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ARTIST'S RESALE RIGHT TASK FORCE

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SUB WORKING GROUP 2 ON MANAGEMENT OF ART RESALE ROYALTY RIGHTS AND CONCRETE MODALITIES IN SELECTED JURISDICTIONS – SUMMARY OF WORK SO FAR

CONSTITUTION OF THE SUB-WORKING GROUP

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WHAT THE SUB WORKING GROUP WAS ASKED TO DO

The Sub Working Group has been asked to provide an overview of the key features of management of Art Resale Royalty Rights ('ARRR') in selected jurisdictions where such schemes have been established (some for longer than others). The jurisdictions considered so far have been the UK, France, Hungary, Australia, Czech Republic, Slovakia, Poland, Sweden, Russia, Brazil and Uruguay. Not covered in our work, however, at this stage, have been the issues arising in relation to the implementation and management of ARRR in developing countries, although it should be noted that a number of countries in Africa have legislated for such schemes (Senegal, Mali).

In addition, comments on certain aspects of the operation of ARRR generally have been received from the Secretary General of the International Confederation of Art and Antique Dealer Associations (CINOA).

THE QUESTIONS ON WHICH COMMENT HAS BEEN SOUGHT

A draft report has been compiled by the Sub-Working Group on the basis of responses from relevant collecting society representatives in each country other than Poland¹ to the following questions circulated by the convenor of the task force sub-group:

1. When was ARRR established in your country, and how was this done, eg by inclusion within your national copyright law, under some freestanding regulation, or in some other way?
2. What works are subject to the scheme? For example, are there limitations on the kinds of artistic works covered, or does it extend beyond, eg to original manuscripts?
3. What resales are affected? What exclusions are there?
4. What is the royalty charged and how is this done? Are there minimum or maximum limits imposed?
5. Who is liable to pay?
6. How is the scheme managed? For example, is it left to individual artists or is it subject to collective management, and how is this done?
7. What are the levels of returns to artists? Are there any particular groups who benefit more than others?

¹ These are The Design and Artists Society or DACS (UK); Société des auteurs dans les arts graphiques et plastiques or ADAGP (France); Copyright Agency Ltd or CAL (Australia); HUNGART (Hungary); The Union for the Protection of Authorship or GESTOR (Czech Republic); LITA (Slovakia); *Bildupphovsrätt* or *BUS* (Sweden), *Associações. AUTVIS* (Brazil), AGADU (Uruguay), UPRAVIS (Russian Federation).

8. What administrative issues arise in managing AAR in your jurisdiction? In particular, what costs issues arise? To what extent has it been possible to deploy digital technology in your national system?
9. Are there reciprocal arrangements for collection with respect to overseas collecting societies? In particular, where these agreements exist, have they been operationalized and what are the amounts that have been shared between countries in relation to ARRR and what revenues have been distributed to artists.
10. What other issues arise in relation to the operation of ARRR in your jurisdiction? Does it have a strong constituency of supporters in your country?
11. Are any changes to the scheme that have been proposed in your country?

What follows below is a brief summary of the various responses received so far.

1 ESTABLISHMENT OF ARRR IN EACH COUNTRY SURVEYED

This has occurred in different ways in different countries, although in those countries which are part of the European Union an overall framework is now provided by the EU Directive 2001/84 EC on art resales right.

It should be noted that, where ARRR is established outside existing copyright laws, this potentially removes any obligation to accord national treatment to non-national artists seeking protection via the Berne Convention (article 14 *ter* of the Berne Convention leaves such protection, where accorded, as a matter of reciprocity between countries with similar schemes). It should also be noted that article 14 *ter* is very open-ended as to the components of *droit de suite* for those Berne members that opt to implement such a right (at the moment, it is estimated that up to half of the present Berne membership have legislated for some kind of ARRR scheme).

2 WORKS SUBJECT TO THE SCHEME

The scope of what is covered, ie all or only some artistic works and manuscripts, differs from country to country. Differences and uncertainties also arise in relation to works that are produced in numbers rather than singly. Gaps or uncertainties may also arise with respect to some kinds of artistic works, for example, installations, digital and computer-generated works, works of architecture, and works of applied art, craftworks and the like. Original manuscripts are protected in only a few countries, noting that this is an optional feature of *droit de suite* under article 14 *ter* of the Berne Convention.

In countries where there are differences between the definition of artistic work for the purposes of ARRR and for the purposes of copyright protection generally, this may give rise to problems so far as those called upon to implement ARRR are concerned, in particular as between 'art market professionals' and the relevant collecting society (the UK is an instance of this disconnect).

3 REALES COVERED AND EXCLUSIONS

In general, these only extend to resales involving an art market professional of some kind, such as an agent or gallery, with private resales and some others, for example by museums, remaining outside the scheme. This reason for such exclusions may appear obvious enough – the difficulty of identifying and tracking such transactions, but presumably this does mean a significant gap in artists' income from such resales. Minimum resale prices are also usually set in most ARRR systems, and difficult issues may arise in defining what is actually resold, for example, where multiple items are included in a single transaction (diptychs, collages, and so on). These and other

matters, for example, the treatment of value added tax and buyers' premiums, may therefore be treated differently under each ARRR system.

4 ROYALTY CHARGED

In EU countries, a framework is set by the terms of the EU Directive; Australia, Brazil, Uruguay and Russia are not affected by this, and, while the UK is no longer part of the EU following Brexit, there has been no indication to date that it will depart from the rates set in the EU Directive.

In general, the rates charged are a percentage of the value of the resale (between 3 and 5%), with several basing this on a percentage of the increase in value on resale. In the EU, there is a cumulative sliding scale of up to 5% with an upper limit (see further below), and an upper limit is also adopted in some non-EU countries.

5 PERSONS LIABLE TO PAY

This is a critical part of any ARRR scheme, where legal liability to pay may differ as a matter of practice (and practicability). In the case of the EU, for example, while the starting point is that the seller should be liable for payment, member states may vary this so as to provide that the buyer or any intermediary art market professional involved in the resale is solely or jointly liable: EC Directive, article 1 .4. Accordingly, differences in both law and actual practice as to the persons liable to pay are to be found in both EU and non-EU countries.

6 MANAGEMENT OF SCHEME

The key issue here is whether it is left to artists individually to exercise the right or whether this is done through a collective management organization ('CMO') and, if so, whether collective administration is compulsory or not. The countries covered in this report adopt a range of approaches here, ranging from individual management (Poland), optional collective management (France, Australia) to compulsory collective management (UK, Hungary, Czech Republic and Slovakia). All of these approaches are compatible with art 14 *ter* of Berne; it is quite another question, however, whether an ARRR right can be effective where this is left as a matter of individual enforcement.

7 LEVELS OF RETURNS TO ARTISTS

A particular concern for some critics of ARRR is that returns are unevenly distributed between particular groups of artists, eg older and more established artists benefit more than less well known and/or younger artists. On the other hand, it may have particular benefits for indigenous artists who are otherwise vulnerable to exploitation. The evidence from the different countries responding to this question is mixed. The figures for France are most instructive here, indicating that, among categories of artists, painters have benefitted most, while the bulk of distributions go to male artists and to the estates of such artists.

8 ADMINISTRATIVE ISSUES ARISE IN MANAGING AAR

The comments received here point to a number of practical issues that arise, including problems of interpretation of relevant legislation (UK), identification and tracking of persons entitled to ARRR, problems with estates and calculation of royalties. Technology, however, may provide

some solutions, eg through the use of blockchain (the possibility of which has been explored in several jurisdictions).

9 RECIPROCAL ARRANGEMENTS FOR COLLECTION WITH RESPECT TO OVERSEAS COLLECTING SOCIETIES

Not all of the collecting societies surveyed in this report have reciprocal arrangements in place with other overseas collecting societies. In some instances, such as in France and the UK, reciprocal arrangements are quite extensive and have been of benefit to foreign artists. In others, however, such arrangements may be in place, but are effective only within particular regions, such as Europe. still need to be operationalized effectively. In some instances, such as Australia, the legal mechanisms for protecting foreign artists have not yet been activated.

10 OTHER ISSUES ARISING WITH RESPECT TO ADMINISTRATION OF ARRR

A particular question raised here was whether ARRR has a strong constituency of support in the countries surveyed. Responses to this are varied, ranging from general acceptance and wide support (as in France and Sweden) to scepticism and muted opposition in others (UK), divided views (as in Australia), as well as uncertainties and lack of understanding of ARRR arising from problems with the meaning and scope of specific ARRR laws (Hungary, Czech Republic, Russia and others). A common, though not unexpected, view from collecting societies is that the administration and implementation of ARRR schemes would be enhanced if there were some international framework for this in place.

11 ANY CHANGES PROPOSED

As for any prospective changes that have been proposed or might occur, there do not presently appear to have been any changes proposed or introduced at the national level, with the exception of France.

CONCLUDING REMARKS

The countries surveyed thus far show a variety of practices that have been adopted in implementing ARRR schemes at the national level. There are variations in relation to such matters as the kinds of works and resales covered, the rates charged, the person(s) responsible for payment, and the mode of administration of the right.

Two particular issues, however, may be highlighted. The first is that it does not seem sufficient simply to legislate for ARRR: attention must also be given as to how this is to be implemented on the ground. This leads to the second issue, namely that implementation seems to be more effective when some kind of collective solution is sought, rather than leaving this as a matter for individual enforcement. A further observation is that reciprocal arrangements between countries with ARRR schemes have been slow in developing, although they are most mature, as might be expected in view of the EC Directive, within Europe.

A final observation is that ARRR schemes may be particularly beneficial for indigenous visual artists.

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