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# **Proposed international treaty on droit de suite/resale royalty right for visual artists**

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## Executive summary

1. The following study reviews the arguments in favour of introducing a new treaty on resale royalty rights ('RRR') for visual artists and outlines the principal features of such an agreement.
2. It begins with a discussion of the origins of RRR in France, and how this right has come slowly to be recognized today in up to 81 countries that are members of the Berne Union: pars 3-5. It also discusses how the right is to be characterized legally, whether as a right of visual artists to a share in the proceeds of any resale of their original work of art by visual artists following the first transfer of ownership, or whether this should be limited to a share in the increase in value of the work on resale: par 6.
3. Justifications for RRR are then discussed, and it is argued that the most powerful of these is that recognition of RRR goes some distance towards correcting the imbalance that otherwise exists as between the exclusive economic rights enjoyed by visual artists as compared with those enjoyed by other categories of authors: pars 7-20.
4. The fact that RRR relates to the first physical embodiment of the artistic work and its subsequent disposal rather than to the making of copies or the communication of the work - that is, subsequent utilisations in which the first physical embodiment becomes irrelevant - does not present a barrier to this being used as a means of aligning the rights of visual artists with those of other categories of authors. In this regard, rights of distribution and rental of copies, not recognized under Berne, are equally seen as being authors' rights that have now received protection under later international agreements. This has been on the same basis as argued for here in favour of RRR, namely to correct the imbalance that might otherwise arise because of perceived limitations in the scope of the reproduction right for certain categories of creators, such as computer programmers and cinematographers.

5. The fact that RRR, 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 RRR simply reflects the particular character of visual works of art and their form of exploitation, but it does not differ in kind from the reproduction right which will only be of benefit to the struggling writer or composer in the event that his or her manuscript is published and captures the public's attention.
6. There is a further argument that RRR might be of specific benefit to indigenous artists whose works may have both a national and international market. This was certainly a factor in the adoption of RRR legislation in Australia in 2009, and similar arguments have been advanced in a number of developing countries which have recently passed RRR laws.
7. Apart from the additional revenue stream that RRR 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.
8. Given the gradual adoption of RRR regimes by nearly half the membership of the Berne Union, there is now a clear imbalance in protection for visual artists globally as between RRR and non-RRR countries. At the moment, this bears particularly harshly upon US and Chinese artists, who gain nothing from the resales of their works in RRR countries; likewise, there is a shortfall for artists from RRR countries in the growing Chinese and US resale art markets. Yet their art is experienced and enjoyed universally without regard to borders. Arguments of fairness here are difficult to reject.
9. A consideration then follows of the way in which RRR has been incorporated into the Berne Convention for the Protection of Literary and Artistic Works as Article 14<sup>ter</sup> of the latest Paris Act (1971), and how this provision is to be interpreted and applied.

Essentially, this is an inalienable right to an interest in the proceeds of resale of original works of art and manuscripts, but is an optional requirement only that is subject to material reciprocity: pars 21-45.

10. It is argued that RRR is now clearly established at the international level as one of the authors' rights belonging to visual artists, albeit of a particular kind. The fact that such protection is presently optional and subject to the requirement of reciprocity under Article 14<sup>ter</sup> does not affect the recognition of RRR 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.
11. National laws are then examined, in order to identify points of commonality, notably in relation to such matters as the works covered, the persons entitled to claim, duration of protection, the sales affected, royalty rates, mode of collection, and other matters: pars 46-62. The position with respect to countries where RRR is not presently protected is considered briefly, and the need for uniform treatment at the international level for artists is discussed: par 63.
12. RRR is readily susceptible to treatment under a separate international agreement consistently with the requirements of Article 20 of the Berne Convention, which provides for the making of 'special agreements' among Berne Union members. This has already occurred in the area of public communication and other rights under the WIPO Copyright Treaty 1996 ('WCT') and in relation to limitations and exceptions in favour of visually impaired persons under the Marrakesh Treaty 2013. The options open to Berne countries for international action in this area are then discussed: pars 63-78.
13. The study concludes with draft proposals for an international treaty on RRR comprising 18 articles: pars 79-107.

## **The purpose of the present study – the question to be considered**

1. In this study, I have been requested to consider the arguments in favour of the adoption of a new treaty on *droit de suite* or resale royalty right (RRR) and to propose the essential elements of such a treaty.
2. For ease of exposition, it is divided into the following sections:
  - Defining the resale royalty right and its correct legal characterisation
  - Justifications for RRR
  - The current international legal protection of RRR under the Berne Convention and the implications of this
  - Domestic legislation on RRR – where it is and is not protected
  - Extending international protection for RRR – the case for a new international treaty
  - The framework for a proposed new treaty

## Defining RRR and its correct legal characterisation

3. *Defining the right*: In normal usage, RRR refers to the author's right to a share in the proceeds of subsequent sales of his or her original work—'original' here meaning the first or original tangible or physical embodiment of the work.<sup>1</sup> The present English description - resale royalty right - reflects more accurately the character of the right involved here than does the original French expression *droit de suite*. The literal translation of this expression in French was 'the right of follow-up' or the 'right of following on', and was drawn from the French law of real property (although the analogy here does not bear very close examination).<sup>2</sup>
4. *The origins of RRR*:<sup>3</sup> These are to be found in France, and stemmed from concerns in that country about the financial position of visual artists as compared with that of writers and composers.<sup>4</sup> Thus, an original artistic work might be sold for a low price by a young and unknown artist, and then resold years later by the astute purchaser for a much greater sum when the artist had become famous and his works generally commanded far higher prices. In such cases, it seemed inequitable that the artist should not share in the good fortune of the purchaser, and the portrayal of the artist (usually a man) declining into poverty and

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<sup>1</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] *DA* 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, *Das Folgerecht im deutschen und ausländischen Urheberrecht* (1970); 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').

<sup>2</sup> See Hauser at p 97.

<sup>3</sup> The following section draws on material in S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights*, Oxford University Press, Oxford, 2006 ('Ricketson and Ginsburg'), [11.54] ff.

<sup>4</sup> See generally, Duchemin, pp 17ff.



illness in his squalid garret surrounded by his starving family while the rapacious art collector became ever wealthier through prudent resales of the artist's early works was a compelling one to draw. Its pathos was intensified in the case of a dead artist, with his dependents reduced to beggary, and this pathos could be fanned into outrage when names of particular artists who had suffered in this way—Millet, Degas and Bollin among them—were invoked.<sup>5</sup> The 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 France.<sup>7</sup> This resulted in special legislation that was adopted 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 severe potential restriction, but this made collection far easier if it were carried out by an authors' society that entered into arrangements with galleries and auction rooms.<sup>10</sup>

5. *The trajectory of RRR laws:* The French example was soon followed by several other Berne members, but with their own national variations: Belgium 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

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<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'); Katzenberger, pp 364ff; Duchemin, pp 17ff.

<sup>6</sup> *Chronique de Paris*, 25 February 1893; see also Hauser, pp 96ff, Duchemin, pp 35ff, and Pierredon-Fawcett, pp 2-3.

<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] *DA* 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* 101ff. 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.

<sup>10</sup> See further Vaunois, [1920] *Le Droit d'Auteur* 106-107; Hauser, 99–101.

<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.

of such protection in 1937,<sup>15</sup> and, following World War II the number of states which recognised RRR increased slowly but steadily. In 1992, when the US Copyright Office conducted a study into RRR, it reported that 36 countries had legislation on this in one form or another.<sup>16</sup> A subsequent US Copyright Office study in 2013 put this figure at ‘more than 70’, with 13 countries in South America, 16 in Africa, as well as Australia, the Philippines and the Russian Federation.<sup>17</sup> The correct number, at the time of writing, appears to be 81,<sup>18</sup> which is almost half the membership of the Berne Union, but it is worth noting the serious consideration being given presently to the adoption of RRR legislation in two Berne members with large and expanding art markets, namely the USA and China – as well as in one strategically located country (Switzerland).<sup>19</sup> The nature and the scope of the rights adopted, to say nothing of the detail provided, vary significantly from country to country. While the subject of these different laws are artistic works (defined widely or narrowly), some have extended RR to include original manuscripts.<sup>20</sup> In the case of Europe, however, the cradle of RRR, a considerable harmonization of RRR at national level has now been achieved through the European Union’s Directive in 2001: while this has led to dilution of the scope of RRR laws in some countries – an inevitable consequence of harmonization - it has also had the effect of bringing into the fold several countries historically unsympathetic to the RRR, notably

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

<sup>16</sup> *Droit de Suite: The Artists’ Resale Royalty, A Report of the Register of Copyrights*, Washington, 1992, p 7 (‘USCO 1992 Report’) These were: Algeria, Belgium, Benin, Brazil, Burkina Faso, Cameroon, Central African Republic, Chile, Congo, Costa Rica, Czechoslovakia (as it then was), Ecuador, France, Germany, Guinea, Hungary, Holy See, Italy, Iraq, Ivory Coast, Laos, Luxembourg, Madagascar, Mali, Morocco, Monaco, Peru, Philippines, Portugal, Poland, Rwanda, Senegal, Spain, Tunisia, Turkey, Uruguay and former Yugoslavia, as well as California, NB Poland repealed it.

<sup>17</sup> Office of the Register of Copyright, *Resale Royalties: An Updated Analysis*, Washington, December 2013 (‘USCO 2013 Report’), p 17. A more precise list of exactly 70 countries (including California) is to be found in Appendix A of a recent Canadian Report: Canadian Artists Representation/Les Front des Artistes Canadien (CARFAC), *Recommendations for an Artist Resale Right in Canada*, April 2013, p 14. In addition to then 27 states of the EU covered by the EC Directive, these countries were: Algeria, Australia, Benin, Bolivia, Brazil, Burkina Faso, Cameroon, Chile, Columbia, Congo, Costa Rica, Croatia, Ecuador, Guatemala, Guinea, Honduras, Iceland, India, Iraq, Ivory Coast, Laos, Liechtenstein, Madagascar, Mali, Mexico, Monaco, Mongolia, Morocco, Nicaragua, Norway, Panama, Paraguay, Peru, Philippines, Russia, Rwanda, Senegal, Serbia and Montenegro, Tunisia, Turkey, United States (CA), Uruguay Venezuela. There are now 28 states of the European Union following the admission of Croatia in July 2013, while Serbia and Montenegro are now separate states and Bosnia Herzegovina and the Holy See are not included in the list. Also not included are the former Soviet republics of Belarus, Armenia, Azerbaijan, Georgia, Kazakstan, Kyrgyzstan, Moldova and Ukraine which have RRR, according to a recent CISAC publication: see CISAC, EVA and GESAC, *What is the Artists Resale Right*, Paris and Brussels, 2014, p 5 (note that this list omits Bosnia and Hergovina, Moldova and the Holy See, but also includes New Zealand, which has not yet adopted such legislation).

<sup>18</sup> See preceding footnote.

<sup>19</sup> See further CISAC, EVA and GESAC, *What is the Artists Resale Right*, Paris and Brussels, 2014, p 5.

<sup>20</sup> The first to do so appears to have been the Italian Law of 1941, Article 144.

the UK.<sup>21</sup> In the case of developing countries, a model RRR provision is contained in the Tunis Model Law formulated by WIPO and UNESCO jointly in the mid-1970s.<sup>22</sup> Most notable in recent years has been the adoption of RRR provisions in Latin American and African countries and within those of the Commonwealth of Independent States (the former Soviet Republics).

6. *Legal characterisation of RRR:* It was unclear under early RRR laws how the right granted was to be characterised legally. Was it an ‘author’s right’, albeit confined to the visual arts, which was to be ranked equally alongside the other economic and moral rights accorded to authors generally? Or was it something separate, more akin to a levy or tax? The latter characterization was easier where the royalty was chargeable only upon increases in value on resale, as was the case under the early Czech, Polish and Italian laws.<sup>23</sup> Characterization as an author’s right, however, had implications so far as national treatment requirements under the Berne Convention were concerned. If this were correct, then, in the absence of any contrary provision, the few Berne countries with RRR would be required to grant this to authors from the majority of countries without such protection. As will be seen, the question of characterization was to remain unresolved until the Brussels Revision of the Berne Convention in 1948, when RRR formally entered the Convention as Article 14*bis* but its recognition was not mandatory and was, furthermore, subject to the requirement of reciprocity. Characterisation is also important when one comes to consider justifications for granting such protection in the first place. It will come as no surprise that these raise a mixture of philosophical, sentimental and economic arguments.

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<sup>21</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, *Official Journal L 272*, 13/10/2001 P. 0032 – 0036. As to the dates of implementation of the Directive, see Article 12.1 (1 January 2006), with a later date (1 January 2010) under Article 8(2) for full implementation as to persons entitled to the right after the death of the author. As of 30 May 2015, there were 28 members of the European Union that are required to implement the Directive in their national laws.

<sup>22</sup> Tunis Model Law on Copyright for Developing Countries, WIPO Publication 812(E), Geneva, 1976, Article 4*bis*.

<sup>23</sup> As well as under an earlier draft law published in [1913] *DA* 34, 36.

## Justifications for RRR

### *Arguments based on sentiment or compassion*

7. Much of the early argument in favour of RRR was presented simply in terms of a humanitarian concern for the plight of poor starving artists, seeing it as a means of securing for them and their families some form of social security during and after the artists' lifetime. The case of Jean-François Millet whose painting 'The Angelus' was sold for 800,000 gold francs after his death as the result of a bidding war between US and French collectors while his family was left in poverty provided a potent image for advocates of *droit de suite* in late nineteenth century France.<sup>24</sup> A more robust, but equally compelling image is provided by the example of the US artist Robert Rauschenberg confronting the collector of one of his early paintings when it was resold at a considerable profit some years later.<sup>25</sup> Certainly, the empirical evidence is that visual artists, as a group, have low incomes and must usually rely upon supplementing these in other ways.<sup>26</sup> A recent US Copyright Office study also has found that the incomes of visual artists are lower than those of other categories of creators.<sup>27</sup> Whether the grant of an RRR is a means of redressing the imbalance between artistic endeavour and low income is a much more difficult question, and its utility in doing so has been strongly contested by some commentators, notably in the USA.<sup>28</sup> There are certainly some artists who do live long enough to reap a handsome financial reward from their later works, even if they received very little for the sales of their earlier ones. Indeed, death often leads to an upsurge in the resale of artists' works, as there is no longer a continuing supply of them,

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<sup>24</sup> As captured in the lithograph of Jean-Louis Forain on the opening page of J Farchy, *Le droit de suite est-il soluble dans le analyse économique?* March 2011 ('Farchy'). See further C M Vickers, 'The Applicablity of the *Droit de Suite* in the United States' 3 B C Int & Comp L Rev 433, 438, n 16 (1980).

<sup>25</sup> See further M. Elizabeth Petty, 'Rauschenberg, Royalties, and Artists' Rights: Potential *Droit de Suite* Legislation in the United States', (2014) 22 *Wm. & Mary Bill Rts. J.* 977, at <http://scholarship.law.wm.edu/wmboj/vol22/iss3/8>; MB Reddy, 'The *Droit de Suite*: Why American Fine Artists Should Have a Right to a Resale Royalty', (1995) 15 *Loy. L.A. Ent. L. Rev.* 509, note 4. Available at: <http://digitalcommons.lmu.edu/elr/vol15/iss3/2>

<sup>26</sup> See further D Throsby and A Zednik, *Do you really expect to be paid? An economic study of profesional artists in Australia*, Australia Council for the Arts, Sydney, 2010, available at [http://australiacouncil.gov.au/workspace/uploads/files/research/do\\_you\\_really\\_expect\\_to\\_get\\_pa-54325a3748d81.pdf](http://australiacouncil.gov.au/workspace/uploads/files/research/do_you_really_expect_to_get_pa-54325a3748d81.pdf) and see also an earlier study by D Throsby and V Hollister, *Don't give up yourday job: an economic study of ;rofesional artists in Australia*, Australia Council, 2003. See further the excellent study by E Hudson and S Walker, 'Droit de Suite downunder: Should Australia introduce a Resale Royalties Scheme for Visual Artists?' Intellectual Property Research Institute of Australia, Working Paper No 11/04, September 2004.

<sup>27</sup> USCO 2013 Report, pp 31-36.

<sup>28</sup> See, for example, M E Price, 'Government policy and economic security for artists: the case of the *droit de suite*' (1968) 77 *Yale LJ* 1333;

as revealed by auction sales.<sup>29</sup> If familial poverty is a strong argument in favour of a post mortem RRR, this might provide a good reason for according the right, except that it is often the case that the deceased artists were also doing well, indeed, extremely well, before their death. Limited information from one country (Australia) that recently introduced RRR suggests that the amounts collected so far have gone to the best known Australian artists or their estates, with miniscule distributions to the great bulk of practising artists.<sup>30</sup> It is also clear that there are many artists, perhaps the great majority, whose works increase very little in value, or even decrease, both during and after their lifetime. Indeed, if resale is the trigger point for imposition of RRR, this may never occur or may only do so many years after the death of the artist.<sup>31</sup> In this respect, RRR will do little, if anything, to address artistic poverty in the present, as compared with other methods such as state subsidies or awards or even better regulation of artists' agreements with agents and galleries.<sup>32</sup> Justifying RRR as a humanitarian gesture may therefore be nothing more than sentimentalism,<sup>33</sup> notwithstanding its strong emotional appeal. One might warn here against formulating a general proposition (the adoption of RRR) on the basis of notorious particular examples.

#### *The visual artist's entitlement to share in increases in value*

8. There are more reasoned, and perhaps more philosophically satisfying, arguments that can be advanced in favour of RRR<sup>34</sup> Unjust enrichment theories were deployed in support of at least one early RRR law (Belgium<sup>35</sup>), while another (Czechoslovakia) accorded a

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<sup>29</sup> In this regard, see the table of the top 100 auction sales in Farchy, p 48. With a few exceptions, such as Jeff Koons and Damien Hirst, the vast majority of these artists were deceased, ranging from Francis Bacon, Pablo Picasso, Claude Monet, Andy Warhol, Mark Rothko, Fernand Leger, Edvard Munch, and Edouard Degas, were all deceased. Of interest also is the fact that all these sales were in countries with no RRR, namely the UK (London) and USA (New York).

<sup>30</sup> Several such artists were the late Fred Williams and the late Brett Whiteley: see N Rothwell, 'Royalties schemes cast sharp light on divided landscape', *The Australian*, 8 August 2013.

<sup>31</sup> See, for example, C McAndrew, *The EU Directive on ARR and the British Art Market*, Study prepared for the British Art Market Federation by Arts Economics, pp 12-13 (finding that RRR benefited only 1% of living British artists in 2013).

<sup>32</sup> This was certainly the view of a recent inquiry in Australia, which recommended adoption of other measures, together with RRR: *Report of the Contemporary Visual Arts and Crafts Inquiry*, Commonwealth of Australia, 2002 (the 'Myers Report'), pp 11-20.

<sup>33</sup> See, for example, M E Price, 'Government policy and economic security for artists: the case of the droit de suite' (1968) 77 *Yale LJ* 1333; ME Petty, 'Rauschenberg, Royalties, and Artists' Rights: Potential Droit de Suite Legislation in the United States', (2014) 22 *Wm. & Mary Bill Rts. J.* 977. <http://scholarship.law.wm.edu/wmborj/vol22/iss3/8>; GA. Rub, 'The Unconvincing Case for Resale Royalties' (2014) 124 *Yale L J F* 1, <http://www.yalelawjournal.com/forum/the-unconvincing-case-for-resale-royalties>.

<sup>34</sup> See generally Duchemin, pp 19ff; Katzenberger, pp 364ff; Hauser, pp 103ff.

<sup>35</sup> USCO 2013 Report, p 31.

right to the author of a share in the net profit on resale where this was ‘disproportionate’.<sup>36</sup> Such arguments look at the increase in value of the original work (where this occurs), and assume that this is, at least in part, due to the subsequent work and fame of the artist, and that he or she should therefore be entitled to a share in this increased value. In such cases, the purchasers of these works have done little personally to bring about this increase, although their astuteness in purchasing those particular artists’ works at early stages of their careers can be likened to the skill of the canny investor who has done the necessary market research and is therefore deserving of reward.<sup>37</sup> There may also be other external factors relating to the development of the market for those kinds of works that should not be overlooked (these might include such matters as larger cultural and artistic trends or changes in public taste). Nevertheless, it can be argued that the collector here is in the position of a speculator reaping windfall profits on resale, and therefore that some part of these profits should be returned to the artist whose efforts have helped bring about this state of affairs (this is to say nothing of the often large fees that have been earned by the market intermediaries, such as galleries, agents and brokers, along the way). This has been the approach adopted in some national laws which have adopted RRR,<sup>38</sup> with the consequence that the artist receives nothing if her work is resold at the same or a lesser price. This is a kind of ‘swings and roundabouts’ argument, which can be seen as postulating the artist as a co-venturer in the later exploitation of his or her work. In a free market economy, this may have some intuitive appeal, but inevitably faces the practical difficulty of estimating the profit earned if sellers and intermediaries adopt creative accounting practices to disguise what has been earned – identifying the extent of profit on any transaction is always a fraught exercise. Nonetheless, it does have the virtue of inviting attention to the respective contributions of artist, collector and intermediary in creating the later value attached to a work. On the other hand, it is not immediately clear why works of art should be differentiated from other property rights which are traded in a resale market, such as land, equities, wine or

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<sup>36</sup> Czech Law of 1926, Article 35.

<sup>37</sup> See the example of Robert Rauschenberg and the collector Robert Scull in M E Petty, ‘Rauschenberg, Royalties, and Artists’ Rights: Potential Droit de Suite Legislation in the United States’, 22 *William and Mary Bill of Rights Journal* 977 (2014) (‘I’ve been working my ass off just for you to make that profit’) and, see further, Pierredon-Fawcett, pp 12-14.

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

antiques, and where the original owner will usually have no entitlement to a share of increased profits along the line. There is also another side of the argument to consider here: if there is an entitlement to share in increases in value (on the basis that this would not have occurred without the artist's contribution), why should the artist not bear a share of any loss that is sustained on resale? No suggestion of this latter kind has ever been seriously advanced, but the reality seems to be that most works of visual art decrease in value over time rather than the opposite.

### *RRR as an 'author's right'*

9. There is another different justificatory argument that shies away from notions of fairness or unjust enrichment in relation to particular transactions (although these may still linger in the background). Rather, it is concerned with notions of parity or fairness as between groups of creators and looks at the position of the visual artist *qua* other categories of author, and the way in which authors' rights should be formulated with respect to this particular kind of creative production. It proceeds on the basis that the visual artist, by reason of the peculiar nature of her work, is disadvantaged in the exploitation of her authors' rights in comparison with other categories of author. Thus, the reproduction right may not be as of great value as in the case of a writer or composer (although this may not always be true<sup>39</sup>), while the artist also lacks the same opportunities of exploitation through such forms of public communication as performance and broadcasting. Her main source of income derives from her sale of the initial work as an artefact in its own right, and, after the first sale, her scope for receiving continuing income from the licensing of her reproduction and public communication rights is usually more restricted than for her literary and musical colleagues. The grant of a RRR can therefore be seen as a way of redressing the imbalance, and the question of whether the resale occurs at a profit becomes irrelevant, as the artist is receiving a 'royalty' on the resale of her work in the

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<sup>39</sup> In this regard, in the UK it appears that the right to make engravings was of great value to painters and other artists who did not receive copyright protection for their works until as late as 1862 under the *Fine Arts Copyright Act* of that year. But more than 120 years earlier, they had been given a right to make engravings of their works and this had proved particularly profitable for painters and engravers such as Hogarth: see the *Engravers' Copyright Acts 1735 and 1766*, 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)

same way as the writer receives a royalty on the sale of a further copy of her work. The purpose of the RRR, then, is to make more effective the artist's exploitation of her work *as a work*, and to redress the imbalance that otherwise exists.<sup>40</sup> This 'exploitation' approach is now to be found in the greater number of national laws on RRR, which usually treat this right as part of the author's general copyright, rather than as something separate. This approach is reflected in recital 3 of the EU Resale Right Directive:

*The resale right is intended to ensure that authors of graphic and plastic works of art share in the economic success of their original works of art. It helps to redress the balance between the economic situation of authors of graphic and plastic works of art and that of other creators who benefit from successive exploitations of their works.*<sup>41</sup>

10. Viewed in this way, the RRR can be seen as one of the exclusive economic rights to be accorded to artists, no different in kind from the rights of reproduction, public performance, and so on, albeit one that is specially tailored to meet the peculiar working circumstances of visual artistic practice and production (an analogy here might be drawn with rental rights which are often limited to particularly 'vulnerable' kinds of works such as computer programs and cinematographic works<sup>42</sup>). The fact that RRR is usually inalienable under national laws may appear to complicate this analysis – this is obviously not the case for other economic rights which are freely tradeable in the marketplace. But, rather than being an attribute more usually associated with moral rights, inalienability can be justified in this context as an essential measure of 'consumer protection' – protecting the artist against unscrupulous and/or undeserving purchasers and agents who would otherwise seek to get around the right through requiring its waiver in the initial contract of sale. Arguing for protection of visual artists on the ground of fairness and parity as between different categories of authors therefore feeds into the wider arguments based on

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<sup>40</sup> See Katzenberger, 367–368; Hauser, 106–107.

<sup>41</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.

<sup>42</sup> See, for example, WCT, Article 7(1)(i) and (ii).



justice to authors and the need for incentives that are advanced in favour of intellectual property rights generally.<sup>43</sup>

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

#### *Extension to original manuscripts*

13. The discussion above has focussed on works of visual art, as these are the subject of all national RRR laws. However, also included in some national laws are 'original manuscripts' of the works of writers and composers. As is well known, such artefacts may well command high prices on resale, particularly in the case of celebrated authors and composers. The arguments in favour of RRR, however, may not be the same as for works of visual artists as it will rarely 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 usually have had the full benefit of their reproduction and communication rights.. 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

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<sup>43</sup> See further the excellent discussion of these issues in M Spence, *Intellectual Property*, Clarendon Law Series, Oxford University Press, 2007, Ch 2.

intentions, infused as they may be by the fact of their intimate link to the well-known creator's person, the arguments for linking RRR here to authors' rights are much weaker.

### *Practical justifications for RRR*

14. How important actually is RRR to visual artists? As already noted, it is open to the objection that sums collected tend to be relatively small and concentrated among a narrow band of artists and their descendants. Moreover, the costs of administration can be high, at least in some jurisdictions, and there are obvious practical difficulties in identifying and tracking those sales that will attract RRR and then collecting and distributing these receipts back to the artists affected.<sup>44</sup> In some instances, it also appears that RRR laws have not been enforced and have lain dormant.<sup>45</sup>
15. None of the above objections, however, is peculiar to RRR, or rather they apply just as readily in the case of any of the other exclusive rights accorded to authors, whether these be rights of reproduction, public performance, or communication, or moral rights. Authors' rights generally provide no guarantee of return to the author or that these returns will be equitably shared. At most, they provide the promise of return, subject to the vagaries of public taste and need. Arguments based on fairness, the need to avoid free riding and to provide incentives tend to come together here to provide cumulative justifications for their protection, and are equally applicable in the case of RRR, which makes the case for seeking parity with other categories of creators, however approximate this may be, a more compelling one.
16. Arguments for parity of treatment do not only apply as between different categories of creators, but as between visual artists in different countries, or blocs of countries, as well. Thus, within the European Union, the move towards harmonization under the Directive was also based on the need to remove distortions within the internal market that arose from the fact that not all member states recognized RRR, with the consequence that art resales might move to those EU countries without such a right.<sup>46</sup> Harmonization within

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<sup>44</sup> This, of course, is a potential problem in the administration of other authors' rights as well.

<sup>45</sup> This appears to be the case in a number of countries with RRR on their statute books, including India, Turkey, the Russian Federation and other former Soviet republics. It also appears to have been the case in Italy until 2002.

<sup>46</sup> This does not in fact appear to have happened in the case of the UK, an important art resale market, since its initial adoption of RRR and up until full implementation in 2010: see further European Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social*

the EU has now shifted attention to the possibility that arts resales might move outside the EU to countries without RRR, such as the USA, China or even Switzerland. While there appears to have been some loss of market share for the EU post 2010 (chiefly by the UK which was the second largest global art market up to this time<sup>47</sup>), it is hard to identify RRR as being the main, or even a minor, factor here, given the limits that apply to RRR under the EC Directive as distinct from other costs and external factors, such as taxes, agents' fees and the like, to say nothing of the effect of the global financial crisis of 2008 and the emergence of a growing art market in a country the size of China. If there is such a shift from RRR countries to those without, this simply repeats on a broader scale the distortions that previously applied within the EU. More importantly, from the perspective of visual artists, wherever situated, the inequality of treatment becomes more apparent: European artists receive no RRR within the USA and China (now the two largest art resale markets in the world), while US and Chinese artists are unable to claim RRR within Europe. Furthermore, as noted above, RRR is scarcely the exclusive province of EU members, given that the number of countries with some form of RRR has increased to nearly half the membership of the Berne Union. This suggests that there is growing support for the concept as a matter of principle, and points, in turn, to the need for the development of uniform standards that can apply globally. In this regard, it has already been noted that, in recognition of the justice of this principle, the USA, China and Switzerland are presently considering adopting RRR.<sup>48</sup>

17. But even against the frequent objections of inadequacy of remuneration and difficulty of collection, there is growing evidence that RRR is of identifiable benefit to some artists in those countries where it is now well established. While the sums collected may still be relatively modest, they are not insignificant and their distribution is becoming more

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*Committee, Report on the Implementation and Effect of the Resale Right Directive (2001/84/EC)*, Brussels, 14.12.2011, COM(2011) 878 final, Chapter 5 (Conclusions). See also See further the studies done by Chanont Banterghansa & Kathryn Graddy, *The Impact of the Droit de Suite in the UK: An Empirical Analysis*, Centre for Economic Policy Research Discussion Paper No. DP7136, 5 (Jan. 2009), available at <http://ssrn.com/abstract=1345662> and by Katy Graddy, Noah Horowitz and Stefan Szymanski, *A study into the effect on the UK art market of the introduction of the artist's resale right*, Intellectual Property Institute, London, January 2008.

<sup>47</sup> See further the studies by C McAndrew, *The EU Directive on ARR and the British Art Market*, Study prepared for the British Art Market Federation by Arts Economics, pp 3-4; C McAndrew, *The British Art Market in 2014*, Study prepared for the British Art Market Federation by Arts Economics, 2014, pp 1-2.

<sup>48</sup> Information supplied to the author by CISAC. Note, however, that the progress of draft legislation in the USA now appears to have been delayed in Congress: see J Halperin, 'Democrats lobby for US artists' economic right with two bills, But it remains unclear what chance either proposal has of passing into law while Republicans control both houses of Congress', *The Art Newspaper*, 16 April 2015.

widely dispersed among living artists. Thus, in France, €12,443,901 was collected for the year 2013, from 24,293 relevant transactions affecting 1,938 artists of whom 45% were still living.<sup>49</sup> In the UK, in 2013 £8.4 million was distributed to over 1,400 artists and artists' estates.<sup>50</sup> This was the second year of full implementation of the EC Directive in that country and represented almost a doubling from the previous year (£4.7 million).<sup>51</sup> Italy, another country where RRR has only recently been fully introduced, reported gross collections of €6,088,771 in 2013, with this representing the lion's share of royalties collected for plastic, graphic and photographic works generally.<sup>52</sup> In some instances, where RRR has only been recently established, such as Australia, it is still too early to estimate the real benefit of the scheme for artists.<sup>53</sup> And while it seems true, as in the case of France, that the greater share of royalties is distributed to the descendants of deceased artists, significant numbers of living artists benefit even if only to a small degree from RRR. In this respect, it is easy to be dismissive of the smallness of some of these individual payments,<sup>54</sup> but it needs to be remembered that artists generally are poorly remunerated overall and RRR can provide a useful supplement to pay for materials, rent, and the like. This is particularly so in remote indigenous communities, such as in Australia, where other sources of income are very limited. Anecdotal evidence from artists themselves also indicates that the fact of payment, however small, represents recognition of their continuing link to their work as well as providing a measure of transparency as to its destination and ownership.<sup>55</sup> Furthermore, the relative significance

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<sup>49</sup> Figures supplied to the author by AGADP.

<sup>50</sup> Design and Artists Copyright Society (DACS), *Annual Review 2013*, pp 10 and 13.

<sup>51</sup> Design and Artists Copyright Society (DACS), *Annual Review 2012*, p 9. In 2011, prior to full implementation, the amount was £2.7 million going to 750 artists: Design and Artists Copyright Society (DACS), *Annual Review 2011*, p 14,

<sup>52</sup> See Società Italiana degli Autori ed Editori, *Report on Transparency – 2013*, p 30, available at [http://www.siae.it/documents/Siae\\_Documentazione\\_RelazioneTrasparenza2013\\_en.pdf?647289](http://www.siae.it/documents/Siae_Documentazione_RelazioneTrasparenza2013_en.pdf?647289)

<sup>53</sup> In Australia, the RRR scheme has only been in operation since 10 June 2010 and has been restricted to resales of works of works acquired after the commencement of the scheme. Nonetheless, within the 35 months between 10 June 2010 and 15 May 2013, there have been 6,801 eligible resales that have generated over \$A1.5 million in royalties for 650 artists: Australian Government, Department of Regional Australia, Local Government, Arts and Sport, 2013 Review of the Resale Royalty Scheme Discussion Paper and Terms of Reference, June 2013, p 3 (the first three years of the scheme are now under a departmental review which was still in train at the time of writing).

<sup>54</sup> See, for example, the dismissive comment of one critic, as 'Much ado about nothing': V Ginsbergh, 'The Economic Consequences of Droit de Suite in the European Union', European Center for Advanced Research in Economics and Statistics, Université Libre de Bruxelles and Center for Operations Research and Econometrics, Louvain-la-Neuve, March 2006, p 10.

<sup>55</sup> See the Artists' Testimonials in CISAC, EVA and GESAC, *What is the Artists Resale Right*, 2014, pp 6-7 and also at [www.resale-right.org](http://www.resale-right.org) Further testimonials from living artists, though not all in favour, are to be found in submissions to the current Australian review of RRR at <http://arts.gov.au/visual-arts/resale-royalty-scheme/review>

of RRR payments overall in comparison with payments received for the exercise of other authors' rights, such as reproduction and communication should not be overlooked: in the case of Italy, referred to above, RRR receipts in 2013 were 10 times those for paper reproduction rights,<sup>56</sup> while in the UK the RRR sums collected in 2013 were significantly more than the sums collected for other uses.<sup>57</sup>

18. A further 'practical' objection to RRR that has been made concerns its effect on the general art resale market, that is, its introduction in one country will lead to an exodus of art resales to other countries where there is no RRR.<sup>58</sup> While it is certainly true that the Chinese and US shares of the global art market have increased significantly in recent years,<sup>59</sup> introduction of RRR throughout the European Union does not appear to have led to a flight out of the EU. In this regard, the UK art market, which is the largest within the EU, has not been materially affected by the introduction of RRR in that country; nor does there appear to have been a shift to Switzerland, which presently has no RRR.<sup>60</sup> The reasons for this may be: (a) the RRR royalty chargeable in the EU is quite small compared with other costs involved with resales, such as gallery commissions, insurance, and the like, and (b) the growth in markets such as China has little, if anything to do with the imposition of RRR in other countries, but a great deal to do with increased prosperity and the emergence of a wealthier, art buying middle and upper class.

19. Finally, objections as to the administrative costs and burdens in collecting and distributing royalties can be met by collective administration, which can keep these costs down and provide for relatively speedy procedures. In this regard, there is now considerable experience to be found in countries with long-established RRR systems, such as France, Germany and now the UK, which can be drawn upon. Costs of

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<sup>56</sup> See Societa Italiana degli Autore ed Editori, *Report on Transparency – 2013*, p 30, available at [http://www.siae.it/documents/Siae\\_Documentazione\\_RelazioneDiTrasparenza2013\\_en.pdf?647289](http://www.siae.it/documents/Siae_Documentazione_RelazioneDiTrasparenza2013_en.pdf?647289)

<sup>57</sup> The figures were as follows: £8.4 million for RRR, £4.2 million for 'Payback', and £1.5 million for copyright licensing: Design and Artists Copyright Society (DACS), *Annual Review 2013*, pp 9 and 10.

<sup>58</sup> This was the prediction made by one writer in 2006: V Ginsbergh, 'The Economic Consequences of Droit de Suite in the European Union', European Center for Advanced Research in Economics and Statistics, Université Libre de Bruxelles and Center for Operations Research and Econometrics, Louvain-la-Neuve, March 2006, p 9-10.

<sup>59</sup> European Commission, *Report from the Commission to the European Parliament, The Council and the European Economic and Social Committee, Report on the Implementation and Effect of the Resale Right Directive (2001/84/EC)*, December 2011, p 4 (in 2010, China had 23%, up from 5% in 2006, and the US share was 34%).

<sup>60</sup> At least, so far as the initial introduction of RRR was concerned: see European Commission, *Report from the Commission to the European Parliament, The Council and the European Economic and Social Committee, Report on the Implementation and Effect of the Resale Right Directive (2001/84/EC)*, December 2011. Pp 10-11.

administration by galleries, auction houses and other intermediaries can also be kept down.<sup>61</sup> As will be seen below, there are various ways in which collection and distribution procedures can be streamlined, for example, through the setting of minimum resale prices and caps on the total amount royalty payable.

### *The argument for RRR underlying the present study*

20. For the purposes of the present study, the ‘parity rationale’ for recognizing RRR is the primary one that underpins the proposals that are advanced herein in support of a new international treaty on RRR. It will be argued that this is the most logical and consistent approach that should be adopted. This is for the following reasons:

1. RRR 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 RRR into the Berne Convention for the Protection of Literary and Artistic Works, where this has been the case since the adoption of Article *14bis* (now Article *14ter*) as part of the Brussels Revision. This point is developed more fully in the next section.
2. 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 RRR 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>62</sup>
3. The fact that RRR might relate to the first physical embodiment of the artistic work and its subsequent disposal rather than to the making of copies or the communication of the work – that is, subsequent utilisations in which the first physical embodiment becomes irrelevant - does not present a barrier to this being used as a means of aligning the rights of visual artists with those of other categories of authors. In this regard, rights of distribution and rental of copies, not recognized under Berne, are equally seen as being authors’ rights that have now received protection under later

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<sup>61</sup> *Ibid*, p 8.

<sup>62</sup> See further Ricketson and Ginsburg, [11.15] ff.

international agreements.<sup>63</sup> This has been on the same basis as argued for here in favour of RRR, namely to correct the imbalance that might otherwise arise because of perceived limitations in the scope of the reproduction right.

4. The fact that RRR, if recognized, may only benefit some visual artists, rather than all, is neither here nor there. This is the case for all categories of literary and artistic work: the grant of exclusive rights provides no guarantee of reward or continuing income, but simply the prospect of receiving some share of the proceeds of the exploitation of the work if it subsequently receives public recognition and demand. In this regard, the RRR simply reflects the particular character of visual works of art and their form of exploitation, but it does not differ in kind from the reproduction right which will only be of benefit to the struggling author in the event that his or her manuscript is chosen for publication out of the thousands that cross the desk of the publisher daily.
5. There is a further argument that RRR might be of specific benefit to indigenous artists whose works may have both a national and international market. This was certainly a factor in the adoption of RR legislation in Australia in 2009,<sup>64</sup> and similar arguments have been advanced in a number of developing countries which have recently passed RRR laws. In this regard, it will be remembered that provision for RRR was made by WIPO and UNESCO in the Tunis Model Law on Copyright Law for Developing Countries that was adopted nearly 40 years ago.<sup>65</sup>
6. Given the gradual adoption of RRR regimes by nearly half the membership of the Berne Union, there is now a clear imbalance in protection for visual artists globally as between RRR and non-RRR countries. At the moment, this bears particularly harshly upon US and Chinese artists, who gain nothing from the resales of their

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<sup>63</sup> WCT, Articles 6 and 7.

<sup>64</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. [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId\\_Phrase%3Ar4010%20Title%3A%22second%20reading%22%20Content%3A%22I%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20\(Dataset%3Ahansardr%20%7C%20Dataset%3Ahansards\);rec=1](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3Ar4010%20Title%3A%22second%20reading%22%20Content%3A%22I%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20(Dataset%3Ahansardr%20%7C%20Dataset%3Ahansards);rec=1). A similar view is to be found in a recent Canadian report: Canadian Artists Representation and Le Regroupement des Artistes en Arts Visuels du Quebec, *Recommendations for an Artist Resale Right in Canada*, April 2013, Appendix C.

<sup>65</sup> WIPO and UNESCO, *Tunis Model Law on Copyright Law for Developing Countries*, Geneva, 1976, Section 4bis.



works in RRR countries; likewise, there is a shortfall for artists from RRR countries in the growing Chinese and US resale art markets. Yet their art is experienced and enjoyed universally without regard to borders. In the age of digital technologies and networked communications, this point hardly needs repetition.

7. RRR is readily susceptible to treatment under a separate international agreement consistently with the requirements of Article 19 of the Berne Convention, which provides for the making of ‘special agreements’ among Berne Union members. This has already occurred in the area of public communication and other rights under the WIPO Copyright Treaty 1996 (‘WCT’) and in relation to limitations and exceptions in favour of visually impaired persons under the Marrakesh Treaty 2013.
8. Apart from the additional revenue stream that RRR 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.

## **The current international legal protection of RRR under the Berne Convention and the implications of this**

21. In considering any proposal for the adoption of an international treaty on RRR, it is necessary to begin with a consideration of the present international framework for its protection that exists under the Berne Convention. It will be seen that this is both flexible and optional, but also provides certain boundaries that will need to be observed in the making of any new treaty. The history of the recognition of RRR within the Berne Convention is also instructive, as this occurred over a period of about 30 years and shows an evolution in thinking about its nature. This development is integrally linked to the slow adoption of national RRR laws during the same period.
22. Initially viewed as a right separate from authors’ rights, by the time of the Brussels Revision Conference in 1948 RRR had come to be seen as an integral part of those rights. At the earlier revision conference in Rome in 1928, however, it was still a very novel conception and alien to most Berne members. At this time, only two other Berne nations—Belgium and Czechoslovakia—had followed the example of France in



legislating for RRR. However, *ALAI* had long taken an interest in the question, and this interest intensified in the mid-1920s with a series of reports and resolutions urging the adoption of such protection in national laws.<sup>66</sup> The matter was also taken up by the International Institute for Intellectual Cooperation (the ‘IIC’), an advisory body of the League of Nations, which advocated action on both a national and international level.<sup>67</sup> At the Rome Conference in 1928, the French Government proposed the following ‘*voeu*’ which was based directly on the wording of a resolution passed by *ALAI* at its Paris Congress in 1925:

*‘It is desirable that the inalienable droit de suite, established in France by the law of 20 May 1920 and in Belgium by that of 25 June 1921, to the profit of artists, in their original works which are publicly sold, should be the object of similar legislative dispositions in other countries, on condition of reciprocity, in each of them, between their nationals and those of countries which have already adopted this measure.’*<sup>68</sup>

23. This proposal, modestly framed with its reference to the need for the proposed right to be reciprocal, was nonetheless pushing the boundaries so far as the majority of Berne Union members were concerned. While it was supported, not unexpectedly, by the Belgian and Czech delegates,<sup>69</sup> as well as by the IIC,<sup>70</sup> there were doubts were expressed by other delegates, such as the British and Norwegians, as to the connection between this and copyright protection in general.<sup>71</sup> A modified text of the resolution was finally adopted as follows, but a number of delegations, including those of the UK, Hungary, the Netherlands, Norway and Switzerland, abstained from voting:

*‘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*

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<sup>66</sup> See Duchemin, 241–245 for an account of *ALAI*’s involvement in the study and promotion of *droit de suite*. See also the resolutions of *ALAI* passed at Paris 1912, Paris 1925 and Warsaw 1936: *Actes 1928*, 48.

<sup>67</sup> Institut International de Cooperation Intellectuelle, *La Protection internationale du droit d’auteur* (1928): includes the report of the IIC sub-committee on *droit de suite*. For a commentary on the report, see Duchemin, pp 245–249.

<sup>68</sup> *Actes de la Conférence réunie à Rome du 7 mai au 2 juin 1928*, International Office, Berne (1929) (‘*Actes 1928*’), p 103.

<sup>69</sup> *Actes 1928*, p 283.

<sup>70</sup> *Actes 1928*, p 283 (present at the Conference as an observer).

<sup>71</sup> *Actes 1928*, p 283.

*successive public sales of their original works should take into account the possibility of considering such provisions.*<sup>72</sup>

24. Following the Rome Conference, both *ALAI* and the *IIC* continued to study the implementation of RRR on both a national and international scale,<sup>73</sup> and the matter was also considered by a number of other international bodies, including the prestigious International Institute of Rome for the Unification of Private Law.<sup>74</sup> More particularly, the Belgian Government and International Office made it the subject of a specific proposal for a new right within the Berne Convention, which they included in their preliminary programme for the Brussels Revision in 1934:

*'As far as original works of art and the original manuscripts of writers and composers are concerned, the protection accorded by the present Convention includes equally for the author of the work and his heirs an inalienable right to an interest in any public sale of which the said work is the object after the first sale thereof has been made by the author.*

*The method and amount of this collection are to be determined by national legislation.*<sup>75</sup>

25. Not unexpectedly, this expanded proposal for protection received a wide range of critical responses from member states, some of which were hostile to the notion of an obligatory right generally,<sup>76</sup> while others objected to particular aspects of the programme proposal, such as its inclusion of manuscripts and its apparent inclusion of architectural works and works of applied art, its limitation to heirs, and the failure to link its duration to that of economic rights generally.<sup>77</sup> Following the postponement of the planned Brussels Revision Conference in 1936, proposals for recognition of RRR became part of an emerging agenda for protection of neighbouring rights that was being considered by a committee of experts convened by the International Institute for the Unification of Private Law in Rome in April 1935.<sup>78</sup> This committee proposed that certain matters which were

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<sup>72</sup> *Actes 1928*, p 283.

<sup>73</sup> Duchemin, pp 243ff.

<sup>74</sup> Duchemin, pp 252ff.

<sup>75</sup> Duchemin, p 301 (for text of the proposition, to be article 14*bis*) and pp 250ff (for further background).

<sup>76</sup> See [1936] *DA* 93.

<sup>77</sup> [1936] *DA* 93. See also *Documents* 1948, 362–363.

<sup>78</sup> Duchemin, pp 252ff.

not generally regarded as part of copyright but were nevertheless closely related or ‘neighbouring’ should be dealt with in a convention or arrangement annexed to the Berne Convention. This would be an instrument to which Berne member countries could accede to separately if they wished, but without any obligation to do so. These related or ‘neighbouring’ matters included the rights of performing artists and rights in broadcasts and sound recordings, and the committee recommended that RRR should be added to this list.<sup>79</sup> This proposal was duly elaborated upon in a draft convention that was drawn up by the Director of the Berne International Office, Fritz Ostertag,<sup>80</sup> and was considered by a further committee of experts that met at Samaden in July 1939.<sup>81</sup> RRR was now added as a seventh category of neighbouring rights to the six that had been included in an original draft. Under the regime proposed here,<sup>82</sup> each contracting state undertook to accord the authors of ‘original works of art in the field of painting, sculpture, engraving, and design, a *droit de suite* in the price of resales of their works in accordance with the provisions of the present convention’.<sup>83</sup> This was to be a personal and inalienable right of the author which would belong to his heirs after his death.<sup>84</sup> Certain matters, however, were left to national legislation to determine, including the duration of protection, the method of collection and the amount, and the means of safeguarding the new right.<sup>85</sup> Finally, the proposed convention was to be open to signature only by present and future Berne Union members.<sup>86</sup>

26. With the advent of World War II, the Samaden project lapsed, but elements of it were to be drawn upon in the post-war negotiations that led ultimately to the creation of a separate Convention on neighbouring rights in 1961 under the joint auspices of BIRPI (United International Bureaux for the Protection of Intellectual Property), the ILO International Labour Organisation) and UNESCO (the ‘Rome Convention’). As for the proposals concerning RRR, these were quietly abandoned, and in its renewed programme for the 1948 Conference the Belgian Government returned to its original proposal of 1934

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<sup>79</sup> Duchemin, p 255.

<sup>80</sup> Duchemin, p 255; see further [1939] *DA* 62 and [1940] *DA* 109, 121 and 133.

<sup>81</sup> Duchemin, 255ff.

<sup>82</sup> For the text of the draft relating to *droit de suite*, see Duchemin, 299–301 (the ‘draft text’); also in [1940] *DA* 138 and, in English translation, in Pierredon-Fawcett, pp 198-199.

<sup>83</sup> Draft text, art 1.

<sup>84</sup> *Ibid*, art 5.

<sup>85</sup> *Ibid*, arts 6 and 7.

<sup>86</sup> *Ibid*, art 9.

for the addition of a new article 14*bis* to the Berne Convention.<sup>87</sup> In doing so, its clear purpose was to gain acceptance for the RRR as part of authors' rights, rather than as something separate, that is, as a neighbouring right as proposed in the Samaden draft. Nevertheless, since the Rome Conference adoption of RRR at the national level had been minimal - only two other Berne members, Italy and Poland, had legislated for this - and there were still considerable reservations about the proposal on the part of other members.<sup>88</sup> An Austrian amendment (later withdrawn) proposed that those countries of the Union which had adopted RRR in their legislation should not be obliged to grant to authors of another member state more extensive protection than that granted in their country of origin.<sup>89</sup> Norway and Finland, however, did not see the need for such a right for their own artists,<sup>90</sup> and the UK, without actively opposing the concept, argued that the time was not yet ripe for its adoption into UK law.<sup>91</sup> A more fundamental objection came from the Dutch delegation which did not see the proposed right as belonging to the realm of copyright at all and was therefore opposed to it being brought within the framework of the Berne Convention.<sup>92</sup> For these reasons, a further paragraph was added to the Belgian proposal to the effect that the RRR should only be claimed in those countries whose legislation provided for it and that this should be on the basis of reciprocity.<sup>93</sup> No objection was raised to this, and the final provision adopted by the Conference as article 14*bis* read as follows:

*(1) The author, or after his death, the persons or institutions authorized by national legislation, shall, in respect of original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first disposal of the work by the author.*

*(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*

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<sup>87</sup> *Documents de la Conférence réunie à Bruxelles du 5 au 26 juin 1948*, International Office, Berne (1951) ('*Documents 1948*'), p 364, and see the background commentary at pp 362-364 and observations by member states at pp 365-367.

<sup>88</sup> *Documents 1948*, p 363.

<sup>89</sup> *Documents 1948*, pp 364-365.

<sup>90</sup> *Documents 1948*, pp 365 and 366.

<sup>91</sup> *Documents 1948*, pp 367.

<sup>92</sup> *Documents 1948*, p 366.

<sup>93</sup> *Documents 1948*, p 368.

*belongs so permits, and to the degree permitted by the country where this protection is claimed.*

*(3) The procedure for collection and the amounts shall be a matter for determination by national legislation.'*

27. Notwithstanding the fact that RRR was still only accepted in a small minority of Berne members (and was subject to the requirement of reciprocity under the text just adopted), there is a certain grandiloquence in the description of what had been achieved that is evident in the general report of Marcel Plaisant, the distinguished international lawyer, to the closing session of the Brussels Conference:

*The droit de suite is a conditional legacy left by the Rome Conference, which had subscribed to the principle advocated so eloquently by Jules Destrée [the Belgian delegate at the Rome Revision Conference] in the form of Rome Resolution III.*

*This illustrates the value of the resolutions of our Conferences: they are in the nature of incubators for ideas that are liable to mature under the beneficial influence of this first stage of exposition and consideration.<sup>94</sup>*

28. But if the new 'idea' was now embedded in the Berne Convention, it was only optional for Union members and it is clear that, at this stage, there was limited support for it in the great bulk of Union members. Indeed, no proposals for change to the provision were made at the time of the Stockholm Revision, either in the programme or in the proposals submitted by member nations. The text therefore remains the same in the Stockholm and Paris Acts, except for the following minor changes of a drafting kind: (1) the article is now renumbered as article 14<sup>ter</sup>, and (2) the word 'transfer' was substituted for 'disposal' in paragraph (1) and 'extent' for 'degree' in paragraph (2).

### *Interpretation of article 14<sup>ter</sup>*

29. An important step in developing further treaty proposals with respect to RRR is to identify the present content and parameters of the right provided for under Article 14<sup>ter</sup>.<sup>95</sup>

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<sup>94</sup> *Documents 1948*, p 104.

<sup>95</sup> The following analysis draws upon, and develops, material contained in Ricketson and Ginsburg, [11.62] ff.

When this is done, it becomes easier to determine what features should be carried over into a separate treaty proposal: at the very least, such an instrument should not run counter of the requirements of Article 19 of Berne, if it is to qualify as a special agreement under that Article.

30. The essential elements of the concept of RRR or *droit de suite* (although it is not referred to by either of these names) are outlined in paragraph (1) of Article 14*ter*. Paragraph (2) then makes it clear that there is no obligation on member states to accord this protection, and that it may only be claimed by nationals of other Union countries on the basis of reciprocal protection being available in their own country. Finally, paragraph (3) leaves it to national legislation to determine how the collection of the RRR is to be done, as well as the amount of it. Again, to quote Marcel Plaisant:

*The careful drafting of Article 14bis, which asserts, in favour of the author or the persons or institutions that succeed him, an inalienable right to an interest in any sale of the work subsequent to its first disposal, thus strikes us as having rather the function of a magnet: the future will show whether in fact it has exerted its attractive force on national legislation.*<sup>96</sup>

#### *The right to be accorded*

31. *An inalienable right:* Under paragraph (1), this is to be an ‘inalienable’ right, which immediately distinguishes it from the other pecuniary rights of the author protected under the Convention which may be freely assigned and transmitted. In this respect, the RRR is akin to the moral rights of attribution and integrity of authorship under article 6*bis*, but any further analogy is misleading. The RRR is a right that entitles the author to an ‘interest’ in subsequent sales of her work, and it is clear from the preparatory work for the Brussels Revision Conference that this was considered to be a ‘pecuniary interest’.<sup>97</sup> In other words, it is an entitlement to remuneration, albeit one that may not arise until some point in the future (or not at all). Thus, the first transfer of the work is excluded, as the artist will usually (but not always) be the person making this transfer (and receiving payment for it). Subsequent sales of the work will be by the transferee, and it is these transactions that attract application of the right. In this regard, it should be noted that,

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<sup>96</sup> *Documents 1948*, p 104.

<sup>97</sup> *Ibid*, pp 362ff (Conference programme).

unlike some national laws<sup>98</sup> and the original proposal of the Belgian Government,<sup>99</sup> paragraph (1) makes no distinction between public and private sales – all sales are potentially covered.

32. *Distinction between ‘transfer’ and ‘sale’*: A distinction is also to be drawn between the terms ‘transfer’ (previously referred to as ‘disposal’ in the Brussels Act 1948) which is the act of the author (artist) and ‘sales’ subsequent to this transfer. ‘Transfer’ implies a passing of ownership by the artist, but this need not necessarily be for money, for example, it could be a gift or a testamentary disposition by the artist which passes ownership of the work on the artist’s death. Each of these acts will satisfy the first condition for the RRR to apply under paragraph (1). ‘Sale’, by contrast, indicates that ownership has passed in return for payment of a monetary consideration. Accordingly, the RRR will not be applicable where the subsequent transfer is itself a gift or bequest, for example, to a public gallery.

33. *Basis on which RRR is to be accorded*: As to how this is to be done — whether on all sales or only on those which are made at an increased price—the words ‘interest in any sale of the work subsequent to the first transfer of the work by the author’ indicate that this is to be an entitlement to a share in the proceeds of *all* subsequent sales, not just those that are made at a profit. On the other hand, this may be too strict an interpretation of the expression ‘any sale’, given that, of the five Berne members that had RRR at the time of the Brussels Revision, three based this on sales at an increase in value,<sup>100</sup> and it cannot be assumed that their ready acceptance of the Brussels text was on the basis that this required changes to their existing laws. As a practical matter, of course, assessing RRR on this basis led to practical difficulties in determining how such a profit is to be calculated.

34. *Works covered*: In this regard, paragraph (1) casts its net widely so as to cover not only ‘original works of art’ but also ‘original manuscripts of writers and composers’. The adjective ‘original’ is interesting in this context, in that it could refer to the criterion for protection of the work under the Convention, that is, ‘originality’ in the sense of intellectual creation. Alternatively, and far more likely, it could be a reference to the first

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<sup>98</sup> For example, France, Code of Intellectual Property, Article L122-8 (conferring right to royalty).

<sup>99</sup> *Documents* 1948, pp 364.

<sup>100</sup> Czechoslovakia, Poland and Italy.

embodiment of the work. The latter interpretation seems more apt in the case of works of art and manuscripts where it is the initial embodiment of the work that commands value in the marketplace so far as subsequent sales are concerned. The terms ‘original works of art’ and ‘original manuscripts of writers and compositions’ are otherwise at large and there are, in fact, few national laws that accord protection in such wide terms.<sup>101</sup> Such limitations, however, are permissible under the reciprocity provision that is contained in paragraph (2) (see further below).

35. *RRR after the death of the author*: Paragraph (1) provides that the ‘inalienable right’ accorded under that paragraph passes after the death of the author to ‘the persons or institutions authorized by national legislation’. These may very well be the persons or bodies that would be entitled to succeed to the other rights of the author in the ordinary course of events (for example, the ‘heirs’ under a testamentary disposition), but the provision leaves it open to national legislation to determine otherwise. For instance, it would be possible to provide that the post-mortem RRR should be exercised by some public agency or official, such as a cultural or heritage body or public guardian, or even for the proceeds to be distributed to authors generally. This is a significant provision that differentiates the RRR from other authors’ rights which can generally be freely disposed of by the author.

36. *Duration of RRR*: Paragraph (1) contains no reference to the duration of the right to be granted, but the post-mortem position discussed in the preceding paragraph indicates that it is to survive the author. However, if the RRR is to be regarded as part of the author’s economic rights, its duration would then fall to be regulated under articles 7 and 7<sup>bis</sup>, with a minimum term of the author’s life plus 50 years. This is generally the case under existing national RRR laws (see further below).

#### *Application of reciprocity*

37. This is provided for under paragraph (2), and is one of the few exceptions allowed under the Berne Convention to the general principle of national treatment and rights specially provided for under Article 5(1).<sup>102</sup> The adoption of reciprocity in the case of RRR also

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<sup>101</sup> See, for example, the Brazilian Law 9610 of 19 February 1998, Article 38.

<sup>102</sup> The others arise under Article 2(7) with respect to works of applied art and Article 7(8) with respect to the comparison of terms.



underlines its conditional adoption within the framework of the Berne Convention at the time of the Brussels Revision Conference: while it might have been accepted that this was now an ‘authors’ right’, its recognition was not mandatory and, most likely, it would not have entered the Convention had its proponents so insisted.

38. However, the way in which the requirement of reciprocity is formulated under paragraph (2) is curious, and gives rise to some difficulties of interpretation. Thus, a claim for protection of RRR under the Convention may only be made: (a) ‘if the legislation in the country to which the author belongs so permits’, and (b) then only ‘to the extent permitted by the country where this protection is claimed’.
39. The starting point here is the fairly obvious one that there must be protection of RRR in the country of the author who is now claiming protection in another country of the Union. Does this mean that the protection offered by the author’s country must meet all the elements referred to in paragraph (1), namely that it is an inalienable right to an interest in post-transfer sales of original works of art and manuscripts, and nothing less? If this were so, there would be very few countries whose RRR systems would satisfy all these requirements, and would mean that other Union countries could simply refuse protection, even if the claim was in respect of a RRR that would otherwise be accorded under their own law. On this approach, an author from country A which gives RRR to all works of art would be unable to claim this protection in country B which also accords RRR to all works of art, if country A did not also extend its RRR to original manuscripts (as apparently required under paragraph (1)). In fact, as will be seen, the latter form of protection is to be found in relatively few countries with RRR systems, so it would be odd if paragraph (2) permitted other countries to refuse protection for something they would otherwise protect, particularly where they themselves did not give protection for all the matters covered by paragraph (1) (in this instance, original manuscripts). Reciprocity usually means an equivalence between the claims for protection that may be made in both the country of origin and the country where protection is claimed, and it would have been preferable if paragraph (2) had been framed along those lines, for example, that the author claiming protection should not be accorded greater protection than that accorded him in his country of origin. This, in fact, was the wording of the Austrian amendment which

was before the Drafting Committee at the Brussels Conference.<sup>103</sup> The present wording, however, was preferred by the Committee,<sup>104</sup> with no clear indication as to why this was so.

40. Some writers, such as Nordemann, argue that paragraph (2) is to be interpreted as meaning that there must be a ‘substantial equivalence’ between the laws of the two countries in the sense that the matters protected in both countries should be broadly the same, even if there are differences in the details of this protection.<sup>105</sup> This interpretation would clearly be correct if paragraph (2) had adopted one of the more usual formulas for material reciprocity suggested above. On the present wording, however, this result can only be reached in a roundabout way. As noted above, if all the protection provided for by paragraph (1) had to be accorded by the author’s country before he or she could make a claim in another RRR country, paragraph (2) would become largely ineffective, as very few Union members protect RRR in this extended fashion. Alternatively, these words could be interpreted as meaning that the particular protection claimed in a country of the Union (being a part of the general protection provided for under paragraph (1)) must also be provided by the legislation of the country to which the author belongs—in such a case, the country in which protection is claimed must accord this ‘to the extent permitted’ by its laws. In other words, there must be substantial equivalence on this matter between the laws of the two countries. This seems the more reasonable interpretation, with the result that an author from a country whose law does not accord the RRR in respect of a particular category of work will be unable to claim protection for this in another country which does. The latter, of course, is quite free, as a matter of international comity, to accord such protection in any event.<sup>106</sup>

41. Nonetheless, the words ‘to the extent permitted’ by the laws of the country where protection is claimed may qualify the issue of substantial equivalence. While substantial equivalence may be easy to establish where the subject of the claim is the same in both countries, there may be significant differences on such matters as the basis on which the RRR is assessed or the persons entitled to the right after the death of the author. For example, if the author’s country provides for RRR on all subsequent sales, whether

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<sup>103</sup> *Documents* 1948, p 364.

<sup>104</sup> *Documents* 1948, pp 367–368.

<sup>105</sup> See Nordemann, pp 339–340 and Ulmer, 26–27.

<sup>106</sup> See also Ulmer, p 27.

private or public, she will only be to claim this for public sales in country B if that is all that is covered under that country's law. Likewise, if her country assesses RRR on all subsequent sales but country B allows it only for those made at a profit, then that will be all she is able to claim in country B. The words 'to the extent permitted' indeed indicate that the authors in these cases will not receive equivalent protection to that in their own country, but will only receive what is, in effect, national treatment in the country where protection is claimed, along with that given to local authors. Other instances where this might arise would be where the RRR accorded in the country where protection is claimed is exercised by a public institution after the author's death, whereas it is transmissible to the heirs in the author's own country or vice versa: in each case, the right will only be exercisable by the person or body so authorized under the law of the protecting country. The application of this approach would be at its most stringent where the protecting country's RRR regime did not include one of the 'essential' elements of RRR contained in paragraph (1), such as provision for the inalienability of the right. So long as this was the case under the law of the author's country, she should still be entitled to receive whatever protection for RRR is provided for in country B, even if this is not inalienable.

42. *A further possible interpretation of 'to the extent permitted'*: If the words 'to the extent permitted' in paragraph (2) are to be understood as requiring national treatment for authors claiming under the Convention once it is established that there is protection for RRR in respect of that category of work in their own country, there is another possible interpretation of these words that would give them another and quite different application. According to this view,<sup>107</sup> even if the country to which the author belongs<sup>108</sup> accords RRR protection within the meaning of paragraph (1), the words 'to the extent permitted by the country where this protection is claimed' would permit this second country to restrict this protection further in whichever way it wishes. In other words, the second country could accord a different or more restricted level of protection to a foreign claimant from a RRR country to that which it accords to its nationals, or even deny it altogether.<sup>109</sup>

43. This interpretation, if correct, would lead to the anomalous situation that article 14<sup>ter</sup> would then represent no advance on the pre-Brussels position, where states always had

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<sup>107</sup> See Baum, pp 67ff and the other German authors referred to by Nordemann in [1977] *Copyright* 337 at 339.

<sup>108</sup> This must mean the same as the country of origin of the work: see art 5(3).

<sup>109</sup> See further [1977] *Copyright* 337 at 339.

the discretion whether or not to recognise RRR in the case of foreigners and to regulate the extent to which this protection was to be accorded to this group as distinct from their own nationals. Such a provision would be superfluous, and there is no reason to suppose that an international conference of the authority and weight of that which met at Brussels in 1948 would have undertaken such a pointless exercise.<sup>110</sup> More generally, it would also be an unusual form of drafting to provide for protection of RRR on the basis of reciprocity, and then to stipulate that the country where protection was claimed might impose whatever other conditions it wished on the foreign claimant. While the records of the Brussels Conference are not very helpful on this point, there is no indication in them that the delegates intended anything other than the application of material reciprocity between member countries as regards the RRR. Accordingly, while the wording of article 14<sup>ter</sup>(2) is open to this interpretation, the above considerations indicate that the cumulative conditions listed in paragraph (2) are to be interpreted as making material reciprocity the sole condition for claiming protection of the RRR.<sup>111</sup> This means that the words ‘to the extent permitted by the country where this protection is claimed’ do not confer on countries a separate discretion whether or not to protect authors from RRR countries, but are to be read simply as a reference to the nature and extent of the national treatment which is to be accorded to foreigners and nationals alike. In other words, foreign authors from a country where RRR is recognized are to be protected to the same extent as national authors in the country where protection is claimed under the principle of national treatment. In such a case, the country in which protection is claimed may not impose any further requirement in relation to the author from the other country.<sup>112</sup>

### *Collection and amounts due*

44. At one level, Article 14<sup>ter</sup>(3) is superfluous in view of the words ‘to the extent permitted by the country where this protection is claimed’ which appear in paragraph (2). If the interpretation advanced above is accepted, these words require the foreign author to

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<sup>110</sup> Nordemann, [1977] *Copyright* 337 at 339.

<sup>111</sup> See also to the same effect Ulmer, pp 27ff.

<sup>112</sup> Moreover, EC law limits reciprocity further still, see EC Directive, recital 6: ‘It follows from the case-law of the Court of Justice of the European Communities on the application of the principle of non-discrimination laid down in Article 12 of the Treaty, as shown in the judgment of 20 October 1993 in Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* (4), that domestic provisions containing reciprocity clauses cannot be relied upon in order to deny nationals of other Member States rights conferred on national authors. The application of such clauses in the Community context runs counter to the principle of equal treatment resulting from the prohibition of any discrimination on grounds of nationality.’

submit to whatever conditions and restrictions are placed on national authors, that is, national treatment. These must include such matters as the procedure for determining the amount due to the author, as well as the way in which this is to be collected, for example, whether it can be done collectively or is left to the individual artists and their successors, or, indeed, by some state or public entity. Identification of those entitled to claim RRR, particularly in the case of successors to the original artist may also be a matter of great practical importance, and the same will be true of the means by which those resales attracting RRR are to be identified and tracked. These are all details which would be inappropriate to include in a general convention such as Berne, and paragraph (3) therefore simply confirms this to be the case. On the other hand, they may well be matters on which some degree of harmonization in a special treaty would assist the international administration of RRR: see further below. A particular issue, however, that may arise here will be the avoidance of any system of notification or registration which falls potentially foul of the ‘no formalities’ prohibition under Article 5(2) of Berne (particularly, given the potential utility of RRR systems in ‘tracking’ such matters as the changes in ownership and physical location of works).

#### *No requirement under the Berne Convention to protect RRR*

45. It may be unnecessary, after the discussion above, to state this, but the words ‘to the extent to which ...’ in paragraph (2) also underline the optional or non-mandatory character of the right outlined in paragraph (1). Quite simply, there is no obligation on Union countries to have legislation on RRR in the first place: the words ‘to the extent to which ...’ clearly means that there is a sliding scale, the top of which is represented by the full protection defined in paragraph (1) and the bottom of which is no protection at all. If this were not so, it is clear from the records of the Brussels Conference that the proposal for article 14*bis* would not have been acceptable to many Union members.<sup>113</sup>

### **Domestic legislation on RRR – countries where it is protected**

46. Within the loose parameters set by Article 14*ter* of Berne, there are, as might be expected, wide variations in the scope and application of RRR laws at the domestic level. Some of

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<sup>113</sup> *Documents* 1948, 365ff.

these laws, such as the Australian, are extremely detailed and lengthy;<sup>114</sup> others are to be found in a couple of paragraphs.<sup>115</sup> The harmonizing provision of the EC Directive comprises 30 recitals, which provide a lengthy argument in favour of adopting harmonized provisions throughout the EU, and then conclude with 14 articles.

47. The purpose of the following section is to outline the principal common features that are to be found in national RRR laws, as this will assist in the formulation of the appropriate provisions that might be put into the proposed treaty (on the basis that any norms that are proposed at the international level are best founded upon the points on which national laws already agree).

#### *Persons who may claim the right*

48. Invariably – and consistently with Article 14<sup>ter</sup> of Berne - the initial entitlement to RRR is vested in the author of the work for which it is claimed. Relatively few laws make explicit provision for the possibility of joint authorship (the prolix Australian law is an exception here<sup>116</sup>), but it may be assumed this is to be implied in the case of those laws where the ‘author’ is referred to in the singular and will be dealt with under the general principles applicable to co-authorship in that country’s authors’ rights law.<sup>117</sup> Another situation that may arise in artistic practice, both ancient and modern, is where a work is created under the author’s direction, for example, where the artist produces a design that is then executed by a team of assistants. Again, the Australian law leads the way here with a specific provision;<sup>118</sup> otherwise, it may be assumed that this situation will be dealt with under the general principles applicable under the law of the country concerned.

#### *Entitlements after death of author*

49. As for the holders of RRR after the death of the author, under national laws this is generally passed on to the heirs or successors of the author, and it does not seem that the option of transferring rights to a national cultural institution or fund, as allowed for under Article 14<sup>ter</sup>(1) of Berne, has been adopted. National laws, however, vary considerably as

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<sup>114</sup> And contained within its own legislative enactment: see *Resale Royalty Right for Visual Artists Act 2009* (Australia).

<sup>115</sup> See, for example, the Brazilian Law, Article 38.

<sup>116</sup> See, for example, *Resale Royalty Right for Visual Artists Act 2009* (Australia), s 16.

<sup>117</sup> See, for example, EC Directive, Article 6.

<sup>118</sup> Again, see *Resale Royalty Right for Visual Artists Act 2009* (Australia), s 71(1)(b)..

to how the right of succession is expressed and as to how the right of the author passes after his or her death. The EC Directive refers in general terms to ‘those entitled under him/her [the author]’<sup>119</sup>, while the Australian law refers in a rather complicated way to the ‘successor’ of the author and the Mexican law refers to the right being ‘transferred by inheritance’.<sup>120</sup> Others again refer to the ‘legal heirs’<sup>121</sup> or the ‘heirs and legatees’,<sup>122</sup> while the Costa Rican provision is limited to ‘his spouse and thereafter to his consanguineous heirs’.<sup>123</sup> Some laws remain silent upon who has the right after the death of the author, but it may be supposed that this will be the heirs or successors of the author under the general laws of inheritance in those countries where it is clear that the RRR continues to subsist after the author’s death.<sup>124</sup> Given that RRR remains as much inalienable in this post mortem period as during the author’s lifetime, it appears logical that it should be held by the nominated successors of the author and should not become a tradeable commodity: this is at least consistent with the traditional justifications of RRR as being for the benefit of the author’s impecunious heirs.

### *Inalienability*

50. Inalienability of RRR is the one clear prescription for RRR that arises under Article 14*ter*(1) of Berne, and invariably appears in all national RRR laws in one form or another. Generally, this is as a simple and direct statement that the right granted is ‘inalienable’, but with variations such as ‘unrenounceable and inalienable’<sup>125</sup> or ‘irrevocable and inalienable’<sup>126</sup> or a direct prohibition on renouncing or selling the right.<sup>127</sup> The recent Bosnia and Herzegovina Law is even more prescriptive and covers all possible forms of alienation,<sup>128</sup> while the Senegalese Law makes it clear that the RRR is

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<sup>119</sup> Typical here is Article 6.1 EC Directive (‘...after his death, to those entitled under him/her’); Art is

<sup>120</sup> Mexican *Federal Law on Copyright*, 24 March 1997, Article 92*bis*(ii)

<sup>121</sup> India, *Copyright Act 1957* (as amended), s 53A(1).

<sup>122</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](#), Article 44; Mali, *Ordinance No 77-46 CMLN of 12 July 1977 concerning Literary and Artistic Works*, Article 75.

<sup>123</sup> Costa Rica, *Law on Copyright and Related Rights, Basic Law no 6683 of 14 October 1982, as amended by Law No. 8834 of May 3, 2010*, Article 151.

<sup>124</sup> Brazil appears to be such a country.

<sup>125</sup> See, for example, the Ecuador Intellectual Property Law (Consolidation No. 2006-13), Article 38.

<sup>126</sup> Brazil Law No. 9610 of February 19, 1998, on Copyright and Neighbouring Rights, Article 38.

<sup>127</sup> Serbian *Law on Copyright and Related Rights*, 27 December 2011, Article 36(1).

<sup>128</sup> Bosnia and Herzegovina, *Copyright and Related Rights Law 2010*, Article 35(7) providing that: ‘*Droit de suite* may not be subject to waiver, transfer *inter vivos* by legal transactions and execution.’

inalienable '[N]otwithstanding any assignment of the original work'.<sup>129</sup> Accordingly, any agreement to sell the right will be null and void<sup>130</sup> and, as suggested above, this operates as a kind of consumer protection measure in favour of struggling artists. While there has been some academic and industry criticism of the inalienability requirement as a factor that may reduce the initial sale price of artistic works to the prejudice of artists,<sup>131</sup> it is interesting to note that a recent US Copyright Office study on RRR did not consider this to be an insuperable objection to its recommendation for the adoption of a limited RRR in that country.<sup>132</sup>

51. A further point which is explicitly addressed only in some laws excludes waiver of RRR. In the absence of a direct prohibition, it may well be open to argue that, as a matter of general law in most countries, a person (in this instance, an artist) is always free to waive his or her legal rights. This possibility is expressly excluded under the EC Directive,<sup>133</sup> as well as in a number of other non-EU countries.<sup>134</sup>

#### *Term of protection*

52. In general, this seems to be tied to the length of the economic rights; this can range between 50 to a maximum of 100 years after the death of the author, as in the cases of Mexico,<sup>135</sup> and Côte d'Ivoire.<sup>136</sup> Within the countries of the European Union and Australia, this term is now 70 years.<sup>137</sup>

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<sup>129</sup> Senegal Law No 2008-09 of January 24, 2008, on Copyright and Neighbouring Rights in Senegal, Article 47.

<sup>130</sup> Expressly so provided in the Uruguayan, Law of 1937, Article 9.

<sup>131</sup> See, for example, V Ginsbergh, 'The Economic Consequences of Droit de Suite in the European Union', European Center for Advanced Research in Economics and Statistics, Université Libre de Bruxelles and Center for Operations Research and Econometrics, Louvain-la-Neuve, March 2006.

<sup>132</sup> USCO 2014 Report, pp 78-79.

<sup>133</sup> EC Directive, Article 1(1).

<sup>134</sup> See, for example, *Resale Royalty Right for Visual Artists Act 2009* (Australia), s 34(1); *Copyright and Related Rights Act 2011* (Montenegro), Article 36

<sup>135</sup> Mexican Law, Article 92bis(ii)(100 years).

<sup>136</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](#), Articles 26-44 Arts 43(1) (99 years).

<sup>137</sup> EC Directive, Article 8(1), applying Article 1 of Directive 93/98/EEC and subject to transitional provisions in Article 8(2)-(4); Australia, *Resale Royalty Right for Visual Artists Act 2009*, s 32.



### *The nature of the right to be accorded*

53. In some instances, this is grouped together with the other economic rights of the author<sup>138</sup> (and certainly separately from provisions on moral rights), while in others it is not characterised in any particular way or is grouped with ‘other rights of the author’<sup>139</sup> or even, as in the case of India, appears as a provision in the section of its Act dealing with infringement of copyright.<sup>140</sup> In the EU, while the RRR is the subject of a separate Directive, this makes it clear that the right to be protected ‘forms an integral part of copyright and is an essential prerogative for authors’<sup>141</sup> and is to be provided by each member state ‘for the benefit of the author’,<sup>142</sup> with provision for protection of third party nationals where there is reciprocity of protection in those countries for authors from Member States and their successors.<sup>143</sup>
54. Australia is something of an outlier here, as its RRR is the subject of separate legislation outside the general copyright law<sup>144</sup> and has the curious subtitle of ‘An Act to create a right to resale royalty in relation to artworks and for related purposes’. This might suggest that the right relates to the artwork itself and is not strictly a right of the author (artist) him- or herself, leading to the inference that Australia would not be bound to accord protection on a reciprocal basis under Article 14*ter* of the Berne Convention. This might be a deliberate choice of drafting: although the Australian legislation does allow foreign authors to claim RRR in Australia if they are citizens or nationals from a ‘reciprocating country’,<sup>145</sup> the prescription of a country as ‘reciprocating’ is a matter for regulations and none have yet been made. It might be argued here that, unlike the EC Directive, there is no onus on Australia to do so, as the wording of its legislation keeps its RRR excluded from the RRR defined in Article 14*ter*(1) which is to be accorded automatically to nationals of other Berne countries in the event that they also protect RRR (see pars 37-43 above). It might be therefore be said that Australia has maintained a maximum of

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<sup>138</sup> See, for example, the Brazilian Law, where it is grouped under ‘Economic Rights of the Author...’ in Chapter III of Title 3 on Authors’ Rights.;

<sup>139</sup> For example, Bosnia and Herzegovina, *Copyright and Related Rights Law 2010*, Article 35 (within Section D of Chapter III. Other Rights of the Author); the former Yugoslav Republic of Macedonia, *Law on Copyright and Related Rights*, 23 August 2010, Articles 41-45 (sub-section 2 within Section 3, ‘Other Rights of the Author’).

<sup>140</sup> India, *Copyright Act 1957*, s 53A (Chapter IX, Infringement of Copyright).

<sup>141</sup> EC Directive, Preamble (4).

<sup>142</sup> EC Directive, Article 1.1.

<sup>143</sup> EC Directive, Article 7.1.

<sup>144</sup> Australia, *Resale Royalty Right for Visual Artists Act 2009*. The principal copyright legislation is the *Copyright Act 1968* (as amended).

<sup>145</sup> *Resale Royalty Right for Visual Artists Act 2009*, s 14(1)(c).

flexibility in its capacity to recognize RRR from other countries, albeit that it has embraced the concept in a fairly generous, and certainly elaborated, form in its own legislation.

### *Works covered by RRR*

55. In general, RRR is limited to artistic works, but a number of countries extend it to original manuscripts as well.<sup>146</sup> Within those countries that are limited to artistic works, this category is defined in varying ways and degrees of detail. For example, in Brazil it is referred to simply as ‘any original work of art’<sup>147</sup>, in Côte d’Ivoire as ‘graphic and three-dimensional works’<sup>148</sup> while in the EC Directive a lengthier definition is provided:

*‘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, photographs, provided they are made by the artist himself or are copies considered to be original works of art.*<sup>149</sup>

To this list, the Australian legislation adds ‘digital artworks’, ‘multimedia artworks’, ‘video artworks’ and ‘fine art jewellery’, with provision for further items to be added under regulations.<sup>150</sup> Most laws also contain exceptions, such as for works of applied art and architecture.<sup>151</sup> A further possible category is works that are created in series, where each copy may be treated as an original work in its own right.<sup>152</sup>

### *Transactions covered by RRR*

56. Article 14<sup>ter</sup>(1) potentially covers all resales after first transfer by the author. In practical terms, however, this is the most difficult issue for the application of RRR, as it would be

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<sup>146</sup> For example: India *Copyright Act 1957*, s 53A(1) (‘original manuscript of a literary or dramatic work or musical work’); Brazil Law 1998, Article 38 (‘original...manuscript’); former Yugoslav Republic of Macedonia Law, Article 44 (‘original(manuscript) of a literary or musical work’);

<sup>147</sup> Brazil Law 1998, Article 38.

<sup>148</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\*](#), Articles arts. 26-44; Mali, *Ordinance No 77-46 CMLN of 12 July 1977 concerning Literary and Artistic Works*, Article 44.. See also Senegal Law No 2008-09 of January 24, 2008, on Copyright and Neighbouring Rights in Senegal, Article 47.

<sup>149</sup> EC Directive, Article 2.1.

<sup>150</sup> *Resale Royalty Right for Visual Artists Act 2009*, s 7(2).

<sup>151</sup> A precedent for these exclusions is to be found in the *Tunis Model Law*, Article 4bis(2).

<sup>152</sup> See, for example, EC Regulation, Article 2.2 (these must have been made ‘in limited numbers’ by the artist or under his authority, and should be signed by the author and numbered).

impossible to cover all resales that might occur, for instance, those of a private character between two parties. Thus, the earliest national law (of France) was limited to sales of works that were ‘publicly sold’,<sup>153</sup> while the Belgian Law of the following year was restricted to sales of works at ‘public auctions’.<sup>154</sup> While the later Uruguayan law of 1937 sought ambitiously to cover ‘any alienation’,<sup>155</sup> subsequent laws have sought to extend the category of ‘publicly made’ sales to cover all sales with a ‘commercial’ or non-private character. In this regard, the requirement of the involvement of an agent, auctioneer or some other professional intermediary has been increasingly adopted as a useful discriminating factor. Thus, Article 2 of the EC Directive provides:

*2. The right referred to in paragraph 1 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.*

57. The Australian legislation, in its own inimitable fashion moves through several stages to reach the same result. Thus, RRR is defined as the ‘right to receive resale royalty on the *commercial resale* of an artwork.’<sup>156</sup> ‘Commercial resale’ is then defined in broad terms as meaning all transfers of ownership for value, other than the first one, but excluding those transfers in circumstances not involving an ‘art market professional acting in that capacity’.<sup>157</sup> ‘Art market professional’ is then defined as meaning:

- (a) an auctioneer; or
- (b) the owner or operator of an art gallery; or
- (c) the owner or operator of a museum; or
- (d) an art dealer; or
- (e) a person otherwise involved in the business of dealing in artworks.<sup>158</sup>

58. The concept of ‘art market professional’ is a useful one here, as it appears wide enough to cover the differing circumstances in which art resales may now occur on a commercial basis, including transactions conducted over the Internet and transactions arising through or associated with ‘art fairs’ and ‘biennales’ (a particular phenomenon of the past 50

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<sup>153</sup> French Law of 1920, Article 1.

<sup>154</sup> Belgian Law of 1921, Article 1.

<sup>155</sup> Uruguay, Law of 1937, Article 9.

<sup>156</sup> *Resale Royalty Right for Visual Artists Act 2009*, s 6.

<sup>157</sup> *Resale Royalty Right for Visual Artists Act 2009*, s 8(1) and (2).

<sup>158</sup> *Resale Royalty Right for Visual Artists Act 2009*, s 8(3).

years or so<sup>159</sup>). However, the pressing practical issue of identifying which sales are caught by this criterion still remains: see further below.

59. As to whether RRR should be charged on all resales or only on those which reflect an increase in value over the first transfer by the original artist, the number of national laws using the latter approach has now shrunk to a minority. This may reflect a general acceptance that, consistent with its inclusion under the Berne Convention, RRR is an authors' right that should be charged in the same way as any other of the economic rights. More realistically, it reflects the practical difficulties involved in determining the amount of profit on resale.<sup>160</sup> Accordingly, the general trend in national RRR laws, as exemplified by the EC Directive,<sup>161</sup> is to impose RRR on *all* resales of a non-private or commercial kind. A practical means of reducing the number of transactions that this may potentially include is to specify a minimum floor price, with RRR being only charged on sales in excess of this floor.<sup>162</sup> Another possible limitation, also to be found in the EC Directive, is to have a maximum limit on the amount of royalty payable.<sup>163</sup>

### *Royalty rate*

60. This is a matter on which there are great variations to be found in national RRR laws, ranging as high as 25% of the profits of resale under the Uruguayan Law of 1937.<sup>164</sup> In general, however, the rate of royalty charged is between 3%<sup>165</sup> to 5%<sup>166</sup> of the gross sales

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<sup>159</sup> Indeed, the Venice Biennale is much older, having been established in 1895. Others are obviously much more recent, but growing, eg Sao Paulo (1951), documentia in Kassel, Germany (1955, but held every five years), Sydney (1973), Havana (1984), Istanbul (1987), Lyon (1984), Dakar, Senegal (1992), Sharjah, UAE (1993), Berlin (1998), Shanghai (1996), Yokohama (2006), Singapore (2006), Whitney, New York (1932, annually), and Manifesta (different European cities, 1996). Source: S Kendzuliak, 'Top 15 International Art Biennales' at [www.fineart.about.com/od/International-Art-Exhibitions/tp/top-15-international-art-biennial-exhibitions.0.1.htm](http://www.fineart.about.com/od/International-Art-Exhibitions/tp/top-15-international-art-biennial-exhibitions.0.1.htm)

<sup>160</sup> See, for example, the Italian Law of 1941, Articles 144-155, which, it appears was never collected in practice.

<sup>161</sup> EC Directive, Article 1.1 ('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>162</sup> Again, the EC Directive provides a guide here, leaving national laws the discretion to set a minimum price which is not to exceed 3,000 €: Article 4.1 and 4.2. This allows for considerable variation between EC countries: for example, in Germany the minimum is €400, in France it is €750, and in Austria it is the maximum level of €3,000 (information on Bild-Kunst website at <http://www.bildkunst.de/en/copyright/resale-right/>). In Australia, the legislation sets a minimum threshold of \$A1,000 or such other amount as may be set by regulations made under the Act: *Resale Royalty Right for Visual Artists Act 2009*, s 10.

<sup>163</sup> EC Directive, Article 4.1 (not to exceed 12,500 €).

<sup>164</sup> Uruguayan Law of 1937, Article 9.

<sup>165</sup> For example, in Peru: USCO Report 2013, Appendix C, p 6.

<sup>166</sup> USCO Report 2013, Appendix C, lists the following non-EU countries as having a rate of 5%: Armenia, Australia, Azerbaijan, Brazil, California, Chile, Philippines. Another is Senegal: Senegal Law, Article 48.

price, with most settling on 5%.<sup>167</sup> Some laws leave this to be fixed in subordinate legislation<sup>168</sup> or by an administrative agency,<sup>169</sup> which presumably makes it easier to adjust the rate from time to time or even vary it according to categories of works.<sup>170</sup> The EC Directive is perhaps the most detailed, with a carefully calibrated scale that reflects the approach of the initial French and Belgian laws and which sets a declining percentage as the selling price of the work falls within different price bands. This is as follows:

- (a) 4 % for the portion of the sale price up to EUR50 000;
- (b) 3 % for the portion of the sale price from EUR50 000,01 to EUR200 000;
- (c) 1 % for the portion of the sale price from EUR200 000,01 to EUR350 000;
- (d) 0,5 % for the portion of the sale price from EUR350 000,01 to EUR500 000;
- (e) 0,25 % for the portion of the sale price exceeding EUR500 000.<sup>171</sup>

This is subject to the possibility of a threshold price (no more than 3,000 €)<sup>172</sup> as well as a maximum royalty of 12,500 €, <sup>173</sup> and the further facility of adopting 5% rather than 4% for the first band.<sup>174</sup> These bands now apply throughout the 28 countries of the EU, which have adjusted their domestic laws accordingly. By way of comparison, the bills under consideration in the USA have proposed a 5% royalty for works sold at resale auction for at least \$5,000 and a maximum royalty amount of \$35,000.<sup>175</sup>

### *Mode of collection*

61. The administration of RRR differs from country to country, with much of it being dealt with under subordinate legislation or through administrative direction. Important issues calling for particular attention here are:

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<sup>167</sup> See, for example, *Resale Royalty Right for Visual Artists Act 2009* (Australia), s 18; Brazilian Law, Article 38; Senegal Law, Article 48;

<sup>168</sup> See, for example, Cameroon, Law No. 2000/011 of December 19, 2000, on Copyright and Neighbouring Rights, Article 20(2).

<sup>169</sup> See, for example, Mexico, Federal Law on Copyright, Articles 92bis(1) and 212; India, *Copyright Act 1957*, s 53A(2).

<sup>170</sup> As under the Indian provision.

<sup>171</sup> EC Directive, Article 4.1.

<sup>172</sup> EC Directive, Article 3.1 and 3.2. An interesting variation on setting a minimum price is to be found in Article 20 of the Moldovan Law which fixes the rate of 5% of the of the resale price where such a price is at least 20 times the minimum wage: Moldovan Law on Copyright and Related Rights *No. 139 of 07.02.2010*, Article 20(1).

<sup>173</sup> EC Directive, Article 4.1.

<sup>174</sup> EC Directive, Article 4.2.

<sup>175</sup> *American Royalties Too (ART) Act*, reintroduced on 16 April 2015 as S.977 by US Senators Tommy Baldwin and Ed Markey and as HR 1881 by Re Jarrold Nadler: see further 'Art resale royalty and Artist-Museum Partnership bills re-introduced', Greenbuerg Traurig LLP, 27 April 2015, Lexology, at <http://www.lexology.com/library/detail.aspx?g=296d969d-02cc-4b5d-96a9-3adef20de204>

- a. The desirability of collection of royalties through an authors' society rather than by individual authors: as with other economic rights, collective administration may make enforcement of RRR more practical and efficient (economies of scale and so on), and may indeed be made mandatory or at least receive strong legislative encouragement. Thus, collective management of the royalty may be either compulsory or optional under the EC Directive,<sup>176</sup> but is, in fact, compulsory in most EC member states.<sup>177</sup> In countries where it is optional or not available, while the onus may lie on the seller to pay the royalty, it may be up to the author to claim it and enforce his or her entitlement.<sup>178</sup>
- b. Information about resales may be difficult to obtain. In the EU and in some other laws, there is a right on the part of the holders of RRR (ie the authors and their successors) to require art market professionals to furnish such information in order for them to secure payment of royalties that may be due.<sup>179</sup> Under some laws, there is a requirement for sellers to give notice to the author of a relevant resale.<sup>180</sup>
- c. The question of who is liable to pay RRR may also vary. Clearly, the starting point is that this should be the seller,<sup>181</sup> but in some instances the buyer and/or agent or 'art market professional' may be jointly or even solely responsible.<sup>182</sup>

### *Countries where RRR is not protected*

62. While the number of Berne countries now recognizing some form of RRR represents approximately a little under half of the membership of the Berne Union, there are still

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<sup>176</sup> EC Directive, Article 6.2.

<sup>177</sup> For example, in Denmark, Finland, Germany, Hungary, Iceland, Italy, and the UK, likewise in Australia: USCO Report 2014, Appendix C.

<sup>178</sup> USCO Report 2014, Appendix C cites Chile as such a country. It is also likely that such circumstances exist in many developing countries that have RRR laws.

<sup>179</sup> EC Directive, Article 9; *Resale Royalty Right for Visual Artists Act 2009* (Australia), s 29.

<sup>180</sup> Serbian Law, Article 35(9). Under the Australian legislation, notice is to be given to the collecting society declared under the Act: *Resale Royalty Right for Visual Artists Act 2009* (Australia), s 28 (with civil penalties for failure to comply).

<sup>181</sup> See EC Directive, Article 1.4.

<sup>182</sup> Flexibility in this regard is allowed in EC Directive, Article 1.4. The Australian provision (s 20) provides for joint and several liability to pay by the following persons:

- (a) the seller or, if there is more than one seller, all of the sellers;
- and
- (b) each person acting in the capacity of an art market professional and as agent for the seller; and
- (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
- (d) if there are no such agents—the buyer or, if there is more than one buyer, all of the buyers.

significant countries that do not have such protection. These include the USA and China, which have large and, in the case of China, rapidly increasing shares of the global art market. While both countries are contemplating the adoption of RRR,<sup>183</sup> the fact that there will still be significant countries with no RRR suggests to some commentators that there may be substantial shifts to these countries, including, for example, Switzerland in the case of Europe, as sellers and intermediaries seek to avoid payment RRR in their home countries.<sup>184</sup> The basis for these kinds of fears is hard to assess, as there did not seem to have been any noticeable shift from RRR countries to non-RRR countries within the European Union in the transitional period allowed under the 2001 Directive.<sup>185</sup> Likewise, there does not appear to have been an immediate flight of art resales from UK to other non-RRR countries, whether within or without the EU, following the graduated introduction of RRR in that country after 2006,<sup>186</sup> although more recent evidence after 2010 indicates that there has been a decline in the UK share of the global art resales market and a corresponding increase in the share of countries such as the USA and China.<sup>187</sup> The full adoption of the EU-harmonized RRR is suggested as a contributing cause of this,<sup>188</sup> but it is equally, if not more likely, that other factors are also operating here, such as the global financial crisis of the preceding years and, in the case of China, an increasing general interest in art works, to say nothing of other financial benefits that might apply in these countries, such as in taxation matters. In any event, the EU (and UK) cap on RRR payments makes this an insignificant fraction of the overall costs associated

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<sup>183</sup> See, for example, the extensive study prepared by the US Copyright Office in late 2013 which recommends the introduction of a limited RRR: USCO Report 2013. In the case of China, several newspaper reports indicate an ongoing debate in that country about the need to adopt RRR: see Kelly Chung Dawson, 'Bill on art-resale rights draws stark portrayals in China', *China Daily* 2013-03-06 and K Hunt, 'China debates droit de suite', *Art Market*, Issue 243, February 2013.

<sup>184</sup> See, for instance, the views of Ginsbergh in an early article on the EC Directive: V Ginsbergh, 'The Economic Consequences of Droit de Suite in the European Union', European Center for Advanced Research in Economics and Statistics, Université Libre de Bruxelles and Center for Operations Research and Econometrics, Louvain-la-Neuve, March 2006. In Switzerland, partial revision of the Copyright Law is expected to include some form of a resale right. The draft is expected to be published towards the end of 2015.

<sup>185</sup> See further European Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Report on the Implementation and Effect of the Resale Right Directive (2001/84/EC)*, Brussels, 14.12.2011, COM(2011) 878 final, Chapter 5 (Conclusions).

<sup>186</sup> See further the studies done by Chanont Banterngansa & Kathryn Graddy, *The Impact of the Droit de Suite in the UK: An Empirical Analysis*, Centre for Economic Policy Research Discussion Paper No. DP7136, 5 (Jan. 2009), available at <http://ssrn.com/abstract=1345662> and by Katy Graddy, Noah Horowitz and Stefan Szymanski A study into the effect on the UK art market of the introduction of the artist's resale right, Intellectual Property Institute, London, January 2008.

<sup>187</sup> See further C McAndrew, *The EU Directive on ARR and the British Art Market*, Study prepared for the British Art Market Federation by Arts Economics, 2014, pp 3-4; C McAndrew, *The British Art Market in 2014*, Study prepared for the British Art Market Federation by Arts Economics, 2014, pp 1-2.

<sup>188</sup> McAndrew, *The EU Directive*, p 16.



with art resales, including insurance and agents' fees. In this regard, it is hard to imagine that a RRR payment of €12,500 was a moving factor in the recent decision to sell Picasso's 'Women of Algiers' in New York where the reported price was \$US179 million.<sup>189</sup> Furthermore, even if the adoption of RRR within the EU is causing the shift in art resales to other markets, the risks of this occurring will obviously diminish as more and more countries adopt RRR, particularly in the cases of the USA and China. In this regard, the adoption of a carefully formulated 'global' agreement should provide a stimulus in extending the spread of RRR.<sup>190</sup> It could indeed be argued that we have now reached critical mass with so many countries presently having adopted some form of RRR.

## Extending international protection for RRR – the case for a new international treaty

### *Revising Berne itself*

63. Given that RRR is presently already embedded within the Berne Convention, albeit only as an optional requirement, it is worth considering whether any project for enhancing international protection of RRR should begin with that instrument. One simple amendment, for example, might be to make Article 14<sup>ter</sup> mandatory, perhaps with the possibility of a reservation in the case of manuscripts together with a clearer direction that the basis for determining the 'interest' of the author should be with respect to *all* resales, and should not include the possibility of limiting this to cases where there has been an increase in value (both options being available under the present text). The history of Berne shows that, starting from the base requirement to accord national treatment, it has sometimes taken several revisions or more before the content of the protection to be accorded in specific areas has been adequately defined as one of the 'rights specially granted' to nationals of Union countries claiming protection under the Convention.<sup>191</sup> Potentially, this is a course of action that is available in the case of Article 14<sup>ter</sup> and it

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<sup>189</sup> *Guardian* newspaper, 12 May 2015.

<sup>190</sup> See further C McAndrew, *European Commission Consultation on the Implementation and Effect of the Artists' Resale Rights Directive*, Summary of Research conducted by Arts Economics, commissioned by the European Art Market Coalition, 2011, p 16.

<sup>191</sup> See, for example, in the case of translation rights and public performance rights, Ricketson and Ginsburg, Chapters 11 and 12.



might well be now that there is an emerging consensus among Union countries with respect to the recognition of RRR. But while regular revision is mandated under the Convention,<sup>192</sup> a major impediment has been the requirement of unanimity for the adoption of amendments.<sup>193</sup> Revisions, moreover, have been typically directed at revision of the Convention as a whole, rather than at just one provision, while a further factor that has made revisions impossible in recent years has been the fault lines that have emerged between developed and developing countries, most notably during the last revisions of Stockholm (1967) and Paris (1971).<sup>194</sup> These difficulties lead most seasoned observers to conclude that the possibility of a future revision of Berne occurring is either impracticable or unattainable (or both). This view, again, appears to have been borne out in practice in the unsuccessful attempts to insert a protocol to the Convention in the early 1990s.<sup>195</sup>

64. Accordingly, it is highly unlikely that amending Article 14*ter* of Berne itself will ever occur as a realistic option, whether as a specific project of revision on its own or as part of a revision of the Convention as a whole. And, even there were to be agreement on an appropriate amendment to Article 14*ter*, it may be very difficult to obtain a similar consensus on amendments to other provisions of the Convention at the same time. This, then, leads to a consideration of alternative routes to achieving enhanced international protection for RRR. In this regard, the ‘special agreement’ provision under Article 20 of Berne provides a convenient way of proceeding.

#### *A special agreement?*

65. Article 20 of Berne allows Union members to reach separate arrangements, called ‘special agreements’, among themselves, so long as these grant authors ‘more extensive rights that those granted under the Convention or are not contrary to this Convention.’ Thus, the WCT can be sustained under the first of these heads (in granting to authors ‘more extensive rights...’), while the Marrakesh Agreement presumably can be justified under the second (as elaborating on permitted exceptions to protection that are ‘not contrary to the provisions of the Convention’). In the case of RRR, a special agreement that provides for a mandatory right to be recognized by each signatory country would fall

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<sup>192</sup> Berne Convention, Article 27(1).

<sup>193</sup> Berne Convention, Article 27(3).

<sup>194</sup> See further Ricketson and Ginsburg, Chapter 14.

<sup>195</sup> See further Ricketson and Ginsburg, Chapter 4.B.

squarely within the first of these limbs – there could be little argument against the proposition that a right, to be protected on a voluntary basis under the present Berne text, would be ‘more extensive’ under the new agreement if it were now to be made mandatory. Care would need to be taken that the right to be protected under the new treaty did not contravene the second limb of Article 20 as being contrary to provisions of the Convention, including Article 14*ter* itself. In general terms, such inconsistencies are unlikely to arise, but one possible instance might be if the RRR in the proposed treaty were to be made assignable or subject to waiver and hence inconsistent with Article 14*ter*(1) which specifies that such a right is to be inalienable.

### *Models for a separate treaty on RRR*

66. It is important to bear in mind that the purpose of any proposed special agreement under Article 20 would only be to secure RRR protection at the international level so that authors from one treaty country can claim protection in other treaty countries. Such a treaty is not therefore directly concerned with the way in which treaty countries treat their own nationals, although clearly there may be a flow-on effect to nationals if the treatment of foreigners is more favourable and countries wish to avoid this imbalance arising (as is usually the case). Bearing this in mind, and having regard to the requirements of Article 20 discussed above, there are two possible models for a separate treaty on RR: (1) a basic agreement based on the principle of national treatment under which members of the special agreement would extend whatever RRR protection they accord to nationals to authors of other member countries, and (2) a more elaborated agreement that takes national treatment as a starting point but which contains specific standards as to the level of protection to be accorded to foreign claimants. Each of these approaches has certain advantages and drawbacks from both a policy and strategic perspective.

### *An agreement based on national treatment alone*

67. Under this approach, parties would be required to apply RRR to foreign authors if it is already part of their national law, even if there would be no corresponding protection for their own authors in other countries that belong to the treaty but the laws of which do not recognize RRR. This requirement is now excluded under Article 14*ter*(2), although it is of course open to countries to do so as an act of international goodwill and altruism.

68. Prior to the Brussels Act of the Berne Convention, it might have been open to an RRR country to argue that it was not required to extend RRR as a matter of national treatment to authors from non-RRR countries on the basis that RRR was not, at that time, accepted as being part of authors' rights. Post Brussels, however, it now seems clear that this is the case, although without any obligation to protect RRR other than on the basis of reciprocity under Article 14*ter* (see above).
69. Accordingly, it is possible to conceive of a special agreement on RRR that (a) confirms that this is now part of authors' rights and (b) makes protection solely a matter of national treatment as between treaty members. This would mean that the authors of each treaty country would receive whatever protection for RRR that is available to nationals of other treaty countries under their national laws, but that it would not be possible for a RRR protecting country to deny protection on the basis that RRR was not a right pertaining to authors.<sup>196</sup> Protection under such a treaty would, of course, be uneven and vary from country to country, to say nothing of being non-existent in those countries that still had no RRR. On the other hand, there would be a basis for protection at the international level without the need to inquire into the details of material reciprocity as between countries. Indeed, it may be assumed that non-RRR countries would not join such a treaty simply to give their own authors the benefit of RRR in other treaty countries while denying it to them at home and, of course, not according it to authors from those other countries. But even if such brazen state behaviour were to occur, membership of a special treaty on RRR would surely encourage these countries to consider adopting it in their own laws – and, in this regard, it should be recalled that national treatment has been the starting point for both the Berne and Paris Conventions and has the singular merit of achieving international protection where there was previously none at all for anyone outside their own country. In the case of the Paris Convention, for example, the obligation to accord national treatment with respect to patents did not carry with it a corresponding obligation to have a patent system, but only an obligation to accord claimants under the Convention whatever protection was available to nationals under this head. In the case of the Netherlands, this meant nothing, as that country did not introduce a patent law until 1911, although it had been a member of the Paris Union since its inception. The Netherlands example, while objectionable (and criticised by other members at the time), was not a

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<sup>196</sup> At present, this option is potentially open to a country such as Australia, which protects RRR under separate legislation and not as part of its general copyright legislation: see further par 54 above.

breach of the national treatment obligation under Paris and it did eventually adopt a fully-fledged patent law.<sup>197</sup>

70. Accordingly, a special agreement on RRR based on national treatment within Article 20 of the Berne Convention might comprise the following single provision:

*The contracting parties acknowledge and confirm that the right described in Article 14ter(1) of the Berne Convention is one of the exclusive rights of authors and is to be accorded national treatment under Article 5(1) of that Convention.*

71. This would represent an advance over the present position under Article 14ter, at least so far as authors from non-RRR countries are concerned and who do not presently receive it at all. It may also have the ultimate effect of persuading their own countries to adopt RRR, if only out of shame rather than conviction. On the other hand, such an agreement does nothing to flesh out the content of the RRR to be accorded and, indeed, there is no precedent for such a limited kind of special agreement under Berne or, indeed, under the Paris Convention. Such agreements have usually been directed at resolving a common problem or difficulty shared by a number of member states or at giving effect to a new or extended norm of protection that is already accepted at national level: see further below.

72. This therefore leads to a consideration of what a more elaborated special agreement might contain in the case of RRR, that is, one that seeks to set out more precisely the content and scope of the right to be accorded to claimants under the agreement.

#### *A more elaborated treaty on RRR*

73. The history of special agreements under both the Berne and Paris Conventions is instructive here in suggesting the conditions, legal and strategic, for formulating such an agreement. If the latter is seen as a way of meeting the demands of only a small group of contracting states that wish to increase the level of protection as between themselves, this may result in a treaty with a limited membership that fails to attract wider accessions. In the case of the Paris Convention, a good example is provided by the Lisbon Agreement on Appellations of Origin which contains quite prescriptive conditions as to what is to be

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<sup>197</sup> See further JJ Bos, 'The Netherlands and the Paris Convention for the Protection of Industrial Property' [1984] *Industrial Property* 383-386.

protected and which, in consequence, has only attracted accessions from a limited number of countries that accept the desirability of this kind of protection.<sup>198</sup>

74. On the other hand, where there is a common acceptance at the national level of a problem to be overcome or of the need for a new or extended form of protection, membership of the new agreement is likely to be taken up more swiftly. In the case of the Paris Convention, the Patent Cooperation Treaty provides a striking instance of the first (the common problem being the backlog of patent applications in national offices in the late 1960s),<sup>199</sup> while, in the case of the Berne Convention, the WCT has now achieved a membership of more than half of that of Berne with respect to the recognition (among other things) of the new right of communication to the public.<sup>200</sup> This suggests that there is probably a ‘critical mass’ of acceptance at the national level that is required before substantive proposals for an elaborated separate agreement should be advanced. This is scarcely a radical insight, but it may now indicate that the time is ripe for such a proposal in the case of RRR, where the increase in national schemes of protection in recent years has been impressive, and is an issue presently under active consideration in three important Berne members – China, Switzerland and the USA.

75. Thus, while a proposal for a separate treaty on RRR might have been quixotic a couple of decades ago – and destined for irrelevance like the Lisbon Agreement<sup>201</sup> – the level of support for RRR at a national level (up to 81 members of Berne) suggests that this would now be a worthwhile endeavour. At the level of implementation, this also means that such a project needs to be undertaken with certain clear guidelines in mind. At the risk of stating or re-stating the obvious, the following matters will be relevant here:

- a. Any proposed agreement must comply with the requirements of Article 20 of Berne. These are hardly onerous, but one clear restriction is that any proposed RRR must be inalienable (see above). Another is that the right should not be restricted to re-sales at an increased value.

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<sup>198</sup> 28 parties as at December 2014: [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=10](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=10)

<sup>199</sup> 148 members as at December 2014: [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=6](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=6)

<sup>200</sup> 93 members as at December 2014: [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=16](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16)

<sup>201</sup> In fairness, it should be noted that a diplomatic conference to adopt a new Act of the Lisbon Agreement so as to make it more attractive to prospective members was held in May 2015, albeit as to some controversy concerning the effectiveness of the Act finally adopted in achieving this objective: see <http://www.wipo.int/portal/en/index.html>.

- b. The proposed agreement should seek to adopt and harmonize the basic elements of RRR that are recognized at national level. Indeed, the least controversial and most minimalist way to proceed would simply be to make the existing guidelines in Article 14<sup>ter</sup> mandatory, perhaps with a reservation in favour of original manuscripts, on the basis that existing national RRR laws will be consistent with these in any event. Nonetheless, there is much to be said for further codification of norms that embodies some of the refinements that have already been developed at national level, as well as clarifying matters of uncertainty: see further the matters listed in par 76 below. ‘Progressive development’ of new norms that will require significant and further changes in national legislation should be at the edges only, rather than at the centre of the exercise involved here.
- c. The proposed agreement should utilize the templates provided by the many special agreements already reached under both the Berne and Paris Conventions. In particular, it will be suggested below that an assembly of member states, together with the appointment of a technical committee of experts (following the precedents to be found in the PCT, Madrid and classification agreements such as Locarno and Nice) might provide an effective mechanism for dealing with some of the administrative problems that arise with RRR, such as modes of collection and royalty rates.

*The starting point - identifying points of common agreement at the national level*

76. National laws on RRR vary greatly, both in length and detail and in their coverage. So far as length and detail are concerned, there is a striking contrast between the Australian law (some 39 pages) and that of Brazil (two short paragraphs). Nonetheless, as the survey above indicates, there are a number of points that are common in all national laws and which provide a basis for incorporation as basic norms within the proposed treaty. At the risk of repetition, these are:

1. The persons who may claim the right – invariably the original author of the works for his or her lifetime, and generally limited to heirs and/or other successors of the author, without taking advantage of the wider options that may be permissible under Article 14<sup>ter</sup>(1)).

2. The works covered by the right – generally, works of visual art, but with some widely accepted exclusions, such as works of applied art and works of architecture, and no mandatory requirement with respect to manuscripts (which are protected only in a minority of national laws).
3. The re-sales covered by the right –only sales by public auction were originally covered in some national laws, but an increasing number of transactions mediated by ‘art market professionals’ are now included, for example, sales by galleries, at art fairs or online.
4. The basis of the RRR – in most instances, this covers any sale, whether at a profit or not, but a number of jurisdictions still limit this to resales where there has been an increase in value.
5. The rate of royalty charged – a general range of between 3 to 5% of gross sales price is to be found, but in the EU an elaborately calibrated scale of rising royalty rates now applies across the 28 members of that regional grouping as well as a maximum amount of the royalty which may push the overall percentage charged significantly below 5%.
6. The possibility of a minimum level sales price before the RRR applies, as well as the possibility of a maximum (as in the EU).<sup>202</sup>
7. The person or persons liable for payment of RRR – invariably the seller, but with provision under many national laws for joint liability on the part of buyers and ‘art market professionals’.
8. The desirability of collection through an authors’ society rather than by individual authors.

On each of these, the drafting of suitable treaty provisions will call a for a careful balancing of what parts may be usefully enshrined as international standards or norms, and those parts that are better left to national laws to determine. Integral to this balancing process may be the adoption of a mechanism under the treaty under which the

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<sup>202</sup> There remain questions concerning the constitutionality of a maximum sum.

international standards may be varied or modified in the future or may provide guidance to national laws.

77. *Other matters*: There are other matters presently dealt with in national laws where differences arise and where harmonization at an international level may be difficult to achieve. Examples include: the way in which claims for RRR are to be notified and assessed; the sharing of RRR where there are joint claimants; collection and distribution procedures; enforcement; and other matters of a procedural kind. These may all be matters that are better left to national laws to determine for themselves. However, it may be helpful for the proposed treaty to provide for some mechanism by which recommended “best practice” guidelines can be developed and adopted by treaty countries.

## **The framework for a draft treaty on RRR**

78. This section sets out the principal provisions of the proposed treaty, together with explanations and commentary, including consideration, where relevant, of alternative provisions. It follows the general format adopted in WIPO-administered treaties.

### **Preamble**

*The Contracting Parties,*

***Desiring 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,***

***Recognizing 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,***

***Recognizing further that this puts authors of original works of art at a material disadvantage compared with other authors whose works are more readily exploited through the rights of reproduction, adaptation and public communication,***

***Recognizing further that the right of authors of original works of art to an interest in any sale of the work subsequent to the first transfer by the author of the work is already recognized as an author’s right under Article 14ter of the Berne Convention, albeit on an optional basis and subject to the requirement of reciprocity,***



***Recognizing further that such a right is of particular value with respect to works that are traditional cultural expressions of indigenous communities,***

***Recognizing also that such a right is recognized under Article 14<sup>ter</sup> with respect to the original manuscripts of the works of writers and composers, and***

***Accepting therefore the desirability of establishing more fully the norms for the protection of such a right (hereafter called the ‘resale royalty right’) under public international law***

***Have agreed as follows:***

79. ***Commentary:*** Preambles may all too readily get out of control, as some more recent WIPO treaties demonstrate, to say nothing of the preambles to EC directives and regulation. Nonetheless, they can be valuable for purposes of treaty interpretation in setting out the objects and purposes of a proposed treaty and in highlighting particular concerns of the contracting parties. The above draft draws upon some of the language used in WCT, but is relatively modest compared, say, to the lengthier narrative that is contained in the preamble to the EC Directive on resale royalty rights. It is suggested that such an extensive explanation is not needed in the case of the proposed RRR treaty.

80. Several features of the draft preamble should be noted:

- a. It places the proposed RRR squarely in the context of an author’s right and therefore squarely within the framework of the Berne Convention, the premier authors’ rights convention.
- b. It postulates that the proposed RRR is an economic, rather than a moral right, and that its primary justification is to be found in its potential to redress the balance between visual artists and other categories of authors.
- c. It highlights that the proposed RRR may be of particular significance to developing countries and indigenous peoples generally in the context of traditional cultural expressions.
- d. It includes original manuscripts as being potentially the subject of the proposed RRR.

**Article 1: constitution of a “special union” and relationship to the Berne Convention**

- (1) **The countries to which this Treaty applies constitute a Special Union for the protection of the resale royalty rights of authors of literary and artistic works.**
- (2) **This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, as regards Contracting Parties that are countries of the Union established by that Convention. This Treaty shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties.**
- (3) **Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works.**
- (4) **Hereinafter, ‘Berne Convention’ shall refer to the Paris Act of July 24, 1971 of the Berne Convention for the Protection of Literary and Artistic Works.**

81. *Comments:* The constitution of a ‘Special Union’ is presented as an option here (hence the square brackets) and is more in keeping with the practice followed, though not invariably, with respect to special agreements under Article 19 of the Paris Convention. However, this was not done in the case of the WCT or the Marrakesh Agreement. In legal terms, creating a union of contracting states is probably only of limited significance, particularly if there is only one text in common between contracting parties. Conceptually though, it may make more sense in relation to the constitution of the various organs (the Assembly and Expert Committee) that are proposed below for the carrying out of the objects of the treaty – these will be the ‘organs’ of the overall union of states established under Article 1(1). In symbolic terms, the notion of a ‘Union’ also highlights the significance that members attach to the adoption and recognition of the proposed RRR. It is relevant to note, however, that both the WCT and Marrakesh Treaty, which do not have unions, still have an assembly, which may indicate that this is not seen as an important issue by WIPO in its current treaty making activities.

82. More important are paragraphs (2)-(4), which align the treaty with the Berne Convention and Article 20 thereof. This is critical for Berne Union members, as there can be nothing in the proposed treaty that runs counter to their obligations under the Berne Convention (see above). They also link into the proposition in the preamble that the RRR is now an author’s right and squarely within the purview of Berne.

## **Article 2: Definitions**

## **For the purposes of this Treaty**

**‘Author’ means the person or persons who have created an original work of art or the person or persons, who being writers or composers, have created the original manuscript of a literary, dramatic, dramatico-musical or musical work, and includes a person or persons under whose direction such an original work of art or original manuscript has been created.**

**‘Original work of art’ means the first physical or tangible embodiment of any artistic work falling within the meaning of article 2(1) of the Berne Convention; and**

**‘Original manuscripts of writers and composers’, hereafter referred to as ‘original manuscripts’, means the first physical embodiments of a literary, dramatic, dramatico-musical or musical work falling within the meaning of article 2(1) of the Berne Convention.**

**‘Sale’ means any transfer of the ownership of an original work of art or original manuscript whether this is done for money value or the equivalent.**

**‘Art market professional’ means an auctioneer, the owner or operator of an art gallery, the owner or operator of a museum, an art dealer or a person otherwise involved in the business of dealing in artworks, including transactions conducted online.**

**‘Committee of Experts’ means the committee established under Article 10.**

**‘Interest’ in relation to the right referred to in Article 4 means a pecuniary or monetary interest.**

83. *Comments:* The following observations may be made about the proposed interpretations:

- a. ‘Author’ is not defined under the Berne Convention, although there can be no doubt that this must refer to the person or persons responsible for the making of anything that is a ‘production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression...’ within the definition of ‘literary and artistic works’ in Article 2(1) of that Convention. While Article 2(1) says nothing directly about the level of intellectual creation or ‘originality’ that such productions must have before protection is to be accorded, it seems reasonable to define ‘author’ for the purposes of the present proposed treaty as the person ‘making’ the work or bringing it into existence. Again, this says nothing about the level of creativity or original intellectual contribution required for this – this remains ultimately a matter for national law - although it can be said that Article 2(1) presumes the presence of some minimal level. However, identification of the ‘author’ is critical for the recognition and exercise of the proposed RRR, and the

proposed definition will serve this purpose. It is extended to cover the situation that arises in a number of instances of artistic practice, both modern and ancient, where a work is executed under the direction or control of a supervising artist.

- b. The adjective ‘original’ in the expressions ‘original work of art’ and ‘original manuscript’ is used in the sense of meaning the first tangible embodiment or fixation of the work, in contradistinction to its other meaning of ‘creative’ or involving some element of intellectual contribution by the author. It will be noted that the term ‘original’ is used in this first sense in Article 2(3) of the Berne Convention. In some instances where works of art are created in series, it may be necessary for national laws to have some discretion in determining what ‘original’ means.
- c. ‘Original work of art’ maintains the usage in Article 14*ter*(1) of the Berne Convention. It is then linked back to the definition of ‘literary and artistic works’ in Article 2(1), but provision is made in Article 5(3)(b) below for some categories of artistic works to be excluded from the RRR under national laws.
- d. ‘Original manuscripts of writers and composers’ likewise tracks the usage in Article 14*ter*(1). The provisions in the draft treaty relating to RRR for original manuscripts are framed in such a way that they will be optional for special union countries. It will be noted that the terms ‘composers’ and ‘writers’ appear only in Article 14*ter*(1) and nowhere else in the Convention, but they are clearly used here in contrast to authors of original works of art, that is, visual artists. In keeping, however, with the terminology of Article 2(1), they are linked back to ‘literary, dramatic, dramatico-musical or musical works’ which are all defined, or at least described to some extent, in that paragraph. So far as the proposed treaty is concerned, it is only the manuscripts of these works that will qualify for the RRR, with the adjective ‘original’ confining this to the first physical or tangible embodiment. In some cases, identifying the first authentic manuscript of a writer’s or composer’s work may be a difficult process that will need to be left to national laws to determine.
- e. ‘Sale’ means any transfer of the ownership of an original work of art or original manuscript for money or money’s worth. This is in contrast to ‘transfer’, which

may encompass both sale and gifts or other non-remunerated voluntary or involuntary transmissions of ownership, as for example on bankruptcy or death.

- f. The definition of ‘art market professional’ is taken from the Australian RRR law,<sup>203</sup> and is suggested as a way of encompassing all ‘commercial sales’ that extend beyond publicly conducted sales conducted by galleries or auction houses or sales occurring through public art exhibitions or biennales. It will not include bilateral private sales.
- g. The ‘Committee’ will be a critical component in the continuing application of the RRR system set up under the Treaty, and has a parallel with the committees of experts set up under each of the classification agreements for patents, trademarks and designs: see further Article 10.
- h. ‘Interest’ is defined in order to clarify that the right protected under the Treaty is an economic and not a moral one.

### **Article 3: Persons entitled to protection under the Treaty**

- (1) The protection of this Treaty shall apply to:**
  - (a) authors of original works of art or original manuscripts who are nationals of one of the countries of the Union/contracting countries, for their works, whether published or not;**
  - (b) authors of original works of art or original manuscripts who are not nationals of one of the countries of the Union, for their works first published in one of those countries, or simultaneously in a country outside the Union and in a country of the Union.**
- (2) Authors of original works of art or original manuscripts who are not nationals of one of the countries of the Union but who have their habitual residence in one of them shall, for the purposes of this Convention, be assimilated to nationals of that country.**
- (3) The expression ‘published’ shall bear the same meaning as under Article 3(3) and (4) of the Berne Convention.**

84. *Comment:* These provisions track those of Article 3 of the Berne Convention.

### **Article 4: Protection under the Treaty**

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<sup>203</sup> Resale Royalty Right for Visual Artists Act 2009 (Australia), s 8(3).

- (1) **Authors shall enjoy, in respect of works for which they are protected under this Treaty, in countries of the Special Union other than the country of origin, those rights respecting the subject of the present Treaty that may be accorded at present or in future to their nationals, as well as the rights specially granted by this Treaty.**
- (2) **The enjoyment and exercise of these rights shall not be subject to any formality and shall be independent of the existence of protection in the country of origin.**
- (3) **The country of origin shall be considered to be the author's country of nationality or habitual residence or, where this is not a country of the Special Union but the work is first published in a country of the Special Union, that country.**

85. *Comments:* Article 4(1) is derived from a similar provision that appeared in Articles 2 and 3 of the Samaden Draft Treaty of 1939. Its effect is that authors claiming under the Treaty shall receive whatever protection for RRR that is presently and may hereafter be accorded to nationals of the country where protection is claimed, that is, they are to receive national treatment, which is not presently required under the Berne Convention. This is then extended to include the rights specially granted under the Treaty, that is, the specific RRR that is contained in Article 5 and the optional RRR for original manuscripts that is contained in Article 7.

86. Article 4(2) contains a 'no formalities' prohibition in the same terms as under Article 5(2) of the Berne Convention. This would not prevent a Special Union country imposing some kind of formal requirement, including a requirement for art market professionals to notify sales (which could even be strengthened by criminal or civil penalty regimes as in Australia<sup>204</sup>), so long as this was not a condition for the claiming of RRR by its holder.

87. Article 4(2) also contains a requirement of independence of protection, in line with Article 5(2) of Berne.

88. Finally, the interpretation of 'country of origin' in Article 4(3) links back to the identification of the persons protected under Article 3.

#### **Article 5: The resale royalty right for original works of art**

- (1) **Authors of an original work of art protected under this Treaty shall, during their lifetime, have an inalienable right (hereafter called the resale**

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<sup>204</sup> *Resale Royalty Right for Visual Artists Act 2009* (Australia), s 29.

royalty right) to an interest in any sale of the work subsequent to the first transfer of ownership by the author of the work.

- (2) **The resale royalty right referred to in paragraph applies only to sales that involve the services of an art market professional.**
- (3) **Countries of the special union reserve the right to exclude or modify the application of paragraph (1) in the following circumstances;**
  - (a) **with respect to resales for less than a minimum sum specified under national legislation [taking account of any relevant recommendations made from time to time by the Committee of Experts]**
  - (b) **works of architecture, sculptural and other three-dimensional works of art incorporated in buildings and other structures, or computer-generated works of art.**
  - (c) **resales to public galleries or public institutions within those countries, and other category of resales.**
- (4) **The interest referred to in paragraph shall represent at least 3% of the gross sale price of the work of art which is sold.**
- (5) **The resale royalty due under paragraph (4) shall become payable at the time of completion of the resale and the art market professional shall be responsible for payment of the resale royalty, together with any other persons who may be specified under national legislation.**
- (6) **Countries of the Union may provide that:**
  - (a) **a specified proportion of resale royalty right receipts is to be allocated to wider cultural and social purposes; and**
  - (b) **the collection and distribution of resale royalty right receipts may be exercised exclusively or otherwise by an approved authors' society acting on behalf of the author or his or her successors (as provided for under Article 6(2)).**

89. *Comments:* This is the critical provision of the proposed treaty, and seeks to provide for flexibility in implementation under national laws within the framework of Article 14<sup>ter</sup>:

90. *The formulation of the right in paragraph (1):* This follows the wording of Article 14<sup>ter</sup>(1) and requires no further comment.

91. *Limitation to sales involving art market professionals:* It may be generally agreed that it would be impossible for the RRR to apply to all resales of works of art, in particular those made between private individuals, however desirable this might be as a matter of

principle. On the other hand, if resales were limited to those made by art galleries and public auction houses, there would be many sales of a non-private nature that would slip through the net, for example, those made through the intermediary of a broker or agent – something that appears to be well recognized under the great majority of national RRR laws. One way of demarcating resales that will be subject to RRR is to inquire, as under Australian legislation, as to which resales have involved the services of an ‘art market professional’. This is on the basis that these persons should have the necessary record keeping resources as part of their daily work to keep track of RRR payments (for which the seller remains liable).

92. *Exclusions*: Scope is left to national laws to exclude certain categories of sales and works from the RRR, together with an advisory mechanism (the Committee of Experts) that may assist national legislators in making these determinations.

- a. *Sales for less than a specified threshold*: Some countries may take the view that collection of RRR below certain amounts is neither practical nor beneficial to the beneficiaries. This facility is reserved to national laws under paragraph 3(a). This option would leave the setting of any minimum amount to national laws, but with the further option that would require the country to take into account any recommendations made from time to time by the Committee of Experts. There is no obligation for countries to adopt a minimum resale price, but, if they do, this option allows complete flexibility as to the setting of the minimum, having regard to the recommendations of the Committee of Experts (this does not require these recommendations to be accepted, but merely to be considered).
- b. *Exclusion of certain works of art*: This follows the pattern set in some national laws where certain works of art are excluded from RRR liability. The categories listed in paragraph (3)(b) are the most obvious instances where collection of RRR may be impracticable or the work in question is on the borderline.
- c. *Sales to public galleries, etc*: These are suggested categories of resales that national laws may wish to exclude from RRR on the basis that such exclusions will assist in the development of national collections of artistic works. This is proposed as an option for Special Union countries, but a good counter-argument is



that visual artists should not be deprived of the benefits of RRR simply because the resale is to a public institution rather than another collector.

- d. *Amount of RRR*: This could be left entirely to national legislation to determine, but it would be beneficial to have a minimum percentage fixed in the Treaty. Many national laws prescribe 5% of sales price, but there is a sliding scale in the EU that drops from 4% or 5% downwards for each price band. It is therefore suggested that a minimum of 3% should be adopted in the Treaty.
- e. *Time of payment and persons responsible*: Under paragraph (5), payment of the resale royalty will fall due at the time the resale is completed. The person responsible will be the reseller, but national legislation may provide for the addition of other persons, such as the art market professional involved in the transaction or the buyer (or all or any of these).
- f. *Cultural and other purposes*: Under paragraph 6(a), it is provided that national laws may provide for a proportion of resale royalty to be directed towards general cultural or other social purposes. An example might be a visual artists' welfare fund. The way in which this might be done would be purely a matter for national legislation, and would only be optional.
- g. *Collective administration*: Collection and administration of the resale royalty right will be entirely a matter for national laws, but paragraph 6(b) makes reference to the possibility of this being done pursuant to collective administration, whether exclusively or not.

**Article 6: Exercise of resale royalty right after the death of the author and duration of protection**

- (1) The resale royalty right shall be protected for at least the length of the term of protection for the other economic rights of the author as provided in Article 7 of the Berne Convention.**
- (2) After the death of the author, it shall be vested in the author's heirs or successors unless national legislation determines otherwise.**
- (3) A waiver of the resale royalty right shall be of no effect.**

93. *Comments:* The duration of the optional resale royalty right under Article 14<sup>ter</sup> of the Berne Convention is not completely clear, although it has been suggested that it should be for at least the duration of the economic rights and this has been the position adopted under Article 6(1). The right is personal to the author during his or her lifetime, and after this in the author's heirs or successors unless determined otherwise by national legislation (Article 6(2)). The suggested prohibition on waiver under Article 6(3) is to be found in many national laws, though by no means all, and may be regarded as a piece of 'progressive development'. However, it would prevent pre-emptive waivers being sought artists at the time of first acquisition, on the basis that the artist at this time may be vulnerable, particularly at an early stage of their career, and therefore unable to resist such a condition of purchase.

#### **Article 7: Resale royalty right with respect to original manuscripts**

- (1) Countries of the Special Union may extend the application of Articles 4 to 6 to original manuscripts.**
- (2) Countries of the Special Union where protection is claimed under paragraph (1) may refuse this to authors whose country does not provide similar protection.**

94. *Comments:* This Article provides for extension of RRR to original manuscripts, but optionally and on condition of reciprocity. This is on the basis (a) that relatively few countries presently accord such a RRR, and (b) that the same justifications for RRR in the case of artistic works do not necessarily extend to original manuscripts.

#### **Article 8: General Principles on Implementation and application in time**

- (1) Special Union countries undertake to adopt the measures necessary to ensure the application of this Treaty.**
- (2) Nothing shall prevent Contracting Parties from determining the appropriate method of implementing the provisions of this Treaty within their own legal system and practice.**
- (3) Special Union countries shall apply the provisions of Article 18 of the Berne Convention to all protection provided for in this Treaty.**

95. *Comments:* Article 8(1) and (2) are taken directly from Article 10 of the Marrakesh Treaty. Article 8(1) embodies the basic obligation of any state entering into a treaty, namely that it will take whatever steps are necessary to give effect to its obligations under

the treaty. In particular, these will require the extension of a resale royalty right formulated in accordance with the provisions of the Treaty to all persons entitled to claim protection under Article 3. Article 8(2) embodies the salutary principle that compliance with Article 8(1) is a matter of substance, rather than of form.

96. Article 8(3) deals with the application of the Treaty provisions in time, providing essentially for its application to all works protected in Special Union countries at the time the Treaty comes into operation. This is done by incorporation of the provisions of Article 18 of the Berne Convention (as occurs in the case of Article 13 of the WCT).

### **Article 9: The Assembly**

**(1)**

**(a) The Special Union shall have an Assembly.**

**(b) Each Contracting Party shall be represented in the Assembly by one delegate who may be assisted by alternate delegates, advisors and experts.**

**(c) The expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation. The Assembly may ask WIPO to grant financial assistance to facilitate the participation of delegations of Contracting Parties that are regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations or that are countries in transition to a market economy.**

**(2) The Assembly shall:**

**(a) deal with matters concerning the maintenance and development of this Treaty and the application and operation of this Treaty;**

**(b) perform the function allocated to it under Article 12(2) in respect of the admission of certain intergovernmental organizations to become party to this Treaty;**

**(c) decide the convocation of any diplomatic conference for the revision of this Treaty and give the necessary instructions to the Director General of WIPO for the preparation of such diplomatic conference.**

**All matters requiring decision or approval by the Assembly under this paragraph shall be made by resolution.**

**(3)**

- (a) **Each Special Union member that is a State shall have one vote and shall vote only in its own name.**
- (b) **Any Special Union member that is an intergovernmental organization may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty. No such intergovernmental organization shall participate in the vote if any one of its Member States exercises its right to vote and vice versa.**
- (4) **The Assembly shall meet upon convocation by the Director General and, in the absence of exceptional circumstances, during the same period and at the same place as the General Assembly of WIPO.**
- (5) **The Assembly shall endeavour to take its decisions by consensus and shall establish its own rules of procedure, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of this Treaty, the required majority for various kinds of decisions [other than decisions under paragraph (2)(d) which shall require a  $\frac{3}{4}$  majority of votes cast.].**

97. *Comments:* This draws upon the models provided by a variety of WIPO treaties:

- a. Paragraph (1) is modelled on Article 13(1) of the Marrakesh Treaty.
- b. Paragraph (2)(a) is a standard paragraph for all WIPO Assemblies; likewise, paragraph (2)(b) deals with the position of intergovernmental organizations, including the European Union.
- c. Paragraphs (3)-(5) follow the model of Article 13 of the Marrakesh Treaty. In particular, paragraph (5) will allow for maximum flexibility in the matter of required majorities for various kinds of decisions.. However, given that the matter of variation of royalty rates may be a controversial one, an alternative of a binding  $\frac{3}{4}$  majority has been proposed (in square brackets.)

#### **Article 10: Committee of Experts**

- (1) **A Committee of Experts (the ‘Committee’) shall be constituted in which each country of the Special Union shall be represented by a suitably qualified expert nominated by that country.**
- (2)
  - (a) **The Director General may, and, if requested by the Committee, shall, invite countries outside the Special Union which are members of WIPO or party to the Berne Convention to be represented by observers at meetings of the Committee.**

- (b) **The Director General may, and, if requested by the Committee of Experts, shall, invite representatives of any relevant intergovernmental organization or international, regional or national non-governmental organization to participate in discussions of interest to them.**
- (3) **The Committee shall be organized according to rules of procedure adopted by a simple majority of the countries represented. These rules shall provide for the possibility of participation in meetings of the subcommittees and working groups of the Committee by those intergovernmental organizations and non-governmental organizations referred to in paragraph (2)(b) which can make a substantial contribution to the topics under consideration.**
- (4) **The Committee shall have the following functions:**
  - (i) **on its own initiative, it may prepare reports and recommendations on any of the matters referred to in Article 5(3) and (4), and shall do so upon a direction of the Assembly contained in a resolution of that body. Upon completion and adoption by the Committee, such reports and recommendations shall be tabled at the next meeting of the Assembly for consideration and endorsement, and shall be circulated to countries of the Special Union and otherwise made publicly available;**
  - (ii) **on direction from the Assembly, it shall prepare reports and recommendations on any other matter relating to the scope, content and administration of the resale royalty right in relation to original works of art and original manuscripts under the Treaty, including the preparation of guidelines and model laws. These shall be submitted to the Assembly for approval, and, on approval, shall be promulgated to members of the Special Union;**
  - (iii) **shall prepare reports from time to time for the Assembly on all matters relating to the future development of resale royalty rights.**
- (5) **Decisions of the Committee shall be made by a qualified majority of the countries of the Special Union.**
- (6) **Each expert shall have the right to vote by mail.**
- (7) **If a country does not appoint a representative for a given session of the Committee, or if the expert appointed has not expressed his vote during the session or within a period to be prescribed by the rules of procedure of the Committee, the country concerned shall be considered to have accepted the decision of the Committee.**

98. *Comments:* The provisions proposed here for the Committee are derived from, but do not replicate those of Article 3 of the Nice Agreement Concerning the International

Classification of Goods and Services for the Purposes of Registration of Marks. The working of the Committee will be central to the success of the proposed Treaty and the provisions proposed here are directed at ensuring this. Particular points to note are:

- a. While each Special Union member will appoint its own representative to the Committee, it should be someone who is ‘suitably qualified’, that is, someone with expertise relating to artworks and art markets, and, as the occasion arises, original manuscripts. The explicit provision for observers will provide for the receipt of advice from other interested parties.
- b. The Committee may investigate the matters referred to in Article 5(3) on its own initiative (although it must do so if directed by the Assembly). As these matters are reserved to national legislation, the Committee’s reports and recommendations can only be advisory. Nonetheless, tabling in, and endorsement by, the Assembly will add to the weight and influence such reports will have on national policy makers.
- c. The other matters referred to in paragraph (3), including the recommendation of revised royalty rates, will require a direction do so from the Assembly.

#### **Article 11: International Bureau**

**The International Bureau of WIPO shall perform the administrative tasks concerning this Treaty.**

99. *Comment:* This follows the approach adopted in Article 14 of the Marrakesh Treaty.

#### **Article 12: Eligibility for membership of the Special Union**

- (1) **Any Member State of WIPO may become party to this Treaty.**
- (2) **The Assembly may decide to admit any intergovernmental organization to become party to this Treaty which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by this Treaty and that it has been duly authorized, in accordance with its internal procedures, to become party to this Treaty.**
- (3) **The European Union, having made the declaration referred to in the preceding paragraph at the Diplomatic Conference that has adopted this Treaty, may become party to this Treaty.**

100. *Comment:* Again, this follows the approach adopted in Article 15 of the Marrakesh Treaty and in other WIPO agreements in both the copyright and industrial property areas.

In opening up membership to WIPO members rather than limiting to just Berne Union members, this will allow 20 non-Berne countries, mostly developing or least developed, to join the proposed Special Union, but without derogating in any way from obligations that the remaining 168 states have to each other under the Berne Convention (see further Article 1 above).

101. The facility for intergovernmental organizations to join the Special Union under paragraph (2) also follows the precedent of other WIPO Agreements, including the Marrakesh Treaty. However, it would not be open to the European Union to join at this stage (as provided for in paragraph (3)), as the EC Directive on RRR would not qualify as ‘legislation binding on all Member States’ as RRR is still governed by the harmonized national laws of each EU member state. This position would change in the event that the EC Directive was replaced by a Regulation (as in the cases of designs and trade marks) which is binding on all Member states.

#### **Article 13: Signature of the Treaty**

**This Treaty shall be open for signature at the Diplomatic Conference in..., and thereafter at the headquarters of WIPO by any eligible party for one year after its adoption.**

102. *Comments:* The details of the venue for signing will need to be completed when it is decided where the proposed diplomatic conference will be held.

#### **Article 14: Entry into Force of the Treaty**

**This Treaty shall enter into force three months after 20 of the eligible parties referred to in Article 12 have deposited their instruments of ratification or accession.**

103. *Comment:* This follows the template adopted Article 18 of the Marrakesh Treaty.

#### **Article 15: Effective Date of Becoming Party to the Treaty**

**This Treaty shall bind:**

- (a) the 20 eligible parties referred to in Article 12, from the date on which this Treaty has entered into force;
- (b) each other eligible party referred to in Article 12, from the expiration of three months from the date on which it has deposited its instrument of ratification or accession with the Director General of WIPO.

104. *Comments:* This follows the template of Article 19 of the Marrakesh Treaty, but might readily be varied, for example, to decrease the number of required signatories.

#### **Article 16: Denunciation of the Treaty**

**This Treaty may be denounced by any Contracting Party by notification addressed to the Director General of WIPO. Any denunciation shall take effect one year from the date on which the Director General of WIPO received the notification.**

105. *Comment:* Again, this is a standard provision in all WIPO treaties.

#### **Article 17: No Reservations to the Treaty**

**No reservation to this Treaty shall be admitted**

106. *Comment:* On the basis that the substantive provisions proposed represent minimum points of agreement in national RTRR laws, there is no need to make any provision for the making of reservations. The particular case of original manuscripts is dealt with by making this an optional matter, subject to reciprocity, under Article 7.

#### **Article 18: Languages of the Treaty**

- (1) **This Treaty is signed in a single original in English, Arabic, Chinese, French, Russian and Spanish languages, the versions in all these languages being equally authentic.**
- (2) **An official text in any language other than those referred to in Article 17(1) shall be established by the Director General of WIPO on the request of an interested party, after consultation with all the interested parties. For the purposes of this paragraph, ‘interested party’ means any Member State of WIPO whose official language, or one of whose official languages, is involved and the European Union, and any other intergovernmental organization that may become party to this Treaty, if one of its official languages is involved.**

107. *Comment:* This follows the precedent of Article 21 of the Marrakesh Treaty.

#### **Article 19: Depositary**

**The Director General of WIPO is the depositary of this Treaty.**

108. *Comment:* This follows the precedent of Article 22 of the Marrakesh Treaty



## Appendix – selected domestic RRR laws

- Australia, *Resale Royalty Right for Visual Artists Act 2009*
- Bosnia and Herzegovina, *Copyright and Related Rights Law 2010*, Article 35 (within Section D of Chapter III. Other Rights of the Author)
- Brazil, *Law No. 9610 of February 19, 1998, on Copyright and Neighbouring Rights*, Article 38 (within Chapter III of Title III. Economic Rights of the Author and Term Thereof).
- Cameroon, *Law No. 2000/011 of December 19, 2000, on Copyright and Neighbouring Rights*, Section 20(2) (within Chapter II of Part II. Attributes of copyright).
- Costa Rica, *Law No. 6683 on Copyright and Related Rights (as last amended by Law No. 8834 of May 3, 2010)*, Article 151 (within Chapter I of Title VI. General provisions).
- 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*, Articles 26 (within Chapter I of Title III. Scope of Authors' Rights) - 44 (within Chapter III of Title III. Transfer of Copyright).
- Czech Republic, *Consolidated version of Act No. 121/2000 Coll., on Copyright and Rights Related to Copyright and on Amendment to Certain Acts (the Copyright Act), as amended by Act No. 81/2005 Coll., Act No. 61/2006 Coll. and Act No. 216/2006 Coll.*, Article 24 (within Section IV of Title I, Volume III).
- Denmark, *Consolidated Act on Copyright 2010*, Section 38 (within Chapter II. Limitations on Copyright and Management of Rights in the event of Extended Collective License);

- Estonia, *Copyright Act (of November 11, 1992, as last amended by the Act of February 15, 2000)*, Section 15 (within Chapter III, Rights arising upon Creation of a Work).
- Ecuador, *Intellectual Property Law (Consolidation No. 2006-13)*, Articles 37-38-39 (within Part IV, Section V, Chapter I, Title I, Book I. Works of three-dimensional art and other works).
- Finland, *Copyright Act (Law No. 404 of July 8, 1961, as amended up to April 30, 2010)*, Section 26i (within Chapter 2b. Resale remuneration).
- France, *Intellectual Property Code (Consolidated version of February 23, 2015)*, Article L122.8 (within Chapter II, Title II, Book I, Part I, Legislative Part. Patrimonial rights), Articles R122.2-122.12 (within Chapter II, Title II, Book I, Part I, Regular Part. Patrimonial Rights).
- Greece, *Copyright, Related Rights and Cultural Matters; (Law No. 2121/1993 as last amended up to Law No. 4281/2014)*, Article 5 (within Section I. Object and content of copyright).
- Germany, *Act on Copyright and Related Rights (Copyright Act, as amended up to Law of October 1, 2013)*, Section 26 (within Chapter IV of Part I. Scope of Copyright).
- India, *Copyright Act 1957 (as consolidated up to Act No. 49 of 1999)*, Section 53A (within Chapter XI, Infringement of Copyright)
- Italy, *Law No. 633 of April 22, 1941, for the Protection of Copyright and Neighboring Rights (as amended up to Decree-law No. 64 of April 30, 2010)*, Articles. 144-145 (within Section VI, Chapter II, Part III. Rights of the Author in Respect of the Increase in Value of Works of Figurative Art). *Legislative Decree No. 118 of February 13, 2006, implementing Directive 2001/84/EC of the European Parliament and of the Council of September 27, 2001, on the Resale Right for the Benefit of the Author of an Original Work of Art.*

- Latvia, *Copyright Act of April 6, 2000 (as last amended on April 18, 2013)*, Section 17 (within Chapter IV. Rights of an author);
- Lithuania, *Law on Copyright and Related Rights (No. VIII-1185 of May 18, 1999, as amended by Law No. XII-1183, of October 7, 2014)*, Article 17 (within Section III, Chapter II. Authors' rights).
- Mexico, *Federal Law on Copyright (as consolidated up to July 14, 2014)*, Article 92bis (within Chapter II of Title IV. Photographic, Three-Dimensional and Graphic Works).
- Montenegro, *Law No. 07-1/11-1/15 of July 12, 2011, on Copyright and Related Rights (promulgated by Decree No. 01-933/2 of July 25, 2011)*, Articles 34-35 (within Sub-section IV of Section C, Chapter II. Other rights of the author).
- Poland, *Act No. 83 of February 4, 1994, on Copyright and Neighboring Rights (as last amended on October 21, 2010)*, Article 19 (within Division II of Chapter III. Authors' Economic Rights).
- Portugal, *Law No. 24/2006 of 30 June (Artist's Resale Right)*.
- Serbia, *Law on Copyright and Related Rights, 27 December 2011*, Articles 35-36 (within Section 4.3. of Chapter II. Author's Rights in Relation to the Owner of a Work of Authorship).
- Spain, *Law No. 3/2008, of December 20, 2008 on the Resale Right for the Benefit of the Author of an Original Art Work*.
- Sweden, *Act on Copyright in Literary and Artistic Works (Act 1960-729, of December 30, 1960, as amended up to April 1, 2011)*, Articles 26 n-o-p (within Chapter 2a. Right to Special Remuneration).
- The Former Yugoslav Republic of Macedonia, *Law on Copyright and Related Rights, 23 August 2010*, Articles 41-45 (sub-section 2 within Section 3, Chapter II. 'Other Rights of the Author').

- Turkey, *Law No. 5846 of December 5, 1951 on Intellectual and Artistic Works (as last amended by Law No. 5728 of January 23, 2008)*, Article 45 (within Section B of Part III. Limitations).