"Every Artist Was First an Amateur"[1]

A response to the artist resale royalty right's supposed inconsistency with New Zealand's common law legal system

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[1] Ralph Waldo Emerson *The Complete Works of Ralph Waldo Emerson: Letters and Social Aims* (Houghton, Boston, 1904) vol 8 at 226

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I. Introduction

In 1973, outside Sotheby Park-Bernet's Madison Avenue selling room, a scene broke out as the legendary artist Robert Rauschenberg confronted art collector Robert Scull exclaiming, "I've been working my ass off for you to make that profit." Rauschenberg was referring to the fact that moments earlier, inside the selling room, Scull had sold Rauschenberg's *Thaw* (1958) for $85,000 after purchasing it for a meagre $900 15 years earlier.[2]

This is the nature of the visual art market, where most visual artworks are produced singularly and are valued for their scarcity – a typical customer will be interested only in acquiring the singular, 'original' artwork. While purchasers and collectors benefit from the capital gains of the work, the artists' revenue-generating ability is restricted to its initial sale (as detailed below, I will generally use the term 'artist' in a limited sense, being those who produce visual artworks such as paintings, sculptures, or drawings). Creators of songs, films, and books do not face the same issue, as the market dynamics are different.[3] A typical customer will generally be content with purchasing a reproduction of the song, film, book as opposed to the 'original' recording manuscript. Consequentially, such creators (relative to artists) have an easier path to enjoying the revenue from the popularity of their creations – through royalties. As presently constructed, copyright law provides an adequate framework for creators whose works can be produced in multiples to derive economic benefit by receiving royalties based on the exercise of their copyright, but it does not account for those artists who derive most of their revenue from the initial sale of an original work.

Clearly, there is a mismatch between the operation of the visual art market (as well as similar art markets) and copyright legislation, meaning that artists in New Zealand are not afforded the same opportunities as other creatives. This sentiment is echoed in a 2013 report by the U.S Copyright Office where it was stated that due to the lack of resale royalty protection artists are at a "material financial disadvantage vis-a-vis other authors."[4] An Australian study conducted in 2003 showed that royalties as a percentage of a creative's income were 22 per cent for composers, 18 per cent for writers, and only 2 per cent for visual artists.[5] Many countries have

[2] R.C. Baker "Rauschenberg's Throwdown at Sotheby's" (10 October 2018) The Village Voice <https://www.villagevoice.com/2018/10/10/banksy-wasnt-the-first-artist-to-cause-a-scene-at-an-auction/>.
[3] By 'creator(s)' or 'creative(s)' I am referring to those who produce works coming within the scope of the Copyright Act (i.e., authors, musicians, filmmakers etc.).
[4] Office of the Register of Copyrights *Resale Royalties: An Updated Analysis* (United States Copyright Office, December 2013) at 2.
[5] David Throsby and Virginia Hollister *Don't give up your day job: An economic study of professional artists in Australia* (Australia Council for the Arts, 2003) at 103.

chosen to remedy this by enabling artists to share in capital gains made from subsequent sales of their work on the 'secondary market'[6] through enacting a *droit de suite* or 'artist resale royalty right' (ARR), however, such a scheme has received push back from legal commentators and politicians alike.[7]

Before moving any further, it is necessary to clearly define what I mean by 'artist' or its variations. An artist is someone who creates an 'artistic work' or 'artwork' – this has been defined in a multitude of ways across jurisdictions. Some have chosen to draft it widely, referring simply to "works of art" or "visual arts", while others have taken a narrower approach, covering specifically a "painting, sculpture, graphic art and drawing, original and signed by the artist."[8] The specific definition of the term will be discussed in more detail in Chapter Three, however, for now, it should be noted that my use of the term takes a more narrow approach, focusing on original paintings, sculptures, graphic arts, drawings, and prints.

The phrase *droit de suite* comes from French property law and implies a retention of rights despite a change in ownership.[9] In relation to art it is the right of an artist to 'follow' or participate in the proceeds realised from the resale of the tangible embodiment of their work. It is not a copyright in the usual sense – instead of being an exclusive right of a negative character (such as the right to preclude someone from reproducing your work) it is a positive right to receive a payment.[10] First being recognised in law by France in 1920, the ARR has since become a part of more than 70 countries' copyright legislation (including common law countries such as England and Australia)[11] while also making a brief appearance in New

[6] The secondary market being the market where *resales* take place.
[7] Alexander Bussey "The incompatibility of droit de suite with common law theories of copyright" (2012) 23 Fordham Intell. Prop. Media & Ent. L.J. 1063; Ute Klement "Resale royalties for visual artists: an analysis of international developments and the implications for New Zealand" (2006) 4 NZIPJ 215, at 4; Victoria Till "Why a Resale Royalty Was Rejected in Australia" (2007) 13 IJCP 287 at 288; M. Elizabeth Petty "Rauschenberg, Royalties, and Artists Rights: Potential Droit De Suite Legislation in the United States" (2014) 22 WM Mary BORJ 977 at 1001; Erik Valdes-Martines & Vitaliy Kalyatin "Droit de Suite Convention: To Be or Not to Be?" (2020) 29(2) I. & C.T.L. 121 at 127; Sinclaire Devereux Marber "Will the Art Market Really Soar? Revisting Resale Rights After Brexit" (2019) 24 Art Antiquity & Law 137 at 140; Marilyn J. Kretsinger "Droit de Suite: The Artist's Right to a Resale Royalty" (1992-1993) 15 Hastings Comm.& Ent.L.J. 967 at 968; Neil F. Siegel "The Resale Royalty Provisions of the Visual Artists Rights Act: Their History and Theory" (1989-1990) 93 Dick.L.Rev. 1 at 15; Michelle Janevicius "Droit de Suite and Conflicting Priorities: The Unlikely Case for Visual Artists' Resale Royalty Rights in the United States" (2015) 25 DePaul J Art Tech & Intell Prop L 383 at 402; (20 May 2008) 647 NZPD 16083 (Christopher Finlayson, Copyright (Artists' Resale Right) Amendment Bill — First Reading).
[8] Ministry for Culture and Heritage *A Resale Royalty Right for Visual Artists - options for its possible application to New Zealand* (Discussion Paper, April 2007) at 10.
[9] Register of Copyrights *Droit De Suite: The Artist's Resale Royalty* (December 1992) at 7.
[10] J.D. Stanford. "Economic Analysis of the *Droit de Suite* – the artist's resale royalty" (2003) 42(4) Australian Economic Papers 386 at 394.
[11] Laurel Salisbury "*It's Not That Easy:* Artist Resale Royalty Rights and the ART Act" (1 July 2019) Center for Art Law <https://itsartlaw.org/2019/07/01/its-not-that-easy-artist-resale-royalty-rights-and-the-art-act/#_ftn3>.

Zealand in the form of the Copyright (Artists' Resale Right) Amendment Bill which was withdrawn once the National government came into power in 2008.[12] Of note is that an ARR is included in the Berne Convention for the Protection of Literary and Artistic Works, to which New Zealand is a member.[13] Although Article 14ter is not a mandatory requirement of the convention, it is nonetheless a part of the treaty which New Zealand has signed in recognition of their intention (on an international level) to protect literary and artistic works.

It may be questioned whether an ARR is necessary at all – if copyright law is aimed at reproductions or repeated uses of work, do original artworks in essence simply fall outside the scope of copyright? Later it will be discussed whether copyright is the correct lens to be analysing an ARR through, but for now, it should be noted that the purpose of copyright law in New Zealand is not constrained to protecting reproductions. In a discussion paper on the reform of the 1962 iteration of our Copyright Act, the Law Reform Division of the Department of Justice state: [14]

> "[1.3] The reason for the protection given [to authors] is to ensure that [they] receive a reward for the fruits of their minds and labour…it is in the public interest that creativity should be encouraged and rewarded."

This fundamental idea has been recognised more widely as underpinning common law notions of copyright, including in New Zealand.[15] Thus, the underpinning of copyright law in New Zealand is to provide an incentive for authors to create more original works, which in turn benefits the public as a whole. An ARR achieves this purpose by providing an economic incentive to create works.

Regarding the question of how art benefits the public – it captures important historical moments, encourages self-expression and creativity, improves overall well-being, contributes to cultural identity, and plays a role in the economy. In the United Nations Conference on Trade and Development (UNCTAD) 2008 report on the creative economy they stated: [16]

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[12] See Appendix One: Copyright (Artists' Resale Right) Amendment Bill (184-1).
[13] Berne Convention for the Protection of Literary and Artistic Works Paris Act of July 24, 1971 (as amended on September 28, 1979), art 14ter.
[14] Law Reform Division *Reform of the Copyright Act 1992: A discussion paper* (Department of Justice, April 1985) at 7.
[15] Statute of Anne (1710) Anne c 19; *Reform of the Copyright Act 1992: A discussion paper*, above n 14, at 7; Ian Finch (ed) *James & Wells Intellectual Property Law in New Zealand* (3rd ed, Thomson Reuters New Zealand Ltd, Wellington, 2017) at 371.
[16] United Nations Conference on Trade and Development *Summary: Creative Economy Report 2008* (2008) at 5 <https://unctad.org/system/files/official-document/ditc20082ceroverview_en.pdf>.

> "[The creative economy] has the potential to generate income, jobs and export earnings while at the same time promoting social inclusion, cultural diversity and human development. This is what the emerging creative economy has already begun to do as a leading component of economic growth, employment, trade, innovation and social cohesion in most advanced economies."

On the other hand, without such a right the legislation will continue to fall short of the purpose of copyright outlined above, and subsequently, the public will lose out.

Furthermore, with the recent emergence of blockchain and non-fungible tokens (NFT) the already existing incentive distortion is continuing to grow. Before these technological developments it was already in a creative's best interest (in an economic sense) to pursue pathways that lent themselves to reproductions. Now, with the technology allowing for smart contracts that can have a resale royalty built into them, there is further incentive to move away from traditional art that lacks comparable economic opportunities – in part because there are difficulties with ensuring ongoing economic returns from subsequent sales of original traditional artworks.[17]

Despite all of this, a common recurring objection to the introduction of an ARR into countries like New Zealand with a common law tradition is that the ARR is too influenced by its civil law origins to be workable in our legal system. The focus of this dissertation will be to discuss how an ARR can fit within our copyright and property laws in light of this particular objection; in short, that an ARR, being born out of civil law, is unsuitable for our common law jurisdiction.

In order to do so, Chapter One will look to set the scene for the bulk of my legal analysis in later chapters by providing context and looking at some of the more general criticisms of an ARR. Chapter Two proceeds on the basis that these objections are not fatal and takes a detailed look at the more specific objection that an ARR is unsuitable for our common law legal system. Here it is considered what it means to take this objection seriously – how it might be put strongly to supporters of an ARR in New Zealand and outlining potential responses – drawing on the theories and history of copyright and property law more generally in both civil and common law; as well as the practical/principled operation of our copyright and property law

[17] In comparison to the NFT world, incorporating an ARR into a normal contract is impractical due to the concept of privity of contract. While technically this can be overcome by s 4 of the Contracts (Privity) Act 1982, it would require the initial purchaser to confer such a right on the artist in any subsequent sales of the work. Even if this were included as a requirement in the initial contract of sale, if the initial purchaser failed to meet these obligations the artist would not have redress against the subsequent purchaser as they are not privy to the contract.

more generally. Considering the previous discussion, Chapter Three will discuss how an ARR scheme might be best designed to counter criticisms that it would be fundamentally unsuitable in New Zealand. To achieve this, I will build upon the withdrawn Copyright (Artists' Resale Right) Amendment Bill by looking at alterations that could be made to account for the aforementioned objections. Following this, it will be observed that enacting an ARR in New Zealand is not only desirable but plausible.

II. Chapter One: ARR Fundamentals and General Objections

Practical Operation of a Droit De Suite

It is useful at the outset to briefly outline the operation of a typical ARR scheme to provide context. An ARR allows an artist, being someone who has created an artwork', to receive a royalty payment (calculated as a percentage of the resale price) each time their original artwork is resold. The term 'artwork' is relatively wide and varies amongst countries that already have a scheme in place (as discussed in the introduction). Fundamentally, however, the term as used in a typical ARR scheme seeks to capture original works of artistic craftmanship ranging from carvings to weavings and everything in between. Another aspect that displays variation across jurisdictions is the applicable tariffs and thresholds. Some countries have not adopted a threshold price and others have set it relatively high, as well as the royalty rate ranging from 3 per cent to 25 per cent.[18] As indicated by the name of the scheme, the right does not apply to sales on the primary market, and in regard to the resale, most schemes have the right applying only to sales made through art market intermediaries such as auctioneers and dealers, excluding private sales.[19] Other variations include whether the right only applies to living artists or also artists' estates, and whether the right is inalienable or not.

To give a clearer picture of what the right could look like in the New Zealand context, I will outline some of the specifics from the ARR Amendment Bill.[20]

As contemplated by the Bill, an ARR would create a mandatory and inalienable royalty available to artists when their artistic works are resold in New Zealand by inserting a new Part

[18] Ministry for Culture and Heritage, above n 8, at 40.
[19] At 9.
[20] Copyright (Artists' Resale Right) Amendment Bill.

9A into the Copyright Act 1994.[21] The meaning of "artistic work" in s 2(1) of the Copyright Act would be excluded from the new Part, and instead, it would be defined by s 204A.[22]

The right would apply to sales subsequent to the first transfer of ownership.[23] However, a sale would only be treated as a resale if the buyer, seller, or their agent, was acting in the course of their business of dealing in artistic works, and the selling price was greater than the sum prescribed by the regulations made under s 204R.[24] Section 204R would give the Governor General the power to make regulations, by Order in Council, prescribing the rate of the resale royalty and the monetary value above which a sale is subject to a resale royalty. It is of note that the Bill suggested a flat rate of 5 per cent on the hammer or sale price and a threshold price of $500.[25] In line with our other copyright laws, the resale right would expire 50 years from the end of the calendar year in which the artist died.[26] The system would be administered by a collecting agency which manages the right for and on behalf of the holder and in return receives a management fee determined by the Governor General using their powers set out in s 204R.[27] Importantly, the right could only be held by a person who is a New Zealand citizen; a resident of New Zealand; or a national of a reciprocating country.[28]

The Objections

As with any new law, the policy merits of introducing an ARR have been subject to myriad arguments and counterarguments. This dissertation will not go into such arguments in an exhaustive fashion. Rather, the aim of this section of the dissertation is, contextually, to take a better look at two of the most common objections that are raised in respect of the scheme: that an ARR hurts, not helps, the starving artist; and, that the scheme would drive art sales overseas to countries without an ARR. These are obviously not the only general objections (others include: that the costs of administration and implementation are too high;[29] that after the

[21] Copyright (Artists' Resale Right) Amendment Bill.
[22] s 204A.
[23] s 204A.
[24] s 204D.
[25] Copyright (Artists' Resale Right) Amendment Bill at 10.
[26] s 204H.
[27] s 204M.
[28] s 204F.
[29] While there is empirical evidence that goes against such an objection, the strongest argument to be made is a simple observation that countries with an ARR have been operating a scheme for years with no trouble. For more information see: Judy Gray (Presentation to the WIPO International Conference on Resale Right, Session 4: Management of Resale Right, April 2017); Australia Council for the Arts *Australia Council Submission 2013 Review of the Resale Royalty Scheme* (Australian Government, August 2013) at 6.

collecting agency takes its fee there is little left for the artist;[30] and that the 'starving artist' notion is unfounded[31]), however, the two discussed are the most prevalent objections. The purpose here is not to come to conclusive statements about the validity of the following objections, but instead to show that the objections are not definitive roadblocks to an ARR: with the effect that it remains useful to consider how substantial the objection that is the main focus of this dissertation really is – whether an ARR being born out of civil law, is unsuitable for our common law jurisdiction.

1. *An ARR hurts, not helps, the 'starving artist'*

A commonly posited view in opposition of an ARR is that it helps those that need help the least while hurting those who it purports to assist. It is asserted that due to the royalty, rational purchasers of original artworks in the primary market will reduce the purchase price they are willing to pay in order to offset the potential royalty they may pay in the future.[32] This is fine for established artists who will later receive royalty payments on subsequent sales, but as argued by Bolch, Damon, and Hinshaw, most artists' works do not see a substantial increase in value, and therefore the sums collected end up with a concentrated group of artists or their estates.[33] The European Coalition of Art Market Organisations highlighted in a report that out of 168,232 employed artists in the EU (not including artists with other occupations) only 5,070 were eligible to receive the royalty.[34] This is supported by evidence that found three quarters of ARR proceeds in France went to only six families, along with a 2010 study which found that over Continental Europe only 6% of royalties went to living artists.[35] Arguably, the primary

[30] Alexander Weatherall "Harmonising the Droit de Suite; a Legal and Economic Analysis of the EC Directive and an Overview of the Recent Literature*"* 2003 German Working Papers in Law and Economics at 10-16, as cited in Mara Grumbo "Accepting Droit de Site as an Equal and Fair Measure under Intellectual Property Law and Contemplation of Its Implementation in the United States Post Passage of the EU Directive" (2008) 30(2) Hastings Comm.& Ent.L.J. 357 at 359. As will be seen from discussion in Chapter Three, I suggest a high threshold price and high royalty rate should be adopted, thus there will be ample left for an artist after collection of a management fee.

[31] See Elliott C Alderman "Resale Royalties in the United States for Fine Visual Artists: An Alien Concept" (1992) 40 J Copyright Soc'y USA 265 at 280. This objection does not stand when considering the stance I am taking is that the ARR is not intended to provide opportunity to starving artists but to allow them to derive economic benefit from the Copyright Act analogous to other creators. Those who are the most popular will derive the most benefit. See Petty "Rauschenberg, Royalties, and Artists Rights: Potential Droit De Suite Legislation in the United States", above n 7, for a general discussion of the objections.

[32] Klement *Resale royalties for visual artists: an analysis of international developments and the implications for New Zealand*, above n 7, at 8; Alderman, above n 31, at 278 .

[33] Ben W. Bolch, William W. Damon and C. Elton Hinshaw "An Economic Analysis of the California Art Royalty Statute" (1978) 10 Conn. L. Rev. 689 at 695.

[34] The European Coalition of Art Market Organisations *Implementation and Effects of the Resale Rights Directive* (March 2011) at 3.

[35] Colin Gledhill *Taking on the Big Two* (18 April 1998) The Electronic Telegraph issue 1058, as cited in Stanford, above n 9, at 392; Daniel Grant "The Royalty Treatment" (April 2 2014) Observer <http://observer.com/2014/04/the-royalty-treatment/>.

market could be depressed to the detriment of the majority of artists, while the few established artists (or their estates) benefit from the scheme.

However, a report by the United Kingdom's Design and Artists Copyright Society (the "DACS", being the organisation responsible for collection and distribution of royalties in the U.K) looking at the effect of an ARR 10 years after its enactment provides evidence to the contrary.[36] Over the 10 years the DACS had distributed over £46.9m to more than 3,900 artists and artists' estates, with 21 new artists receiving ARR royalties in each month of 2015.[37] Significantly, 56 per cent of total ARR royalties in 2015 were £500 or less.[38] From this empirical evidence we can infer that not only are there a variety of different artists benefiting from the scheme but that many of these are emerging artists who are not selling their work for large sums.

Furthermore, there is an opposing school of thought that believes an ARR would have a negligible effect on the primary market for unestablished artists. Following the implementation of an ARR in the European Union, the EU found little evidence that resale royalties had caused a decrease in the prices fetched on the primary art market.[39] If most artists' work does not substantially increase in value, then a remote possibility of having to pay a royalty at some point in the future is unlikely to affect the price at the initial point of sale.[40]

Clearly, there is conflicting evidence as to whether an ARR will have a detrimental effect on prices attainable on a primary sale and how many artists are able to recover that through future royalties. However, these considerations are largely irrelevant. The point of an ARR is not to provide equal economic opportunity between artists, but to provide equal economic opportunity across different creative endeavours. This is reflected in a statement by the Australian Copyright Council where there is no mention of an objective of copyright being to provide support to all artists, the objective is simply to "encourage creative endeavour by rewarding visual artists with a share in the increasing value of their creative product."[41] In the

[36] Design and Artists Copyright Society *Ten Years of the Artists' Resale Right: Giving artists their fair share* (2016).
[37] At 11.
[38] At 11.
[39] Diana Wierbicki "Is Global Trend on Artist Resale Royalties Right for US?" (March 7 2014) LAW360 < https://www.law360.com/articles/515958/is-global-trend-on-artist-resale-royalties-right-for-us>.
[40] Klement *Resale royalties for visual artists: an analysis of international developments and the implications for New Zealand*, above n 7, at 8.
[41] Australian Copyright Council *Droit de Suite, The Art Resale Royalty and its Implications for Australia* (A Report Commissioned by the Australia Council and the Department of the Arts, Sport, the Environment, Tourism and Territories, February 1989) at 6.

same way copyright laws are more beneficial to the top musicians and authors, an ARR can benefit only a select few artists and still be effective. So long as the category of artists envisaged by the scheme have similar protections provided to them by copyright law as other creators, who reaps the reward should not be a concern – it is the opportunity to reap the reward that provides the encouragement.

Overall, I consider that this line of argument is not fatal to an ARR as the evidence suggests that the scheme has not been detrimental to the prices attainable on the primary market and that a wide range of artists are benefiting from the royalty payments. Furthermore, even if the scheme were to negatively impact the primary market prices to the specific detriment of unestablished artists, this would not be contrary to the purpose of such a scheme.

2. The scheme would drive art sales overseas to countries without an ARR

A second common objection against the imposition of an ARR is that it will drive art sales to countries without a scheme. Before the United Kingdom introduced their ARR, there were a large number of stakeholders voicing their concerns with the regime. A 2020 report published by Art Basel and UBS found that 62 per cent of the global share of the art market is held by the United States and China – two countries without an ARR.[42] In 2009, the British Art Market Federation (BAMF) claimed that by enacting an ARR the art industry in the United Kingdom was "destined to decline".[43] The empirical evidence that has come out of the United Kingdom since adopting an ARR suggests that these earlier concerns were exaggerated by opposing stakeholders, whether intentionally or not.

In DACS's ten-year review of the resale right they stated that "there is no evidence that these modest royalties negatively impact the art trade nor drive sales away from the UK."[44] Similarly, a 2011 report by the European Commission found that "no clear patterns can be established to link the loss of the EU's share in the global market for modern and contemporary art with the harmonisation of provisions relating to the application of the resale right in the EU on 1 January 2006."[45] This is further supported by first-hand evidence, with the former head of the contemporary art department of Christie's stating that the "law hasn't really changed things"

[42] Dr. Clare McAndrew *The Art Market 2020* (Art Basel and UBS, 2020) at 36.
[43] Arts Economics *The British Art Market* (A report prepared for the British Art Market Federation, 2009) at 2.
[44] Design and Artists Copyright Society, above n 36, at 2.
[45] European Commission *Report on the Implementation and Effect of the Resale Right Directive (2001/84/EC)* (Com 878, 2011).

as well as the Director of the Victoria Miro Gallery in London stating that "sales have been as healthy as before the law came into effect."[46]

Although it appears the United Kingdom has not suffered from sales going offshore, this could be attributed to the fact that they are surrounded by, and have a relationship with, the European Union market which has a harmonised royalty scheme.[47] This can be contrasted with California, where they are the only U.S state to have a royalty scheme in place. Following the enactment of the California Resale Royalty Act (CRAA) in 1976, Sotheby's refused to conduct contemporary art auctions in California, and according to a 2013 report by the U.S Copyright Office a meagre 400 artists have received royalty payments totalling $328,000.[48] With the mismatched laws in the U.S, it is much easier for auctioneers and dealers to conduct their sales outside of California in comparison to those in the United Kingdom who are surrounded by countries which also impose an ARR. Thus, the question becomes, how would the scheme affect New Zealand's art market?

The World Trade Organisation's Agreement on Trade-Related Aspects of Intellectual Property allows for reciprocity of intellectual property protection if similar rights are offered in the country of origin.[49] This is reiterated in article 14ter of the Berne Convention.[50] This means that a country will offer the resale royalty right to a New Zealand artist selling overseas so long as New Zealand applies the resale royalty right to that country's nationals selling in New Zealand. The United Kingdom has reciprocity with nationals of countries within the European Economic Area (EEA) as well as countries outside the EEA that have reciprocal rights available to British nationals.[51] Similarly, Australia's Resale Royalty Right for Visual Artists Act 2009 allows for reciprocity.[52] Thus, if New Zealand chooses to adopt reciprocal rights,

[46] Grant "The Royalty Treatment", above n 35.
[47] Sam Ricketson *Proposed International Treaty on Droit De Suite/Resale Royalty Right for Visual Artists* (Academic Study, Melbourne Law School, June 2015) at 18.

[48] Wierbicki, above n 39; *Resale Royalties: An Updated Analysis*, above n 4, at 22; there are a few reasons why an art market intermediary would not want to sell in an area with an ARR. The first being that it shows support for those who sell through them, and the second that they receive a commission upon sale of the work and thus will want to sell the work where there is no ARR, a lower sale price, and greater chance of sale.
[49] Marrakesh Agreement Establishing the World Trade Organization 1867 UNTS 3 (opened for signature 15 April 1994, entered into force 1 January 1995), annex 1C (Agreement on Trade-Related Aspects of Intellectual Property Rights) [TRIPS Agreement], art 4.
[50] Berne Convention, above n 13, art 14ter.
[51] The Artist Resale Right Regulations 2006 (UK), sch 2; As the countries outside the EEA are listed in schedule 2 of the regulations, further countries can be added if they provide reciprocal rights.
[52] Resale Royalty Right for Visual Artists Act 2009 (Cth) s 14.

they will eliminate the ability to avoid an ARR by moving sales offshore to our closest neighbour or one of the largest art markets in the world.

While two of the top three art markets in the world (U.S and China) do not offer a resale royalty right and therefore provide fruitful destinations to move sales to, this is unlikely to happen. Most of the largest sales in New Zealand are of well-known local artists whose popularity is unlikely to translate overseas and thus similar prices are unlikely to be available. Furthermore, when comparing the prices of sales between markets we can see that NZ does not come close to the astronomical prices seen in auctions held in the U.K. Therefore, the benefit of moving the sale offshore is not the same because the 5 per cent royalty equates to a smaller total payment. Moreover, the geographical distance between New Zealand and the larger art markets is so great that the transportation and insurance costs would outweigh the benefits of avoiding a royalty. This was a reason that sales moving to another market was not a large part of the Australian debate.[53]

Clearly, due to the reciprocity of an ARR and the costs of selling works overseas in countries without an ARR, the New Zealand art market is not at significant risk of losing sales to overseas markets without the scheme.

In sum, after outlining the practical operation of the scheme, it has been highlighted that neither of the two most prevalent objections are clear-cut arguments against an ARR. Both are subject to opposing evidence that suggests such arguments do not hold true, and thus they cannot be presented as definitive downfalls of the scheme. With these more general objections dealt with, the path has been cleared to deal with the objection which is the focus of the dissertation in Chapter Two.

[53] Ministry for Culture and Heritage, above n 8, at 20.

III. Chapter Two: The Supposed Inconsistencies of an ARR with New Zealand's Legal System

The objection that is the focus of the dissertation is that an ARR is inappropriate for our common law legal system due to it being born out of civil law. This point of view has seen considerable support from politicians and legal commentators alike,[54] and was also a prominent objection during the introduction of moral rights.[55] In New Zealand, a form of this objection was raised by National MP Christopher Finlayson during the first reading of the Copyright (Artists' Resale Right) Amendment Bill in 2008. To give context I have set out his statement:

> "The second reason National will not support the bill is that this scheme is contrary to basic property law concepts. The droit de suite was founded on, and is consistent with, civil law notions of property. Such a notion sees the artist joining his or her individual will to the work, and as a result the work comes to embody the owner's personality. Yet in our property law system, an artist's work is treated as a commodity, and generally no continuing connection between artists and their work subsists. Accordingly, the purchaser of an artwork who pays the market price, and who assumes the considerable risk that the work may decline in value, should receive unfettered ownership."[56]

To make this objection clearer, and thus easier to analyse, its constituent parts can be viewed separately. There are effectively two interrelated aspects: a theoretical aspect and a practical/principled aspect. The theoretical angle supposes that due to the differing theoretical underpinnings of the common and civil law copyright systems, an ARR is inconsistent with

[54] Bussey "The incompatibility of droit de suite with common law theories of copyright", above n 7; Klement "Resale royalties for visual artists: an analysis of international developments and the implications for New Zealand", above n 7, at 4; Till "Why a Resale Royalty Was Rejected in Australia", above n 7; Petty "Rauschenberg, Royalties, and Artists Rights: Potential Droit De Suite Legislation in the United States", above n 7, at 1001; Valdes-Martines and Kalyatin "Droit de Suite Convention: To Be or Not to Be?", above n 7, at 127; Marber "Will the Art Market Really Soar? Revisting Resale Rights After Brexit", above n 7, at 140; Kretsinger "Droit de Suite: The Artist's Right to a Resale Royalty", above n 7 at 968; Siegel "The Resale Royalty Provisions of the Visual Artists Rights Act: Their History and Theory", above n 7, at 15; Anna di Robilant "Property: A Bundle of Sticks or a Tree?" (2013) 66(3) Vand.L.Rev. 869 at 870; Janevicius "Droit de Suite and Conflicting Priorities: The Unlikely Case for Visual Artists' Resale Royalty Rights in the United States", above n 7, at 402.

[55] Henry Hansmann and Marina Santilli "Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis" (1997) 26 J. Legal Stud. 95 at 96; Mira T. Sundara Rajan "Tradition and change: The past and future of authors' moral rights" in Toshiko Takenaka (ed) *Intellectual Property in Common Law and Civil Law* (Edward Elga Publishing, Cheltenham, 2013) at 123.

[56] (20 May 2008) 647 NZPD 16083 (Christopher Finlayson, Copyright (Artists' Resale Right) Amendment Bill — First Reading).

the common law legal system.[57] The practical objection is based on the notion that art is simply property, specifically a chattel, and the owner of such property should be free to exercise their (extensive) property rights as they see fit – limitations should not be readily placed on the fundamental principle of 'unfettered ownership'. Non-interference with property rights in this manner is envisaged to have beneficial practical results: people will, secure in their extensive, certain, property rights, provide needed investment into art markets, and (perhaps) receive returns commensurate with their risk. As will be discussed, this practical/principled inconsistency can be viewed through the lens of both copyright law, and property law more generally. Such opinions naturally lead commentators to the viewpoint that an ARR is unsuitable for our common law jurisdiction. Other commentators have tended to echo these points in expressing similar objections, with additional elements being: an ARR does not incentivise, but stifles creation;[58] because it shares aspects of both copyright and moral rights it does not sit comfortably under common law;[59] its inalienability is difficult to justify under a common law system;[60] it wrongly assumes that artists cannot protect themselves;[61] and it is not compatible with *any* of the copyright theories (to name a few).[62] Throughout this chapter I will attempt to first present this objection (and its subpoints) in their strongest form, and secondly outline counterpoints that suggest they are largely misguided.

I will first analyse the contention that common and civil law copyright laws are radically different, with the former taking a utilitarian approach and the latter being author orientated. Secondly, I will look at whether the practical operation of an ARR is inconsistent with New Zealand's property and copyright law frameworks, and if it is not, whether it can be implemented without creating unwanted flow-on effects.

The Theoretical Inconsistency

This section is not intended to be a detailed analysis of the whole of copyright law in common and civil law countries. Instead, it looks at the general theoretical underpinnings of the two systems to determine whether or not they are as far apart as they are sometimes made out to be. By showing that they are closer together than they appear, in some instances sharing concepts,

[57] While Finlayson does not mention copyright explicitly, the 'notions' he talks about are recognised as notions of copyright. See above, n 54, for more on this.
[58] Bussey "The incompatibility of droit de suite with common law theories of copyright", above n 7, at 1088.
[59] Till "Why a Resale Royalty Was Rejected in Australia", above n 7, at 298.
[60] Michael Rushton "The Law and Economics of Artists' Inalienable Rights" (2001) 25 J. Cultural Econ. 243 at 250.
[61] Bussey, above n 7, at 1090.
[62] Bussey, Above n 7, at 1094.

it is easier to accept that laws from civil law jurisdictions – specifically an ARR – are not marked, fundamental changes to our law, specifically copyright. This analysis will invoke history from the different legal systems as well as present-day application of the law to highlight how each system is open to each other's legal philosophies. The history of copyright law can often be overlooked as its present-day application is what is important in a practical sense, however, history is precisely where the modern-day ideas of authorship and ownership developed from and thus colour our views on today's laws.

1. Civil law

The contemporary view on civil law copyright is that it has a strong 'author's rights' approach.[63] To elaborate further, a leading French copyright theorist, Henry Desbois, stated: [64]

> "The author is protected as an author, in his status as a creator, because a bond unites him to the object of his creation. In the French tradition, Parliament has repudiated the utilitarian concept of protecting works of authorship in order to stimulate literary and artistic activity."

Following this line of discussion, it is easy to see how commentators can assert that an ARR grows out of, and fits more naturally in, a civil law jurisdiction – such a scheme recognises the special connection shared between an artist and their work. This can be contrasted with the 'utilitarian' underpinning of common law copyright, which intends to incentivise the creation of works through exclusivity for the benefit of the public. Despite this, looking at the theoretical underpinning of French copyright law suggests that such jurisdictions do not completely repudiate utilitarian concepts as Desbois suggests. The "bond" that Desbois speaks of can be best explained by Georg Hegel's 'personality theory' which has been deemed to be a basis for many European copyright law systems.[65] At first glance, the name of the theory suggests a very author-centric approach, which at a high level analysis is correct - his theory operates on the premise that an artist's (or author's) creation is an extension of the artist's self.[66] The influence of this theory can be seen in the French Copyright Act, which in Article 1 states: "The author

[63] Gillian Davies, Nicholas Caddick, and Gwilym Harbottle *Copinger and Skone James on Copyright* (17th ed, Sweet & Maxwell, 2016) vol 1.
[64] H. DESBois, Le droit d'auteur en France 538 (1978) 3rd ed (Translation: Copyright in France), as cited in Jane C. Ginsburg "A Tale of Two Copyrights: Literary Property in Revolutionary France and America" (1990) 64 Tul. L. Rev. 991 at 992; Such treatment of an author's work has also been evidenced in German law: See W. R. Cornish and David Llewelyn *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (5th ed, Thomson Sweet & Maxwell, London, 2003) at 453 where it is stated that German law draws upon the Hegelian perspective of work.
[65] Justin Hughes *The Philosophy of Intellectual Property* (1998) 77 Geo. L.J. 287 at 330.
[66] Bussey, above n 7, at 1093.

of a work of the mind enjoys over this work, by the sole fact of its creation, a right of exclusive intangible property and enforceable against all."[67] This can be contrasted against New Zealand's Copyright Act which creates the right, rather than the right existing due to the very creation.[68] However, Hegel suggests that while attainments, eruditions, artistic skill, and talents are fruit of the free mind and internal, once externalised they become alienable property outside the mind.[69] While control of one's work is necessary for "self-actualization, for personal expression, and for dignity and recognition as an individual person",[70] Hegel believed that mental accomplishments and talents are appropriate for business transactions.[71] Therefore, although the Hegelian approach gives the author general rights of personality that follow the work, there are touches of utilitarian concepts by recognising commodification and its importance.[72]

The history and operation of civil law copyright further suggests that there is not such a strong divide between itself and common law copyright concepts. Although some sources go back far in history, they play an important role in highlighting that the supposed author-centric civil law countries we see today are not untouched from common law notions of copyright.

As noted by Jane Gingsburg in *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, "the French revolutionary sources themselves cast doubt upon the assumed author-centrism of the initial French copyright legislation."[73] This is not to say that French revolutionary legislation was turning a blind eye to author's rights, these were, of course, considerations within the law, however, the motives are much more mixed than given credit for.[74] Before the emergence of moral rights, the view of copyright in revolutionary France was very similar to that of the Anglo-American perspective.[75]

By enlisting revolutionary French decrees from 1791-1793, Gingsburg evidences the point that authors were not at the core of the new literary property regime, but instead the public.[76] For

[67] Art.1, Loi sur la propriété littéraire et artistique Loi du 11 mars 1957 (Translation: Literary and artistic property law, Law of March 11, 1957).
[68] Copyright Act 1994, s 14.
[69] Peter Drahos *A Philosophy of Intellectual Property* (Dartmouth, Brookfield, 1997) at 76-77; Bussey, above n 7, at 1093.
[70] Hughes, above n 65, at 330.
[71] Roberta Kwall *The Soul of Creativity: Forging a moral rights law for the United States* (Stanford Law Books, Stanford, 2010) at 39.
[72] Above at 39.
[73] Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, Tulane Law Review, Vol. 64 May 1990 No. 5 at 995.
[74] Above at 1014.
[75] Kwall, above n 71, at 39.
[76] Ginsburg, above n 73, at 1006.

example, in the 1791 decree, Article 1 pronounced the right of all citizens to erect theatres and to perform plays; Article 2 declared works of authors who have been dead for over five years to be public property; and not until Article 3 did the law give affirmative authors' rights by conditioning performances of the works of living authors upon their written consent.[77] More to the point, the 1792 decree made dramatist's rights subject to compliance with formalities. If the author failed to notify the public that he or she had retained the public performance right the right would never vest.[78] Thus, while contemporary civil law copyright may take an author-centric approach, its history shows that concepts seen as essential to the common law approach, particularly utilitarianism, are not completely foreign.

This interplay can also be evidenced by moral rights. The rights operate independently of the author's economic rights, and even after transferring the work, the author has the right to claim authorship of the work and to object to distortion, mutilation or other modification of the work which would be prejudicial to his or her honour or reputation.[79] These rights give substance to the idea that an artist has a special bond between themselves and their work. However, it has been suggested that it was not until the late nineteenth century that the 'personality' aspect of the theory developed to the point it would be coined 'droit moral'.[80] Up until then it had developed piecemeal from decisions of the courts on standalone aspects of the rights.[81] Furthermore, by using the work-for-hire doctrine as an example, we can see that civil law jurisdictions do not always apply moral rights with such vigour.[82] Despite the fact that such a doctrine is not recognised in civil law jurisdictions, Italian law would likely come to a similar conclusion to that of the work-for-hire doctrine on the basis that the individual was not the "author" of the work he or she created, contrary to the idea that civil law jurisdictions take a strict 'author-centric' approach.[83]

The point here is not to show that civil law jurisdictions are not author-centric, rather, it is to highlight that through history, theory, and application we have examples of those jurisdictions adopting ideologies not unlike those from common law jurisdictions. Thus, it would not be fair

[77] At 1007.
[78] At 1008.
[79] Ian Finch, above n 15, at 413.
[80] Gillian Davies and Kevin Garnett QC *Moral Rights* (Sweet & Maxwell, London 2010) at 18.
[81] Davies and Garnett, above n 80, at 18.
[82] The work-for-hire doctrine operates on the basis that an individual who is employed to create a work is not granted copyright (and in turn moral rights) in the work and instead the employer is the holder of the copyright. See Hansmann and Santilli "Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis", above n 55, at 134.
[83] Hansmann and Santilli, above n 55, at 135.

to suggest that an ARR is unsuitable for our common law jurisdiction simply on the basis that it was born out of a jurisdiction that is rooted in concepts that are entirely alien to ours. To further strengthen this idea, it is necessary to take a more detailed look at the theoretical underpinnings of common-law copyright.

2. Common law

Since the Statute of Anne (the very first 'copyright' legislation in the United Kingdom), it has been recognised that the purpose of copyright law is to provide monopoly incentive to creators, and multiple commentators have identified this as underpinning New Zealand's copyright laws.[84] This purpose has arisen due to the 'utilitarian theory' where the rights afforded to an author are meant to maximise the economic wealth of a nation by incentivising innovation and creation.[85] The incentive is rooted in the author's ability to exclude others from the use of their work, creating a two-fold benefit to the author. Firstly, they are given the opportunity to create without worrying about others riding on their coattails, and secondly, they are able to charge others in exchange for making their creation available to the purchaser. Without this exclusivity authors may not want to take the risk of creating something for the fear of others exploiting the work, stifling the innovation and creation that societies want to promote.

However, this is not to say that we are stringently opposed to ideas of 'author's rights' more akin to a personality theory of copyright. The questions of literary property that arose after the enactment of the Statute of Anne evidenced this.

Following its enactment, it was questioned whether literary property was simply a statutory right, a limited privilege on authors, or an underlying common-law right to property that was absolute and perpetual (in which case it would be no different from any other kind of property).[86] This was answered in the landmark case of *Donaldson v Becket*.[87] The facts at issue in the case were whether Donaldson, a bookseller, had acted illegally when he published a poem for which Becket had the copyright but the 28-year term of copyright under the Statute had expired. The House of Lords found that a common law right to literary property did not exist and any rights were limited to those included in the Statute.[88] A more detailed discussion

[84] Statute of Anne (1710) Anne c 19; Law Reform Division, above n 14, at 7; Ian Finch (ed), above n 15, at 371.
[85] Bussey, above n 7, at 1095.
[86] Mark Rose "The Author as Proprietor: *Donaldson v Becket* and the Genealogy of Modern Authorship" in *Of Authors and Origins: Essays on Copyright Law* (Harvard University Press, London, 1993) at 23.
[87] *Donaldson v Becket* (1774) 4 Burr 2408.
[88] Isabella Alexander *Copyright Law and the Public Interest in the Nineteenth Century* (Hart Publishing, Oxford, 2010) at 38.

of such issues is beyond the scope of this dissertation, however, the judgements arising out of them provide insight into how the courts viewed authors' rights in the eighteenth and nineteenth century. What can be gleaned is that the judges looked more favourably on a continuing common law property right in literature than what our present-day copyright law would lead us to believe.

In *Millar v Taylor*,[89] Lord Mansfield in support of a continuing common law property right, stated that without it there would be the following consequences: [90]

> "He is no more master of the use of his own name. He has no control over the correctness of his own work. He can not prevent additions. He can not retract errors. He can not amend; or cancel a faulty edition. Any-one may print, pirate, and perpetuate the imperfections, to the disgrace and against the will of the author; may propagate sentiments under his name, which he disapproves, repents and is ashamed of."

The importance of this extract is that it is a very clear paraphrasing of what moral rights protect, and while they are often said to be creatures of civil law, the comments are made in the context of a *common law* property right. Further, Lord Mansfield envisaged a right giving said protection before moral rights were enacted in French and German legislation. Clearly, he (as well as those who took this view at the time) did not view such a right as being repugnant to common law notions of copyright.[91] As discussed below, this view seems to have remained immanent within common-law copyright.

Though the final ruling of *Donaldson v Becket* decided against a continuing common law property right in literary works, a deeper analysis of the path taken to get there sheds light on the general view of such a right at the time. Standard practice for the time was to have 12 common-law judges come to the House of Lords to hear the arguments and advise the House on their opinions, following which the Lords would vote.[92] It is of note that only 11 judges gave their opinions – Lord Mansfield abstained because it was essentially his court's decision that was being challenged.[93] As to the question of whether a common law property right was taken away by statute, it has been reported that the majority of judges (six to five) thought this

[89] *Millar v Taylor* (1769) 4 Burr 2303.
[90] Rose, above n 86, at 80.
[91] See Alexander *Copyright Law and the Public Interest in the Nineteenth Century*, above n 88, at 31 for discussion about the considerable support the rights saw.
[92] Rose, above n 86, at 41.
[93] Ronan Deazley *On the Origin of the Right to Copy: Charting the movement of copyright law in eighteenth-century Britain (1965-1775)* (Hart Publishing, Oxford and Portland Oregon, 2004) at 197.

right was taken away by the statute, although there are other accounts that this was reported incorrectly, and it was six to five the other way.[94] Regardless, knowing Mansfield's fervent support for a common law property right if he were to have given his opinion it would have been six-six at the minimum, and possibly seven-five in favour of a common law property right. Unfortunately, the final question put to the Lords was simply whether the decree restraining Donaldson from publishing the poem should be reversed, thus although they voted against a perpetual right, they did not touch on the theoretical matters.[95] Although the literature surrounding the case highlights the ambiguity of its reporting,[96] the important fact for the purposes of this discussion is that there existed a large portion of the twelve Judges who believed there to be a perpetual common law property right in literature that was not taken away by Statute.

While this notion of a perpetual common law property right may seem to be an ideal that was squarely left behind in the development of common law copyright, relatively recent developments in copyright law suggest otherwise. The adoption of moral rights in common law countries indicates that the door has never been entirely shut on a more 'author-centric' approach to some common law copyright laws. While moral rights do not carry the full suite of rights that would have been available under a perpetual common law property right, the aforementioned opinions of the judges have clearly provided roots from which ideas under the perpetual common law property right umbrella can be adopted in New Zealand's copyright system. If there had been a full and wholehearted rejection of these opinions by the common law, then there would have been no grounds upon which moral rights could be enacted in a common law country like New Zealand.

The idea that such an approach was not wholeheartedly rejected is evidenced by the fact that even before enacting any specific moral rights legislation, both New Zealand and the United Kingdom had laws giving similar effect. Neither the right to attribution nor the right to integrity were without protection; defamation, injurious falsehood and passing off have been recognised as providing realistic pathways to achieving the same outcome as some moral rights claims.[97] Thus, the introduction of moral rights into New Zealand legislation has not been an unearthly

[94] Rose, above n 86, at 41.
[95] Rose, above n 86, at 42.
[96] Deazley, above n 93, at 196 notes that six different sources record the various opinions of the judges. It can also be seen from 199-204 that these source's accounts differ on substantial points.
[97] Gerald Dworkin "The Moral Right of the Author: Moral Rights and the Common Law Countries" (1994) 19 Colum.-VLA J.L.& Arts 229 at 234; Davies and Garnett QC, above n 80, at 29.

encroachment into our common law lives, but instead a slight tinkering (under heading three we will see that the same can be said for an ARR).

The above discussion on both the civil and common law theories, history, and operation of copyright supports the views of commentators that in reality a mix of utilitarian and personality theory underpins most copyright regimes and the two are not as far apart as some suggest, nor are they mutually exclusive.[98] Furthermore, the acceptance of foreign notions of copyright suggests that it is not the theories that determine whether a law is suitable for a jurisdiction but whether the law itself, regardless of its origins, its suitable for a jurisdiction. That is, the regimes do not repudiate laws on the basis that it was born out of the 'opposing' scheme, they repudiate them on whether the law works cohesively within their system.[99] As has been shown, the simple fact that a law has grown out of an author-centric copyright system is not in and of itself a basis for denying a law, and thus a deeper look into the practical fit of an ARR will assist in determining whether it is suitable for our common law jurisdiction.

The Practical/Principled Inconsistency

The second aspect of the more general objection that an ARR is inconsistent with common law legal principles, is that it places limitations on the fundamental principle of 'unfettered ownership'. [100] That is, with art being property, the owner of that property should be free to exercise their property rights as they see fit, however an ARR would decrease the scope of their freedom in relation to the property via a 'divided property right', where the artist's interest in the artwork presents a limitation on the owner's property right.[101] This is an important objection because, as we will see further on, other aspects or details of an ARR can be altered to create a more cohesive fit within the common law, but the underlying fact that an ARR has the potential to diminish unfettered ownership cannot be changed, and thus must be addressed.

It has already been shown through the discussion of the history of common law and moral rights that the idea of divided property rights was immanent within the common law's history, but what about in today's practical operation of the law? This can be analysed through two

[98] Bussey, above n 7, at 1092.
[99] Maybe this is why common law countries were willing to incorporate moral rights (albeit in a more limited fashion then civil law jurisdictions) – they already had laws to similar effect.
[100] Bussey, above n 7; Alderman, above n 31; Ben W Bolch and William W Damon and C Elton Hinshaw "Visual Artists' Rights Act of 1987: A Case of Misguided Legislations" (1988) 8 Cato J 71 at 72; Wang Suchen "Resale Royalty Right for Visual Artists in the US and China: A Comparative Study" (2021) 3 FSST 10 at 13; Janevicius "Droit de Suite and Conflicting Priorities: The Unlikely Case for Visual Artists' Resale Royalty Rights in the United States", above n 7, at 402.
[101] Refer to the opening of Chapter Two for further context to this objection.

lenses: copyright and property law. For obvious reasons there will be an analysis under the lens of copyright, however, as will be discussed in detailed later, there is an opposing school of thought that suggests copyright may not be the best lens to analyse an ARR through. Therefore, for the purpose of a well-rounded discussion it is necessary to also look at an ARR through the lens of property law, specifically as it applies to chattel law. Following an analysis of the practical operation of the two areas of law, which will highlight that both are accommodating to divided property interests, Chapter Three will discuss how an ARR can be a further exception to this general rule without upsetting the status-quo.

1. Copyright law

Although it is undeniable that unfettered ownership is an important background concept in our legal system, copyright law is an area of the law where traditional legal concepts do not reign supreme. The law alters ideas such as ownership, authorship, creation, property interests, and privity of contract (to name a few). As stated by the Law Reform Division of the Department of Justice, copyright is not an unqualified property right, but instead a right "which is subject to competing and overriding considerations which are expressed in the form of exceptions."[102]

A prudent place to start regarding these competing considerations is the case of *J Albert & Sons Pty Ltd v Fletcher Construction Co Ltd*.[103] Within the context of s 113 of the Act, [104] which allows for copyright to be transmissible by assignment or testamentary disposition, Quillam J states at [114]:[105]

> "[The Act] establishes a separation of rights at every level from the moment of composition of a work. Every form of transaction with regard to a work is a separate one, and is given separate protection, and is capable of being separately dealt with upon an economic basis."

Further, at [111] he states: [106]

> "The combination of ways in which he may assign his rights is almost endless. Similarly, a person holding a right from an author may himself make further assignments. In these

[102] Law Reform Division, above n 14, at 1.
[103] *J Albert & Sons Pty Ltd v Fletcher Construction Co Ltd* [1974] 2 NZLR 107 (SC).
[104] Copyright Act 1994, ss 113(1)(a)(b).
[105] *J Albert & Sons Pty Ltd v Fletcher Construction Co Ltd*, at 114.
[106] *J Albert & Sons Pty Ltd v Fletcher Construction Co Ltd*, at 111.

ways there may be a multiplicity of rights all stemming from the original work but all different and all capable of separate assignment."

For instance, a copyright holder may partially assign some of the things the copyright owner has the exclusive right to do, and/or for part, but not all, of the period for which the copyright subsists.

A further example of copyright altering traditional notions comes in the form of ownership. The general rule under s 21(1) of the Copyright Act 1994 is that the author is the original owner of the copyright work, however ss 21(2) and 21(3) provide for two exceptions: employers and commissioning parties.[107] In the case of employment, where a literary, dramatic, musical, or artistic work is made by an employee in the course of his or her employment, the employer is the first owner of the copyright (subject to any agreement to the contrary).[108] Similarly, when a person commissions, and pays or agrees to pay for, the creation of certain categories of copyright work and the work is made in pursuance of that commission, that person is the first owner of the copyright in the work.[109] Thus, the interests of the person who creates the work (and is in reality the author) are subjugated by the employer or commissioning party.

The concept of moral rights, which shares theoretical underpinnings with an ARR, is a further exception to the traditional idea of ownership. Dealt with by Part 4 of the Copyright Act, the legislature complies with Article 6bis of the Berne Convention by providing for the right to attribution and the right to object to derogatory treatment of the work.[110] It also provides for two further moral rights: the right against false attribution and the right to privacy of certain photographs and films.[111] As noted in Article 6bis of the Berne Convention, these rights operate independently of the author's economic right and operate even after the transfer of said rights.[112] Therefore, while there may be subsequent purchasers of an artwork, the legislature has deemed that the artist has a continuing interest in the work with associated rights.

Copyright law could have been constructed in a way which requires a creator to transfer all rights subsisting in a work upon transferring the work itself, however in the development of copyright law it has been thought appropriate to accommodate a range of interests in a single work. That is not to say that there are no discrepancies between the ARR and copyright law.

[107] Copyright Act 1994, s 21.
[108] Copyright Act 1994, s 21(2).
[109] Copyright Act 1994, s 21(3).
[110] Copyright Act 1994, ss 94-101.
[111] Copyright Act 1994, ss 102-105.
[112] Berne Convention, above n 13, art 6bis.

On the contrary, suggested features of an ARR such as the inalienable nature of the right, or applying regardless of who the original copyright owner of the work is, are contradictory to normal provisions of the Copyright Act. However, the finer details of the scheme are not definitive roadblocks to its enactment and what can be seen from the preceding examples is that the fundamental aspect of the ARR – that is, a division of property interests in the artwork– is not irreconcilable with our common law copyright system which does not treat copyright as a unitary concept.

a) Is this really copyright?

As aforementioned, although up until this point we have been discussing an ARR through the lens of copyright law, there is another school of thought that takes the view that an ARR is not really a form of copyright.[113] If this is the case, then the next most appropriate lens to analyse the compatibility of an ARR through is property law more generally, specifically as it applies to chattels.

There are a multitude of arguments given for why an ARR is not a 'copyright', the first being that copyright is concerned with negative rights enabling a copyright holder to preclude others from creating reproductions of the copyrighted work. While copyright holders often receive remuneration for the use of the work, this stems from the negative right. Conversely, an ARR is a positive right to receive a payment, with there being no 'negative' aspect attached to it.[114] Secondly, copyright law does not extend the remunerative relationship between the creator and the purchaser beyond the sale of the copyrighted work, while an ARR does. Lastly, and most importantly, a copyright generally arises from *reproductions* rather than the *physical object* itself. For example, a copyright in a piece of literature is intended to protect the (intangible) expression of ideas in a book rather than the ink on the paper, while an ARR, although arising from the artists act of personal expression, would be attaching to the physical artwork. It is for this reason that property law, specifically chattel law, is an area from which an ARR should be discussed, as it concerns a right which is related to a physical object.

This is not intended to be a conclusive statement on the matter, there is certainly an ability to argue either way and I will deal with what I perceive to be the most appropriate angle further

[113] Andrew Stewart, P. B. C. Griffith, Judith Bannister, and Jill McKeough *Intellectual Property in Australia* (4th ed, Lexis Nexis, Sydney, 2010) at 291; Cornish and Llewelyn *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, above n 64, at 529; Susy Frankel *Intellectual Property in New Zealand* (2nd ed, Lexis Nexis, Wellington, 2011); Eliza Hall "The French Exception: Why the Resale Royalty in France and Why It Matters to the U.S." (2007) 1 J Int'l Media & Ent L 321 at 324.
[114] J.D. Stanford., above n 10, at 394.

on. However, for the sake of a well-rounded discussion it is necessary to look at how compatible an ARR would be with New Zealand's property laws.

2. Property law

Analogous to the copyright law analysis, an ARR has been repudiated on the basis that it is antithetical to general notions of property law in relation to chattels.[115] However, also similar to the copyright objection, this statement is often made in a broad sweeping sense and the particular aspects of personal property law that are supposedly violated are not highlighted. Thus, it will first be necessary to unpack what is meant by this objection. From here, a discussion will be undertaken to determine whether these inconsistencies are fatal to an ARR. In doing so, examples from other areas of personal property law will be utilised to illuminate the fact that New Zealand's property law system is able to accommodate the divided property interest encompassed by an ARR.

In the case of generic ownership (that is, when a tangible item belongs to and is in possession of a person, with no one else laying claim to it) Lawson and Rudden note that there are, generally speaking, four main features:[116] owners are able to do whatever they like with what they own (i.e., the law of property imposes no positive duties on an owner (although ownership rights may be limited)); no one else may interfere with the property; the owner assumes the risk; and if you do not pay what you owe, the law will take what you own. Under this form of ownership (which reflects the idea of "unfettered ownership" more generally) it is understandable how objectors may believe an ARR is incompatible: firstly, free alienability of property or interests in property (an important aspect of the first feature) is contravened by the inalienable nature of the right to a royalty;[117] secondly, while the owner of the work assumes the risk that the artwork may decline in value, they must divulge a share of the profits;[118] and thirdly, the person who pays market price for the artwork does not receive unfettered ownership and a full suite of rights. The problem with broad objections based on this way of thinking for

[115] Bussey, above n 7; Alderman, above n 31; Bolch, Damon and Hinshaw "Visual Artists' Rights Act of 1987: A Case of Misguided Legislations", above n 100, at 72; Suchen "Resale Royalty Right for Visual Artists in the US and China: A Comparative Study", above n 100, at 13; Janevicius "Droit de Suite and Conflicting Priorities: The Unlikely Case for Visual Artists' Resale Royalty Rights in the United States", above n 7, at 402.
[116] Fredrick Henry Lawson and Bernard Rudden *The Law of Property* (3rd ed, Oxford University Press, New York, 2002) at 90.
[117] The inalienability of the right is something that could be changed in implementing the law, however it would defeat the purpose of an ARR. In the case of a purchaser and a new artist, the purchaser has all the bargaining power and could leverage this to have the right waived.
[118] This is contrary to the general principle that those who assume full the risk of an investment reap the full reward.

an ARR is that they too readily assume that property rights in relation to an artwork must be treated as an indivisible whole. As we will see in the following discussion, the common law is much more nuanced than that and does not treat all property in the way that Lawson and Rudden describe.

There are examples throughout New Zealand's personal property laws of the legislature enacting provisions that alter or create exceptions to, or entrench and clarify pre-existing exceptions to, traditional concepts of personal property law. A notable example is the legislation and case law surrounding the Personal Property and Securities Act 1999, which has given a plethora of instances of the legislature creating exceptions and re-characterising deeply embedded property laws. The PPSA brought together a wide range of existing common law and equitable rules into a single cohesive piece of legislation, and at the same time rationalised apparent inconsistencies and conflicts while also creating new law altogether.[119] In *New Zealand Bloodstock Ltd v Waller*, the question arose as to whether possessory rights granted under a lease agreement were sufficient for a security interest to attach, such that the lessor (who had title but was unperfected) would lose out to a secured party.[120] Baragwanath J noted that the title of a secured party is subordinated to the operation of the Act by s 24 of the PPSA,[121] thus, ownership in the contest of a lessor and a secured party has no function – the PPSA re-characterises a lessor as another secured party who, if they have failed to perfect their security interest, will lose out to a perfected security interest. In a normal situation the rule of nemo dat would apply (that is, no one can give what they do not have), however the *Bloodstock* case is illustrative of the fact that the legislation has created an exception to this by way of s 40(3).[122]

While the PPSA and its surrounding case law is illustrative of the legislature's ability to alter traditional concepts of property law, if they were to implement laws that simply do not conform to the fundamentals of our personal property law then there would need to be stronger policy reasoning for such encroachments. However, that is not the case. Examples are almost endless of New Zealand's common law legal system being hospitable to divided property interests in personal property: under the PPSA, it is possible for party A to have title, party B to have a possessory interest, and party C to have a first ranking perfected security interest; trust law allows for the trustee to be in possession but for beneficiaries to have a beneficial interest in

[119] Linda Widdup "The PPSA and the general law: how do they work together?" (2019) 46(4) Brief (East Fremantle, W.A.) 37 at 37.
[120] *New Zealand Bloodstock Ltd v Waller* (2005) 2 NZCCLR 985.
[121] At [29]; Personal Property Securities Act 1999 (PPSA), s 24.
[122] At [60]; PPSA, s 40(3).

the property; and architects can licence out the use of their building plans for construction companies to use in the construction process. In reality, common law property takes a more fragmented and pluralistic approach in contrast to the civil law system from which the ARR was developed.[123] Thus, it could be argued that in some ways New Zealand's property law system is more suited for an ARR than its civil law counterparts.[124]

Although it has been shown that the legislature can, is familiar with, and is open to altering traditional property law concepts when it comes to divided property rights, that is not to say that such changes do not come without repercussions. In the same sense that some of nemo dat had to give way to remedy outdated, complicated, and ineffective security laws, other traditional property law concepts would have to give way in order to remedy the shortcomings of the current copyright laws as it relates to artists.[125] This is not something to be glossed over without consideration, unfettered ownership is still an ideal to be protected and making exceptions to this concept should not be taken lightly. Thus, while it can be seen from the above discussion that the law is accepting of divided property rights, such changes are made on balance, and it must be shown that it would not carry further unwanted consequences.

3. Flow-on effects of implementation

So far in Chapter Two it has been highlighted that not only do the common and civil law share similar theoretical underpinnings, but that the theoretical underpinnings of an ARR are immanent within the common law, and the legal mechanics of an ARR can be supported by our current copyright and property law frameworks. However, as discussed, this does not present a free pass to implementation – further considerations must be made. Nevertheless, when undertaking these considerations, it can be deduced that an ARR at a high level does not present a serious threat to the status-quo. Allowing an artist to share in the proceeds arising from subsequent sales of their work is no more intrusive than a moral right, reversionary right,[126] or the work-for-hire doctrine. Furthermore, other common law countries that have implemented an ARR have not seen an uprooting of their property or copyright systems, in the same sense that New Zealand did not see any significant consequences from the enactment of

[123] Robilant "Property: A Bundle of Sticks or a Tree?", above n 54, at 870.
[124] Robilant, above n 54, at 870. The civil law conceives of property as ownership and holistic dominion: exclusive, single and indivisible compared to the common law which treats property as a 'bundle of sticks' where interests can be added and removed. On this conception, the common law property framework is more able to accept an ARR.
[125] See introduction for discussion of shortcomings.
[126] In *Crosstown Music Co 1 LLC v Rive Droite Music Ltd* [2009] EWHC 600 (Ch) it was held that a reversionary right included in an initial contract for sale of copyright applied to subsequent purchasers of the copyright.

moral rights which also give the artist a continuing interest in their work. Important to note, however, is that while an ARR does not present any serious problems at a high level, that is not to say it does not have the potential to be problematic.

The structuring of the specific provisions of the law plays an important role in how cohesive the overall scheme is with common law property and copyright law. For instance, an extremely wide definition of artwork has the potential to blur the line between artworks and everyday goods, giving rise to arguments for application of such a right to resales not envisaged by the legislation; while a disproportionately high royalty rate coupled with a low threshold price would align the scheme too much with the civil law theories of copyright such that we encroach too far on common law conceptions of ownership. A more detailed analysis of these elements of the scheme (and their effects) will be made in Chapter Three, but before getting there it must be determined whether property law or copyright law makes more sense for the practical implementation of the scheme as this will dictate under which legislation the discussion takes place.

Copyright or Property?

As discussed earlier, there has been commentary on whether copyright is the correct lens to be looking at an ARR through, however, while an ARR does not fit perfectly within copyright, it is the most appropriate place for it. Despite the discrepancies, there are a multitude of reasons for it to be enacted as an amendment to the Copyright Act. Firstly, at a theoretical level, it runs in stride with the historical concepts of a perpetual common law property right that were seen in the early copyright cases of *Millar v Taylor* and *Donaldson v Becket* that provided roots for the implementation of moral rights.[127] Secondly, it is a non-mandatory article of the Berne Convention for the Protection of Literary and Artistic Works to which New Zealand is a party to.[128] Thirdly, it fits within the purpose of the Copyright Act by giving a reward to artists for the fruits of their labour, encouraging creativity.[129] Lastly, the scheme deals with works of art and the Copyright Act is the piece of legislation that most directly deals with other aspects of legal rights as it pertains to art. For the reasons discussed, although the underlying principles of an ARR find support in both copyright law and property law (as well as opposition), on balance my view is that an ARR is best enacted via copyright legislation.

[127] See earlier discussion *The Theoretical Inconsistency*; *Millar v Taylor*, above n 89; *Donaldson v Becket*, above n 88.
[128] Berne Convention, above n 13.
[129] Copyright Act 1994, s 14(1)(a).

IV. Chapter Three: How an ARR in NZ Could Meet Inconsistency Objections

As we have seen in Chapters One and Two, there are a range of objections to an ARR, most pertinent to the dissertation being that an ARR is unsuitable for New Zealand's common law legal system. While it has been displayed that these objections are not insurmountable barriers to the enactment of an ARR, that does not mean they should not be considered in implementing the scheme. How the legislature chooses the finer details has a great bearing on how cohesive the scheme fits into the legal system. Although New Zealand is not closed off to ideas from the civil law, it would be irresponsible to take the ARR in its most civil law form and not adapt it to fit more cohesively in New Zealand's common law conception of copyright.[130] For instance, although it has been outlined that the fundamentals of the scheme are not contrary to New Zealand's copyright laws, if there were to be no threshold price, a generous definition of artwork, and an irresponsibly high royalty percentage, then the scheme has the potential to be overreaching and cause more harm than the good it is designed to achieve. Therefore, it is necessary to take a more detailed look at some of the core components of an ARR that affect its cohesiveness – namely, the definition of artwork, the threshold price, and the royalty rate – drawing on the dismissed 2008 Copyright (Artists' Resale Right) Amendment Bill and international developments to guide the discussion. The Australian and United Kingdom's legislation will be leaned on more heavily than other jurisdictions due to their commonwealth and common law roots.

The adoption of moral rights in New Zealand are a good example of how the legislature can adopt an author-centric law but alter it to their liking. Article 6bis of the Berne Convention states: [131]

> "(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.
>
> …

[130] See discussion below on the legislature's adoption and adaption of moral rights.
[131] Berne Convention, above n 13, art 6bis.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed."

Clearly, while the convention provides the fundamentals of moral rights, the countries are at discretion in regard to the details – there is flexibility in its implementation. In turn New Zealand's legislature has enacted weaker moral rights in comparison to civil law countries such as France and Germany. Ours are defined narrowly, must be asserted, and can be waived.[132] It can be seen then, that this weaker form of moral rights is entirely consistent with the ideas outlined in Chapter Two that were immanent in the roots of common law copyright, and thus objections on the basis of fundamental inconsistency are much weaker.

Like Article 6bis, Article 14ter of the Convention only provides a general guideline to an ARR:[133]

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

…

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

Again, the detailed operation of the scheme is left up to the national legislature and consequentially they are able to construct it in such a way that it is not disruptive to the operation of our copyright laws.

It should be noted that in the drafting of legislation there are a large variety of elements to be considered, all of which can not be done within the confines of this dissertation. For this reason, this dissertation focuses on the elements that I believe to have the greatest bearing on the scheme's cohesiveness with New Zealand's common law copyright and thus most directly respond to the objection outlined in Chapter Two (and in some instances the objections in Chapter One). These elements are the definition of artwork, the threshold price, and the resale royalty percentage.

[132] See Copyright Act 1994, ss 96, 107 as well as ss 96-107 more generally.
[133] Berne Convention, above n 13, art 14ter.

Definition of 'Artwork'

A regular argument that comes up in opposition to an ARR is that if we create such a right for artists and their artworks, why can it not be applied to other aspects of personal property?[134] Such arguments reflect the concerns from Chapter Two – making exceptions to the general rules may be acceptable in a one-off case such as an ARR, but it could become problematic if the treatment leaked into other types of personal property and becomes a larger interference with unfettered ownership. In order to account for this, it would be necessary for the legislature to have a definition of art that is not so wide that it is susceptible to analogies between art which falls within the definition and other types of personal property. To do so, there first must be characteristics relatively unique to art that cannot be easily applied to other types of personal property, and secondly, the definition of artwork in the legislation must be tight enough that it is less susceptible to the analogies mentioned above.

1. The distinguishing factors of art

There are plenty of situations that should arguably have the same treatment extended to them. For instance, should the architect of a building receive a royalty each time the building is resold? What about a winery and its rare wine? A shoe designer and its (original) sought-after shoe? On their face, these situations share similarities with an artist and their artwork – a person has created or designed something which has subsequently increased in value; however, these are not scenarios that we would want an ARR covering. How then, is art differentiated?

One of the differentiating factors of art, is its strong embodiment of the artist's personal expression. The connection between the creator or designer in the other instances are not as strong as the artist's and their artwork. In other words, there is a much higher degree of separation between the creator's personal expression and the final product. Taking the architect-building situation as an example, the architect may design the building but to get to the final product other parties such as structural engineers, town planners, and construction workers apply their skills to the process, often making changes along the way. This can be contrasted against an artist and their artwork, where application of their personal expression to the final work is much more direct. Even in the case of an artist creating limited prints of their work, there is still only one external factor between their creation and the final product (whatever printing mechanism is used). This point is further supported by the fact that art is the purpose and the end product itself, compared to an architect's design (and some of the other

[134] Bussey, above n 7, at 1089.

examples) where its purpose is to create the building, but the building is the end product. However, if this is the only differentiating factor then what about a book? Literature also clearly takes on a strong embodiment of the authors personal expression.

This brings us to another differentiating factor of art – its originality (or its limited ability to be reproduced). Art, or at least the type that is contended should be captured by the ARR, cannot be recreated to perfection. Even the artist themself would not be able to reproduce a piece that is exactly the same – each painting, drawing, or sculpture would have its own brushstrokes or mouldings personal to the piece itself. The necessity for the artwork to be original does not exclude all prints or reproductions, however. An 'original print' is a work created in an edition or multiples by hand and printed by hand, either by the artist or by a professional assistant, from some of form of reproductive mechanism (i.e., a plate, stone, block, or stencil) that has been produced by the artist for the sole purpose of producing the desired image.[135] This excludes commercially produced reproductions of art which can be done in large quantities as they already come within the scope of copyright, as well as the example of a book as they are not printed by hand by the author. This necessity for originality ties back into the first feature of the work being an embodiment of the artist's free expression – if we were to include commercial reproductions we begin to move further away from the direct connection between the artist and their work.

With these distinguishing features of art illuminated, it is clear that the regime is capable of providing a practical, principled basis for protection that is workable in practice. This is not to say that there is a perfect exhaustive list of distinguishing factors, all of which cannot be applied to other personal property, rather, there are a combination of factors that provide a sufficient basis for having an ARR applied only to art. Without such a basis, it becomes difficult to keep 'art' or 'artwork' reasonably tightly defined and identifiable, creating a risk that the scheme extends too wide and undermines property law fundamentals. With these distinguishing factors providing a basis for the ring-fencing of the intended type of artwork to be protected, we can now turn to the specifics of the definition to be used in the scheme.

2. Specifics of the definition

As has been mentioned throughout the dissertation, the definition of artwork varies considerably across jurisdictions. Looking at the proposed definition under s 204A of the

[135] "What is an original artist's print?" St Jude's Prints <https://www.stjudesprints.co.uk/collections/what-is-an-original-artists-print>.

Copyright (Artists' Resale Right) Amendment Bill, the legislature opted for a relatively wide definition by keeping the definition open ended.[136] This is comparable to both the United Kingdom and Australia's definitions which are inclusive, using the phrasing "such as" and "not limited to" respectively.[137] Notwithstanding this, I believe a tighter definition will be necessary to limit the scheme's ability to leak into other areas of personal property law and respond to the concerns from Chapter Two.

Australia's legislation is helpful to illustrate this point in the fact that it lists 21 things that would be considered a work of art – including artists' books, digital artworks, fine art jewellery, and video artworks – giving a sense of what works a wide definition would capture.[138] If Australia is allowing fine art jewellery to be included in their scheme, then why could limited handmade shoes not also be subject to the scheme? It is easy to see how this argument can be extended to many types of personal property, while in contrast, with a tightly defined, narrow group of artworks to which the right applies it is much harder to make such arguments. Although a narrower definition will exclude works by some artists, this consequence is a necessary evil to give certainty and reduce the potential of the objections in Chapter Two holding more weight. Furthermore, it is a natural consequence of definitions in legislation – there will always be something that just falls outside the definition which is very similar to the thing that just falls within the definition. A not uncommon approach when the legislature struggles to determine a definition of a word or term is to leave it undefined and accordingly for the courts to interpret it as cases are brought before it. However, I believe a better approach is for the legislation to provide reasonable certainty about what artworks qualify for the right. This could be via a combination of a description of what the qualifying works are, together with some examples of the types of works that are excluded.

As to what works should be included in an exhaustive definition, the legislature should look to the works which are predominantly sold by art market intermediaries – for example, paintings, sculptures, drawings, prints, drawings etc. Restricting the definition of 'artwork' to these forms can be justified by the purpose of an ARR scheme which is to provide economic benefits comparable to what is currently derived from the Copyright Act by other creators. Because these are the works that are being sold at auction, they are the ones which are currently 'missing

[136] Copyright (Artists' Resale Right) Amendment Bill, s 204A "or (b) a work of artistic craftmanship not falling within paragraph (a)."
[137] The Artist Resale Right Regulations 2006 (UK), reg 4; Resale Royalty Right for Visual Artists Act 2009 (Cth), s 7.
[138] Resale Royalty Right for Visual Artists Act 2009 (Cth), s 7(2).

out' on the economic benefits provided by the Act.[139] Those works which do not fall within this category do not need to be given the same opportunity to achieve the purpose of the scheme as they are not missing out. If types of artworks that are initially outside of the definition start to be sold more frequently through art market intermediaries there can always be later amendments to include them in the definition.

Following this line of discussion, a narrower definition also excludes works which are currently deriving economic opportunities in other ways. If they were to also derive advantage from an ARR, it would undermine the policy reasoning behind the scheme and open pathways for arguments that other works coming under the Copyright Act should be given a similar right, giving weight to the objection in Chapter Two.[140]

Moreover, by taking a broad approach that would capture digital artworks, the right would potentially apply to works which already possess the ability to obtain a resale right. Times have changed since the enactment of the Australian and United Kingdom Acts and dismissal of the New Zealand Bill, and there has been a surge in digital artwork being sold as non-fungible tokens (NFT). NFTs can be sold using 'smart contracts' which have coding built into them to push a portion of the proceeds from a resale back to the original creator.[141] This would give creators of this type of art the ability to 'double dip' into the resale right, by getting a portion from their smart contract and a portion from the legislation. The purpose of the ARR is to level the playing field between artists and other creators protected by the Copyright Act, but if the scheme were to apply to artworks that can gain a resale royalty by other means, those artists would not only be better off than artists incapable of that but also other creators protected by the Act. To counteract this, it is necessary to include a section or subsection which states that any artworks capable of procuring a resale royalty by means of a smart contract are ineligible for the royalty provided by the legislation.

The Bill's failure to define the word "original" adds to the lack of clarity surrounding what works come within the scope of legislation in the case of limited editions. Section 204A(c) states that an artistic work is an original work that is "an artistic work that is one of limited

[139] See Professor Dr. Rachel A.J. Pownall *TEFAF Art Market Report 2017* (The European Fine Art Foundation, 2017) at 21 for most sold art mediums at auction.
[140] In the sense that arguments arise for application to the right to a range of different property, in which case the scheme can undercut our property law fundamentals.
[141] Pratin Vallabhaneni and Adam Chernichaw "How do NFT Royalties Work? We Ask Two Blockchain Lawyers…" (video, 19 June 2021) TalksonLaw < https://www.talksonlaw.com/briefs/how-do-nft-royalties-work>.

edition of artistic works created by the artist or under the artist's authority."[142] This was clearly the Bills attempt to capture limited edition prints of an artist's work which can hold value on the resale market, but what constitutes originality in the case of reproductions? Regarding one-offs the question of originality is easily answered, but not so much in the case of reproductions.

Article 2.2 of the 2001 EU Directive on an ARR states: [143]

> "Works of art to which the resale right relates
>
> …
>
> 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 purposes of this Directive. Such copies will normally have been numbered, signed or otherwise duly authorised by the artist."

While this definition is stronger by including the words "numbered" and "signed", there is still ambiguity as to what constitutes being "made" by the artist. A similar problem arises in the 2008 Bill which uses the phrasing "created by the artist."[144] It would be clearer to define originality in regard to reproductions using similar wording from the discussion under *The distinguishing factors of art* – that is, an original reproduction is a work created in an edition or multiples and printed by hand, either by the artist or by a professional assistant, from some form of reproductive mechanism (i.e., a plate, stone, block, or stencil) that has been produced by the artist for the sole purpose of producing the object. It is essential that reproductions which do not meet these requirements are excluded from the scope of an ARR as the Copyright Act already provides protection for mass reproduction.

The inclusion of the word "limited" does not do enough to mitigate this issue – it is ambiguous and presumably could include any work that is a numbered edition. [145] Thus, artists commercially producing prints of their work or selling the copyright to do so (for example Dick Frizzell), are already benefited by the Act and should not be able to further obtain resale royalties from those same works. To do so would create the same problem that called for an

[142] Copyright (Artists' Resale Right) Amendment Bill, s 204A(c).
[143] Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, art 2.2.
[144] Copyright (Artists' Resale Right) Amendment Bill, s 204A(c).
[145] There is nothing in the Bill stopping a numbered run of works being commercially produced and being numbered up into the thousands. In the EU Directive of 2001, there is no upper limit on the number of items on an edition (see Ministry for Culture and Heritage, Above n 8, at 22).

ARR, artists operating in the space of commercial reproductions would be advantaged in comparison to those who create one-offs or limited works. For this reason, the legislature should consider including an upper limit on what constitutes "limited".

The takeaway from the above discussion is that the legislature should aim for certainty in the definition of artwork. This considers the objections from Chapter Two by mitigating the potential of leakage into other areas of personal property while still tending to the purpose of the scheme.

Threshold Price

Similar to the definition of artwork, the choice of threshold price has a strong connection to the schemes over all fit within New Zealand's common law copyright system in the sense that it effects its alignment with the differing underlying copyright theories. Turning again to international application of an ARR, the United Kingdom opted to set its threshold price at €1,000, while Australia similarly opted for $1,000.[146] However, there is a wide variety amongst jurisdictions who have enacted an ARR, for instance Germany and France have chosen to set their threshold price at €300 and €15 respectively.[147]

A possible explanation for the differing threshold prices is the differing underlying conceptions of copyright that were discussed earlier. Although it has been clarified that the civil and common law are not separated to an irreconcilable degree, that is not to say that they are the same.[148] Civil law countries still take a more personality theory-based approach to copyright law, and consequentially are likely to be more generous as to the value of works subject to the scheme.[149] This can be contrasted with common law copyright which, by having a higher threshold price, achieves the purpose of their utilitarian copyright theory by incentivising only those works that are maximising economic wealth and innovation. The lower the threshold price is set the more it is recognised that all art, no matter the value, should have the benefit of an ARR, whereas by setting it high it is incentivising works that are valued most by the market. With this in mind, the legislature can opt for a threshold price closer to the 'utilitarian' end of the spectrum so that the scheme fits more cohesively into New Zealand's common law copyright.

[146] Resale Royalty Right for Visual Artists Act 2009 (Cth), s 10; The Artist Resale Right Regulations 2006 (UK), reg 12(3).
[147] Ministry for Culture and Heritage, above n 8, at 26.
[148] See earlier discussion under *The Theoretical Inconsistency*.
[149] That is, low value works will come within the scope of the scheme.

Although the Bill does not have a threshold price prescribed in the provisions themselves (it is left up to regulations made by the Governor General), the explanatory note suggests it be set at $500.[150] For the reasons given above, a threshold price of $500 is potentially inconsistent with New Zealand's utilitarian approach. Given that between 2019 and 2021 the average price of art being sold at auction was around $7,000, the threshold price has room to be set higher and still provide a substantial amount of royalties.[151] A threshold price in line with that of the United Kingdom and Australia of $1,000 or even higher is more consistent with the utilitarian approach as it rewards the popular and commercially successful artworks. Though a higher threshold price does exclude lower valued work it must be kept in mind that this is a consequence of the utilitarian approach to copyright. The utilitarian approach does not claim to reward anyone and everyone but instead provides benefits that incentivise those works which are valued by the market, in turn benefiting the public.[152]

A higher threshold also helps to quell some of the earlier objections from Chapter One. With a lower threshold price more sales become subject to the scheme, thus increasing compliance costs for art market intermediaries.

The threshold price is not the only aspect of the scheme that affects its alignment with the differing copyright theories. The setting of the royalty rate has a similar effect and thus must be considered in conjunction with the threshold price to determine the scheme's overall compatibility with common law copyright.[153]

Royalty Rate

Analogous to the threshold price, the royalty percentage rate to a resale affects whether the scheme is more aligned with a personality or utilitarian theory. A higher royalty percentage indicates a stronger recognition of the work embodying the artist's free expression, while a lower royalty percentage does the opposite. However, this is not the only consideration to be made in determining the royalty rate. Whether the scheme encroaches too far on people's ownership as well as the overall practicality of the scheme must also be considered. Although copyright was earlier determined to be the best lens to look at an ARR through, as aforementioned it still has close connections with concepts of property and ownership and

[150] Copyright (Artists' Resale Right) Amendment Bill, Explanatory Note, at 10.
[151] New Zealand Annual Numbers Sold by Year, Australian and New Zealand Art Sales Digest < https://www.aasd.com.au/index.cfm/sales-by-year/new-zealand/>.
[152] Law Reform Division, above n 14, at 7.
[153] For example, a high royalty percentage may not make the scheme very inconsistent if it was matched with a very high threshold price.

therefore its effect on these aspects of the law is still relevant.[154] A high royalty rate – for example, 20 per cent - is a much greater intrusion into the seller's right to proceeds arising from their sale of ownership in comparison to a smaller rate (i.e., 5 per cent).

Most countries with an ARR have chosen to set the rate at 5 per cent. The United Kingdom is somewhat of an outlier by adopting a sliding scale where the rate decreases as the sale price increases,[155] however this has been criticised for increasing compliance costs for art market professionals.[156] In my view, a rate of 5 per cent would simply be too low and create problems for the viability of the scheme going forward. With a threshold price of $1,000, a rate of 5 per cent would only fetch $50 for the artist. After considering that a collecting society would take a small management fee on top of this, the remaining amount would seem to be relatively small in comparison to the trouble gone through to enact legislation and set up a collecting agency.

A more viable rate would be minimum 15 per cent, as this would provide a healthier royalty sum to the artist and the collecting agency.[157] At the end of the day, artworks that experience a substantial increase in value do so largely because of the artist's own conduct subsequent to the creation of the piece of art (i.e., their reputation has improved via subsequent works; they have limited the number of pieces they do, increasing scarcity; they eventually die and cannot make any more). Therefore, while the purchaser assumes the risk in purchasing the artwork, they often do so having regard to how the artist's career is progressing and how their other artworks are being valued. In turn, a higher percentage is proportionate to the role the artist plays in the increase in the value of their work. Such reasoning should not be confused with the personality theory where the royalty is appropriate simply *because* the artist created the work, but instead is recognising their efforts (or lack thereof) which contribute to the increasing value.[158]

As mentioned above, a higher rate of 15 per cent does present a greater encroachment on the owner's property rights and aligns the scheme more with an author-centric approach, however these effects can be weakened. To mitigate the effect of the encroachment on property rights,

[154] See earlier discussion under *Copyright or Property?*
[155] See <https://www.gov.uk/guidance/artists-resale-right> for information on the sliding scale.
[156] Ministry for Culture and Heritage, Above n 8, at 25.
[157] As aforementioned 5 per cent may be too low to be viable. While 15 per cent is 200 per cent more than the proposed rate, it will help greatly with the viability of the scheme and as discussed further on, the high threshold price mitigates the adverse effects on property rights. The more you increase the right the closer you get to one fifth or one quarter of the resale, which becomes quite a large encroachment, and thus I think keeping the rate around 15 per cent is most appropriate. I accept that there is room for argument surrounding this aspect.
[158] See earlier discussion under *The Theoretical Objection* for more information about the personality theory.

in line with international practice the legislature could set a maximum royalty payable.[159] This not only limits the encroachment on property rights but also responds to objections highlighted in Chapter One that an ARR would stifle the New Zealand art market. Moreover, a higher royalty percentage could be combined with a higher threshold price. In doing so, the more author-centric royalty rate is offset with a utilitarian approach to the threshold price that was discussed above. This would leave us with a mixture of influences on the scheme, which when considering earlier discussions, is a representation of the mix of theories that has come to govern copyright regimes and thus a compatible fit.[160]

What can be seen from the preceding discussions is that none of the key elements of an ARR are irreconcilable with New Zealand's common law legal system. While there is a kernel of truth to the objection that the scheme is incompatible with our legal system, there are clearly multiple routes that can be taken to mitigate the opposition's concerns. Similar to what the legislature did with moral rights, the scheme can be adapted from its initial 'civil law' form so as to be incorporated into New Zealand's common law legal system more seamlessly.[161] This is evidenced across borders where common law countries that have adopted an ARR have not seen an uprooting of their copyright or property systems. While there will be aspects of the scheme that may not fit the utilitarian approach to copyright, as evidenced, there are things that can be done to alleviate concerns arising from objectors.

V. Conclusion

By way of the structure of the art market, New Zealand's current copyright laws do not provide the same economic opportunities to visual artists as they do for other creatives. While visual artists are in the business of creating original works that are valued for their scarcity, the Copyright Act largely benefits those who are in the business of selling reproductions. This should not be confused with the purpose of the Act however, which is to "ensure [authors/musicians/artists etc.] receive a reward for the fruits of their minds and labour", in turn benefiting the public.[162] Although an ARR has obviously been recognised by other countries and commentators as a mechanism for achieving this purpose by providing visual artists with similar economic opportunities, it has nonetheless faced push back from detractors.

[159] The United Kingdom has it set at €12,500; see The Artist Resale Right Regulations 2006 (UK), sch 1.
[160] See *The Theoretical Inconsistency*, "a mix of utilitarian and personality theory underpins most copyright regimes."
[161] See earlier discussion surrounding the flexibility of article 6bis of the Berne Convention.
[162] Law Reform Division, above n 14, at 7.

The objection which was the focus of this dissertation was that because the ARR was born out of and developed in the civil law, it is inconsistent with New Zealand's common law legal system.

Chapter One cleared the way for analysis of this objection by outlining the practical operation of an ARR and dealing with some of the most prevalent objections that are raised in opposition to an ARR. These were: an ARR hurts, not helps, the starving artist; and the scheme would drive art sales overseas to countries without an ARR. Through a wide range of sources and empirical evidence from countries which already have an ARR, it was highlighted that these objections were not unanswerable, and thus not decisive barriers to the scheme's implementation.

Following this, Chapter Two moved to the core of this dissertation (stated above). There were effectively two limbs to this objection: a theoretical aspect and a practical/principled aspect. The theoretical aspect suggested that due to the differing theoretical underpinnings of common and civil law copyright systems, an ARR is inconsistent with the common law legal system, while the practical/principled aspect is based on the notion that art is simply property – a chattel – and that the owner of such property should be free to exercise their property rights – limitations should not be readily placed on the fundamental principle of 'unfettered ownership'; which is also said to create desirable end outcomes in practice. Through an analysis of the theoretical underpinnings and history of civil and common law copyright, it was shown that the two systems in fact have relevantly shared or similar concepts and ideologies, and thus it would not be fair to repudiate an ARR simply on the basis that it was born out of a civil law system with fundamentally alien values and concepts. In responding to the practical/principled aspect of the objection, using practical examples of the operation of both copyright and property (specifically chattel) law, it was shown that the legislature can, is familiar with, and is open to altering traditional property law concepts in a way similar to what would be required for implementation of an ARR. Moreover, it can do so without substantially upsetting the status-quo of our property and copyright law fundamentals, as well as important practical considerations such as certainty and the operation of the art market.

Despite the conclusion of Chapter Two, it was accepted that while at a high level an ARR does not pose a threat to these fundamentals, there is potential for the objection to have more bite if the details of the scheme were not carefully curated. Thus, Chapter Three discussed how the legislature could alter the details of the scheme to account for the objection made in the

preceding chapter to the extent that it has force. This Chapter highlighted that through a tight definition of 'artwork', and a high royalty rate in conjunction with a high threshold price, the scheme can mitigate any potential leakage into other areas property law as well as gear itself towards a utilitarian approach, in turn undermining the objection of a fundamental and practical inconsistency.

The conclusions reached in Chapters Two and Three has led to the overall conclusion that an ARR cannot, and should not, be repudiated on the basis that it is unsuitable for our common law legal system simply because it was born out of, and developed in, civil law jurisdictions which have differing conceptions of copyright law. When coupled with the findings in Chapter One (that the two strongest general objections are not definitive roadblocks), and the policy reasoning for why art should be treated differently,[163] there is a realistic path forward for the implementation of an ARR in New Zealand which can be taken by Parliament. In doing so, artists would finally be afforded economic opportunities analogous to those available to other creators under the Copyright Act.

[163] See *The Distinguishing Factors of Art*.

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VII. Appendix One

The explanatory note and executive summary of the Bill have been removed.

Hon Judith Tizard

Copyright (Artists' Resale Right) Amendment Bill

Government Bill

Contents

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Copyright (Artists' Resale Right) Amendment Act **2008**.

2 Commencement

This Act comes into force on a date to be appointed by the Governor-General by Order in Council.

3 Principal Act amended

This Act amends the Copyright Act 1994.

Part 1
New Part 9A inserted into principal Act

4 New Part 9A inserted

The following Part is inserted after Part 9:

"Part 9A
"Artists' resale right

"**204A Interpretation**

In **this Part**, unless the context otherwise requires,—

"**agent** means an auction house, gallery, dealer, and any other art-market intermediary or professional person involved in the business of dealing in artistic works

"**artist** means—

"(a) the author who creates an artistic work; and

"(b) in relation to a computer-generated work, the person by whom the arrangements necessary for the creation of the artistic work are undertaken

"**artistic work** means an original work that is—

"(a) a graphic work, photograph, sculpture, collage, or model, irrespective of artistic quality; or

"(b) a work of artistic craftsmanship not falling within **paragraph (a)**; or

"(c) an artistic work that is one of a limited edition of artistic works created by the artist or under the artist's authority; but

"(d) not—

"(i) a work of architecture (being a building or model for a building); or

"(ii) a layout design or integrated circuit within the meaning of section 2 of the Layout Designs Act 1994

"**artists' resale right** and **resale right** mean the right conferred on artists by **section 204C(1)** to receive a resale royalty in respect of an artistic work and, unless the context otherwise requires, includes a share in a resale right

"**Assignee** has the meaning it is given in section 3 of the Insolvency Act 2006

"**collecting agency** means the person (whether corporate or unincorporate) that is the sole collecting agency under **this Part**

"**first transfer of ownership by the artist** means the first disposition of an artistic work, whether by sale, gift, or for any other kind of consideration, including—

"(a) transmission of the work by testamentary disposition or in accordance with the rules of intestate succession; and

"(b) disposal of the work by the artist's personal representative for the purpose of administering the estate of the artist; and

"(c) disposal of the work by the Assignee for the purpose of realising the artist's estate, but not the vesting of the work in the Assignee if the artist is adjudicated bankrupt

"**holder** means, as the context requires, either—

"(a) the artist entitled to a resale right under **section 204C**; or

"(b) a person beneficially entitled to a resale right under **section 204J**

"**reciprocating country** means a convention country that is a State, part of a State, a territory for whose international relations a State is responsible, a political union, an international organisation, or any other entity that is specified in an Order in Council made under **section 204B**

"**resale** means—

"(a) the sale of an artistic work other than the first transfer of ownership by the artist; and

"(b) as further provided for in **section 204D**

"**resale royalty** means the amount payable by way of royalty under **sections 204K and 204L** in respect of a resale right.

"**204B Application of this Part to reciprocating countries**

"(1) The Governor-General may, by Order in Council,—

"(a) for the purpose of this section, specify a reciprocating country; and

"(b) apply any provisions of **this Part** to that reciprocating country.

"(2) An order may apply a provision—

"(a) unconditionally or subject to conditions, modifications, or both; and

"(b) generally, or in relation to a particular class of artistic works.

"(3) The Minister must not recommend the making of an order to apply any provision of **this Part** to a reciprocating country unless the Minister is satisfied that the law of the reciprocating country does or will provide for a reciprocal resale right.

"*Artists' resale right*

"**204C Scope of resale right**

"(1) An artist has a right to be paid a resale royalty on every resale of an artistic work created by that artist (**resale right**).

"(2) However, a resale right applies only if,—

"(a) at the time of the resale of the artistic work, the resale right has not expired in accordance with **section 204H**; and

"(b) the contract for resale of the artistic work is completed on or after the commencement of **this Part**; and

"(c) the resale, or any part of the transaction, takes place—

"(i) in New Zealand; or

"(ii) in a reciprocating country.

"(3) A resale right applies whether or not the artist—

"(a) is or was the first owner of any copyright in the work; or

"(b) has entered into an agreement with any person to assign, waive, or charge a resale right, in contravention of **section 204I(1)**.

"**204D Further meaning of resale**

"(1) The sale of an artistic work is a resale even if the first transfer of ownership of the work was not made for money or any other kind of consideration.

"(2) However, a sale may only be treated as a resale if—

"(a) the buyer or the seller or, if the sale takes place through an agent, the agent of the buyer or seller is acting in the course of his or her business of dealing in artistic works; and

"(b) the selling price is not less than the amount prescribed by regulations made under **section 204R**.

"**204E Proof of who created artistic work**

"(1) If a name purporting to be the name of the artist was included on an artistic work when it was created, the person whose name appeared is, unless the contrary is proved, presumed to be the artist who created the artistic work.

"(2) If an artistic work is alleged to be the work of 2 or more artists, the presumption set out in **subsection (1)** applies to each person alleged to be one of the artists of the work.

"(3) To avoid doubt, this section applies to **Part 9A** in place of section 126.

"*Eligibility to hold resale right*

"**204F Persons eligible to hold resale right**

"(1) A resale right is held only by a person who,—

"(a) at the time when a contract for resale of the artistic work is completed, is a natural person who is—

"(i) a New Zealand citizen; or

"(ii) a resident of New Zealand; or

"(iii) a national of a reciprocating country; or

"(b) in the case of a deceased artist, at the time of the artist's death, was—

"(i) a New Zealand citizen; or

"(ii) a resident of New Zealand; or

"(iii) a national of a reciprocating country.

"(2) This section does not limit the application of **section 204J** (which relates to the transmission by testamentary disposition of a resale right).

"*Artistic works created by joint artists*

"**204G Joint artists**

"(1) An artistic work is the work of joint artists if it is created by the collaboration of 2 or more artists in which the contribution of each artist is not distinct from that of the other artists.

"(2) There is a resale right in an artistic work created by joint artists if, at the time of the resale, 1 or more of the artists satisfies the requirements of **section 204F(1)**.

"(3) The resale right—

"(a) belongs to both or all of the artists as owners in common; and

"(b) is held in equal shares or in any other shares that the artists agree in writing, signed by or on behalf of each party to the agreement.

"(4) If a resale right would not exist if 1 or more of the joint artists were the sole artist or sole joint artist, the work is to be treated as if 1 or more of the other artists were the sole artist or sole joint artists of the work.

"(5) A reference in **this Part** to the artist of an artistic work must be read, in relation to a work created by joint artists, as a reference to all the artists of the work.

"*Duration of resale right*

"204H Duration of resale right

"(1) An artist's resale right expires—

"(a) at the end of the period of 50 years from the end of the calendar year in which the artist died; or

"(b) in the case of an artistic work that is computer-generated, at the end of the period of 50 years from the end of the calendar year in which the work was created; or

"(c) in the case of an artistic work created by an unknown artist, at the end of the period of 50 years from the end of the calendar year in which the work is first made available to the public, including by exhibition in public.

"(2) In the case of an artistic work by joint artists, the resale right continues,—

"(a) if the identity of all the artists is known, until the end of the period of 50 years from the end of the calendar year in which the last of the artists dies; or

"(b) if the identity of 1 or more, but not all, of the artists is known, until the end of the period of 50 years after the death of the last of the artists whose identity is known.

"(3) After the expiry, under **subsection (1)(c)**, of a resale right in an artistic work created by an unknown artist, the resale right in that work does not revive if the identity of the artist becomes known.

"(4) In **subsection (3)**, the reference to the identity of the artist becoming known must be read, in relation to an artistic work created by joint artists, as a reference to the identity of any of the artists becoming known.

"*Limits to exercise of resale right*

"**204I Assignment, waiver, and charges not permitted**

"(1) A resale right is not able to be assigned, waived, or charged.

"(2) Any assignment or waiver of, or charge over, a resale right is void.

"(3) **Subsection (1)**, as far as it relates to the assignment of a resale right, does not limit **section 204J or 204M**.

"**204J Transmission of resale right**

"(1) A resale right may be transmitted on the death of the holder as follows:

"(a) the right passes to a person (whether corporate or unincorporate) by testamentary disposition of the holder; or

"(b) if there is no direction by testamentary disposition of the holder, by operation of law.

"(2) In the case of a bequest of an artistic work by an artist who did not transfer ownership of that work in his or her lifetime, the bequest must be read as including the resale right, unless the will of the artist (or a codicil to that will) provides to the contrary.

"(3) If a resale right that passes to a person under **subsection (1)(a)** is able to be exercised by 2 or more persons, it may be exercised by each of them independently of the other or others.

"(4) If resale royalties are recovered by the collecting agency after the death of a holder, those resale royalties must be treated as part of the deceased holder's estate.

"Resale royalty payments

"**204K Calculation of resale royalties**

"(1) The resale royalty payable in respect of a resale right is the amount calculated on the basis of—

"(a) the resale price of the artistic work; and

"(b) the rate of the resale royalty prescribed by regulations made under **section 204R**.

"(2) In **subsection (1)**, **resale price** means the price obtained for an artistic work at resale,—

"(a) excluding any tax charged under section 8 or 11 of the Goods and Services Tax Act 1985; and

"(b) if the resale price is paid in any currency other than New Zealand dollars, the resale price converted to New Zealand dollars at the Reserve Bank of New Zealand reference rate as at the date of the contract for resale.

"**204L Liability for payment of resale royalties**

"(1) The following persons are jointly and severally liable to pay resale royalties payable under **section 204K**:

"(a) the seller; and

"(b) one of the following, as appropriate:

"(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.

"(2) Liability to pay a resale royalty arises on the completion of the sale.

"(3) If a resale right belongs to 2 or more persons as owners in common, the liability to pay the resale royalty is discharged if the total amount of the royalty is paid to 1 of those persons.

"(4) A person liable to pay a resale royalty may withhold payment until evidence is produced of the entitlement to be paid.

"(5) Any agreement to share or repay resale royalties, other than as provided for in **this Part**, is void.

"*Management of collection of resale royalties*

"**204M Collection of resale royalties**

"(1) The collecting agency must manage the resale right for and on behalf of the holder, whether or not the holder gives consent.

"(2) In this section, **manage**, in relation to a resale right, means—

"(a) the collection, by the collecting agency on behalf of the holder, of the resale royalty to which the holder of the resale right is entitled; and

"(b) the distribution of the resale royalty to the holder; and

"(c) the performance by the collecting agency of related functions provided for under **this Part**.

"(3) In return for managing the resale right, the collecting agency is entitled to charge a fixed fee or a percentage of the royalty, as prescribed by regulations made under **section 204R**.

"**204N Rights to information**

"(1) The collecting agency may, in respect of the resale of an artistic work, request information on that resale from any person who is liable to pay the resale royalty under **section 204L(1)**.

"(2) A request for information must be made not later than 6 years from the date of the resale to which the request relates.

"(3) The information that may be requested must be necessary for the purpose of securing payment of the resale royalty that is due, so as to ascertain, in relation to a resale right,—

"(a) the amount of the resale royalty that is due for payment:

"(b) if the resale royalty is not paid by the person to whom the request is made, the name and address of a person who is liable for its payment.

"(4) Information obtained under this section must be treated as confidential.

"**204O Obligation on person to whom request made**

A person to whom a request is made under **section 204N** must supply the information within 60 working days of receiving the request.

"*Infringements and remedies*

"**204P Infringements**

The collecting agency may apply to a court of competent jurisdiction for orders under **section 204Q** if—

"(a) information is not supplied in accordance with **section 204O**:

"(b) a person liable under **section 204L** to make resale royalty payments fails to do so:

"(c) any other requirement under **this Part** is not complied with in accordance with **this Part**.

"**204Q Remedies**

"(1) In proceedings brought under **section 204P**, the court may grant relief by making orders that—

"(a) the necessary information be provided, as required by **section 204N**:

"(b) payment be made of any resale royalties owing:

"(c) are appropriate for an infringement of a property right.

"(2) Nothing in this section affects any other power of the court.

"*Regulation-making power in relation to resale right*

"**204R Regulations**

The Governor-General may, by Order in Council, make regulations for all or any of the following purposes:

"(a) appointing the sole collecting agency to perform its functions under **this Part**:

"(b) prescribing rules for the operation of the collecting agency, including rules in relation to any or all of the following matters:

"(i) the manner in which the collecting agency must collect, hold, and distribute resale royalties:

"(ii) the way in which the management fee is to be calculated, whether by a fixed fee or percentage of the resale royalty, and who may be charged the management fee by the collecting agency:

"(iii) the representation of the holders in the management of the collecting agency:

"(iv) the disclosure of the financial affairs of the collecting agency:

"(v) the collection and retention by the collecting agency of information relating to a resale right:

"(vi) access to, and disclosure of, records held by the collecting agency:

"(vii) any other matter relating to the conduct or the operation of the collecting agency under **this Part**:

"(c) prescribing, under **section 204K**,—

"(i) the rate of the resale royalty:

"(ii) the monetary value above which a resale price is subject to a resale royalty:

"(d) providing for such matters as are contemplated by, or necessary for giving full effect to, **this Part** and are necessary for its due administration."

Part 2
Other amendments to principal Act

5 Interpretation

The definition of **artistic work** in section 2(1) is amended by inserting ", except in **Part 9A**," after "means".

6 Application to Convention countries

Section 230 is amended by adding the following subsection:

"(4) This section does not apply to **Part 9A**."

7 Application of Act (other than Part 9) to other entities

(1) The heading to section 232 is amended by inserting "or **9A**" after "**Part 9**".

(2) Section 232(1) is amended by inserting "or **9A**" after "Part 9".