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WIPO TOOLKIT ON ARTIST'S RESALE RIGHT (PART II)

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Toolkit on Art Resale Royalty Right

Part II

ABBREVIATIONS USED IN THIS PART:

ARR:	Art Resale Royalty
CMO:	Collective Management Organization ¹ (collecting society)
AMP:	Art Market Professional, E.G. Art Dealer, Gallery, Art Auction
IT:	Information Technology
AI:	Artificial Intelligence
NFT:	Non-Fungible Token
Other abbreviations (for CMOs and non-governmental organizations): see Appendix 3	

INTRODUCTION AND OVERVIEW

1. This Part of the Toolkit deals with the practicalities of administering an ARR scheme at the national level. In no way is this intended to be prescriptive or normative: rather, it seeks simply to provide some guidelines and 'tools' that national law and policy makers may find helpful, and that are derived from some of the practical experiences under national laws where ARR schemes are presently in operation.
2. In preparing this Toolkit, the author has had the advantage of consultations with, and feedback from, national CMOs representing visual artists, including the very helpful responses that have been received from many of these CMOs with respect to several questionnaires: the first addressed to CMOs that are presently administering ARR schemes and the second addressed to CMOs in countries where ARR is recognized under national law but where the CMO is not yet involved in the administration of such a scheme. Copies of these questionnaires are set out in Appendices 1 and 2, and a list of national CMOs who have contributed responses and/or comments is contained in Appendix 3. These responses have provided very useful examples and models which have been drawn upon in the following Part of the Toolkit, but there has been no attempt to tabulate them question by question as they reflect many different national and cultural circumstances in each country surveyed. As with the preparation of Part I of the Toolkit, there has also been extensive desk research into national laws and regulations.
3. A further word of explanation here should be given here with respect to the range of CMOs consulted in the preparation of this Part of the Toolkit. As noted in Part I, ARR is recognized in just over half of the membership of the Berne Union and in only a proportion of these countries is ARR managed by a CMO. The majority of these CMOs, moreover, are situated in Europe, principally because of the harmonizing effect of the EC Directive on ARR, although there are significant outliers elsewhere, such as Australia and in South America. As a practical matter, this means that experience in ARR management, to date, is primarily to be derived from European models. However, art resale markets operate in all Berne countries and the artists of those countries are potentially beneficiaries of ARR – hence, it is useful for countries that have not yet legislated for ARR to draw on the experiences of those countries which have done so, in particular those in which some form of collective management of ARR has been adopted.

¹ In some jurisdictions, such as Australia, the term 'collecting society' is used to indicate collective management organisations, but, for the purpose of this Toolkit and consistency with the general usage in other WIPO documentation, the term CMO is used throughout.

4. In this regard, it is helpful to bear in mind that while there are several countries in Europe that have significant art resale markets, for example, the UK, France, Germany, Italy and Spain, there are also many EU countries that have smaller markets that are comparable in size to those in other parts of the globe. Hence, the experience of CMOs in those smaller countries may be particularly instructive to legislators and policy makers who are seeking to promote ARR within their own countries. As will be seen below, CMOs in countries with larger markets have also been very proactive in helping CMOs in countries that have been undertaking these efforts; in this regard, CISAC and EVA have also been very involved, while such legislative and policy assistance is, of course, part of the overall mandate of WIPO.

ENFORCEMENT OF ARR – INDIVIDUAL AND COLLECTIVE MANAGEMENT

5. As a starting point, it should be reiterated that under international law, that is, article 14ter of the Berne Convention, there is no prescription as to how ARR is to be recognized or enforced at the national level. It should also be noted that, unlike the other authors' rights enshrined in Berne, this is not characterized as an 'exclusive' right but rather as a right to remuneration, albeit one of a special kind in that it is framed as an inalienable right. Apart from this, article 14ter leaves it open to Berne member countries to determine whether this right is to be exercised by an individual artist him or herself, or whether this may be done collectively through a CMO or, indeed, in some other way.
6. That said, as we shall see, some form of collective management is probably the most practical way in which an ARR scheme may be administered. In this regard, it is helpful to refer to the following description of the rationale for 'collective management' of copyright and related rights generally that is provided by Dr Ficsor in the *WIPO Guide to the Copyright and Related Rights Treaties Administered by WIPO*:

Collective management of copyright and related rights

A way of exercising copyright and related rights where the exercise of rights is impossible or highly impracticable on an individual basis. The owners of rights concerned authorize an organization to exercise their rights on their behalf; more particularly, to grant licenses, to monitor uses, to collect the corresponding remuneration, and to distribute and transfer that remuneration to those to whom it is due. The traditional concept of this term also implies that actual collectives of authors, performers and owners of rights administer the rights concerned through appropriate bodies and administrative units established by them. In the case of such collective management, usually blanket licenses are granted to users, uniform tariffs and distribution rules are established, and deductions are made from the remuneration collected not only for administration costs but also for cultural and social purposes....

Collective management organization

An organization performing collective management of copyright and/or related rights. (p 275)²

7. ARR obviously has special characteristics not present in the management of other authors' rights – for example, it is not a right that can be licensed in the usual way – but collective management may nonetheless be well suited to ARR, although there are variations in the way in which this may be carried out and none of these different approaches is precluded by the terms of article 14ter, so long as there is no assignment of ARR. For example, it might be provided that the ARR can only be exercised and collected on the artists' behalf through a CMO ('mandatory collective management') or optionally (meaning that an individual artist may choose whether the artist exercises the right him- or herself or does so through a CMO). A further form of collective management, drawing on models adopted in national laws with respect to other exclusive rights, is 'extended collective management' in which a CMO that is substantially representative of the right holders may then collect remuneration on behalf of

² WIPO *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright, and Related Rights Terms*, EWIOPO Publication No 899(E), 2003, p 275. Available at: <https://www.wipo.int/publications/en/details.jsp?id=4645&plang=EN>

non-members, subject to various conditions, including the possibility of an opt-out provision by individual right holders.³

8. There is no 'right' or 'wrong' approach to the question of whether collective management – mandatory, optional or extended – is adopted in a national ARR scheme in view of the latitude allowed under art 14^{ter}(3), Berne Convention. However, the following general observations may be made here :
 - a. If ARR is left simply as a matter for individual enforcement, it is likely that the vast majority of affected artists will be unable to administer and enforce the right themselves: this, indeed, is the basic argument in favour of some kind of collective management of many exclusive rights, as the long history of CMOs in the music and literary areas demonstrates. While there may be a handful of artists who would have the resources to do this themselves in the case of ARR – and to do so very effectively - they will be the exception rather than the rule.
 - b. It is worth reiterating that ARR differs from other exclusive rights of authors in that it is framed as a right to remuneration only as distinct from an exclusive right to the use of a work that may then be licensed on a continuing basis to third parties, sometimes at rates set by legislation – or not licensed at all, if the right holder decides to withhold permission. This gives ARR a distinct character of its own where the advantages of collective management may be inherently more attractive to the right holder than they are in the case of an exclusive right: regardless of ARR, the work in question will be resold or transferred by the owner of the physical item; ARR simply entitles the right holder to a share in the proceeds of commercial resale or transfer and such entitlement would not otherwise arise.
 - c. There are obvious economies of scale that apply where rights, whether exclusive or simply remunerative, are administered collectively, and this can bring great benefits to the individuals who are part of the collective, particularly artists belonging to disadvantaged groups such as indigenous communities. At the same time, there may be issues of anti-competitive behavior that become relevant where a CMO assumes a dominant position in a particular market. However, this is an issue that can be readily addressed by other laws outside copyright, such as those dealing with competition and consumer protection. Indeed, there may be national (and regional) laws that address the operations of CMOs directly and provide a framework within which CMOs must operate to ensure transparency and accountability: such is the case with CMOs in member countries of the European Union.⁴ In the case of ARR, moreover, competition issues arising from fears of market dominance by a single CMO appear less likely in view of the fact that the royalty rate will usually be set by legislation and the costs of collection by competing CMOs will be similar (this appears to be the experience in the UK). The size of the art resale market in each country, rather than competition issues, will therefore usually determine whether there is one or more CMOs involved in ARR collection. Thus, in countries with relatively limited art resale markets a CMO which acts as 'one stop shop' for ARR may prove to be the most effective approach to serving the interests of ARR right holders, whereas in countries with larger art resale markets, there may be room for several CMOs to provide this service (as in the UK and France).
 - d. As noted above, it is still possible that there will be individual artists who are capable of exercising ARR themselves and do not wish to do so collectively. This is certainly the case in several jurisdictions, where collective management is optional rather than mandatory. The issue in such cases therefore is to identify the circumstances in which this may occur, for example, through a provision for opting out of collective management upon the giving of timely notice: see further Table 19 below.

³ For fuller descriptions of various forms of extended collective management that may be adopted, see further M Ficsor, *Collective Management of Copyright and Related Rights*, WIPO Publication No 855/22, Third ed 2022, Chap 5 ('Voluntary, presumption-based, extended and mandatory collective management').

⁴⁴ See here DIRECTIVE 2014/26/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

Another situation that may arise is where a right holder does not wish to have his or her ARR enforced by a CMO, and there will be a need for the rules of the CMO to allow for such a waiver.

9. In practical terms, however, as an ARR scheme will be most effective where this is done collectively, it is preferable that national legislation should provide for this possibility, rather than remaining silent on this question. The further issue of whether this should be mandatory, optional or extended, will then remain a matter for countries to determine, having regard to their own legal traditions and the nature of their particular art markets. Some examples from national laws may assist here.

TABLE 19 – MODES OF IMPLEMENTATION OF NATIONAL ARR SCHEMES

<u>International instrument, national and regional laws</u>	<u>Text</u>	<u>Comments</u>
<u>Berne Convention, article 14ter(3)</u>	The procedure for collection [of ARR] and the amounts shall be <u>matters for determination by national legislation.</u>	<u>Leaves this as a matter for national law to determine</u>
<u>National law does not prescribe how ARR is to be exercised (Brazil)</u>	The author has the irrevocable and inalienable right to receive at least five percent of the price increase that may be verified in each resale of a work of art or manuscript, whether original, that has been disposed of. ⁵	<ul style="list-style-type: none"> • <u>Few, if any, national laws go so far as prescribing that ARR can only be exercised by the author alone; many, however, such as the Brazilian provision here, define the right but without specifying that it may be managed collectively</u> • <u>In practice, it may be almost impossible for an individual author to enforce on his or her own ARR – hence, provision for some form of collective management represents the best way forward; it may therefore be helpful for this to be stated expressly in any implementing law, rather than left at large (see next two provisions)..</u>
<u>EU, Directive</u>	Art 6. 2 ... 2. Member States may provide for compulsory or optional collective management of the royalty provided for under Article 1.	<ul style="list-style-type: none"> • <u>This leaves it open to national laws to determine whether they will adopt collective management and, if so, whether this will be on a mandatory (compulsory) or optional (voluntary) basis.</u>
<u>Swedish Copyright Law, 1960, art 26p – only CMO can collect ARR</u>	Article 26 p. Only an organization representing a substantial number of authors of works in the area concerned which are being exploited in Sweden is entitled to claim the remuneration.	<ul style="list-style-type: none"> • <u>Bildupphovsrätt collects ARR for all right holders, not just members of the CMO, who cannot do this on their own behalf.</u> • <u>This is also an instance of extended collective management.</u>

⁵ See, for example, article 38, Brazil, Law No. 9610 of February 19, 1998, on Copyright and Related Rights.

<p><u>More detailed provision on mandatory collective management where there are several CMOs (UK).</u></p>	<p>(1) Resale right may be exercised only through a collecting society.</p> <p>(2) Where the holder of the resale right has not transferred the management of his or her right to a collecting society, the collecting society which manages copyright on behalf of artists shall be deemed to be mandated to manage his or her right.</p> <p>(3) Where there is more than one such collecting society, the holder may choose which of them is so mandated.</p> <p>(4) A holder to whom paragraph (2) applies has the same rights and obligations, in respect of the management of his right, as have holders who have transferred the management of their right to the collecting society concerned.</p> <p>(5) For those purposes—</p> <p>(a) “collecting society” means a society or other organisation which has as its main object, or one of its main objects, the administration of rights on behalf of more than one artist; and</p> <p>(b) the management of resale right is the collection of resale royalty on behalf of the holder of the right in return for a fixed fee or a percentage of the royalty.⁶</p>	<ul style="list-style-type: none"> • <u>This places collection and distribution in the hands of a CMO (collecting society) which must be approved for this purpose (see further below).</u> • <u>The only choice available to the ARR holder here is the choice of CMO which is to be mandated: see further pars 24ff and Table 21 below. Otherwise, the holder of ARR has no direct say in the way ARR is administered by the CMO, eg whether it is to be collected or not, and cannot do this him- or herself.</u>
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⁶ UK, Artists Resale Right Regulation, reg 14.

<p><u>Extended collective management, with individual management as a default position (Australia).</u></p>	<p>(1) Unless the holder of the ARR on the commercial resale of an artwork notifies the collecting society in writing, within 21 days after notice of the commercial resale is published on the collecting society's website, that the collecting society is not to collect the ARR, or enforce the ARR, on the commercial resale on behalf of the holder, the collecting society must use its best endeavors to collect the ARR payable under this law, and, if necessary, enforce any ARR held under this Act, on the commercial resale of the artwork on behalf of the holder or holders of the ARR.</p> <p>(2) The collecting society is <u>not subject to the direction of any holder or holders of the ARR in collecting the resale royalty or enforcing that right.</u>⁷</p>	<ul style="list-style-type: none"> • <u>This provides for extended collective management of ARR, ultimately leaving the choice of whether to leave this to collective administration to the individual author (on an opt-out basis)</u> • <u>It provides for time limits within which the holder of ARR is to indicate that he or she does not wish collective management of their ARR to commence</u> • <u>The opt-out is limited to a particular resale and is not a general one over all resales that may occur.</u>
<p><u>Optional collective management (France)</u></p>	<p>Art L 122-8 al 4: The art market professionals referred to in the first paragraph must provide the author or the resale right's collective management organization with all necessary information for the liquidation of sums due under resale right for a period of three years from the date of sale.⁸</p>	<ul style="list-style-type: none"> • <u>In practice, ADAGP manages the resale right for almost all artists in France (with a few rare exceptions such as Picasso and Matisse).</u> • <u>As to this, ADAGP comments: 'The ability for artists to manage their own ARR presents challenges for AMPs, as they must verify the legitimacy of the right holder. There have been cases where AMPs have been contacted by "fake" heirs. Management by the ADAGP provides AMPs with simplified verification processes, additional security, and a sole point of contact.'</u>
<p><u>Optional collective management (Algeria)</u></p>	<p>if the author is not member of the CMO he or she may appoint it as agent for the collection of ARR.⁹</p>	<ul style="list-style-type: none"> • <u>This gives the author the option of appointing the CMO to act in its behalf, but without becoming a member.</u>

⁷ Following section 23, Resale Royalty Right for Visual Artists Act 2009 (Australia). Other provisions of the Act provide for the appointment of the collecting society and oblige the collecting society to publish on its website details of commercial resales of artworks of which it becomes aware. The society is given further powers of collection and enforcement of ARR.

⁸ France, Intellectual Property Code, art L 122-8 al 4.

⁹ See the Algerian Executive Decree number 05-358 of 21 septembre 2005 (article 5)

ROLE OF CMOs

10. It follows from the above that collective management of ARR represents the most practical way of administering and enforcing this right, although there may be differences as to the mandatory, extended or optional nature of this arrangement. The remaining sections of this Part of the Toolkit are therefore directed at the practical aspects of collective management of ARR through a CMO.
11. In this regard, it should be borne in mind that WIPIO has produced another and very detailed Toolkit on CMOs generally: see the *WIPO Good Practice Toolkit for Collective Management Organizations (The Toolkit): A Bridge between Rightholders and Users*, Working Document, 15 September 2021 (referred to hereafter as **CMO Toolkit**). The subject of collective management generally is also dealt with at length in Dr Ficsor's 3rd edition of *Collective Management of Copyright and Related Rights*, WIPO Pub 855-22-en, 2022. It is therefore not intended, in this Part, to repeat the detailed and extensive information that is available in these documents, other than in general terms: appropriate cross-references will be made where relevant as many of the important tools and guidelines contained in these documents, in particular in the CMO Toolkit, will be equally applicable to a CMO that is administering ARR.¹⁰ This Part therefore is concerned primarily with matters that are particular to ARR.
12. Having said this, it should be remembered that the role of a CMO in relation to ARR differs significantly from the more traditional licensing role of CMOs with respect to other authors' and related rights: a CMO for ARR is primarily concerned with the collection and distribution of ARR, coupled with an important monitoring and identification role. By definition, the receipt of ARR will occur after the commercial resale of an eligible work has taken place, *ex post facto* rather than *ex ante* as in the case of the other licensing activity carried out by CMOs.

CONSTITUTION OF CMO – IN GENERAL

13. This may be done in different ways under national laws, for example, through specific legislative provisions in a national copyright law or a collective management related regulation, or under the general laws relating to the establishment of corporate entities, associations or co-operatives. Examples of the first kind are to be found in number of national laws: thus, the **CMO Toolkit**, at par 1.1.2.1 lists a number of countries, including Algeria, Brazil, Mexico, Morocco, Cote d'Ivoire, Tunisia where this is the case. Examples of the second kind are to be found in countries with both common law and civil law systems. For instance, in the UK one CMO (DACS) is established as a company limited by guarantee and the other CMO (ACS) is formed as a Community Interest Company, with slightly different legislative regimes applying to each category of company under UK companies legislation; in Norway, BONO is established under Norwegian co-operative law; in Denmark, VISDA is established under Danish associations law; in Slovakia, LITA is established as a 'civic association' under general law; in the Netherlands, Pictoright is established as a non-profit organization, while in Belgium, the legal forms to be adopted is left open but in general CMOs are established as co-operative societies. It may also be the case that the national copyright law specifies the role and objectives of the CMO, but then provides that it should be a body established under the general laws of that country relating to corporations, associations and so on, as for example in France.¹¹
14. As stated above, there is no normative prescription that can be made in this regard: each country will work within its general legal, economic and cultural framework. Furthermore, it may be the case that management of ARR is folded into the operations of an existing CMO

¹⁰ Further useful guidance on the establishment, promotion, operation, and governance of CMOs in the area of related or related rights is to be found in WIPO, *Collective Management organizations – Toolkit: Related Rights*, Robery Hooijer and J Joel Baloyi, Feb 2016.

¹¹ In France, ADAGP is a civil society governed by dispositions of general French law (articles 1832 and subsequent, 1845 and subsequent of the Civil Code, but subject also to the specific provisions of the Intellectual Property Code (arts L.321-1 and subsequent)).

that is already managing other rights of the more traditional kind: see further pars 16 ff below. But regardless of how a CMO is set up, a common feature of those presently operating in WIPO member countries is that their primary purpose is that they have been established to operate for the collective benefit of their members, ie the right holders. Important consequences flow from this, for example, that the management of the CMO should be clearly accountable to, if not controlled, by its membership; its operations should be transparent to both its members and the wider public; distributions to members should be administered in a fair and timely manner; it may be appropriate to have regard to wider social and cultural objectives that promote awareness and support for the rights administered (in this case, ARR); and that the costs of administration should be kept to an acceptable minimum. Furthermore, such CMOs will usually (but not necessarily) be organized on a non-profit basis: such a requirement clearly focusses back on ensuring and promoting the collective benefit of the membership.

15. In the case of CMOs generally, these matters are addressed in considerable detail in the **CMO Toolkit**: Parts 2-5. More specific issues that arise in the case of a CMO concerned with ARR are discussed in the following sections.

SINGLE AND MULTI-REPertoire CMOS

16. While there is no reason why a CMO could not be constituted for the administration of ARR alone, there appears to be only one Berne member country where this is presently the case (the Czech Republic¹²). In practice, ARR management has been taken over by existing CMOs that are administering other exclusive rights, such as those of reproduction and communication. Typically, such CMOs are concerned with the visual arts only rather than other kinds of works, such as literary and musical works. Examples of such CMOs are to be found in the UK (DACs and ACS), France (AGADP), Germany (Bildkunst), Bildrecht (Austria), HUNGART (Hungary), Norway (BONO), Romania (VISARTA), Pictoright (Netherlands) and Finland (KUVASTO). In some instances, however, administration of ARR is carried on by a CMO managing rights in relation to other kinds of works, such as Australia (the Copyright Agency or CA) where the initial establishment of a visual arts CMO (Viscopy) in the 1990s was later folded into CA which had been initially established for the purposes of administering reproduction rights for photocopying in educational institutions. Again, in Latvia, AKKA/LAA is a multi-repertoire organization, administering rights of the rightsholders of musical, literary, dramatic and visual works, with ARR administration forming only a fraction of AKKA/LAA's activities in administration of copyright. The same is true in Italy with SIAE.
17. The advantages of adding ARR to an existing CMO, particularly one already concerned with visual artists, can be simply stated:
- a. Existing infrastructure for collection and distribution of funds can be readily deployed into ARR collection and distribution.
 - b. Staff with experience in relation to the visual arts generally can be more readily deployed in relation to ARR management.
 - c. The interests of visual artists more generally can be represented in a CMO that is administering the range of rights relating to visual artists, rather than just one of these rights, ie ARR. Furthermore, ARR will be potentially relevant to most, if not all, categories of visual artists, as a useful supplement to their existing income streams.
 - d. The size of the art resale market in a particular country may be insufficient to support the operations of a CMO dedicated just to one right such as ARR. In smaller countries, it may be that it will only be economically viable to have one CMO which covers multiple repertoires, including for works other than those of visual artists. Each country

¹² The CMO here is GESTOR; other rights relating to the visual arts in the Czech Republic are administered by OOAS. It appears previously that there was a single CMO administering ARR in the Russian Federation (UPRAVIS).

will have differing circumstances, and these need to be considered along with those relating to legal requirements.

18. On the other hand, there may be disadvantages in folding management of ARR into an existing CMO that is managing a wide range of rights beyond those of visual artists, even if there are apparent economies of scale and efficiencies that may otherwise arise. The interests of visual artists in such a CMO may be deferred to those of other right holders, particularly if the latter bring in more remuneration that is easier to collect. Accordingly, where a CMO is managing a range of rights, non-visual and visual, a 'pecking order' may emerge and it will be necessary to ensure that the internal regulations of the CMO give appropriate representation to visual artists to ensure that their interests are properly represented. Such regulations, for instance, could deal with such matters as voting powers within the CMO and election of board members, although this may still leave visual artists at a disadvantage where there are other – and larger – groups of right holders involved. That said, the advantages of a more specialized CMO dealing only with visual artists, including ARR, are considerable, as this allows for an increased focus on fund allocation, collective participation in shared objectives, and the provision of social assistance for visual artists (as in France, where a portion of the undistributed ARR is allocated to a public organization that manages artists' retirement funds (IRCEC)).

INTERNAL AND EXTERNAL CONTROLS

19. National laws typically stipulate that control over the activities of any CMO will occur in two ways. The first is through the internal rules or statutes of the CMO that establish the governance and accountability of the CMO to its members. These will need to comply with the provisions of national law relating to these kinds of entities, for example, the national laws relating to companies or associations, and so on. They will typically include provisions for a board of directors, meetings of members, financial and reporting requirements in the same way as for other entities in the wider economic sphere, but also a summary of the CMO's role and function, and an explanation of each category of right holders and the rights which it represents. The **WIPO Toolkit** for CMOs deals with these matters in considerable detail: see Part 5.
20. A second level of controls will usually also arise through an overlay of external regulations at the national level that are directed specifically at the recognition and operations of the entity as a CMO. Such controls may be of different kinds: legislative provisions prescribing the requirements for recognition of the CMO, and a continuing monitoring function performed by an external regulator, such as the relevant Minister, department or other governmental agency. It will be seen therefore that there is a symbiotic relation here between the internal and external controls that apply to a CMO, in that what happens internally within the CMO, which is controlled by its members, must take place within the parameters set by the external controls that apply.
21. For example, in the European Union, there is a directive (Directive 2014/26/EU) which deals in detail with CMOs, covering such matters as their objectives, membership and representation of members, management, transparency and reporting, users' obligations, complaints and dispute resolution. This directive is then reflected in corresponding regulations at the national level in member countries that have opted for collective management of ARR (most, but not all, EU members). Typical is Hungary which adopted an implementing law in 2016 (Act XCIII of 2016): at this point, HUNGART (and all other functioning Hungarian CMOs) had to modify their statutes and other internal rules to comply with the 2016 Act. Again, in the UK, no longer in the EU, its implementing regulation (*The Collective Management of Copyright (EU Directive) Regulations 2016*) continues to apply to CMOs in that country. Another EU country, Austria, has its own authority that monitors the works of CMOs, including the granting of licences to operate and the rights they are allowed to manage.
22. In addition to such specific legislative controls, as mentioned above further monitoring of CMO operations is typically carried out by the relevant minister, government department or agency.

In Italy, for example, SIAE is subject to the joint control of the Ministry of Culture and Presidency of the Council of Ministers as well as the Ministry of Economy and Finance in certain respects. This is also the case for the ADAGP in France, which has been subject to control from the Ministry of Culture as well as the Court of Audit since 2000. National audit offices may also have a potential role here, as in Hungary and Estonia. In Australia, there is a requirement for the annual report of the CMO to be tabled in parliament each year. Regular renewal of authorizations of CMOs to administer ARR is generally provided as well: for example, every five years, as in Denmark and Australia.

23. More generally, national CMOs also receive the benefit of ‘peer review’ through their membership and participation in the activities of CISAC, the relevant international ‘peak’ organization for CMOs. Some sample provisions from national laws follow in Table 20.

TABLE 20 – APPOINTMENT OR ACCREDITATION OF CMOS

Country	Legislative provision	Comments
Australia, <i>Resale Royalty Right for Visual Artists Act 2009</i>	<p>35 Appointment of the collecting society</p> <p>(1) A body may apply to the Minister to be appointed as the collecting society.</p> <p>(2) After receiving the application, the Minister must do one of the following:</p> <p>(a) appoint the body to be the collecting society, by notice in the Gazette, for a period not exceeding 5 years specified in the notice;</p> <p>(b) refuse to appoint the body to be the collecting society.</p> <p>(3) Only one body may be appointed to be the collecting society at a time. A body must not be appointed to be the collecting society while another body is appointed to be the collecting society.</p> <p>(4) The Minister must not appoint a body to be the collecting society unless:</p> <p>(a) it is a company limited by guarantee and incorporated under the Corporations Act 2001; and</p> <p>(b) all resale royalty right holders are entitled to become its members; and</p> <p>(c) its rules prohibit the payment of dividends to its members;</p> <p>and</p> <p>(d) its rules contain provisions of the kind determined by legislative instrument by the Minister, being provisions necessary to ensure that the interests of holders of resale royalty rights or their agents are protected adequately, including, in particular, provisions about:</p> <p>(i) the collection of amounts of resale royalty; and</p> <p>(ii) the distribution of amounts collected by the society; and</p> <p>(iii) the holding on trust by the society of amounts for holders of resale royalty rights who are not its members;</p> <p>and</p> <p>(iv) access to records of the society by holders of resale royalty rights and their agents.</p>	<p>The ‘tender’ requirements of the Australian Government for the purposes of appointment as the collecting society were more detailed than this, going to such matters as the way the society would identify eligible right holders and works, communications strategies, timing of royalty payments, and so on</p>
France, <i>Intellectual Property</i>	<p>I. - The Minister responsible for culture establishes by order a list of collective management organizations capable of informing the beneficiaries of the resale right and likely, as such, to be informed</p>	<p>This has a broad list of factors to be considered.</p>

<p>Code, Art R122-7</p>	<p>of the sales of original graphic or plastic works under the conditions set out in II of Article R. 122-10.</p> <p>II. - To be included on the list mentioned in I of this article, a collective management organization must, in support of its request:</p> <p>1° Provide proof of the diversity of its members and the number of rights holders;</p> <p>2° Justify the qualification of its managers and corporate officers, assessed based on their professional experience in the graphic or plastic arts sector or the management of professional organizations;</p> <p>3° Provide all information relating to its administrative organization, its installation and equipment conditions and its capacity to inform beneficiaries of the resale right, including abroad. Any organization that requests it or, subject to having been given the opportunity to submit its observations within two months, any company that does not meet the requirements, is removed from the list by order of the Minister responsible for culture. plus the conditions to which registration on the list is subject.</p> <p>III. - The orders of the Minister responsible for culture mentioned in I and II are published in the Official Journal of the French Republic</p>	
<p>New Zealand, <i>Resale Right for Visual Artists Act 2023</i></p>	<p>22 Minister may appoint collection agency</p> <p>(1) There must at all times be a person appointed by the Minister as the collection agency.</p> <p>(2) The Minister may, by notice in the Gazette, appoint a person as the collection agency for the purposes of this Act.</p> <p>(3) Before appointing a person as the collection agency, the Minister must—</p> <p>(a) be satisfied that the appointee has the appropriate knowledge, skills, and experience to carry out the functions of the collection agency under this Act; and</p> <p>(b) consider, or be satisfied of, any other matters specified in the regulations.</p> <p>(4) The collection agency holds office for the term specified in the notice, unless the appointment is earlier revoked (see section 23).</p> <p>...</p> <p>(6) The collection agency is subject to the Ombudsmen Act 1975, the Official Information Act 1982, and the Public Records Act 2005 in respect of functions that it performs under this Act.</p> <p>23 Minister may revoke appointment</p> <p>(1) The Minister may, by notice in the Gazette, revoke the appointment of the collection agency—</p> <p>(a) if, in the opinion of the Minister, the collection agency has failed to comply with any of the terms or conditions of the appointment or satisfactorily perform its functions or duties under this Act:</p> <p>(b) if requested to do so by the collection agency.</p>	<p>This new legislation is particularly detailed on the qualities of the management of the CMO, its management, and the need for it to act in th interests of right holders, with particular reference to the interest of Māori artists.</p>

	<p>(2) The Minister must give the collection agency reasonable notice of a revocation under subsection (1)(a).</p> <p>24 Function, duties, and operation of collection agency</p> <p>(1) The function of the collection agency is to collect and distribute resale royalties to right holders.</p> <p>(2) The collection agency must—</p> <p>(a) comply with the rules of operation set out in the regulations; and</p> <p>(b) operate in a way that is transparent, accountable, and respectful; and</p> <p>(c) act in the best interests of right holders; and</p> <p>(d) in carrying out its function and duties,—</p> <p>(i) acknowledge and respect the role of Māori as tangata whenua and provide culturally appropriate support to Māori artists; and</p> <p>(ii) be inclusive of, and recognise the different needs of, all peoples in New Zealand.</p> <p>(3) The regulations may specify the rules of operation of the collection agency, including rules in relation to any or all of the following matters:</p> <p>(a) how resale royalties are to be collected, held, and distributed:</p> <p>(b) how resale royalties that are not distributed are to be used or managed (for example, where right holders decline payment or cannot be found):</p> <p>(c) how right holders are to be represented in the management of the collection agency:</p> <p>(d) how financial records are to be disclosed:</p> <p>(e) how information relating to resale rights is to be collected and retained:</p> <p>(f) what records must be kept and how they are to be kept and made available:</p> <p>(g) any other matter that relates to the role of the collection agency under this Act.</p> <p>(4) The regulations may provide for the collection agency to establish and maintain a register of right holders.</p>	
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THE LEGAL BASIS ON WHICH CMOS MANAGE ARR – THE QUESTION OF MANDATES

24. The legal basis on which a CMO administers ARR may differ significantly from country to country. As a general matter, however, the relationship between right holder and the CMO is one of agency, where the CMO acts as an intermediary with authority to collect and distribute ARR royalties on behalf of rightsholders, rather than as an assignee or licensee of the right as may be the case with other exclusive rights that are collectively managed (indeed, any assignment of ARR would be inconsistent with the requirement of inalienability under article 14^{ter}(1) of Berne). This highlights the peculiar character of ARR, in that it is framed as a right to remuneration – in effect, a debt obligation – flowing from a particular transaction rather than the licensing of a particular usage of a copyright work which may be on a continuing (and future) basis, as typically occurs in the case of the exclusive reproduction, performance and communication rights. As noted above, article 14^{ter}(3) of the Berne Convention leaves it open to member countries to determine how the amounts due under ARR are to be collected, which allows a great deal of latitude as to how national laws deal with this matter, for example, under a collective management scheme or variant thereof.

25. In many instances, the practice in national legislation where ARR is recognised is to provide further that the right may be collectively managed, that is, by an appointed or authorised CMO, rather than individually managed. But, as we have seen, there may be significant differences here as to the scope of the CMO's remit.
26. One approach is to be found in the UK where the right may only be exercised through a CMO: reg 14(1) of the *Artists Resale Right Regulation 2006*, which is set out in Table 19 above. Thus, an individual holder of ARR (the visual artist or his or her heirs) may provide a 'mandate' to the CMO to act on their behalf, in other words as the agent of the right holder. In the case of DACS, one of the active UK CMOs, the mandate requested of right holders is as follows:

Mandate

The Artist hereby authorises DACS exclusively to administer and manage the Resale Right as amended or varied from time to time and any right of a similar nature in any part of the world in respect of Artistic Works created (whether solely or jointly) by the Artist.

27. Among other things, but most importantly, this mandate authorizes the CMO (DACs) to take whatever steps are necessary to enforce payment of any ARR that is due, as the CMO now stands in the same footing as the eligible right holder. This is in addition to any other statutory rights that the CMO may be given under UK law, such as the right to seek information about resales from AMPs: see further Table 23 below. Where a right holder has not transferred the management of his or her ARR to a CMO, the latter is 'deemed to be mandated' to manage that right by virtue of reg 14(2) of the *Artists Resale Right Regulation 2006*. It is further provided under reg 14(4) that the holders of ARR who have not transferred mandates to a CMO are to be treated in the same way as those who have expressly transferred the management of their ARR to the CMO. In broad terms, then, the UK scheme may be described as an example of mandatory collective management in the sense that ARR can only be exercised through a CMO, which may manage the ARR of a right holder regardless of whether it has received a mandate from that right holder to do so. However, as noted above in Table 19, if there is more than one CMO, UK right holders may decide which CMO is so mandated: see reg 14(3) (in the UK there are two active CMOs: DACS and ACS).
28. A similar position applies in Hungary where ARR is subject to mandatory collective management, but with an 'extended effect'. Thus, the approved CMO, HUNGART, may receive a specific mandate from its members or right holders, but is authorised under Hungarian law to proceed without a mandate to provide collective management services to all Hungarian and foreign right holders who cannot opt out of this.¹³ Mandatory collective management also applies in Italy, with no opt-out being allowed: collections of ARR are made for members and non-members alike.¹⁴ Mandatory collective management of ARR is likewise to be found in a number of other EC member states, including Spain, Belgium, Czech Republic, Denmark, Finland, Latvia, Romania, Slovakia and Sweden.¹⁵
29. An alternative approach applies in Australia where the approved CMO (CA) is required under statute to collect ARR on reported resales (as to this, see Table 21 below), but the individual right holder can give 21 days' notice that a particular payment is not to be collected or enforced and may then collect ARR him- or herself. Right holders can register their details with the CMO or become members of the CMO, but in either instance the power of the CMO to manage ARR does not come from an express mandate or authority from the right holder but from the

¹³ Some limitation of this on the part of individual right holders is possible with respect to other rights, where a limited mandate may be adopted or even terminated: see further at <http://www.hungart.org/en/information-about-collective-rights-management/>

¹⁴ Art. 144, Italian Copyright Law No 1369/1942 as amended.

¹⁵ Information available on the VEGAP website (Spain), which also lists the following non-EC countries as having similar regimes (although the art markets in some of these countries may be different from those in EC and information on implementation of ARR in some countries is not readily available): Algeria, Australia, Bosnia Herzegovina, Burkina Faso, Georgia, United Kingdom, Honduras, Iceland, Ivory Coast, Moldova, Norway, Panama, Russia and Venezuela See further at <https://vegap.es/area-de-derechos-liquidacion-del-derecho-de-participacion/> (accessed 28 February 2024)

powers that are conferred on the CMO under the relevant legislation, although these clearly indicate that the CMO acts only on behalf of the right holder(s).

30. In the recently enacted New Zealand ARR law, a slightly different approach has been adopted: the proposed collection agency is the only entity entitled to claim and collect ARR payments, subject to an obligation to account for these payments, after deduction of administrative costs, to right holders. That said, the latter may decline to accept payments but cannot then individually enforce them: see the relevant provisions in Table 21 below. To similar effect is the position in Denmark: see further below.
31. In the above countries, the authority to the CMO is essentially derived from legislative provisions which empower the CMO to act on behalf of right holders. In countries with voluntary collective management schemes, however, this authority will be directly dependent upon an express mandate given by its members to the CMO which can act only on behalf of those right holders who are members and not on behalf of non-members, in the absence of some provision of national law that allows for extended collective management. This is the case in countries such as Germany, Netherlands, and France where there are well established CMOs in the visual arts. In these countries, while the mandates sought from members include ARR together with other rights that the CMO administers, there is no deemed mandate or other deemed representation that applies to non-members. The individual mandates given by members may also vary from right to right: see, for example, the broad mandates with respect to all rights in visual works of art, including ARR that are sought from members of ADAGP (France) and Bildkunst (Germany: see the Table below). Another example is provided by AGADU in Uruguay, one of the oldest CMOs in this area, where visual artists become a member of the CMO by countersigning a mandate to represent them legally for all the copyrights that they have generated and that are contemplated in Uruguayan copyright law, including ARR. The power of these CMOs to enforce ARR, for example, through court proceedings, will therefore derive from the terms of the mandate they have received from their members and will obviously be inapplicable with respect to non-members. However, such CMOs will also typically have the benefit of further powers given to them under their national laws, for example, the crucial power to request information about resales from AMPs: see further at Table 23 below, as well as further obligations to contact eligible non-member right holders where the CMO has knowledge of eligible resales, for example, as in the case of ADAGP.

TABLE 21 – LEGAL BASES FOR COLLECTIVE MANAGEMENT OF ARR

Country	Legislative and other provisions
Denmark <i>Copyright Act 2014</i> , s 38(5)	(5) The right of remuneration of resale right may be exercised only by an organisation approved by the Minister for Culture. The organisation shall be in charge of the collection and make distribution to the beneficiaries. The beneficiary's claim against the organisation shall last until three years have elapsed from the end of the year in which the resale took place. The period of limitation shall be suspended by written demand from the beneficiary
Australia, <i>Resale Royalty Right for Visual Artists Act 2009</i> , s 23	23 Collection of resale royalty by the collecting society (1) This section applies unless: (a) the holder of the resale royalty right on the commercial resale of an artwork; or (b) if there is more than one holder of the resale royalty right on the commercial resale of an artwork—all the holders of the resale royalty right on the commercial resale of the artwork; notify the collecting society in writing, within 21 days after notice of the commercial resale is published on the collecting society's website, that the collecting society is not to collect the resale royalty, or enforce the resale royalty right, on the commercial resale on behalf of the holder or holders of the right. (2) The collecting society must use its best endeavours to collect the resale royalty payable under this Act, and, if necessary, enforce any resale royalty

	<p>right held under this Act, on the commercial resale of the artwork on behalf of the holder or holders of the resale royalty right.</p> <p>(3) The collecting society is not subject to the direction of any holder or holders of the resale royalty right in collecting the resale royalty or enforcing that right.</p>
<p>France (ADAGP), general mandate sought from members, including ARR</p>	<p>Rights managed</p> <p>In compliance with the ADAGP Statutes and General Rules (accessible at www.adagp.fr), including any further changes that may be made subsequently by the General Meeting :</p> <p>I authorise the ADAGP to deduct my share of the Society registered capital of 15,24 € from my first copyrights payment. This sum, which will be returned if you cancel your membership, is only payable once, when you join.</p> <p>I exclusively entrust to ADAGP management of the following rights:</p> <p>A Collective rights</p> <p>....</p> <p>B Resale right, entitlement to a royalty when works are resold through an art market professional, including for sales prior to your membership</p> <p>Unless otherwise instructed, management of the rights referred to above is entrusted to ADAGP worldwide. ADAGP may, where necessary, defend these rights in the courts. ADAGP may be replaced, in full or in part, in all territories, by other collective management bodies, both French and from other countries, insofar as is necessary to ensure correct royalties management.</p> <p>Restrictions on the scope of management (territory, categories of works, etc.) :</p> <p>...</p> <p>By adhering to the Statutes and General Rules of ADAGP, I undertake to comply with them.</p> <p>Executed at , on Signature</p> <p>Signature appearing on the works¹⁶</p>
<p>Germany (Bildkunst), general, mandate sought from members with respect to all rights in visual works of art, including ARR</p>	<p>The entitled person hereby assigns VG Bild-Kunst as trustee the rights to which he is currently entitled under his copyright or future usage rights listed below, remuneration and information claims for the perception within the Federal Republic of Germany:</p> <p>...</p> <p>1.4 the right to information and compensation in the event of resale a work of fine art or a photographic work § 26 Copyright Act;¹⁷</p>
<p>New Zealand, <i>Resale Right for Visual Artists Act 2023</i></p>	<p>17 Liability for payment of resale royalties to collection agency</p> <p>(1) The following persons are jointly and severally liable to pay a resale royalty to the collection agency:</p> <p>(a) the seller; and</p> <p>(b) either—</p>

¹⁶ See at: <https://res.cloudinary.com/void-sarl/image/upload/v1665648844/2022-adhesion-DroitsCollectifs-EN.pdf>

¹⁷ See at https://www.bildkunst.de/fileadmin/user_upload/downloads/Wahrnehmungsvertrag/Wahrnehmungsvertrag_BG_I_II_Urheber_VGBK_2211_Web.pdf (Google translate 8 Dec 2023).

	<p>(i) the agent acting for the seller on the resale; or (ii) if the seller does not have an agent, the agent acting for the buyer on the resale; or (iii) if there are no agents, the buyer.</p> <p>(2) The liability arises on the completion of the qualifying resale. (3) The liability is discharged when the total amount of the resale royalty is paid to the collection agency. (4) Payment of the resale royalty must be made to the collection agency within the time frame, and otherwise in the manner, specified by the regulations. (5) Any agreement to share or repay the resale royalty, other than as provided for in this Act, is void.</p> <p>18 Liability for payment of resale royalties to right holders</p> <p>(1) The collection agency is liable to pay, to the right holder, each resale royalty it receives under section 17. (2) The liability arises when the total amount of the resale royalty is paid to the collection agency. (3) The liability is discharged— (a) on the date on which the total amount, less the percentage that the collection agency is entitled to retain (see section 20), is paid— (i) to the right holder, if the right holder is New Zealand-based: (ii) to the equivalent of the collection agency in the relevant reciprocating country, in all other cases; or (b) if the total amount is unpaid on the expiry of the period specified by the regulations despite the collection agency's best endeavours, on the expiry of that period</p> <p>...</p> <p>19 Right holder may decline resale royalty payment</p> <p>(1) A right holder may, in accordance with the process specified by the regulations, decline to receive— (a) payment of all or part of a resale royalty: (b) payment of a resale royalty on the future resale of any or all of their visual artworks. (2) If a right holder declines to receive payment of any amount of a resale royalty, the collection agency must use or manage the amount in the manner specified by the regulations.¹⁸ (3) A right holder may, in accordance with the process specified by the regulations, opt to receive payment of a royalty on future resales of any or all of the artworks previously declined under subsection (1)(b).</p>
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ELIGIBLE RIGHT HOLDERS AND CMO MEMBERSHIP

32. Depending on the way in which ARR is established under national law, membership of a CMO may not be a critical issue, as in the UK, Australia and New Zealand and in other countries where collective management of ARR is established on an extended or mandatory basis, as in Hungary, Denmark, Norway and Slovakia. On the other hand, it will obviously be of critical importance in countries with voluntary ARR schemes where CMOs can act only on behalf of their own members, as in France and Germany. That said, CMO membership has distinct advantages so far as issues of accountability and representation in the operations of the CMO are concerned. There is no need here to rehearse these benefits at the more general level: see further the **CMO Toolkit**, in particular Parts 3 and 4. In the case of ARR, however, CMO membership may have further benefits in terms of the increased information flow back to members and thorough the provision of mechanisms allowing for member feedback to the CMO on the way the ARR scheme is managed, distributions made and questions that arise in relation to the use of undistributed funds.

¹⁸ None yet made.

33. For example, Bild-Kunst (Germany) recites the advantages of membership generally (covering all mandated rights, not just ARR) on its website as follows at <https://www.bildkunst.de/service/mitglied-werden/warum-mitglied-werden> (9 Dec 2023). It will be seen that this is expressed in language that is very 'user friendly' :

Membership of VG Bild-Kunst brings many advantages for authors in the visual sector. As a collecting society, we manage all copyrights in the visual area that you cannot manage yourself for practical or legal reasons. Membership is free and is worthwhile even for beginners. But not only authors, but also their legal successors (heirs) can still become members, because copyright continues to exist 70 years after the death of an author. As a member, you benefit from our work in the following areas:

Participation in the distributions for flat-rate copyright royalties, such as private copying royalties or library royalties. These are managed for visual authors in Germany by VG Bild-Kunst;

Licensing and enforcement of individual rights, such as resale rights and reproduction rights for visual artists;

Possibility of funding from our Cultural Works and Social Works foundations;

Regular information about copyright issues when you subscribe to our newsletter;

Political and legal strengthening of copyright protection.

But you as the author are not the only ones who make a profit from a membership. Users – for example museums, agencies, publishers – can also acquire all the necessary rights in the field of fine art from us from a single source.

And last but not least: When you sign the contract, you become a member of a club that is democratically structured. You can influence the work of VG Bild-Kunst in your professional group meeting and in the general meeting, but also as an elected committee member.

By the way, you can also leave without us putting obstacles in your way. Termination is possible at the turn of the year in writing.

34. ADAGP in France likewise cannot collect on behalf of artists and right holders who are not members of ADAGP: such persons must contact the AMP involved in the resale of their work if they are to claim payment. However, If an AMP files a declaration with ADAGP to declare resale royalties for a sale of an artist's work who was not a member of ADAGP at the time of the sale, this information can be found in the Search Notice Board which is provided on the ADAGP website and membership by the artist concerned is readily effected: see further at <https://www.adagp.fr/en/i-am-artist-or-rightholder/joining-adagp/search-notice>. In such cases, there is an obligation on ADAGP – and any other relevant French CMO – to take all appropriate steps to ensure that potential beneficiaries of ARR who are not ADAGP members of their entitlement to claim ARR: see further art R122-10 par 2 of the French Intellectual Property Code (set out in Table 22 below).
35. It is also worth noting that in a country such as Australia where right holders need to register with the CMO in order to facilitate receipt of any ARR payments due to them, becoming a member is very easily achieved at the same time, and is also free: see further at https://www.resaleroyalty.org.au/join_cal.aspx
36. As to matters of membership generally, individual CMOs may differ as to details, but the general principle should be that, in the case of ARR, eligibility for membership should align with eligibility for ARR, ie the visual artist(s), personal representatives and heirs. For example, in the case of ADAGP, living artists can register and pay a small contribution: in the case of heirs, a notarized declaration is required.
37. Finally, in Italy, a country where mandatory collective management is applied, while it is unnecessary to be a CMO member (in this instance, of SIAE) in order to receive ARR payments, it appears that the position of 'administered right holders' ('administrato') may be different that of full members ('associato' or 'mandante') on the basis that it is usually easier to keep in contact with the member in the event that an eligible resale occurs and a royalty is due. And, of course, there are other benefits of membership and, in this regard, SIAE has

carried out promotional campaigns to make artists aware of ARR and the advantages of membership.

IDENTIFYING ELIGIBLE RIGHT HOLDERS

38. Information flow is the critical consideration in the management of any ARR scheme: ensuring that eligible right holders are properly identified and that eligible resales are likewise identified as they occur. Once these elements are in place, the appropriate payments may then be determined and made to the eligible right holder(s).
39. So far as identification of eligible right holders is concerned, it is obviously desirable for the CMO to have this information in advance so that this can then be made available to AMPs who will be involved in any future eligible resales. In the case of a voluntary ARR scheme, this can be done through right holders becoming members of the CMO that is to represent them, and there obviously must be clear channels through which right holders (visual artists and their heirs) can readily access and acquire membership. While membership of the CMO will still be highly relevant in the case of compulsory or extended ARR systems, there will also be a need in those systems for further mechanisms by which right holders can record or register their interests in advance. Identification of eligible right holders has long been recognised as a matter of best practice by CMOs within Europe. At the level of general exhortation, see the *EC Key Principles and Recommendations on the Management of the Author Resale Right, 2013 (EC Principles)* in the following table which indicate that CMOs should take a proactive role here, particularly when operating under mandatory and extended collective management regimes where significant efforts may be required to track and identify non-members of the CMO who may be entitled to receive ARR. It is critically important here for the CMO to ensure that this information is accurate and up to date, particularly in instances of multiple authorship and succession where there are heirs, as this will provide assurance to AMPs who are involved in eligible resales and who may be liable for ARR payments. CMOs typically have readily accessible online forms available on their websites which enable right holders to register their names and other relevant information with the CMO. Several CMOs operating under voluntary ARR schemes, in keeping with the EC Principles, also publish the names of the right holders they represent, for example, AGADP in France, or provide facilities by which a search can be conducted to identify a relevant right holder, as in Germany (Bildkunst). Some examples of CMO practices here are set out in Table 22 below).
40. Provision of this information in advance of any eligible resales cannot be readily compelled, other than through general promotion and publicity by the relevant CMO. Obviously, good practice here will be to promote the advantages of registering or recording their interest among the relevant visual artist communities and their members. These communities should already be within the knowledge of the relevant CMO and may even be represented in its membership or governance bodies. Examples of relevant information brochures, questions and answers on ARR, and the like are to be found on the websites of most CMOs administering ARR: see the list in Appendix 3. In countries with significant communities of indigenous artists, such as Australia and New Zealand, there may be a need for some specialised promotion and publicity among those groups, but this may also apply to other disadvantaged groups within a member country, such as those with a physical or other disability.
41. Finally, and quite apart from the measures mentioned above, there will be a powerful incentive to register or record one's eligibility with the CMO where the national CMO law provides that ARR can only be collected by a CMO and the individual artist is unable otherwise to enforce his or her right or must take special steps to do so. At the very least, CMOs can facilitate the process of identification of right holders (and resales) through an attractive website of which many examples are to be found in the various CMOs consulted in the preparation of this

Toolkit. Of particular note in a smaller EU country, is the multi-lingual 'one stop shop' provided by SABAM in Belgium.¹⁹

TABLE 22- IDENTIFYING ELIGIBLE RIGHT HOLDERS

Regions and Countries	Samples of regional and national best practice
EC <i>Key Principles and Recommendations on the management of the Author Resale Right</i> , 2013, recommendations	<ol style="list-style-type: none"> 1. CMOs undertake to make available to the AMPs (online and in print) comprehensive registers of Artists represented. 2. CMOs undertake to declare which mandates they hold and to provide proof of them in case of justified doubt. 3. CMOs operating under a system of compulsory collective management agree to use all reasonable efforts to identify and trace Artists who are not their members.
Australia (Copyright Agency or CA)	<p>Right holders can register their details online with CA: see at https://www.resaleroyalty.org.au/Registration.aspx where there are online forms for artists and beneficiaries to complete. Essentially, these forms are concerned with providing names, addresses, contact details and bank information, as well as being password protected and requiring warranties as to the accuracy of information provided. (Registration is required, even if the person is already a member of CA). Similar forms are also provided for art market professionals, art buyers and art sellers as this information will be useful for administration of the scheme. In registering, artists can indicate the general medium within which they work; once registered, there is the facility online to provide lists of their works that might potentially be eligible for ARR in the event of a resale and to update this list.</p> <p>A note from CA advises that in practice only a small number of right holders use this registration facility; also that this information is not made publicly available as the Australian scheme applies to all artists in any event.</p>
Germany	<p><i>Germany:</i> A list of artists represented by Bild-Kunst and its related foreign CMOs appears on its homepage in the service area for users: see further at https://www.bildkunst.de/service/kuenstlersuche</p>
France	<p>ADAGP has a full list of artists whom it represents (nearly 200,000), including for ARR, on its website at: https://www.adagp.fr/en/i-am-exploiting-or-selling-work/my-toolbox/artists-directory</p> <p>In the case of non-member artists or beneficiaries, ADAGP and other French CMOs are required to take steps to notify these persons of their entitlement to claim. Art R122-10 II al 2 of the IPC provides:</p> <p>“When a collective management organization is notified of a sale entitling a beneficiary mentioned in article R. 122-8 to resale right, it must inform the beneficiary. When the beneficiary is not identified, the collective management organization takes all necessary steps to inform the persons likely to benefit from resale right, if necessary, by calling on the other collective management organizations mentioned in article R. 122-8. If it has not been possible to</p>

¹⁹ See at: at

https://www.resaleroight.be/pls/apex/f?p=20000:1::CHANGE_LAN:::FSP_LANGUAGE_PREFERENCE:en&cs=1F381D3BA210D41ED5A8EE0E05DC83B18

	inform the beneficiary, it proceeds with the appropriate publicity measures in electronic form or by any other suitable means.”
Denmark (VISDA)	VSDA provides for registration of artists and heirs through an online form on its webpage at https://www.visda.dk/en/artists-resale-right/?lang=en
UK (DACS)	There are online forms which may be used by artists and beneficiaries to register their interests in receiving ARR; these require names, addresses, bank information, etc: See further at https://www.dacs.org.uk/artists-resale-right/register-for-arr

IDENTIFYING ELIGIBLE REALES – THE CHALLENGE FOR CMOs AND THE OBLIGATIONS OF RESELLERS AND AMPs

42. A further step is to identify eligible resales. This has both a legal and factual aspect. The legal aspect has already been covered in Part I: not all resales fall within the scope of ARR, as the resale must be ‘commercial’ (involving an AMP), above a certain minimum price (usually), and so on. But assuming these matters can be resolved, the practical aspect requires that these resales should be brought to the attention of the CMO in the first place. The obvious sources for such information, apart from the actual resellers themselves will be the AMPs involved in the resale, in particular, art dealers, galleries, and auction houses.
43. Obtaining this information will require the CMO to be proactive in monitoring and ascertaining when and where resales have occurred, e.g. consulting sale catalogues, social media, personal visits to galleries and so on (in smaller markets, this may be quite feasible, as in Uruguay and Estonia). Likewise, in France, ADAGP adopts a ‘very proactive approach’, in that it sends a declaration request to AMPs once an eligible resale has been identified by its ARR team, rather than waiting for the latter to spontaneously send in its declaration. That said, not all eligible resales occur in public, although they involve AMPs, for example, private sales by a gallery or dealer, and this information needs to be captured if a national ARR scheme is to be truly effective. To assist in this regard, therefore, many national ARR schemes contain legislative requirements for sellers and/or AMPs to report resales and relevant details in a timely fashion (see, for example, Spain); such powers may ultimately require a court order for enforcement in the event that the information requested is not supplied, as in the UK, and failure to report may attract civil or even criminal consequences, as, for example, in Denmark and France. Under the Australian scheme, this obligation is placed directly on the seller of the work, with a 90 day time limit. Other national laws have provisions empowering right holders and/or CMOs to request information from AMPs as to resales that are suspected to have occurred, as in Germany, the UK and France: see the sample provisions in the Table below. Further provisions may require the CMO to publish notice of a commercial resale of which it has become aware and for which the CMO believes, on reasonable grounds, that a person may hold the resale royalty right, as in Australia (see Table 23 below)..
44. The German law also includes provision for the CMO to appoint an auditor to inspect the accounts of the AMP where there are doubts as to the accuracy of information provided. This appears to be a relatively rare inclusion in national laws (court-ordered audits are also possible in France), but several CMOs consulted during the course of preparing this Toolkit have expressed the view that such a provision would be a desirable addition to their national schemes: see further at pars 60-61 below. In France, CMOs also have the power to request and obtain from the tax authorities information relating to the revenues or turnover of the AMP subject to ARR where there is a suspicion that ARR payments have not been made: see Table 23 below.

TABLE 23 – IDENTIFYING ELIGIBLE REALES

Country or region	Provision
<p>France, <i>Intellectual Property Code</i>, Art R122-8 (4) and Art R 122-10</p>	<p>Art R122-8(4): The art market professional referred to in the first paragraph must provide the author or a collective management organization of the resale right with all the information necessary for the liquidation of the sums due under the resale right for a period of three years from the date of sale.</p> <p>Art R 122-10:</p> <p>I. - When seized with a request from the beneficiary, the professional responsible for the payment of the resale right shall pay the amount thereof within a period not exceeding four months from the date of receipt of the request or, if such request is received prior to the sale, from the date of such sale.</p> <p>If the work is a product of collaboration among multiple authors, the beneficiary must disclose this and specify the distribution of the resale right agreed upon among the authors.</p> <p>II. - In the absence of any request, the professional responsible for the payment of the resale right shall, no later than three months after the end of the calendar quarter in which the sale occurred, notify one of the collective management organizations specified in Article R. 122-8 by registered letter with acknowledgment of receipt regarding the realization of the sale. This notification shall include details such as the date of the sale, the name of the author of the work, and, if applicable, any information regarding the beneficiary entitled to the resale right that is available to the professional.</p> <p>When a collective management organization receives notification of a sale entitling the beneficiary specified in Article R. 122-8 to collect the resale right, it is required to inform the beneficiary. When a collective management organization receives notification of a sale entitling the beneficiary specified in Article R. 122-8 to collect the resale right, it is required to inform the beneficiary. If the beneficiary cannot be identified, the collective management organization must take necessary measures to inform individuals eligible for the resale right, potentially by collaborating with other collective management organizations mentioned in Article R. 122-8. Should the beneficiary remain unidentifiable, the organization will resort to suitable publicity measures, electronically or through other means, to ensure notification.</p>
<p>Spain, art 24.14, <i>Law of Intellectual Property 1996</i> (as amended)</p>	<p>14. Art market professionals who have participated in a resale subject to the resale right will be obliged to:</p> <p>a) Notify the seller and the corresponding management entity of the resale carried out. The notification will be made in writing or by another means that allows recording the sending and receipt of the notification within a period of two months counting from the day following the date of the resale and must contain in all cases:</p>

	<p>i) The place and date on which the resale took place. ii) The full price of the sale. iii) The documentation proving the resale necessary for the verification of the data and the practice of the corresponding settlement. Said documentation must include, at least, the place and date on which the resale took place, its price and the identifying data of the resold work, as well as the contracting parties, intermediaries, if applicable, and the author of the work. b) Retain the amount of the author's participation right in the price of the resold work. c) Keep in free deposit, and without obligation to pay interest, the amount retained until delivery to the corresponding management entity. d) When more than one art market professional has been involved in the resale of the work, the person obliged to carry out the operation, both in terms of notification, retention, deposit and payment of the right, will be the art market professional who has acted as a seller and, failing that, who has acted as an intermediary. 15. Once the notification referred to in paragraph a) of section 14 has been made, the art market professionals will make the payment of the right to the corresponding management entity within a maximum period of two months. ... 17. Intellectual property rights management entities may require from any art market professional mentioned in section 4, for a period of three years from the date of resale, the information indicated in the letter a) of section 14 that is necessary to calculate the amount of the participation right.</p>
<p>Australia, <i>Resale Royalty Right for Visual Artists Act 2009</i>, ss 28 and 29</p>	<p>28 Notice of commercial resale (1) A person must give the collecting society notice complying with subsection (2) of the commercial resale of an artwork if: (a) the person is a seller under the commercial resale; and (b) the person is: (i) an Australian citizen; or (ii) a permanent resident of Australia; or (iii) a corporation incorporated under the Corporations Act 2001; or (iv) a person (including a body corporate) who carries on an enterprise in Australia; or (v) a trustee of a trust of which one of the persons mentioned in subparagraphs (i) to (iv) (inclusive) is a beneficiary. Civil penalty: (a) for an individual—200 penalty units; (b) for a body corporate—1,000 penalty units. (2) The notice must: (a) be in writing; and (b) be given to the collecting society within the period of 90 days beginning at the time of the commercial resale; and (c) include sufficient detail to allow the collecting society: (i) to work out whether resale royalty is payable on the commercial resale under this Act; and (ii) to work out the amount of resale royalty payable under this Act; and (iii) to identify who is liable to pay the resale royalty.</p>

	<p>(3) The seller may satisfy the requirement to give notice in accordance with this section through an agent.</p> <p>(4) If:</p> <p>(a) there is more than one seller under the commercial resale of an artwork; and</p> <p>(b) one of the sellers gives the collecting society notice in accordance with this section;</p> <p>then all of the sellers are taken to have given the collecting society notice in accordance with this section.</p> <p>(5) A person who wishes to rely on subsection (3) or (4) bears an evidential burden in relation to those matters.</p> <p>29 Requesting information about the commercial resale of an artwork</p> <p>(1) If the collecting society believes on reasonable grounds that a person is:</p> <p>(a) a seller under a commercial resale of an artwork; or</p> <p>(b) a buyer under a commercial resale of an artwork; or</p> <p>(c) an agent of a seller or buyer under a commercial resale of an artwork; or</p> <p>(d) an art market professional otherwise involved in a commercial resale of an artwork;</p> <p>the collecting society may, in writing, request the person to give the collecting society information in relation to the commercial resale relevant to determining:</p> <p>(e) the amount of any resale royalty payable on the commercial resale under this Act; and</p> <p>(f) who is liable to make the payment.</p> <p>(2) If:</p> <p>(a) a request is made to a person in accordance with subsection (1); and</p> <p>(b) the commercial resale in relation to which the request was made occurred within 6 years before the request was made;</p> <p>the person must comply with the request within 90 days after it is given.</p> <p>Civil penalty:</p> <p>(a) for an individual—100 penalty units;</p> <p>(b) for a body corporate—500 penalty units.</p>
<p>Latvia, <i>Copyright Law, 2003</i> (as amended), s 17(6)</p>	<p>(6) On the basis of a request from a collective management organisation managing these rights, the seller (also store, gallery, salon, etc.) has a duty to provide the information which is necessary in order to ensure management of the remuneration. Such a request may be made within three years after the sale of the original work of visual art.</p>
<p>Denmark, <i>Copyright Act 2014</i>, 38(7)</p>	<p>AMPs are obliged to report eligible sales to VISDA in accordance with the Danish copyright act art 38(7) which reads:</p> <p>(7) The seller or agent, cf. the second sentence in subsection (2), shall</p> <p>(i) submit an annual statement to the organisation as at 1 June specifying the previous year's sales of works of art that are covered by the resale right scheme, cf. subsections (1) and (2), attested by an authorised public accountant or a registered auditor and</p> <p>(ii) at the organisation's request and within four weeks of receipt of the request to submit all of the information necessary to secure payment of</p>

	<p>remuneration when the organisation requests this within three years of the resale Failure to submit the information is punishable by fine cf. the Danish copyright act art. 76(1)(iv).</p>
<p>UK, <i>Artists Resale Right Regulation 2006</i>, reg 15</p>	<p>Right to information 15.—(1) A holder of resale right in respect of a sale, or a person acting on his behalf, shall have the right to obtain information by making a request under this regulation. (2) Such a request— (a) may be made to any person who (in relation to that sale) satisfies the condition mentioned in regulation 12(3)(a); but (b) must be made within three years of the sale to which it relates. (3) The information that may be so requested is any that may be necessary in order to secure payment of the resale royalty, and in particular to ascertain— (a) the amount of royalty that is due; and (b) where the royalty is not paid by the person to whom the request is made, the name and address of any person who is liable. (4) The person to whom the request is made shall do everything within his power to supply the information requested within 90 days of the receipt of the request. (5) If that information is not supplied within the period mentioned in paragraph (4), the person making the request may, in accordance with rules of court, apply to the county court for an order requiring the person to whom the request is made to supply the information. (6) In Scotland, such an application shall be by way of summary application to the sheriff, and the procedure for breach of an order shall proceed in like manner as for a contempt of court....</p>
<p>Germany, <i>Copyright Law 1965</i> (as amended), § 26</p>	<p>(4) The author may request information from an art dealer or auctioneer as to which originals of the author's works were resold with the participation of the art dealer or auctioneer within the last three years prior to the request for information. (5) The author may, to the extent necessary to enforce his claim against the seller, request information from the art dealer or auctioneer about the name and address of the seller as well as the amount of the proceeds from the sale. The art dealer or auctioneer may refuse to provide information about the name and address of the seller if he pays the author the share. (6) The claims according to paragraphs 4 and 5 can only be asserted by a collecting society. (7) If there are reasonable doubts as to the accuracy or completeness of information in accordance with paragraph 4 or 5, the collecting society may request that, at the choice of the person obliged to provide the information, it or an auditor or sworn auditor appointed by it to inspect the business books or other documents is granted as necessary to determine the accuracy or completeness of the information. If the information turns out to be incorrect or incomplete, the person providing the information must reimburse the costs of the examination</p>
<p>New Zealand, <i>Resale Right for Visual Artists Act 2023</i>, s 21</p>	<p>21 Requirement to provide collection agency with information about qualifying resales (1) This section applies to the following persons involved in a qualifying resale of an original visual artwork:</p>

	<p>(a) in the case of a professional resale,—</p> <p>(i) each art market professional that is involved in the resale; or</p> <p>(ii) if none of the persons involved in the resale is an art market professional, each art gallery, museum, library, or archive referred to in section 9(2)(a) that is involved in the resale:</p> <p>(b) in the case of a voluntary qualifying resale, the person that the parties to the resale agreed would be responsible for providing information to the collection agency.</p> <p>(2) Each person must ensure that the following information about the resale is provided to the collection agency:</p> <p>(a) the name of the artwork, if known;</p> <p>(b) a brief description of the artwork;</p> <p>(c) the resale value;</p> <p>(d) the name of the artist, if known;</p> <p>(e) the name and contact details of the persons liable under section 17 to pay the resale royalty, if known;</p> <p>(f) any other information specified by the regulations.</p> <p>(3) The information must be provided within the time frame, and otherwise in the manner, specified by the regulations.</p>
EC Directive, art 9	<p>Article 9 Right to obtain information</p> <p>The Member States shall provide that for a period of three years after the resale, the persons entitled under Article 6 may require from any art market professional mentioned in Article 1(2) to furnish any information that may be necessary in order to secure payment of royalties in respect of the resale.</p>
France, art L.163, <i>Livres des procédures fiscales</i>	Societies of authors, publishers, composers or distributors may receive from the tax authorities all information relating to revenues generated by companies under their control.

OBLIGATIONS OF CONFIDENTIALITY

45. An important matter for CMOs handling information about right holders and eligible resales is that CMOs need to observe obligations of confidentiality in dealing with this information. Information about eligible resales is rightly in the public domain and must be made readily available, but obligations of privacy arise with respect to other information received and must be observed. These are usually matters for national laws on privacy and information security generally, but also find a place in some regional and national ARR laws, particularly when dealing with information obtained under statutory power of request of the kind detailed in Table 23 above: see Table 24 following.

TABLE 24 – CONFIDENTIALITY OBLIGATIONS OF CMOS

Region or country	Provision
EC Directive 2014/26/EU, 26 February 2014, on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market	<p>Recital (52):</p> <p>It is important for collective management organisations to respect the rights to private life and personal data protection of any rightholder, member, user and other individual whose personal data they process. Directive 95/46/EC governs the processing of personal data carried out in the Member States in the context of that Directive and under the supervision of the Member States' competent authorities, in particular the public independent authorities designated by the Member States.</p>

	<p>Rightholders should be given appropriate information about the processing of their data, the recipients of those data, time limits for the retention of such data in any database, and the way in which rightholders can exercise their rights to access, correct or delete their personal data concerning them in accordance with Directive 95/46/EC. In particular, unique identifiers which allow for the indirect identification of a person should be treated as personal data within the meaning of that Directive.</p> <p><i>Article 42</i></p> <p>Protection of personal data</p> <p>The processing of personal data carried out within the framework of this Directive shall be subject to Directive 95/46/EC.</p>
UK, <i>The Artist's Resale Right Regulations 2006</i> , re information, obtained on request under reg15(1)	Reg 15(7) Information obtained under this regulation shall be treated as confidential.
Spain, art 24.18, <i>Law of Intellectual Property 1996</i> (as amended)	18. Management entities must respect the principles of confidentiality or commercial privacy in relation to any information they become aware of in the exercise of the powers provided for in this law.

IDENTIFYING ELIGIBLE REALES – MORE PRACTICAL STEPS THAT MAY BE TAKEN BY CMOS (PROTOCOLS, AGREEMENTS, AND OTHER PRACTICES)

46. It will be clear that judgments as to the legal eligibility of a particular resale for ARR will fall to be made at several times and by several parties: at the times of resale and reporting by the AMP, seller and/or buyer; and, at the time of its receipt of the AMP's report, by the CMO, acting on behalf of the eligible right holder. These parties will therefore need to be well briefed on the criteria for eligibility and their application to any given resale that is reportable and is reported: training of skilled staff within the CMO to deal with these matters is therefore essential.
47. In operational terms, once the eligible resale is identified and reported to the CMO, the latter can then link this information to that which it already holds concerning the eligible right holder and determine the amount of royalty payable accordingly. Nevertheless, as the old English proverb states, 'There's many a slip 'twixt the cup and the lip'. While it is undoubtedly helpful for right holders and CMOs to possess the power to request information from sellers and AMPs, including the power to request audit as in Germany (see above), the real objective for the CMO is to ensure that it receives timely notification of eligible resales: for this reason, as noted above, most CMOs are proactive in monitoring what is occurring within their particular art markets and in seeking information from sellers and AMPs where it is believed that an eligible resale has occurred.
48. In practical terms, liaising with the likely groups of AMPs that will be involved in commercial resales is a sensible and obvious way of closing this information gap. In many countries, such groups will have their own professional trade associations, making it easier to set up lines of communication with members and to establish channels for the ready reporting of resales. In such cases, therefore, it may be possible to establish contractual arrangements between the CMO and these associations as well as their individual members in which protocols for reporting resales can be agreed, as well as other matters relating to the management of ARR (see further at par 82(b) below in relation to the various categories of works that will potentially be liable for ARR). Such arrangements will be distinct from any legislative reporting requirements (which may still apply) and may be seen as instances of private ordering between the affected parties to ensure the smooth processing of claims and payments.
49. Germany provides an example of this approach. In that country, there are peak associations covering auctioneers (Federal Association of German Auctioneers - BVDG), galleries and art

dealers (Federal Association of German Galleries and Art Dealers – BVDG), art dealers (Art Trade Association Germany – KD and Association of German Antiquarians – VDA). There are framework agreements between these associations and Bildkunst and there is provision for their members to enter into individual contracts with Bildkunst in which they undertake to report relevant resales, with the possibility of receiving a 10% credit of the resale right fee: see further at <https://www.bildkunst.de/service/folgerecht/informationen-zum-folgerecht>

A model reporting form is to be found on the Bild-Kunst website and access to an online reporting portal is provided. For another, see Sweden: Bildupphovsvratt at <https://bildupphovsvratt.se/foljeratt#foljeratt-for-upphovspersoner>

50. A somewhat different approach is taken in the UK and France, although there are, of course, also significant professional associations of AMPs in that country. DACS and ADAGP obtain information by reviewing publicly available auction results and information made available by commercial galleries. On its website, DACS has online forms for sellers and AMPs to fill in about resales: see at <https://www.dacs.org.uk/for-art-market-professionals> It also sends quarterly requests for information to any AMP that appears to be involved in ARR qualifying transactions to inform them of their obligations to pay ARR royalties. AMPs are then asked to respond to these requests for information with details of any qualifying sales within 90 days, relying here ultimately on their statutory power to apply for a court order to compel disclosure of information should an AMP fail to respond to a request for information. Over the years, these quarterly requests and returns from AMPs have provided a reliable source of information about resales,²⁰ although DACS employs a small team of skilled researchers to monitor resales generally and to check these returns where it appears likely that a resale has occurred but has not been reported. In this regard, DACS reported that a power to seek an audit of AMP's books would be a useful aid in its work but, in general, the system that has evolved operates reasonably well, with trust on all sides. A similar system of quarterly reporting is operated by ACS in the UK: see at <https://artistscollectingsociety.org/information-amps/> and also in Denmark: see at <https://www.visda.dk/en/artists-resale-right/?lang=en>
51. The art market in each member country will vary widely, according to population and the structure of the society and economy. However, 'best practice' here suggests that the development of trust relationships between CMOs and sellers/CMOs is critical in the development of any workable system of reporting and processing of ARR claims. The following practical steps will assist in the development of such relationships:
- a. Determine the major groups of AMPs involved in potential eligible resales – are they auction houses, galleries, museums, individual art dealers, or is there some other identifiable group of AMPs active in that market?
 - b. Is it feasible to deal with members of these groups on an individual basis to arrive at agreed protocols for reporting and dealing with ARR claims? In some instances, this may be possible; in others, the groups may be too disparate or numerous to deal with on an individual basis.
 - c. Where there are larger groups involved, do they have any representative trade or professional association that may be useful to negotiate with in relation to protocols for reporting eligible sales, thereby providing a framework within which individual members of the association will be required to operate because of the other benefits of their association membership? As noted above, this level of private ordering appears to be most fully developed in Germany, but less formal arrangements and understandings may be possible in countries with smaller art markets where the principal players are well known to each other.

²⁰ See further at <https://www.dacs.org.uk/artists-resale-right/pay-arr> (viewed 2 March 2024). The information required, which may be supplied at any time apart from in responses to these quarterly requests, should contain the following information: title of the work; medium; edition number, if applicable; sale price, excluding VAT; date the work was sold; name of artist; artist's nationality (if known); artist's year of birth (if known); and artist's year of death (if known). In the case of ACS, the other UK visual arts CMO, it also sends out a quarterly request to AMPs throughout the UK with a list of ACS members and a form for the AMP to report any eligible resales: see further at <https://artistscollectingsociety.org/information-amps/> (viewed 2 March 2024).

- d. Having said all this, it should be remembered that an incentive for AMPs and their associations to agree to reporting protocols and the like will be any legal requirement to report that arises under the ARR scheme as well as any other powers that the CMOs possess to request information on resales. In most instances, it appears that AMPs are ready to co-operate – after all, payment of ARR is simply another business cost for them – and timely and accurate reporting is therefore in their own interest as much as that of the artist and other eligible claimants. From the perspective of CMOs, recourse to the courts to enforce their rights can prove to be an exhausting process that can occur where the art market is disorganised and AMPs are unwilling to co-operate (this appears to have been the experience in Romania). Good faith and trust between the interested parties are important aspects of any effective ARR scheme, as reflected in the responses of many CMOs

OTHER STEPS TAKEN BY CMOs TO IDENTIFY ELIGIBLE REALES

52. Leaving aside any legislative supplements to their powers to request information and the like, all CMOs managing ARR still need to take practical steps to monitor potential eligible resales that might be occurring in their national art markets. This obviously involves skilled inhouse personnel who are familiar with that market and the principal players in that market, such as galleries, auction houses, art dealers and so on. Such work will involve reviewing auction sale catalogues as they appear; doing online searches of gallery and auction house websites; trawling social media; and so on. Thus, in the UK, DACS reports that it 'performs ARR forecasting by manually reviewing auction house websites for upcoming sales to identify ARR qualifying sales'. These forecasts can then be compared to the actual disclosures of qualifying resales received from AMPs for the same period to ascertain whether there are any resales that may not have been reported, whether unintentionally or not.
53. 'Leg work' on the ground may also be necessary in the case of resale markets such as art fairs, as reported by ADAGP and Bild Kunst. In smaller markets, such as Estonia, monitoring of galleries and auction houses is relatively easy, as EAU reports:

We monitor social media posts, press releases and gallery websites. Since we have few of these institutions in Estonia (less than ten), in case of doubt there is no problem to contact them directly and ask for information.' The same appears to be true in related countries such as Norway: 'The Norwegian art market is a relatively small one, and thus also quite transparent. The main actors (AMPs) are known and their business transparent. We do however conduct monitoring as well as audits of selected AMPs in order to ensure that reporting is done in accordance with the law. Our right to do so is regulated in the same law (art. 61), and covers the last three years sales.

54. Even in smaller markets such as these, the fact that the CMO possesses default powers to request information from AMPs and resellers doubtless assists in the information flow back to the CMO. Larger art markets may pose more difficulties, as in Hungary:

HUNGART has no specific tools to monitor the activity of the AMPs. We monitor the press releases on major auctions and regularly check the websites of the AMPs. It would be useful if HUNGART could have a comprehensive list of the AMPs, that could be the basis for enforcement.

55. Some kinds of commercial resales may also be easier to monitor than others. Thus, in Sweden, Bildupphovsrätt reports that it:

...conducts thorough assessments by consistently monitoring major online auctions, such as Auctionet and Bukowskis. In the course of these evaluations, ongoing sales are scrutinized to ensure the proper identification of works eligible for resale rights. When dealing with galleries and art dealers, oversight becomes more intricate. Currently, we lack the means to scrutinize a gallery's records or other documents to ascertain whether they have executed sales that trigger royalty compensation without proper disclosure. Our authority does not extend to conducting examinations or demanding detailed accounting. Instead, our primary objective is to provide information about the pertinent rules

and laws governing resale rights, and we stand ready to offer assistance if needed or if there are inquiries related to resale rights.

...

Bildupphovsrätt has implemented a robust internal system structure to guarantee the timely receipt of reports from major players. In instances where an auction house fails to report, we can efficiently issue reminders.

56. How the function of monitoring is done may also be a significant aspect of the initial accreditation aspect of a CMO when this is sought. For example, in Australia when the Copyright Agency sought accreditation from the relevant Government minister, it was required to address in its application detailed questions as to how it would collect information monitoring commercial resales of artwork so as to identify resales that might trigger liability to pay a resale royalty, how it would identify and approach AMPs about reporting requirements, and how it would develop tools and documentations to assist in this process. Use of appropriate information technology is also critical in this regard, as CA reports:

The Copyright Agency has built a bespoke IT system and website which supports the receipt of information, automates the process where possible and provides information to rightsholders and reporters in an accessible and transparent way [not all of this is publicly available]. The administrators focus on confirming resales eligible; carrying out the research to locate artists/beneficiaries and resolve will issues; and monitor reports and market activity to drive compliance for the scheme. Some of the research activities plus the compliance and monitoring are the higher cost elements of managing the scheme.

57. More generally, it must be said that the use of appropriate information technology (IT) will usually be a critical component of ARR management for any CMO and, there are some IT systems that can be used to identify artists and works, such as Interested Party Information (IPI)(used, for example, by Bildupphovsratt in Sweden, SIAE in Italy and AGADU in Uruguay). In the UK, DACS uses ERP software to manage the collection and use of data about AMPs and responses to requests for information about qualifying sales and collection and distribution of resale royalties. DACS is also currently exploring the potential for the use of blockchain and other frontier technology to help with ARR collection through collaboration with other partners (this is also under review by CA in Australia). In this regard, however, it should be noted that another CMO (Bildkunst in Germany) has sounded a note of scepticism about the deployment of blockchain technologies in relation to ARR, particularly where there are gaps between the analogue and digital world that will need to be bridged.
58. It is beyond the scope of the present Toolkit to provide specific guidance on IT matters to countries establishing an ARR scheme and a CMO to manage this, other than to say this is an area where assistance should be sought from CMOs in countries already managing ARR and to draw upon their experiences in this regard.

FURTHER CMO POWERS – INSPECTION AND AUDIT

59. As noted above, several CMOs have reported that, in addition to powers to request information about resales from AMPs, a power to inspect and audit the books of errant AMPs would be useful where an eligible resale is suspected to have occurred but has not been reported. An example of such a power is to be found in s 26(7) of the German law set out above in Table 23. Bildkunst reported that it had only used this power, requiring a court order, twice in the last decade. While such a power may clearly have an *in terrorem* effect and encourage compliance with reporting requirements by CMOs, it may prove to be controversial in some countries, on the basis that this is an unusual power to place in the hands of a private party (the CMO). By way of a counter-balance, the requirement to seek a court order, with its attendant costs, as in Germany, may provide some assurance that the power will not be abused.
60. As noted in Table 23 above, in France CMOs also have the power to request and obtain from the tax authorities information relating to the annual revenues of an AMP, as well as the

amount of sales subject to VAT and reduced VAT. Once again, such a power might not be acceptable in some jurisdictions, given that CMOs are private, rather than public or governmental, entities. That said, as they are usually non-profit and acting on behalf of members to whom remuneration is due pursuant to law, it might be said that in this context the CMO is acting for a public purpose and such a power can therefore be justified. This will be a matter for each national law to determine for itself.

DETERMINING ROYALTIES AND MAKING PAYMENTS

61. The linking of eligible resales and eligible right holders is obviously the central role of the CMO in relation to ARR and CMOs will need to have efficient internal systems for this, that is, to calculate the amount of the royalty due, the persons entitled to payment, and so on. Given that CMOs managing ARR will often have experience in collecting and distributing royalties received for other uses of works, there will already be internal experience that can be drawn upon here (although, as noted above, collection and distribution of ARR payments is a distinct exercise from that of collecting royalties for uses that may continue over a period of time). In addition, CMOs in countries that have already been managing ARR payments can help CMOs that are starting to do this. CISIAC, EVA and WIPO likewise have expertise that can be drawn upon here.
62. As a general principle, information about resales notified to the CMO should be made publicly available, for example, on the CMO's website to assist in identifying eligible right holders. Provisions for online calculators of rates will also be of assistance here: see, for example, AGADP at <https://www.adagp.fr/en/adagp-role-and-missions/copyrights-managed-adagp/resaleright#presentation>, Bild Kunst at <https://www.bildkunst.de/service/folgerecht/folgerecht-berechnen>, DACS at <https://www.dacs.org.uk/for-art-market-professionals> and VEGAP at <https://vegap.es/area-de-derechos-informacion-de-los-derechos-calculadora/>
63. As noted in Part I of this Toolkit, there are differences between WIPO members as to the way in which ARR payments are to be determined, notably whether these should be on a sliding scale depending on the resale price or as a simple percentage of that price, and also whether there should be minimum and maximum limits set on the amount of ARR that is charged. Given that the sliding scale approach is adopted under the EC Directive, this is the approach to be found in EC countries as well as in some non-EC countries such as Mexico. However, from a practical perspective a fixed percentage, as in Uruguay and Australia, may be easier to apply.
64. As for the timing of payments, the EC CMO Directive provides guidelines that apply generally to revenues collected by CMOs: payments should be made 'in a timely manner', any delays should be objectively determined (Recital 29), but that payments should be made no later than nine months from the end of the financial year in which the revenue was collected (art 13). These may need some adaptation in the case of ARR payments, which will be one-off payments made with respect to particular resales and the frequency of which may be very uneven. This contrasts with the receipt of royalty payments for the continuing use of a work, as might occur in the case of public performance or reproduction rights. Nonetheless, right holders will have a lively interest in the frequency with which ARR payments will be made, once the ARR on resales has been collected, eg whether this is to be done only on an annual basis or whether they can expect distributions at shorter intervals. Individual CMOs may deal with this question differently under their internal distribution rules, but the following payment schedules applied by CMOs in some Berne member countries may be instructive here: three times annually (Sweden), monthly (DACS, UK), twice annually (Bild Kunst, Germany), at least annually (AGADP, France), at least twice annually (Hungary) three times annually (Norway), quarterly (Italy); automatically upon receipt in the case of national members (Uruguay) and on a six monthly basis (Mexico).

TABLE 25 – DETERMINING AND DISTRIBUTING ARR PAYMENTS

Region or country	Provision
<p>EC, <i>Directive 2014/26/EU</i>, 26 February 2014, on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, recital 29 and art 13</p>	<p>(29) The distribution and payment of amounts due to individual rightholders or, as the case may be, to categories of rightholders, should be carried out in a timely manner and in accordance with the general policy on distribution of the collective management organisation concerned, including when they are performed via another entity representing the rightholders. Only objective reasons beyond the control of a collective management organisation can justify delay in the distribution and payment of amounts due to rightholders. Therefore, circumstances such as the rights revenue having been invested subject to a maturity date should not qualify as valid reasons for such a delay. It is appropriate to leave it to Member States to decide on rules ensuring timely distribution and the effective search for, and identification of, rightholders in cases where such objective reasons occur. In order to ensure that the amounts due to rightholders are appropriately and effectively distributed, without prejudice to the possibility for Member States to provide for more stringent rules, it is necessary to require collective management organisations to take reasonable and diligent measures, on the basis of good faith, to identify and locate the relevant rightholders. It is also appropriate that members of a collective management organisation, to the extent allowed for under national law, should decide on the use of any amounts that cannot be distributed in situations where rightholders entitled to those amounts cannot be identified or located.</p> <p><i>Article 13</i></p> <p>Distribution of amounts due to rightholders</p> <p>1. Without prejudice to Article 15(3) and Article 28, Member States shall ensure that each collective management organisation regularly, diligently and accurately distributes and pays amounts due to rightholders in accordance with the general policy on distribution referred to in point (a) of Article 8(5). Member States shall also ensure that collective management organisations or their members who are entities representing rightholders distribute and pay those amounts to rightholders as soon as possible but no later than nine months from the end of the financial year in which the rights revenue was collected, unless objective reasons relating in particular to reporting by users, identification of rights, rightholders or matching of information on works and other subject-matter with rightholders prevent the collective management organisation or, where applicable, its members from meeting that deadline.</p> <p>2. Where the amounts due to rightholders cannot be distributed within the deadline set in paragraph 1 because the relevant rightholders cannot be identified or located and the exception to that deadline does not apply, those amounts shall be kept separate in the accounts of the collective management organisation.</p> <p>...</p>
<p>UK, <i>The Collective Management of Copyright (EU Directive) Regulations 2016</i>, reg12</p>	<p>12.—(1) A collective management organisation must regularly, diligently and accurately distribute and pay amounts due to right holders in accordance with the general policy on distribution referred to in paragraph (1)(d)(i) of regulation 7 (general assembly of members) subject to paragraph (3) of regulation 14 (deductions and payments) and regulation 27 (payment).</p>

	<p>(2) A collective management organisation or, a member of it which is an entity representing rightholders, must distribute and pay the amounts referred to in paragraph (1) to right holders as soon as possible but in any event no later than the beginning of the period which starts 9 months from the end of the financial year in which the rights revenue was collected unless paragraph (3) applies.</p> <p>(3) This paragraph applies where there are objective reasons which prevent the collective management organisation or its member referred to in paragraph (2) from distributing or paying the amounts within the time specified in that paragraph.</p> <p>(4) The objective reasons referred to in paragraph (3) may relate in particular to</p> <p>(a) reporting by users;</p> <p>(b) identification of rights or right holders; or</p> <p>(c) matching of information on works and other subject matter with right holders.</p>
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ENFORCEMENT OF ARR

65. Any ARR scheme, which is ultimately concerned with the collection and distribution of payments due on eligible resales, should have clear guidelines as to how the scheme is to be enforced, in this instance, by the CMO. The desirability of CMOs having specific powers to request information about resales from AMPs has already been referred to above, including the possibility of being able to audit the books of AMPs. In one country, Algeria, there is also power in the legislation which entitles the CMO and/or the right holder, who may opt to manage his right individually, to attend the auction where resale is occurring, to request information and inspect documents: see the text of the provision in Table 26 below.
66. Time limits for the taking of certain steps are also critical, for example, in relation to the notification of eligible resales by AMPs, provision of information by AMPs to CMOs and the making of payments when ARR is due. Such limits provide a focus for enforcement proceedings by the CMO and are preferably established under legislation or regulation, as example, in Spain where payment of ARR by an AMP must be made within 2 months of the making of a notification to a relevant CMO and in France where a period of 4 months is fixed: see Table 26 below. In the case of requests by CMOs for information, in the UK a 90 day period for a response is stipulated: see Table 26 below.
67. More generally, where payment of ARR has not been made, CMOs should have the specific power to pursue an entitlement to ARR through the courts on behalf of the eligible right holder as a debt owed to that person. In many instances, this power should be inherent in the mandate given to the CMO by the member, that is, the CMO is entitled to take such action as the agent of the right holder: see further the discussion above of mandates generally, and the specific examples given there, notably AGADP where the power to undertake civil proceedings is specially entrusted to it in the mandate its receives from members. Ultimately, the scope of the CMO's authority to take legal proceedings on behalf of individual right holders will be a matter of the terms of the mandate it has received as well as any relevant provisions of national law which may differ from country to country.
68. Several national laws, to avoid any doubts arising as to the standing of CMOs to initiate and pursue legal proceedings to enforce ARR payments, have specific legislative provisions dealing with this topic. Two such countries are Australia and New Zealand: see Table 26 below. The Australian legislation also contains some evidentiary presumptions that may be useful in such proceedings. In France, the entitlement of a CMO to take legal action to defend the rights of members for which it is responsible within the framework of its members' mandates is specifically confirmed under French IP law: see Table 26 below. Such powers are also referred to in the statute of one leading French CMO (ADAGP).
69. Another possibility is that a CMO may be entrusted under national law with more general powers to monitor and police potential breaches of copyright law, including ARR. This is the

case in Italy (see Table 26 below). The practical implementation of these powers in the context of ARR was described by SIAE in the following way:

In these cases, SIAE and the Fiscal Police jointly carry out the checks all over the territory, which often lead to the seizure of the documentation relating to the transactions regarding the art works and other financial documentation (including cross -examination on the fiscal data of sellers or buyers).

The investigation activity can also concern the online platforms and the TV channels broadcast, which host telesales of works of art marketed by the gallery or the auction house under inspection.

SIAE does not have the power to interrogate the sellers or other professionals., but the Fiscal Police and/or the Public Prosecutor certainly are entitled to do so during the investigation phase.

TABLE 26 – ENFORCEMENT OF ARR

Country	Legislative and other provisions
Spain, <i>Intellectual Property Law (Royal Legislative Decree 1/1996, 12 April, as amended)</i> , art 24.15	15. Once the notification referred to in paragraph a) of section 14 has been made, the art market professionals will make the payment of the right to the corresponding management entity within a maximum period of two months.
France, <i>Intellectual Property Code</i> , art R 122-10	I. - When receiving a request from the beneficiary, the professional responsible for payment of the resale right pays him the amount thereof within a period which cannot exceed four months from the date of receipt of the request. request or, if this request is received before the sale, from the date of this sale.
UK, <i>The Artist's Resale Right Regulations 2006</i> , reg 15(4) and (5)	(4) The person to whom the request is made shall do everything within his power to supply the information requested within 90 days of the receipt of the request. (5) If that information is not supplied within the period mentioned in paragraph (4), the person making the request may, in accordance with rules of court, apply to the county court for an order requiring the person to whom the request is made to supply the information.
Australia, <i>Resale Royalty Right for Visual Artists Act 2009</i> , ss23(2), (3) and 24 (presumptions)	23 ... (2) The collecting society must use its best endeavours to collect the resale royalty payable under this Act, and, if necessary, enforce any resale royalty right held under this Act, on the commercial resale of the artwork on behalf of the holder or holders of the resale royalty right. (3) The collecting society is not subject to the direction of any holder or holders of the resale royalty right in collecting the resale royalty or enforcing that right. Special presumptions apply in these proceedings: 24. In proceedings for the enforcement of the resale royalty right on the commercial resale of an artwork by the collecting society: (a) it is to be presumed conclusively that there is at least one holder of the resale royalty right under this Act; and (b) it is to be presumed that the collecting society is acting on behalf of the holder or holders of the resale royalty right, unless it is proved that a notice was given to the collecting society in accordance with subsection 23(1) in relation to the commercial resale [where right holder has indicated in advance that the CMO is not to enforce the right.].
NZ, <i>Resale Right for Visual Artists Act 2023</i> , ss 26 and 27	26 Enforcement (1) The collection agency may apply to a court of competent jurisdiction for orders under section 27 if— (a) information is not provided in accordance with section 21:

	<p>(b) a person liable under section 17 to make resale royalty payments fails to do so: (c) any other requirement under this Act is not complied with in accordance with this Act. (2) This section does not limit any proceedings that may otherwise be taken by the collection agency, a right holder, or any other person.</p> <p>27 Remedies (1) In proceedings brought under section 26, the court may grant relief by making orders that— (a) the necessary information be provided, as required by section 21: (b) payment be made of any resale royalties owing under section 17: (c) are appropriate for an infringement of a property right.</p>
<p>Algeria, Executive Decree number 05-358 of 21 septembre 2005</p>	<p>This sets out the terms and conditions for exercising the resale right of the author of a work of the visual arts Article 6: the auctioneer is required to notify ONDA of all the information necessary to exercise the resale right at least 5 days before the sale takes place Article 7: ONDA as well as the author of the work or his/her heirs can attend the sale. They can also consult any document and request any information necessary to control the declarations Article 11: the auctioneer as well as the art market professional, keep a register signed and initialled by the clerk of the territorially competent court in which they mention any sale of works of the plastic arts with description and identification of the author. The register can be checked at any time by the author or ONDA</p>
<p>France, <i>Intellectual Property Code</i> (as amended), Art L321-2 ADAGP statute, art 9, is also relevant here</p>	<p>Regularly constituted collective management organizations are entitled to take legal action to defend the rights for which they are statutorily responsible, and to defend the material and moral interests of their members, notably within the framework of professional agreements concerning them.</p> <p>The Company's purpose is: (1) the exercise and administration in all countries of all rights relating to the use of works, which include inter alia the economic rights granted to authors by the French Intellectual Property Code, as well as the collection and distribution of royalties or any other compensation arising from the exercise of said rights and more generally of all sums of any kind owed by third parties as a result of the lawful or unlawful exploitation of said works ; [...] 4) to defend the rights of its associates against all third parties ; [...]. It has the right to : - take legal action to defend the individual rights of its members and the interests and rights of all its associates; - initiate all proceedings in the public interest, in particular to protect and defend authors and their beneficiaries; [...]</p>
<p>Italy <i>Law of 1942</i> (as amended), art 182bis</p>	<p>Art 182bis 27. The Authority for Communications Guarantees and the Italian Society of Authors and Publishers (SIAE) are assigned, within the scope of their respective competences established by law, for the purpose of preventing and ascertaining violations of this law, supervision: ... d-ter) on auction houses, galleries and in general any entity that professionally trades in works of art or manuscripts.</p>

ADMINISTRATIVE COSTS AND OTHER DEDUCTIONS

70. Ceilings on administrative costs typically apply to CMOs, either as a matter of internal or external regulation. An important controlling factor here is that CMOs are acting on behalf of their members and are generally established as non-profit entities. Consistently with this, deductions for cultural and social purposes may also be made, but generally will be for smaller amounts – this will depend upon internal rules of the CMO. Some general principles to be applied here are usefully set out in article 12 of the EU Directive on Collective Management, which also contemplates that deductions may be made for social, cultural or educational services provided by the CMO, provided that this is done on ‘fair criteria’. In practice, this is done by very few CMOs, Germany providing an instance where this does occur and Uruguay, one of the oldest CMOs in this field, another.
71. See further Table 27 below, which also provides examples of internal limits on administrative costs that have been set by individual CMOs in countries within and outside the EU.

TABLE 27 – ADMINISTRATIVE COSTS OF CMOS AND OTHER DEDUCTIONS

Country or region	Legislative and other provisions
<p>EU, <i>Directive 2014/26/EU</i>, 26 February 2014, on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, art 13</p>	<p><i>Article 12</i></p> <p>Deductions</p> <p>1. Member States shall ensure that where a rightholder authorises a collective management organisation to manage his rights, the collective management organisation is required to provide the rightholder with information on management fees and other deductions from the rights revenue and from any income arising from the investment of rights revenue, before obtaining his consent to its managing his rights.</p> <p>2. Deductions shall be reasonable in relation to the services provided by the collective management organisation to rightholders, including, where appropriate, the services referred to in paragraph 4, and shall be established on the basis of objective criteria.</p> <p>3. Management fees shall not exceed the justified and documented costs incurred by the collective management organisation in managing copyright and related rights.</p> <p>Member States shall ensure that the requirements applicable to the use and the transparency of the use of amounts deducted or offset in respect of management fees apply to any other deductions made in order to cover the costs of managing copyright and related rights.</p> <p>4. Where a collective management organisation provides social, cultural or educational services funded through deductions from rights revenue or from any income arising from the investment of rights revenue, such services shall be provided on the basis of fair criteria, in particular as regards access to, and the extent of, those services.</p> <p>Article 3(i):</p> <p>...</p> <p>‘management fees ‘ means the amounts charged, deducted or offset by a collective management organization from rights revenue or from any income arising from the investment of rights revenue in order to cover the costs of its management of copyright or related rights.</p>
<p>Examples of Internal limits on administrative costs set by individual CMOs, both within and outside the EU</p>	<ul style="list-style-type: none"> • 20% in Denmark, determined annually by General Assembly of VISDA, no deduction for general social, cultural or educational purposes • ADAGP: There is no statutory limit in France. The percentage of management fees is determined annually by the board. This rule is specified in the statutes of the ADAGP, Article 32. In 2024 the voted percentage is of 15% : see https://www.adagp.fr/en/adagp-role-and-missions/copyrights-managed-adagp/resale-right#presentation

	<ul style="list-style-type: none"> • Hungary: 25% HUNGART • UK: Limits on deductions to be 'reasonable' (CMO Regs): 15% for UK auction houses, art dealers or galleries; 5% for overseas societies. No deductions for general, social, cultural or educational purposes • Latvia: 24% set by internal rules of the CMO- AKK/ - art 2.3.1 may not exceed 25% of collected rights revenue (General regulations endorsed by General Assembly of Members and Council at https://www.akka-laa.lv/en/about-akka-laa/documents/general-regulations) • Estonia: 10% determined by general meeting of EAU • Norway: around 33% • Australia: up to 15% plus GST (Consumption Tax) on fee charged (by arrangement with Government), no deduction for cultural purposes • Sweden: The administrative deduction is decided on an annual basis. During 2023 the administrative deduction was 20 %. The deduction is determined by the Board of Directors within a frame set by the General Assembly. • Germany: admin fee of 15% and 4% for cultural purposes, 3% for social purposes. • Italy: set by decrees of Ministry of Culture which are updated every three years, currently 19.50%. • Belgium: 15% for administrative costs • Austria: about 10% of collected ARR goes to administrative costs; there is no deduction for general social, cultural or educational purposes • Uruguay: 15% for administrative expenses and 10% for social and cultural purposes relating to AGADU members
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UNALLOCATED OR UNDISTRIBUTED ARR PAYMENTS

72. This is a perennial issue for CMOs in countries where mandatory or extended collective management schemes are in place (in principle, this should not be a significant problem where there is voluntary collective management as all ARR payments will be distributed to existing CMO members only who should therefore be readily identifiable). While CMOs are obliged to identify and pay eligible right holders where possible (see, for example, EU CMO Directive, article 13(1)), inevitably unallocated or non-distributed funds will remain in the CMO's accounts where right holders cannot be located after diligent searches and inquiries have been made. What is the CMO to do with these funds, apart from retaining them indefinitely in the possibly hopeless expectation that an eligible right holder may finally appear?
73. Part of the answer to this problem might be found in general principles of law that restrict the making of claims after the passage of a certain period: limitations periods are a common feature of many national laws, underlining the basic notion that claims should be time-limited and not allowed to linger indefinitely. While such a device, in the case of ARR, may remove the possibility of continuing claims against the CMO holding non-distributed funds, it does not solve the further question of what the CMO should do with these funds. One possibility would be to distribute them among members of CMO, but this would clearly result in unexpected (and possibly undeserved windfalls) as these members have no link otherwise to the resale of the work that attracted ARR in the first place; it would also be to the prejudice of non-members who have equal claims to protection under extended or mandatory collective management regimes. An alternative solution would be to return the payments to the AMPs who were involved in the resale and who would likewise be no longer liable to any delayed claims for payment made by a long-lost claimant because of limitations periods (these AMPs

had, by definition, acted in accordance with the ARR scheme by reporting the resale and making the required payment in the first place). A further alternative would be to provide that the funds should now be directed to some appropriate social, cultural, or educational purpose and, presumably, one connected to the visual arts and visual artists. However, an overall guiding principle here might be that the ultimate decision on how these funds are allocated should be one made by the members of the CMO, on the basis that the CMO is the entity that is holding these funds on trust.

74. Different provisions apply under national laws in relation to this general question, although a general framework for EU member countries is to be found in the EU Directive on CMOs: see art 13 in Table 28 below. This has a general requirement that, after diligent efforts to identify eligible right holders have been made by the CMO, non-distributed funds are to be retained in separate accounts for a period of three years, after which the membership, in General Assembly, are to decide on the use of those funds, subject to any direction under national law which may ensure that such amounts are used in a 'separate and independent way in order to fund social, cultural and educational activities for the benefit of right holders'.
75. Working within this general framework, CMOs in EU countries appear to have taken differing approaches to the ultimate distribution of non-distributable funds:
- Hungary, after 3 years if not claimed, 90% of the royalty retained is paid to the National Cultural Fund for cultural purposes in support of Graphic, Applied and Photographic Artists
 - In Denmark, a similar 3 year period applies after which, if not claimed, the Board of Directors, as mandated by the General Assembly, decides on the use of the funds. According to the legislation, legal uses of the funds may be (1) general social, educational, or cultural purposes that support artists or (2) to support the administration of the ARR by the authorized CMO. For the current accounting period, the board has decided to use the available funds for several cultural projects that support artists.
 - Germany – after 3 years, all funds are distributed to members (there being no mandatory collective management in Germany)
 - Spain – 3 years limitation period, then the funds go to Fine Arts Assistance Fund administered by a commission attached to the Ministry of Culture and Sports. For the time being, this Fund is earmarked for artistic production grants, and is managed through the regional governments and coordinated by the Ministry of Culture and Sport of the Central Government
 - Italy – funds are retained for 5 years; if unclaimed in this period, the amounts are remitted to the National Institute for Welfare and Assistance for Painters and Sculptors, Musicians, Writers and Playwrights (ENAP), but SIAE advises that this body was recently abolished and these funds are currently paid into a fund established at the National Social Insurance agency.
 - Netherlands: this is an issue that does not generally arise, as ARR here is subject to voluntary collective management and Pictoright collects ARR only for right holders with whom Pictoright has an agreement (or with one of its sister societies). In the 'rare case' where ARR cannot be distributed, it is directed to general social and cultural purposes.
 - In France, part of undistributed ARR is allocated to a public organisation that manages the artist's retirement fund (IRCEC)
76. Outside EU:
- UK – funds are held for 6 years; after this, they are dealt with by DACS' voting members in the annual general meeting: in 2023, members voted for funds to be returned to AMP that originally paid the funds to DACS.
 - Norway – funds are held for 3 years, after which they can be used for other purposes, such as social, cultural or educational purposes
 - Australia – a series of steps to be followed are set out in the legislation (see Table below) but ultimately the amount is retained for use in the collection and distribution of resale royalties and for enforcement purposes
 - Uruguay – these funds are carried over into successive periods and retained for two years after which the funds are directed to cultural and social assistance of members.

For a sample of national provisions, see the following Table.

TABLE 28 – UNALLOCATED OR UNDISTRIBUTED ARR PAYMENTS

Region or country	Legislative or other provisions
EU, DIRECTIVE 2014/26/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, art 13 – non-distributable funds	<p>....</p> <p>4. Where the amounts due to rightholders cannot be distributed after three years from the end of the financial year in which the collection of the rights revenue occurred, and provided that the collective management organisation has taken all necessary measures to identify and locate the rightholders referred to in paragraph 3, those amounts shall be deemed non-distributable.</p> <p>5. The general assembly of members of a collective management organisation shall decide on the use of the non-distributable amounts in accordance with point (b) of Article 8(5), without prejudice to the right of rightholders to claim such amounts from the collective management organisation in accordance with the laws of the Member States on the statute of limitations of claims.</p> <p>6. Member States may limit or determine the permitted uses of non-distributable amounts, inter alia, by ensuring that such amounts are used in a separate and independent way in order to fund social, cultural and educational activities for the benefit of rightholders.</p>
Hungary, <i>Act XCIII of 2016 on on collective management of copyright and related rights</i> , art 42(1)	<p>if not claimed, the Board of Directors, as mandated by the General Assembly, decides on the use of the funds. According to the legislation, legal uses of the funds may be 1) general social, educational or cultural purposes that support artists or 2) to support the administration of the ARR by the authorized CMO. For the current accounting period, the board has decided to use the available funds for a number of cultural projects that support artists.</p>
Australia, <i>Resale Royalty Right for Visual Artists Act 2009</i> , s 31	<p>31 Return of unclaimed resale royalty</p> <p>(1) If:</p> <p>(a) resale royalty is paid to the collecting society on the commercial resale of an artwork; and</p> <p>(b) despite using its best endeavours, the collecting society is unable to locate a holder of the resale royalty right on the commercial resale or an interest in the right during a period of 6 years beginning at the time of the commercial resale;</p> <p>the collecting society must deal with that holder's share of the resale royalty together with interest earned on that share less the collecting society's administration fee, in accordance with subsection (2).</p> <p>(2) The collecting society must:</p> <p>(a) distribute the amount in equal shares to those of the remaining holders of the resale royalty right who can be located; or</p> <p>(b) if no such person can be located—distribute the amount in equal shares to the persons who paid the resale royalty and who can be located; or</p> <p>(c) if no such person can be located—retain the amount for use in the collection and distribution of resale royalties and the enforcement of resale royalty rights.</p>
Spain, <i>Decree of 1996</i> , art 24.20-24.4	<p>20. The administration of the Fine Arts Aid Fund corresponds to a Commission attached to the Ministry of Culture and Sports, without prejudice to its functional autonomy. This Commission is chaired by the Minister of Culture and Sports or the person to whom he delegates and will be made up of representatives of the Autonomous Communities, the obligated subjects and the entities that manage the right of participation in the manner determined by regulatory route.</p> <p>21. The amounts received by the management entities as participation rights not distributed to their holders within the period established in</p>

	<p>section 12 due to their lack of identification and for which there is no claim, must be entered into the Fund. of Aid to the Fine Arts within a maximum period of one year.</p> <p>22. The management entities will be obliged to notify the Administrative Commission of the Fine Arts Aid Fund, in the first quarter of each year, the list of amounts received for the participation right and the distributions made, as well as the reasons. that have made it impossible to distribute the amounts deposited into the Fund.</p> <p>23. The Fund's Administrative Commission will publish, on an annual basis, a report on the application of the participation right.</p> <p>24. The Autonomous Communities, in accordance with their exclusive competence in the matter, will directly and fully manage the resources of the Fine Arts Aid Fund in their respective territories. The distribution criteria and mechanisms must, in turn, be agreed with the Autonomous Communities.</p>
<p>UK, CMO Reg, s 7(d) and 12(9)</p>	<p>7.—(1) A collective management organisation must ensure that—</p> <p>...</p> <p>(d) in accordance with regulation 10 (rights revenue), 11 (deductions) and 12 (distribution)and subject to paragraph (2) the general assembly of members decides on at least—</p> <p>(i) the general policy on the distribution of amounts due to right holders;</p> <p>(ii) the general policy on the use of non-distributable amounts;</p> <p>...</p> <p>(iii) the use of non-distributable amounts;</p> <p>...</p> <p>12....</p> <p>(9) Amounts due to right holders are non-distributable for the purposes of these Regulations where—</p> <p>(a) they cannot be distributed before the end of the period of 3 years from the end of the financial year in which collection of the rights revenue occurred; and</p> <p>(b) the collective management organisation has taken all necessary measures to identify and locate the right holders referred to in paragraph (6).</p> <p>(10) The decision on the use of non-distributable amounts referred to in regulation 7(1)(d) is without prejudice to the right of a right holder to claim such amounts from the copyright management organisation in accordance with the law providing for a limitation period applicable to the bringing of proceedings.</p>
<p>France, <i>Intellectual Property Code</i>, Art. R 123-7 II</p>	<p>In the absence of a known rightholder, or in the event of vacancy or escheat, the judicial court may entrust the proceeds of the resale right to a collective management organization governed by Title II of Book III of this part, approved for this purpose by order of the minister responsible for culture. The court may be approached by the minister responsible for culture or by the approved organization.</p> <p>The amounts received by the approved organization are allocated to covering a portion of the contributions owed by authors of graphic and plastic arts under supplementary pension schemes.</p> <p>The management of the resale right provided for in the first paragraph ends when a rightholder, able to provide evidence of their status, makes themselves known to the approved organization.</p>

SOME FURTHER PRACTICAL AND LEGAL ISSUES FOR CMOs

77. There are some further practical issues that may arise in the operation of an ARR scheme by a CMO. Inevitably, these also raise legal questions that are not always be readily resolved.

WHERE AN AMP HAS PAID THE ARTIST AN ADVANCE AGAINST A FUTURE SALE

78. This is a not uncommon situation where an AMP, such as a gallery holds a work for display over a period of time. In principle, ARR should not apply as long as there has been no sale to the AMP by the artist. It should also be inapplicable if there has been a sale to the AMP by the artist, but ARR would then be payable once the AMP sells the work as this will then be an eligible resale. However, national and/or regional laws may set limits on liability to pay ARR where the resale occurs within a given time or below a minimum price: see, for example, art 1.3 of the EU Directive, and art R 122-8, IPC, France. In practical terms, it may not always be easy to identify the basis on which an AMP, such as a gallery, holds a work for sale, depending upon whether it has simply provided an advance on a future sale to the artist or has become the owner of the work which it is now reselling outside any limitations on timing and price set by national law. This is a problem of transparency, on which ADAGP has commented:

Information on gallery transactions is very opaque. It is difficult for us to know how galleries sales are conducted. The application of RR can be complicated when it comes to knowing whether the sale is a deposit sale or whether the gallery acquired the work and then resold it at a later date.

Bildkunst also noted that it only collects ARR in cases where the primary gallery or AMP has bought the work and then resold it when explicitly asked to do so by the artist.

WHERE WORKS OF ART ARE RETURNED

79. In this instance, ownership of the work has not been transferred. Accordingly, if ARR has been received by the CMO, this should now be returned to the AMP. ADAGP advises that in such cases it issues a credit note when the work is finally returned.

SUCCESSIVE REALES OF NFTS

80. In principle, these should be subject to ARR, and ADAGP reports that it will do this, while noting that resales of NFTs are 'really rare' in France. Other CMOs were unable to report such issues arising within their jurisdictions.

TERRITORIAL ISSUES

81. Significant issues for CMOs may also arise where foreign art works are offered for sale by an AMP, such as a gallery, within the CMO's jurisdiction. If the work comes from a country where ARR is recognised and there is a relevant CMO, liability for, and transfer of, any applicable ARR payments can be dealt with under reciprocal agreements between the two CMOs (see further below). However, there may be problems if the work is from a country with no ARR or no relevant CMO and further discussion of these will be included in an updated version of Part I of this Toolkit.

CATEGORIES OF ARTISTIC WORKS SUBJECT TO ARR

82. An issue that is both legal and practical in character concerns the way in which CMOs - and AMPs and resellers – determine the eligibility of certain categories of visual art for the purposes of ARR. This was not a matter on which specific advice from CMOs was sought in the preparation of this Part but is one which may cause problems in day-to-day management

of an ARR scheme. For present purposes, all that can be offered here is to point to several of the questions that may arise here and to refer to approaches that may be adopted:

- a. *Works produced in limited copies*: examples might be sculptures, photographs, tapestries, enamels, batiks and other print works, audiovisual or digital media works. In principle, each copy should be subject to ARR where this has been produced by the artist or under his or her direct authority or supervision, but it may be useful for there to be some prescription as to how the involvement of the artist in their production is to be evidenced, for example, by way of signature on each copy. Limits on the number of copies that can be made in the case of some categories of works may also assist in providing guidance to CMOs and AMPs as to how to proceed. It will be seen from the provisions set out in the Table below that the EC Directive offers some general guidance on this, while some laws, such as the French, are more prescriptive and directed at particular categories of works.
- b. *'Works of fine art' and 'works of applied art'*: Overlapping with the issue of works produced in limited copies is the distinction that is sometimes drawn between 'works of fine art' and 'works of applied art', which may also have a functional purpose and will also typically be produced in multiple copies. However, determining which works of applied art should be eligible for ARR can be a difficult issue for those, such as CMOs and AMPs, who must manage such a scheme and, in this regard, it may be helpful for these to be listed specifically. This 'listing' approach is adopted to some degree in many national ARR laws, with some, such as Australia, doing this in considerable detail: see Table 3, Part 1. Numerical limits may also assist here (as in par a above), but definitional issues may still arise here with respect to categories that cannot readily be resolved by legislative provisions (examples might be jewellery, glassware, furniture, and items of *haute couture*). In this regard, it may therefore be useful for CMOs and AMPs to agree on protocols and guidelines as to how particular items are to be handled, including numerical limits, authors' signatures and the like (EVA advises that such agreements are presently occurring within Europe).
- c. *Other categories of artistic works*: Protocols and agreed guidelines may also be important in determining the way in which new areas of evolving artistic practice are dealt with for the purposes of ARR, for example, digital and multimedia works and NFTs. Agreed protocols may likewise be useful in relation to works embodying traditional cultural expressions, noting here the inclusion of such items in the recent NZ legislation.

TABLE 29 – IDENTIFYING ELIGIBLE WORKS IN CERTAIN CASES

Country or region	Provision	Comment
EC Directive, Art 2	<p>1. For the purposes of this Directive, 'original work of art' means works of graphic or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs, provided they are made by the artist himself or are copies considered to be original works of art.</p> <p>2. Copies of works of art covered by this Directive, which have been made in limited numbers by the artist himself or under his authority, shall be considered to be original works of art for the</p>	<ul style="list-style-type: none"> • This provides an inclusive list of eligible works of art, including some works of applied art, eg ceramics and glassware • It points to the need for it to be established these works are made by the artist himself and provides for limited copies duly signed or authorized by the artist.

	<p>purposes of this Directive. Such copies will normally have been numbered, signed or otherwise duly authorised by the artist.</p>	
<p>France, <i>Intellectual Property Code</i>, Article R122-3, modified by Decree n°2022-928 of June 23, 2022 - art. 10</p>	<p>The works mentioned in article R. 122-2 are original graphic or plastic works created by the author himself, such as paintings, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glasswork, photographs and plastic creations on audiovisual or digital media. Works executed in a limited number of copies and under the responsibility of the author are considered original works of art within the meaning of the preceding paragraph if they are numbered or signed or duly authorized in another way by the author . These are in particular:</p> <p>a) Original engravings, prints and lithographs taken in limited numbers from one or more plates;</p> <p>b) Sculpture editions, limited to twelve copies, numbered copies and artist's proofs combined;</p> <p>c) Tapestries and works of textile art made by hand, based on original models provided by the artist, within the limit of eight copies;</p> <p>d) Enamels executed entirely by hand and bearing the artist's signature, within the limit of eight numbered copies and four artist's proofs;</p> <p>e) Signed photographic works, within the limit of thirty copies, whatever the format and support;</p> <p>f) Plastic creations on audiovisual or digital media within the limit of twelve copies.</p>	<ul style="list-style-type: none"> • Apart from the numerical limits, this requires numbering of copies and signing of the copies by the artist. • This is not an exhaustive list, as ADAGP points out: ‘...certain categories such as applied arts, illustrated books, or haute couture pieces may also qualify for ARR, provided that the artwork is original, meaning it is numbered <u>or</u> signed, <u>or otherwise</u> authorized by the artist (Art. R 122-3 IPC). It is the responsibility of the ARR department to determine, based on professional opinions from AMP’s, internal research conducted on a specific artist's work, and with the assistance of the artist or rights holders, whether an artwork qualifies as original within the scope of the article.’
<p>UK, <i>The Artist’s Resale Right Regulations 2006</i>, reg 4</p>	<p>4.—(1) For the purposes of these Regulations, “work” means any work of graphic or plastic art</p>	<ul style="list-style-type: none"> • This follows the terms of the EC Directive and provides an inclusive list of works subject

	<p>such as a picture, a collage, a painting, a drawing, an engraving, a print, a lithograph, a sculpture, a tapestry, a ceramic, an item of glassware or a photograph.</p> <p>(2) However, a copy of a work is not to be regarded as a work unless the copy is one of a limited number which have been made by the author or under his authority.</p>	<p>to ARR, including several (tapestry, ceramic and glassware) which will be works of applied art</p> <ul style="list-style-type: none"> • As under the EC Directive, there is no prescription of numerical limits (as in France), apart from the general requirement that the copy is one of 'a limited number'.
<p>New Zealand, <i>Resale Right for Visual Artists Act 2023</i>, s 8</p>	<p>8 Meaning of original visual artwork</p> <p>(1) An artwork is an original visual artwork if it is—</p> <p>(a) a visual artwork created by, or under the authority of, an artist; or</p> <p>(b) one of a limited number of copies of a visual artwork made by that artist or under their authority.</p> <p>(2) In this Act, visual artwork—</p> <p>(a) includes a visual work of any 1 or more of the following types:</p> <p>(i) a cultural expression of Māori;</p> <p>(ii) a cultural expression of Pacific peoples;</p> <p>(iii) ethnic or cultural art that is a variation of a type of work described in any of subparagraphs (iv) to (ix);</p> <p>(iv) painting, drawing, carving, engraving, etching, lithography, woodcutting, or printing (including a book of prints);</p> <p>(v) sculpture, collage, or modelling;</p> <p>(vi) craftwork, ceramics, glassware, jewellery, textiles, weaving, metalware, or furniture;</p> <p>(vii) photography or video art;</p> <p>(viii) multimedia art;</p> <p>(ix) art that is created using computers or other electronic devices;</p>	<ul style="list-style-type: none"> • This is a very expansive list of works included (similar to the (Australian one in Table 3). • No limits on numbers of copies are set. • Various forms of cultural expression are included ((2)(ii)-iv).

STAFFING OF CMOS

83. Administration of ARR by a CMO obviously requires skilled staff as well as appropriate information technology resources. The kinds of skills required by staff will be: legal, in the sense of being able to apply the criteria for eligibility swiftly and accurately, coupled with factual knowledge and experience of the art market in the particular country and of the different kinds of art practices to be found in that market, as well links to relevant groups of arts practitioners in that country. High order research skills will also be required, eg in relation to hard copy as well as online sources, such as websites and social media. Good communication skills will be called for in relation to promotion of ARR at the domestic level as

well as internationally, including links with sister CMOs in other countries and other international organizations such as CISAC and WIPO. Finally, appropriate IT skills in relation to processing and distribution of ARR payments will be required.

RECIPROCAL ARRANGEMENTS

85. As might be expected, these are most highly developed within the EU where there are framework directives on both ARR and CMOs. Quite apart from any legislative provisions required to enable collection of ARR for foreign claimants, it will be necessary for the local CMO to have representation agreements with corresponding foreign CMOs. Typically, these will provide for the deduction of a small administrative fee by the local CMO, and there will be other requirements as to the timing of payments, exchange of information and transparency.
86. A model in this regard is ADAGP in France, which has concluded reciprocal arrangements and unilateral arrangements with sister societies. This allows ADAGP to collect ARR for members of sister societies on French soil. It also allows artists represented by ADAGP to benefit from ARR collected by sister societies in their own countries and soil.

SUPPORT NEEDED FOR NEW CMOS

87. In terms of existing Berne membership, recognition of ARR still occurs within just over half of the membership: see further Toolkit, Part 1. Within this group, perhaps less than half effectively implement ARR through the medium of a dedicated CMO, meaning that enforcement of ARR in those countries where there is no CMO will be largely illusory while there are some large and active art resale markets where there is no ARR at all, notably in North America, most of Africa and Asia. The general argument has been made in the preceding paragraphs that some form of collective management is the most appropriate way in which to give effect to a workable ARR scheme, although critical decisions will need to be made as to (a) whether this is done in a voluntary manner or through some form of mandatory or extended scheme, and (b) the kinds of additional powers a CMO operating under a such scheme will require, generally through the means of some explicit legislative provision.
88. As noted at the outset, these policy and legislative choices are left to the discretion of member countries, having regard to the terms of article 14^{ter} of Berne. There is no right or wrong answer here and what works well in one set of economic, legal, and cultural circumstances may not work in another. The size of a country's art resale market may be a general indicator of whether a mandatory or voluntary scheme will be preferred: for example, we have noted that mandatory schemes tend to have been applied in countries with smaller markets, as in many EC countries; at the same time, countries such as the UK and Spain can hardly be described as 'small' in this regard. Mandatory schemes may work effectively to optimise payments to all eligible right holders within a country, but there are striking examples of successfully implemented voluntary schemes in countries with larger art resale markets, such as France and Germany. Much will depend therefore upon the skill and enthusiasm with which ARR schemes, mandatory or otherwise, are managed.
89. Where a country is contemplating establishing a collectively managed ARR scheme – and this is presently occurring in several countries in the Americas, Africa and Asia – there are important steps that need to be taken. The first of these arises at the political level: lobbying for and obtaining the necessary legislative recognition of ARR, including the necessary powers to implement such a scheme collectively (even if this is only done on a voluntary basis). The preceding sections of this Part of the Toolkit have sought to set out the kinds of matters that need attention in this regard, including the necessary machinery to establish a CMO, with appropriate approval procedures and continuing official supervision to ensure transparency and accountability to members, appropriate legal powers to assist in enforcement of the scheme and appropriate procedures within the CMO to collect and distribute ARR payments. In some countries, efforts to achieve recognition of ARR, let alone

implementation through a CMO, have halted for long periods, as in Argentina and Brazil, or are about to be introduced, as in the cases of Mexico and Korea (at the time of writing). Other countries, such as Canada and Japan, are still working towards adoption of ARR, although both have CMOs for visual artists (JASPAR and CARFARC respectively) that are strong advocates for this and would be well placed to administer an ARR scheme, if introduced. In the USA, however, opposition to ARR remains entrenched despite major efforts by the Artists Rights Society (ARS) to lobby for such protection.

90. Legislative and official backing is one thing – and it must be acknowledged that the rights of visual artists may not loom large on the political agendas of many countries – but it must also be acknowledged that there may be strong resistance or reluctance to participate in a national ARR scheme on the part of some groups potentially affected (such matters were commented on in several CMO responses received, such as South Africa and Botswana where proposals for ARR are presently included in proposed legislation). A particular legislative impediment that arises in Brazil, for example, arises from the present requirement in Brazilian law that bases ARR on a percentage of the increase in price which can be difficult to determine and appears to be used by some galleries as a device to avoid payment.²¹ Mexico, which is in the course of implementing an ARR scheme through an existing visual arts CMO (SOMAAP) pointed to resistance from galleries and auctioneers and highlighted the need for tougher penalties and speedier legal processes. Public campaigns and promotions may therefore be necessary to shift opinion in favour of ARR and to achieve the adoption of an effective national ARR scheme, as reported by ONDA in Algeria. In some countries, such as Australia and New Zealand, recognition of ARR may be seen as part of a larger effort to promote reconciliation with disadvantaged sections of their wider communities – Aboriginal and Torres Strait Islanders (Australia) and Māori (New Zealand).
91. Strong support at the operational level for embryonic national CMOs is also to be found beyond national borders:
- a. From sister CMOs that are presently operating CMO schemes. Some of this information is readily available online: it has been noted at various points above that most national CMOs have very informative websites that provide details of their schemes and contain helpful guides and other material. Much of this is available in English, French or Spanish, as well as in national languages; quite apart from anything else, they highlight the need for a CMO to have material readily available for eligible right holders, AMPs and the broader public. Appendix 3 lists the various CMOs consulted during the preparation of this Part and links to their websites. The utility of such information was commented upon in several responses received, for example, AUTVIS in Brazil and ONDA in Algeria.
 - b. Existing national CMOs have also been very active in promoting ARR generally at the regional and international level, for example, VEGAP in relation to Spanish-speaking countries in Central and South America, ADAGP in relation to Francophone countries in Africa and DACS in relation to Anglophone countries in Africa, Asia and the Pacific.
 - c. More generally, ‘peak’ organizations such as CISAC and EVA provide forums in which national CMOs can meet regularly and exchange experiences, provide mentoring programs and other forms of assistance to emerging CMOs, especially in developing countries. These initiatives may include training programs, workshops, and technical assistance aimed at strengthening the operational capacities of CMOs in managing rights and collecting royalties for creators.
 - d. The role of WIPO is also important here: through its formal bodies such as the Standing Committee on Copyright and Related Rights, advice from it skilled

²¹ The increase in value approach is also adopted in the laws of several other Latin American countries, including Chile and Ecuador, where it may be supposed similar difficulties in collection will arise. In this regard, it may be noted that Uruguay which originally provided for a generous ARR of 25% of the increase of value on resale in its 1937 law amended this to 3% of the resale price in 2003: information supplied to the author by Laura Villeraraga Albino, graduate student at Queen Mary University, London who has also provided very helpful information with respect to ARR in Latin American countries generally.

officials and also in the area of IT solutions (see here, WIPO Connect at https://www.wipo.int/global_ip/en/activities/wipo_connect/). WIPO is obviously well-placed to provide training programmes for staff and organizing conferences with visual artists to raise awareness of ARR.

92. Finally – and perhaps a statement of the obvious – is the fact that a significant impediment to the broader acceptance of ARR schemes at the national level arises from its optional status under the Berne Convention. Several of the responses received indicate that this is a factor underpinning some of the resistance to adoption of ARR in their countries: why should this be a reform priority if it is not a mandatory international obligation? Implementation at the national level through collective management might still remain a matter for each country to determine, but a requirement to recognise ARR in the first place is an important step in advancing public debate and acceptance. This point was noted by the response received from JASPAR in Japan.

APPENDIX 1

[Questionnaire sent to CMOs already collecting and distributing ARR payments]

QUESTIONNAIRE ON PRACTICALITIES OF ARR SCHEME (CMOS):

Abbreviations used in this document:

ARR: Art Resale Royalty
CMO: Collective Management Organization (Collecting Society)
AMP: Art Market Professional, e.g. Art Dealer, Gallery, Art Auction
IT : INFORMATION TECHNOLOGY
AI: ARTIFICIAL INTELLIGENCE
NFT: NON-FUNGIBLE TOKEN

- 1- How is your CMO constituted? That is, is it established by or under legislation or under the rules of your general law (such as those relating to corporations or associations) and are there particular restrictions or limitations that apply to its operations? Is it possible to supply the relevant documents, such as a constitution or articles of association and other rules, that govern the operations of your CMO?
- 2- What kind of public control, that is, through government, government agencies, courts or administrative tribunals, etc, apply to your CMO?
- 3- Following on from 2, are there internal controls that apply to your CMO, for example, through boards of directors, members' representative bodies, and the like?
- 4- Is administration of ARR the sole responsibility of your CMO or is this part of an existing CMO which administers other rights of copyright owners, eg reproduction and communication rights for visual artists, or for literary and artistic works more broadly?
- 5- How are rights acquired from artists for the purposes of administering your ARR scheme, eg by way of assignment or exclusive licence, or is this done on an agency basis, or is there mandatory collective management under your ARR scheme, that is, a positive legal provision imposing administration of the scheme through an (approved) CMO?
- 6- More generally, what is the legal basis of your relationship with the artist? For example, can individual artists opt out of membership of your CMO, and in what circumstances can they do so?
- 7- Is there legislative and/or other government support for your CMO? That is, does it receive legislative recognition or endorsement and how does this occur?
- 8- How does your CMO identify artists and artworks that may be eligible for ARR? For example:
 - Is it possible for artists to record or register their names, addresses, etc with your CMO in advance, or is there a general notification that can be used to identify the artist if and when an eligible resale occurs? Do artists then become members of your CMO and what does membership entail?

- How is such recording or registration achieved, ie is there a legislative requirement to do this in order to be eligible at a later stage, or is there just general encouragement to register through advertising and other promotions?
 - Do artists need to identify particular art works that might be eligible for ARR in advance or to give advice as to the broad medium in which they work, eg painting, sculpture, etc? Is such an advance notification desirable in any event, and how can it be kept up to date?
 - Does your CMO deploy such technologies as Interested Party Information (IPI) and International Standard Content Code (ISCC) that can be used to identify artists and art works? More generally, is automated image recognition (AIR) technology something that your CMO is using or is investigating?
 - Are there issues that arise with respect to particular categories of sales over which there may be uncertainty or difficulties as to whether these will be eligible resales, eg where a seller is represented by two AMPs (eg an auction house, art dealer or gallery) or where an AMP has paid the artist an advance against a future sale, returned art works, or where the AMP buys the work (there may be other situations that arise here)?
 - Does your CMO apply the ARR to successive resales of Non-fungible Tokens or NFTs? If this is the case, what is the role of smart contracts in the application of the ARR?
- 9- How does your CMO obtain information about resales from sellers and AMPs? What are the obligations of sellers and AMPs to report eligible resales and how are these obligations enforced? Are there specific legislative or regulatory requirements relating to the information about qualifying resales that these parties must provide to the CMO, and the manner in which this information must be provided?
- 10- What separate monitoring of resales is done by your CMO? Does it have power to interrogate sellers and AMPs where it appears there have been relevant resales, but no reporting has occurred? What further powers or capacities would be desirable in this regard?
- 11- How does your CMO use IT to enhance its existing data collection, to track resales, to calculate royalties and to facilitate online sales reporting? Can artificial intelligence (AI) systems and blockchain technologies be deployed here? (the questions here may overlap with those already raised and answered under 8 above).
- 12- What guidance does your CMO provide to artists, sellers and AMPs on ARR, eg through information guides, model contracts, legal assistance, etc?
- 13- How does your CMO determine the ARR due on reported resales and collect the payments that are due? Are there legislative powers that assist, or could assist, the CMO in this process? Can you comment on the present level of compliance that your CMO has encountered in this regard and what steps might be taken to improve this?
- 14- Does your ARR scheme provide for minimum thresholds and/or caps on ARR payments that make administration of the scheme easier/more difficult? Are there administrative advantages in having a fixed percentage of resale price or are there other ways of fixing the amount of ARR that are fairer to members while not compromising efficiency?
- 15- How are payments of ARR made to artists and when? Does your CMO distribute to non-members as well? What percentage of CMO administrative costs need to be deducted before ARR is paid and is this regulated through legislation or the internal

rules of your CMO? Is any deduction made, or allowable, for general social, cultural or educational purposes relating to members, that is, for the support of visual artists?

- 16- What happens to unallocated or undistributed ARR payments held by your CMO at the end of an accounting period? Are they carried over into successive periods and, if so, for how long are they retained? What ultimately happens to such funds? Is there/should there be provision for such amounts to be paid to some general cultural support fund for artists, scholarships and fellowships, or similar purposes, and how should such provision be made?
- 17- Is the ARR subject to VAT (Value Added Tax) in your country? Are there any specific taxation issues in your jurisdiction that affect the operation of your ARR scheme?
- 18- Do you have any specific rules or regulations for your CMO that are particular to, or needed for, the operation of an ARR scheme (apart from the copyright law or regulations on CMO)?
- 19- Are there any particular issues that arise for your CMO in the case of Indigenous or First Nations artists?
- 20- Do you have any other general comments with respect to the operations of a CMO in collecting and distributing ARR payments?

APPENDIX 2

QUESTIONS FOR CMOs THAT DO NOT YET ADMINISTER ARR:

1. As a preliminary question, does your national law make provision for artist resale royalty (ARR) or droit de suite? Can you please provide details of the law.
2. If your national law recognizes ARR, is this administered by your CMO?
3. If your CMO does not presently administer ARR, does your CMO have the power or mandate to do so, for example, under your national law or the existing rules of your association?
4. If your CMO does not have the necessary power or mandate, what changes in your law or internal rules would be required to obtain the necessary power or mandate?
5. From a practical perspective, what are the problems that your CMO faces in implementing an ARR scheme in your country? Some of these might be external, such as the state of your art market, reluctance to participate on the part of art market professionals (galleries, agents, auction houses, etc), or lack of awareness and/or interest among right holders (visual artists). Others might be issues internal to your CMO, such as problems of staffing and IT infrastructure, lack of clarity in your CMO's legal powers (see 1 and 2 above), and so on.

Your comments on your experiences in relation to the matters raised here would be very helpful.

6. Does your CMO intend to address these issues? And, if so, how?
7. Does your CMO have links or relationships with CMOs administering ARR in other countries? Could such links or relationships be of assistance in addressing effective implementation of ARR within your own country?
8. Does your CMO have links with other international organizations, governmental or non-governmental, that could likewise be of assistance in relation to the implementation of an ARR scheme in your country?
9. How might WIPO be of assistance to you?
10. Do you have any general comments or observations about the implementation of ARR in your country?

APPENDIX 3

LIST OF CMOS AND OTHER ORGANIZATIONS CONSULTED DURING PREPARATION OF THIS REPORT

NATIONAL:

Algeria – ONDA (Office National des Droits d'Auteur et droits voisins),
Australia – CA (Copyright Agency): <https://www.copyright.com.au/>
Austria – Bildrecht: <https://www.bildrecht.at/>
Belgium – SOFAM: <https://www.sofam.be/nl/>
Botswana – COSBOTS (Copyright Society of Botswana): <https://cosbots.com/>
Brazil – AUTVIS (Associação Brasileira dos Direitos de Autores Visuais): <https://autvis.org.br>
Canada – CARFARC (Canadian Artists' Federation/Le Front des Artistes Canadiens):
<https://www.carfac.ca/news/2023/11/14/government-of-canada-launches-survey-on-the-artists-resale-right/>
Côte d'Ivoire – BURIDA (Bureau Ivoirien du Droit d'Auteur) : <https://www.buridaci.com/web/>
Czechia -GESTOR (The Union for the Protection of Authorship) : <http://www.gestor.cz/en/>
Denmark – VISDA (Visuelle Rettigheder Danmark): <https://www.visda.dk>
Estonia – EAU (Estonian Authors Society): <https://eau.org/en/>
France- ADAGP (Association des Auteurs des Arts Graphiques et Plastiques)
<https://www.adagp.fr/>
Germany – Bildkunst (VG- Bild Kunst): <https://www.bildkunst.de/homepage>
Hungary – HUNGART (Collecting Society of Hungarian Visual Artists):
<http://www.hungart.org/en/>
Italy – SIAE (Società Italiana degli Autori ed Editori): <https://www.siae.it/it/>
Japan - JASPAR (Japanese Society for Protecting Artists' Rights): **Error! Hyperlink reference not valid.**
Latvia – AKKA/LAA (Copyright and Communication Consulting Agency/Latvian Authors' Association): <https://www.akka-laa.lv/en> **Copyright an**
Mexico – SOMAAP (Sociedad Mexicana de Autores de las Artes Plásticas):<https://www.somaap.mx>
Morocco- BMDAV (Le Bureau Marocain des Droits d'Auteur et Droits Voisins) : <https://bmda.ma/>
Netherlands – Pictoright: <https://pictoright.nl/en/>
New Zealand – CLNZ (Copyright Licensing New Zealand): <https://www.copyright.co.nz> and see also the website of the relevant government department responsible for implementing ARR under the new NZ legislation: <https://www.mch.govt.nz/our-work/arts-sector/artist-resale-royalty-scheme>
Peru: APSAV (Asociación Peruana de Artistas Visuales) : <https://www.apsav.org.pe/>
Romania – SGDA/VISARTA (Society for Collective Management of Copyrights in the Field of Visual Arts): <https://www.visarta.ro/>
Serbia – OFA (Organization of Photography Authors): does not manage ARR
Sénégal La SODAV (Société Sénégalaise du droit d'auteur et des droits voisins) :
<https://www.lasodav.sn/web/>
Slovakia – LITA (Society of Authors) : <https://www.lita.sk>
South Africa – DALRO (Dramatic, Artistic and Literary Rights Organizational): <https://dalro.co.za/>
Spain – VEGAP (Visual Entidad de Gestión de Artistas Plásticos): <https://vegap.es>
Sweden –Bildupphovsrätt (Image Copyright): <https://bildupphovsratt.se/english>
Tunisia- OTDAV (Organisme Tunisien du Droit d'Auteur et des Droits Voisins) :
<http://www.otdav.tn/index.php/fr/>
UK – DACS (Design & Artists Copyright Society): <https://www.dacs.org.uk/>; and ACS (Artists' Collecting Society): <https://artistscollectingsociety.org>
Uruguay – AGADU (Asociación General de Autores del Uruguay) : <https://www.agadu.org>
US – ARS (Artists Right Society): <https://www.dacs.org.uk/>

INTERNATIONAL AND REGIONAL:

WIPO (World intellectual Property Organizaton): <https://www.wipo.int>

CISAC (Confédération Internationale des Sociétés d'Auteurs et Compositeurs/ International Confederation of Societies of Authors and Composers): <https://www.cisac.org>

EVA (European Visual Artists): <https://www.eartists.org>

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