale Right for Visual Artists Act 2009, s 20.

	<p>company or the auctioneer judicial.</p> <p>II. - In other cases, the art market professional involved in the sale is responsible for paying the resale right. If the sale involves several professionals, the professional responsible for payment of the resale right is:</p> <p>1° The seller, if he acts within the framework of his professional activity;</p> <p>2° Failing this, the art market professional who receives, as intermediary, payment from the buyer;</p> <p>3° Failing this, the buyer, if he acts within the framework of his professional activity.<sup>87</sup></p>	
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## HOW IS ARR ADMINISTERED?

- 48 No specific guideline on this is provided by article 14<sup>ter</sup>, which leaves 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>88</sup> Countries with a long tradition of collective administration may argue that ARR 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 policymakers should determine for themselves, taking account of their particular legal, social and cultural conditions. Part II of this Toolkit addresses these important operational issues in more detail.
- 49 If collective management, either mandatory or optional, is allowed for in any existing or proposed national ARR 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 ARR 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. Depending upon legislative style, these matters might not be dealt with in the principal legislation itself but could be left to be determined in some form of subordinate legislation, such as in a regulation or decree.<sup>89</sup> These matters are dealt with in more detail in Part II of this Toolkit at pars 42 and following and Table 23.

<sup>87</sup> France, Intellectual Property Code, Article R122-9.

<sup>88</sup> Thus, article 6.2 of the EC Directive provides that Member States may provide for compulsory or optional collective management of ARR: see Table 10,

<sup>89</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

[Footnote continued on next page]

51 A question that is sometimes raised in the context of enforcement is whether legislative recognition of ARR is required in the first place, given that there may be other ways on protecting the interests of artists in resales of their works through the use of contracts and/or the deployment of technologies such as NFTs, Blockchain and Smart Contracts. Such matters lie outside the scope of this Toolkit, which is concerned with implementation of legislative regimes within the framework of article 14<sup>ter</sup> of the Berne Convention. However, it should be noted that there has been considerable interest in such approaches, particularly in countries presently lacking formal recognition of ARR in their laws,<sup>90</sup> and it may well be the case that these may in the future be usefully combined with implementation of legislative ARR schemes. Having said this, if contractual solutions alone are relied upon, such as covenants by purchasers of a work to provide a resale royalty back to the original author, there may be problems of lack of privity of contract that arise along the chain of contracts between seller, intermediary and buyer. Technical problems may also arise where NFTs and Blockchain technologies are used<sup>91</sup> and subsequent purchasers fail to return ARR payments or are under no obligation to do so.<sup>92</sup> At the heart of these contractual and technological solutions is the question of the entitlement of the original artist to claim a resale royalty payment, in the absence of a clear legal recognition that such an entitlement arises in the first place. Logically, this points to the need for such a right to be recognized in national law and this is the function of the right outlined in article 14<sup>ter</sup> of the Berne Convention. Accordingly, this Toolkit is concerned primarily with the design and implementation of such a right in national laws, rather than with other solutions which may well provide beneficial complements to ARR schemes.

TABLE 10

Kind of provision	Suggested text	Comments
Berne Convention, article 14 <sup>ter</sup> (3)	The procedure for collection [of ARR] and the amounts shall be matters for determination by national legislation.	Leaves this as a matter for national law to determine

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>90</sup> See further the discussion at par 80 Et seq. of Part II of this Toolkit.

<sup>91</sup> For further discussion of these issues and how the technologies could work here, see the useful discussion in the report of the UK House of Commons House of Commons Culture, Media and Sport Committee, *NFTS and the Blockchain: the risks to sport and culture*, Fourteenth Report of Session 2022-23, *Report, together with formal minutes relating to the report*, Ordered by the House of Commons to be printed 19 September 2023, Chapter 1, and see also the written evidence of DACS to the Committee, available at <https://committees.parliament.uk/writtenevidence/114737/html/> (viewed 2 February 2025)

<sup>92</sup> See further, on such shortfalls, Maria Gracia Santillano Linares, 'Requiem for Royalties: NFT Exchanges Abandon Recurring Compensation for Artists', *Forbes*, 17 September 2023.; noted also in the DACS written submission to the UK House of Commons Committee referred to above and available at <https://committees.parliament.uk/writtenevidence/114737/html/> (viewed 2 February 2025). See further the brief discussion at par 80 of Part II of this Toolkit.



Collective management left as an option (EC)	Art 6. 2 ... 2. Member States may provide for compulsory or optional collective management of the royalty provided for under Article 1. <sup>93</sup>	<ul style="list-style-type: none"> <li>European Union law leaves it to national laws to determine whether they will adopt collective management and, if so, whether this will be on a mandatory (compulsory) or optional (voluntary) basis.</li> </ul>
Other options adopted in national laws	See further Table 19 in Part II for examples of provisions in national laws dealing with modes of implementation of national ARR schemes	

## DURATION OF ARR

51 Generally, this is linked to the duration of the economic rights in the work subject to ARR, noting that article 14~~ter~~ of Berne contains no prescription in this regard, although it clearly contemplates that ARR may survive the death of the artist. Where a national law links ARR 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).

52 Nonetheless, national lawmakers may wish to stipulate the term of protection for ARR 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>94</sup> Sample provisions are contained in the table below.

TABLE 11

Kind of provision	Suggested text	Comments
Simple provision linking ARR to economic rights (UK)	Resale right in a work shall continue to subsist so long as copyright subsists in the work. <sup>95</sup>	ARR continues for as long as the copyright subsists in the work subject to ARR, e.g. this might be between 50 to 100 years <sup>96</sup> after the death of the author, depending on the

<sup>93</sup> EC Directive, article 6.2.

<sup>94</sup> Mexico, Federal Law on Copyright 1996, Article 93~~bis~~(II). This is the same as for economic rights which are dealt with in article 29.

<sup>95</sup> As in the UK, Artists Resale Right Regulation, s 3(2).

<sup>96</sup> As in Mexico: see article 92~~bis~~(II), Federal Law on Copyright 1996.

		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 (Australia)	<p><b>32 Duration of resale royalty right</b></p> <p>Resale royalty right continues to subsist in relation to an original artwork until the end of 70 years after:</p> <p>(a) if there is only one artist of the artwork — the end of the calendar year in which the artist dies; or</p> <p>(b) if there is more than one artist of the artwork, then in relation to the proportion of the resale royalty right held by or through a particular artist – the end of the calendar year in which the artist dies.<sup>97</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 artist. Note, however, that the expression ‘more than one artist’ may be wider than the expression ‘work of joint authorship’ which usually implies some collaboration between the authors and in respect of which Article 7<i>bis</i> of Berne provides that the term of protection generally should be linked to the death of the last surviving author.<sup>98</sup> However, the provision here does not adopt this approach and has the result that the share of ARR where there are multiple artists will expire at different times, depending on when the artist dies and this may differ as well from the term of the other economic rights in the work.</li> </ul>
Another provision stipulating a specific term (New Zealand)	<p><b>15 Duration of resale right period</b></p> <p>(1) This section sets out the period during which a qualifying resale of an original visual artwork creates a resale right.</p> <p>(2) The period begins when the artwork is created and ends at the close of the last day (the expiry date) of the following period:</p> <p>(a) if the artwork is created by 1 artist, the period of 50 years after the end of the calendar year in which the artist dies:</p>	<ul style="list-style-type: none"> <li>• Applies only a life plus 50 year term as allowable under Berne</li> <li>• Provision concerning multiple authors is consistent with article 7<i>bis</i> Berne</li> </ul>

<sup>97</sup> Australia, Resale Royalty Right for Visual Artists Act 2009, s 32(b).

<sup>98</sup> This may be of significance in Australia where ‘work of joint authorship’ is defined in s 10(1), Copyright Act 1968 as meaning a work ‘produced by the collaboration of two or more authors and in which the contribution of each author is not separate from the contribution of the other author or the contributions of the other authors’. The phrase ‘more than one artist’ does not necessarily imply that there has been any collaboration between them, e.g. each artist may have contributed something to the work at different times or places.

	(b) if the artwork is created jointly by 2 or more artists, the period of 50 years after the end of the calendar year in which the last of those artists dies.	
Duration of resale right is linked to duration of economic rights generally (Brazil)	The author's economic rights shall be protected for a period of 70 years as from the first of January of the year following his death... <sup>99</sup>	•

## OTHER CHARACTERISTICS OF ARR – ALIENATION AND WAIVER

53 Under article 14<sup>ter</sup>(1) of Berne, ARR 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). National laws describe this requirement in different ways, e.g. as 'inalienable and unrenounceable' as in Uruguay and 'absolutely inalienable' in Australia. Some, such as in the UK, seek to spell out this restriction in more detail, e.g. by providing that ARR 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 ARR 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 ARR may be assigned to a charitable organization or other public cultural body.<sup>100</sup> While there may be good public policy reasons for such an exception, as a matter of principle it may be argued that this last approach is inconsistent with the requirement of inalienability under article 14<sup>ter</sup>(1) and no provision along these lines is included below.

54 Another important issue is whether ARR 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<sup>ter</sup> but in principle may operate to undermine the requirement of inalienability.) Several national laws contain such an explicit restriction, and it is clearly one that protects the interests of the author. Another recently adopted law (New Zealand) allows a holder of ARR to decline a resale royalty payment: see further Table 12 below.

55 Some sample provisions follow in Table 12.

TABLE 12

Kind of provision	Suggested text	Comments
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<sup>99</sup> Brazil, Law No. 9610 of February 19, 1998, on Copyright and Neighbouring Rights, Article 41

<sup>100</sup> UK, The Artist's Resale Right Regulations 2006, reg 7(3)-(5).

Simple provision barring both assignment and waiver (EC)	1. 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>101</sup>	<ul style="list-style-type: none"> <li>• This prohibits both alienation or transfer of ARR as well as waivers of exercise of the right in the clearest terms.</li> <li>• Query whether “alienation” needs further definition, e.g. 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>
Similar provision barring assignment or waiver (Greece)	1. The author of an original work of art shall have a resale right, to be defined as an inalienable right <i>inter vivos</i> , 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>102</sup>	<ul style="list-style-type: none"> <li>• Specifies that waiver cannot be made in advance (very author-protective).</li> </ul>
More detailed provision barring assignment, charging and waiver (UK)	<p>7(1) Resale right is not assignable.</p> <p>(2) Any charge on a resale right is void.</p> <p>...</p> <p>8(1) A waiver of resale right shall have no effect.</p> <p>(2) An agreement to share or repay resale royalties shall be void.</p> <p>(5) Paragraph (2) does not affect any agreement made with a CMO for the purposes of management of the resale right in accordance with regulation 14.<sup>103</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 ARR to charge it by way of security.</li> <li>• Bars waiver of ARR</li> <li>• Excludes agreements to share ARR apart from arrangements made with CMO in relation to management of the right, e.g. management fees and the like.</li> </ul>
Another detailed provision dealing with assignment and waiver (Australia)	<p><b>33 Resale royalty right absolutely inalienable</b></p> <p>...resale royalty right is absolutely inalienable, whether by way of, or in consequence of, sale, assignment, charge,</p>	<ul style="list-style-type: none"> <li>• A variation on the preceding provision.</li> <li>• Sub-par (34)(2) allows for arrangements made with a CMO to manage the ARR.</li> </ul>

<sup>101</sup> EC Directive, Article 1.1. To similar effect, see Kenya, Copyright Act 2001, s 26D(2)..

<sup>102</sup> Greek Law 2121/1993, Article 5.1.

<sup>103</sup> UK, Artists Resale Royalty Regulation, regs 7 and 8.

	<p>execution, bankruptcy, insolvency or otherwise.</p> <p><b>34 Waiver etc.</b></p> <p>(1) A waiver of a resale royalty right is of no effect.</p> <p>(2) An agreement to share or repay a resale royalty, other than as permitted elsewhere in this law, is void.<sup>104</sup></p>	
<p>A further provision dealing with assignment and waiver and other matters post alienation (Latvia)</p>	<p>17(1) Authors shall retain inalienable rights to receive remuneration for alienated original works of visual art which have been transferred to the ownership of another person. An agreement in respect of which the author waives the right to remuneration in the future shall not be in effect. The transfer of ownership of the original work of visual art from the author to another person, with or without remuneration, shall be considered the first alienation of such a work.</p> <p>...</p> <p>(7) The owner of the original work of visual art has a duty to give the author of the alienated work a possibility to realise the right to reproduce the work, as well as to exhibit the work in a personal exhibition. The author has a duty himself or herself to ensure the preservation of the work in delivering it to and from the place of reproduction or exhibition, unless specified otherwise by contract.<sup>105</sup></p>	<ul style="list-style-type: none"> <li>• A further variation on the above.</li> <li>• Para (7) provides an interesting reservation for the artist to gain access to the alienated work for purposes of 'personal exhibition', together with corresponding obligations with respect to care of the work while in his or her possession.</li> </ul>
<p>Declining ARR payments (New Zealand)</p>	<p><b>19 Right holder may decline resale royalty payment</b></p> <p>(1) A right holder may, in accordance with the process specified by the regulations, decline to receive—</p> <p>(a) payment of all or part of a resale royalty:</p>	<ul style="list-style-type: none"> <li>• Allows right holder to decline ARR payments</li> <li>• ARR payments are then dealt with by CMO as specified in regulations which now provide for this to be paid to a cultural fund' together with other</li> </ul>

<sup>104</sup> Adapted from Australia, Resale Royalty Right for Visual Artists Act 2009, ss 33 and 34.

<sup>105</sup> Latvia, Copyright Law, 2003 (as amended), s 17(1) and (7).

	<p>(b) payment of a resale royalty on the future resale of any or all of their visual artworks.</p> <p>(2) If a right holder declines to receive payment of any amount of a resale royalty, the collection agency must use or manage the amount in the manner specified by the regulations.</p> <p>(3) A right holder may, in accordance with the process specified by the regulations, opt to receive payment of a royalty on future resales of any or all the artworks previously declined under subsection (1)(b).<sup>106</sup></p>	<p>unallocated payments.<sup>107</sup></p> <p>ARR</p>
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## ENTITLEMENT TO ARR AND FOREIGN CLAIMANTS

56 As ARR is an optional requirement under the Berne Convention that may be extended, on condition of substantive reciprocity, to foreign authors, there is no obligation for national laws to make ARR subject to national treatment or to extend it beyond national authors. Some countries may even accord protection to ARR under separate legislations that are quite distinct from their national copyright laws, thereby underlining that protection for foreign artists will only be available if there is reciprocal protection in that artist's country (this is the case for both Australia and New Zealand).

57 So far as entitlement to claim ARR is concerned, 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 can then be made to extend protection of ARR to nationals and residents of countries with substantially similar forms of protection, as allowed under article 14*ter* of Berne.

58 Some sample provisions drawn and adapted from national laws and the EU are given in Table 13 below.

TABLE 13

Kind of provision	Suggested text	Comments
Entitlement under national law (UK)	<p><b>Requirements as to nationality etc.</b></p> <p>10.—(1) Resale right may be exercised in respect of a sale only by a person who, at the contract date, is—</p> <p>(a) a qualifying individual;</p> <p>....</p>	<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</li> </ul>

<sup>106</sup> New Zealand, Resale Right for Visual Artists Act 2023, s 19.

<sup>107</sup> New Zealand, Resale Right for Visual Artists Regulations 2024, regs 14 and 15.

	<p>(3) A qualifying individual is a natural person who is—</p> <p>(a) a national of an EEA state; or</p> <p>(b) a national of a country listed in Schedule 2.<sup>108</sup></p>	<p>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.</p> <ul style="list-style-type: none"> <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> <li>• Further requirements apply to institutions ('qualifying body') in relation to succession on death of the artist: reg 10(3)</li> </ul>
Assimilation rather than permanent residence in the case of non-nationals (Senegal, France)	<p>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 ARR, together with their beneficiaries.<sup>109</sup></p>	<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 ARR even if no longer resident, e.g. consider the case of a French artist long resident in Senegal but now living in France at the time of resale.</li> </ul>
Protection of foreign nationals from states with ARR (France)	<p>Article R 122-4.–</p> <p>Authors who are not nationals of a Member State of the European Community or of a State party to the Agreement on the European Economic Area as well as their successors in title under the</p>	<ul style="list-style-type: none"> <li>• Provides protection for foreign authors from countries with equivalent ARR protection; in other words, protection is</li> </ul>

<sup>108</sup> The Artist's Resale Right Regulations 2006, reg 10(1) and (3).

<sup>109</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 R 122-4 (second para).

	provisions of Article 123-7 shall enjoy the resale right under the conditions provided for in this Code if their national law provides that right for authors who are nationals of the States mentioned above and their successors in title and for the period during which they are eligible to exercise this right in their country. <sup>110</sup>	provided based on substantive reciprocity.
Protection of authors who are nationals of third countries (EC)	<p><b>Article 7</b>  <b>Third-country nationals entitled to receive royalties</b></p> <p>1. Member States shall provide that authors who are nationals of third countries and, subject to Article 8(2), their successors in title shall enjoy the resale right in accordance with this Directive and the legislation of the Member State concerned only if legislation in the country of which the author or his/her successor in title is a national permits resale right protection in that country for authors from the Member States and their successors in title.</p> <p>2. On the basis of information provided by the Member States, the Commission shall publish as soon as possible an indicative list of those third countries which fulfil the condition set out in paragraph 1. This list shall be kept up to date.</p> <p>3. Any Member State may treat authors who are not nationals of a Member State but who have their habitual residence in that Member State in the same way as its own nationals for the purpose of resale right protection.<sup>111</sup></p>	<ul style="list-style-type: none"> <li>Provides for extension of protection on the basis of reciprocity.</li> </ul>
More detailed provisions dealing with works created by single and multiple authors as well as foreign authors	<p><b>12 Who holds resale royalty right?</b>  <i>Artwork created by a single living artist</i></p> <p>(1) If an artwork was created by a single artist who is identified and living at the time of a commercial resale of the artwork, resale royalty right on the commercial resale is held by the artist, provided he or she satisfies the residency test at the time of the commercial resale.</p> <p>...</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> </ul>

<sup>110</sup> France, Intellectual Property Code, Article R 122-4, first para.

<sup>111</sup> EC, Directive, article 7.



	<p><i>Artwork created by more than one artist</i></p> <p>(3) If an artwork was created by more than one artist, resale royalty right on a commercial resale of the artwork is held by:</p> <p>(a) for each artist who is living at the time of the commercial resale—the artist, provided he or she is identified and satisfies the residency test at that time; and</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>(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>.....</p> <p><b>14 Residency test</b></p>	<ul style="list-style-type: none"> <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 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).</li> <li>• Under the regulation making power in the principal legislation, regulations may be made that specify particular countries as ‘reciprocating countries’ – in practical terms, these are all EC members plus the UK, a former EU member.</li> </ul>
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	<p>(1) An individual satisfies the residency test at a particular time if, at that time, the individual is:</p> <p>(a) an Australian citizen; or</p> <p>(b) a permanent resident of Australia; 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 Australia 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 Australia or a country prescribed as a reciprocating country<sup>112</sup></p> <p>...</p> <p><b>53 Regulations</b></p> <p>The Governor-General may make regulations prescribing matters:</p> <p>(a) prescribed or permitted to be prescribed by this Act; or</p> <p>(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.</p> <p><b>Regulation 6A:</b></p> <p><b>Residency test--individuals</b></p> <p>For the purposes of paragraph 14(1)(c) of the Act, the following countries are prescribed as reciprocating countries:</p> <p>(a) Austria;</p> <p>(b) Belgium;</p> <p>(c) Czech Republic;</p> <p>(d) Denmark;</p> <p>(e) Finland;</p> <p>(f) France;</p> <p>(g) Germany;</p> <p>(h) Hungary;</p> <p>(i) Ireland;</p> <p>(j) Italy;</p> <p>(k) Latvia;</p> <p>(l) Netherlands;</p> <p>(m) Norway;</p>	<ul style="list-style-type: none"> <li>• These regulations were only introduced more than a decade after the establishment of the Australian ARR scheme and extend to EU countries and the UK.</li> </ul>
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<sup>112</sup> Australia, Resale Royalty Right for Visual Artists Act 2009, ss 13 and 14.

	<p>(n) Portugal; (o) Spain; (p) Sweden; (q) United Kingdom<sup>113</sup></p>	
<p>Alternative formulation of entitlement to protection, including for foreign author (New Zealand)</p>	<p><b>7 Eligible artists have resale right</b> (2) The artist is eligible if they are one of the following at the necessary time: (a) a New Zealand citizen; (b) a person domiciled or resident in New Zealand; (c) a citizen or subject of, or a person domiciled or resident in, a reciprocating country. ...</p> <p><b>29 Reciprocating countries</b> (1) The Governor-General may, by Order in Council made on the recommendation of the Minister, specify a reciprocating country for the purposes of this Act. (2) The reciprocating country must be an entity (whether a State, part of a State, a territory for whose international relations a State is responsible, a political union, an international organization, or any other entity). (3) The Minister must, before recommending that an order be made, be satisfied that the law of the reciprocating country does or will provide for a reciprocal resale right. ...</p>	<ul style="list-style-type: none"> <li>• Specifies citizenship or domicile or residence.</li> <li>• Extends to authors who are citizens or subjects of reciprocating countries.</li> <li>• Specifies a test for this: satisfaction in the part of the Minister that reciprocity exists in the other country</li> <li>• Reciprocity can be extended with respect to 'part of a State', which would allow for recognition in relation to a state or province with a federation that accorded ARR within that state or province's territory.</li> </ul>
<p>Foreign claimants in particular</p>	<p>(1) Where a country that is a member of the Berne Convention protects the ARR 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 ARR in this country with respect to any resale that occurs there.<sup>114</sup></p>	<ul style="list-style-type: none"> <li>• This provides for reciprocal protection of ARR for nationals or residents of other Berne countries who have similar ARR schemes.</li> <li>• Leaves open the option of extending this to permanent residents [as well as to manuscripts].</li> </ul>

<sup>113</sup> Australia, Resale Royalty Right for Visual Artists Regulations 2021, reg 6A.

<sup>114</sup> Drafted to be consistent with terms of article 14ter, *Berne Convention*.

## SUCCESSION ISSUES – AUTHORS’ HEIRS AND SUCCESSORS

- 59 This is an important issue, which article 14<sup>ter</sup>(1) of Berne leaves largely to national lawmakers to determine. If equated to other economic rights, succession to ARR may simply occur in the same way as for these rights, for example, by bequest under will or other testamentary disposition or in accordance with the national law in relation to intestate succession where there is no will and will not need any further legislative provision. 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<sup>ter</sup> leaves it open to national laws to deal with succession issues by providing for the transfer of the ARR to some national cultural or social institution, without providing any further prescription in this regard (article 14<sup>ter</sup>(1)).
- 60 As a general matter, as ARR 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 entitlement to ARR arises.
- 61 Several sample provisions drawn from national laws are given in Table 14 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. This also uses formulations such as ‘residency test’ (to be satisfied at the time of commercial resale) as well as a ‘succession test’. National policy and lawmakers may find some assistance in this more detailed set of provisions which deal with the important question of what happens to ARR after the author’s death.

TABLE 14

Kind of provision	Suggested text	Comments
Simple provision leaving this as a matter for general law of country	The royalty provided for under Article 1 shall be payable to the author of the work and, ... after his death to those entitled under him/her. <sup>115</sup>	<ul style="list-style-type: none"> <li>Essentially leaves this as a matter for national succession law.</li> </ul>
Provision for ARR to be transferred by inheritance (Mexico)	<p>Art 92<sup>bis</sup></p> <p>..</p> <p>(II) The right established in this Article shall be unrenounceable, shall be transferred by inheritance and shall be cancelled one hundred years after the death or declaration of death of the author.<sup>116</sup></p>	<ul style="list-style-type: none"> <li>Provides that ARR is unrenounceable and for transmission through inheritance laws alone.</li> </ul>

<sup>115</sup> EC Directive, article 6.1.

<sup>116</sup> Mexico, Federal Law on Copyright 1997, Art 92<sup>bis</sup>. For a similar provision, see Latvian Copyright Law 203 (as amended), s 17(9):

After the death of the author, the rights referred to in this Section shall be devolved to the heirs of the author.

<p>More detailed provision (UK)</p>	<p>(1) ..resale right 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) Resale right 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 resale right is transmitted to more than one person, it shall belong to them as owners in common.<sup>117</sup></p>	<ul style="list-style-type: none"> <li>• ARR 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 ARR 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 ARR 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>
<p>Another more detailed provision (New Zealand)</p>	<p><b>14 Who holds right after artist's death</b></p> <p>(1) This section sets out who holds an artist's resale rights after their death.</p> <p>(2) The resale right that arises on a qualifying resale is held by the successor of the resale rights but only if, at the time that the contract for the qualifying resale is entered into,—</p> <p>(a) the successor holds those rights; and</p> <p>(b) the successor,—</p> <p>(i) in the case of an individual, is—</p> <p>(A) a New Zealand citizen; or</p>	<ul style="list-style-type: none"> <li>• Provides a clear, step by step guide as to how ARR is to be dealt with after the death of the artist or artists (in the case of joint works)</li> <li>• Sets out eligibility requirements for successors</li> <li>• Allows for further transmissions of ARR by successors</li> </ul>

<sup>117</sup> See further UK Artists Resale Royalty Regulations, regulation 9.

	<p>(B) domiciled or resident in New Zealand; or</p> <p>(C) a citizen or subject of, or domiciled or resident in, a reciprocating country:</p> <p>(ii) in the case of any other person, is incorporated, registered, or carrying on business in New Zealand or a reciprocating country.</p> <p>(3) A successor may transfer the resale rights to another person, as personal property, by—</p> <p>(a) assignment; or</p> <p>(b) testamentary disposition; or</p> <p>(c) operation of law.</p> <p>(4) If 2 or more successors hold a resale right after the artist's death, each successor holds the share of the right that they inherit or that is transferred to them.</p> <p>(5) In this section, successor, in relation to an artist's resale rights, means—</p> <p>(a) the person who inherited the resale rights under the will or on the intestacy of the artist; or</p> <p>(b) the person who holds the resale rights after 1 or more transfers of the rights under subsection (3).<sup>118</sup></p>	
<p>An even more detailed provision (Australia)</p>	<p><b>12 Who holds resale royalty right?</b></p> <p>...</p> <p><i>Artwork created by a single artist who is no longer living</i></p> <p>(2) If an artwork was created by a single artist who is identified but no 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</p>	<ul style="list-style-type: none"> <li>• This provision seeks to cater for almost all eventualities – single and multiple artists, 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 ARR scheme or revising an existing one.</li> <li>• While detailed, it relies on compliance with two important tests: residence (for text, see second column, Table 13) and succession</li> </ul>

<sup>118</sup> New Zealand, Resale Right for Visual Artists Act 2023, Part 2, s 14.

	<p>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>(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>(see further below in column 2 of this Table).</p> <ul style="list-style-type: none"> <li>Deals with the situation where there is a series of successors in title to the author or authors</li> <li>Includes nationality of both protecting and reciprocating countries (as in other sample</li> </ul>
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	<p><b>15 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> <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>119</sup></p>	<p>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).</p> <ul style="list-style-type: none"> <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 ARR, i.e. 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 policymakers to consider, having regard to their own legal systems and social and cultural traditions, e.g. it might be possible to limit the reference to charities or community bodies to those directly concerned with authors' rights and stipulating that ARR proceeds are to be directed to providing social support for artists, or these</li> </ul>
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<sup>119</sup> Australia, Resale Royalty Right for Visual Artists Act 2009, ss 13 and 15.



		<p>purposes might be drawn more generally.</p> <ul style="list-style-type: none"> <li>• Alternatively, a national scheme might be content to leave ARR 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>
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## SOME OTHER USEFUL PROVISIONS

### *Joint entitlements*

62 Where there are multiple authors of a work subject to ARR, 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 ARR unless they have agreed to the contrary. This contrasts with 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 (UK)	<p><b>Joint authorship</b></p> <p>5.—(1) In the case of a work of joint authorship, the resale right 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>(4) "Work of joint authorship" means a work created by two or more authors.<sup>120</sup></p>	<ul style="list-style-type: none"> <li>• Equal shares appear to be a more equitable way of proceeding here rather than relying on notions of joint tenancy where the surviving author will receive all ARR.</li> <li>• The definition of 'work of joint authorship' in para (4) is wider than the definition of this expression under some national laws, e.g. where collaboration is required and the contributions of individual authors are not readily severable from each</li> </ul>

<sup>120</sup> UK, The Artist's Resale Right Regulations 2006, reg 5.

		<p>other.<sup>121</sup> As a general matter, it is suggested that this is an appropriate provision 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 ARR scheme to determine for itself, having regard to its own national copyright law.</p>
<p>Joint authors – all surviving or some deceased at time of resale (Australia)</p>	<p><b>16 Share of resale royalty right where there is more than one artist</b></p> <p><i>Where there is more than one artist and they are all living</i>  (1) If all of the holders of the resale royalty right on the commercial resale of an artwork are artists of the artwork, each artist is entitled to an equal share of the resale royalty on that commercial resale, unless:  (a) the artists have agreed to apportion shares in the resale royalty differently; and  (b) that agreement does not give a share of the resale royalty to any other person (other than through testamentary disposition or in accordance with the rules of intestate succession on the death of an artist).</p> <p><i>Where more than one artist, but one is no longer living</i>  (2) If:  (a) there is more than one artist of an artwork; and  (b) one of the artists is identified but no longer living at the time of a commercial resale of the artwork; and  (c) the artist satisfied the residency test immediately before his or her death;  it is the share of the resale royalty on the commercial resale of the artwork to which</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>

<sup>121</sup> See, for example, the Kenya Copyright Act 2001, s 2(1) (definition):  
“work of joint authorship” means a work produced by the collaboration of two or more authors in which the contribution of each author is not separable from the contribution of the other author or authors.

	the artist would have been entitled had the artist been alive, identified and satisfied the residency test at the time of the commercial resale that passes to those holding resale royalty right on the commercial resale of the artwork through that artist. <sup>122</sup>	
Artwork created jointly (New Zealand)	<p><b>12 Right held in shares where artwork created jointly</b></p> <p>(1) This section applies if a resale right arises in relation to an original visual artwork that is created jointly by 2 or more artists (joint artists).</p> <p>(2) The resale right—</p> <p>(a) belongs only to those joint artists who are eligible at the necessary time (see section 7(1)(d) and (2)); and</p> <p>(b) is held by those eligible joint artists in equal shares or in any other shares that are specified in a written agreement signed by or on behalf of all of the eligible joint artists.<sup>123</sup></p>	<ul style="list-style-type: none"> <li>• Less detailed provision, with a presumption that shares will be held equally in the absence of contrary agreement</li> <li>• Artists must meet eligibility requirements as required by NZ law</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 ARR is claimed is to be shown. It is assumed here that a system of registration of claims to ARR 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 ARR is contained in stand-alone legislation rather than included within the general copyright law as is the case with the majority of Berne members with ARR schemes.

64 There may also be other evidentiary presumptions that will assist in the collection and recovery of ARR, and several useful sample provisions for consideration by national policy and lawmakers are contained in Table 16 below as well as in Table 26 in Part II.

TABLE 16

Kind of provision	Suggested text	Comments
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<sup>122</sup> Australia, Resale Royalty Right for Visual Artists Act 2009, s 16.

<sup>123</sup> New Zealand, Resale Right for Visual Artists Act 2023, s 12.

Presumption in relation to authorship (Kenya)	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>124</sup>	<ul style="list-style-type: none"> <li>• Presumption applies in the absence of any other mark or evidence of authorship.</li> </ul>
Stronger presumption of authorship (UK)	<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>125</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>126</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>

### *Right to request information*

65 Timely information as to the occurrence of resales of works is critical to the operation of any ARR 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.

<sup>124</sup> Derived from s 26D(5), Kenya Copyright Act 2001 (this refers to the 'artist' rather than the 'author').

<sup>125</sup> UK, The Artist's Resale Right Regulations 2006, reg 6.

<sup>126</sup> Australia, Resale Royalty Right for Visual Artists Act 2009, s 17.

67 More operational aspects of ARR schemes which arise where ARR is administered through a CMO are considered further in Part II of this Toolkit, in particular at pars 42 and following.

TABLE 17

Kind of provision	Suggested text	Comments
Simple provision (EC)	<p>Article 9 Right to obtain information</p> <p>The Member States shall provide that for a period of three years after the resale, the persons entitled under Article 6 may require from any art market professional mentioned in Article 1(2) to furnish any information that may be necessary in order to secure payment of royalties in respect of the resale.<sup>127</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 of he persons entitled to resale royalty to receive information but does not specify the kind of information the information that may be sought.</li> <li>'Persons entitled under Article 6' covers the situation where this person is a CMO managing ARR on behalf of the person entitled.</li> <li>Effective implementation of a provision such as this may call for further prescription through regulation or administrative direction (according to the particular legal system of the country enacting the ARR scheme). A suggested draft provision to this effect would be along the following lines (a new para (2) added to the provision in column 2).</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 where there is failure to comply.</li> </ul>
Existing provisions in national laws	See the provisions extracted in Table 23 in Part II.	

### *Time of implementation of ARR scheme and transitional issues*

68 There are some significant issues that will require careful consideration when formulating a new national ARR scheme: is it to operate retrospectively to cover all works protected in the country concerned at the time of introduction or should it apply only to works created after this

<sup>127</sup> Based on EC Directive, article 9.

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 ARR 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 ARR 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 ARR 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 ARR itself retrospectively, ie to commercial resales occurring before this date, even if this was only a short period before: ARR need only apply prospectively to commercial resales of works that are already protected under national law.

71 It should be noted that article 18(3) of Berne 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 ARR, although the adjective ‘transitional’ suggests that this should be for a relatively short period.<sup>128</sup> In the case of ARR, it might, therefore, be reasonable to provide some short period of time for commercial resales occurring after the commencing date of a national ARR 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 lawmakers 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 ARR.

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 [i.e. the general copyright law of the nation in question] at the time of commencement of the Law, but	ARR is to apply to all works protected at the commencement of the ARR scheme but only to

<sup>128</sup> See further Ricketson and Ginsburg, [6.136-6.137].

	applies only to commercial resales of those works where the contract date of the sale occurs after the commencement of the Law.	commercial resales occurring after this date
Alternative provision based on EC Directive	<p>1) This law —</p> <p>(a) does not apply to sales where the contract date preceded the commencement of the Law; but</p> <p>(b) applies notwithstanding that the work sold was made before that commencement.</p>	Achieves the same effect as the preceding one.
Possible transitional provision	<p>ARR does not apply where:</p> <p>(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</p> <p>(b) commercial resale takes place after the commencement of this Law.</p>	<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, e.g. in the case of deceased estates?</li> <li>• Should there be a cut-off period for commercial resale after commencement, e.g. 6 months, a year, etc?</li> </ul>

[End of document]