

Artist Resale Right: Should Botswana Codify?

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ABSTRACT

The Artist Resale Right (ARR) entitles a visual artist to a certain percentage of income generated from the resale of their artwork in the secondary market. Historically, resale royalty initiatives were motivated by a romantic notion that artists are so poor and in such a weak bargaining position that they deserve special legal protection. Arguments have since advanced from the notion of the 'starving artist' to now citing the copyright protection deficiency that exists between the protection of multiple copy artists and visual artists. There has been advocacy from artists and politicians albeit not in collective voices for Botswana to codify ARR. This paper evaluates whether Botswana should provide for ARR in its laws and further guides lawmakers in considering such legislation. Specifically, this paper points out that many countries that have codified ARR have not implemented it. It attributes the lack of or delayed implementation of ARR to the information deficit, otherwise referred to as the asymmetry problem, that pervades the ARR practice. This asymmetry problem denies policymakers and other stakeholders a chance to establish the efficiency of ARR. The majority of arguments surveyed in this paper are at loggerheads, with each side raising strong valid points. This paper notes that the insignificant size of the Botswana art market is likely to eclipse the potential benefits promised by ARR. However, the authors conclude that Botswana should codify ARR based on the notion of redressing the copyright protection deficiency faced by visual artists as compared to other categories of copyright owners.

Keywords: Artwork, Artist Resale Right, Botswana, Codify, Secondary Market, Visual Artists

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I. INTRODUCTION

The Artist Resale Right (ARR) also known as *droit de suite*,¹ is a right that enables visual artists to claim a certain percentage of income generated from reselling their original works of art in the secondary market.² These original works include graphic works, paintings, sculptures, and collages, which are sold through qualifying intermediaries such as auction houses or art collectors (Travers, 2016, para. 1). ARR was first enacted into law by France in the year 1920, followed by Belgium in the year 1921, and Czechoslovakia in the year 1926 (Bussey, 2013, p. 1068). This right granted the visual artists in these countries an opportunity to be paid royalties from the proceeds of reselling their original works (Reddy, 1995, p. 510).

Historically, the enactment of ARR was motivated by the notion that it is unfair for artists and their families to remain poor while their artworks increase in value and generate profit in the secondary market (Turner, 2012, p. 335). While several opponents argue against the artist's right to receive additional payment for an artwork they have already sold, it would seem very unfair for the resellers to cash in huge amounts of profits while the artists and their families live in abject poverty. This noble idea of fairness became a guiding principle to the initial establishment of ARR.

In the past, society valued art for its aesthetic pleasure. The same value was however not proscribed to the artist because society's aesthetic desires generally suppressed further artistic aspirations (O'Dwyer, 2017, p. 96). Based on this, several artists across the world rose to fame but struggled to make ends meet,

¹ This is a French term commonly used by scholars, as France was the first country to enact ARR into its law. However, since in recent years ARR became popular, this article will adopt the latter.

² In the visual arts sphere, there is a primary and secondary market. In the primary market, works are sold by galleries and artists retain a portion of the selling price after the gallery deducts its fee, while in the secondary market sales are driven by auction houses and art collectors, where works are being sold at a higher rate than in the primary market

some even died impoverished (Deng, 2016, p. 1). The same still happens in the present times. For example, Jean-François Millet's³ painting 'The Angelus'⁴ was initially sold at one hundred US dollars and was resold for about USD one hundred and fifty thousand US dollars fifteen years after his death. Sadly, the painter's family lived in poverty and could not benefit from the resale of the painting (Jewell, 2017, p. 9). Another example is Robert Rauschenberg whose painting 'Thaw' was sold for nine hundred US dollars in the year 1958 and several years later was resold for eighty-five thousand US dollars at an auction. Likewise, Rauschenberg did not benefit from the increased value of his artwork, and this prompted him to be a fervent campaigner for ARR in the United States (US) (Boicova-Wynants, 2019, p. 1). These stories about famous artists who lived in poverty while buyers of their works made a fortune reselling their old works fuelled legislative initiatives. However, according to Rub (2014) these stories were a weak justification for legislative reform. He argues that in many cases, the stories themselves were taken out of context and created a misleading impression.

The ARR has sparked contentious debates among experts about whether the issue is indeed a problem and whether granting artists this right will address the issue, assuming it is one. The case for ARR has advanced over the years, with the focus being on the inherent deficiency in the copyright protection afforded to visual artists vis-a-vis the protection granted to multiple copy artists like composers and writers. Juxtaposing the rights of visual artists and those of multiple copy arts, some authors argue that visual artists are disadvantaged in that they can only cash in once on their work since, by design, their works cannot be made in multiple copies (Yuan & Zhang, 2022, p. 45). This is in contrast with other art categories like music which they can

³ Jean-François Millet was a French painter and one of the founders of the Barbizon school in rural France. He is noted for his scenes of peasant farmers.

⁴ The painting depicts two peasants bowing in a field over a basket of potatoes to say a prayer, the Angelus, that together with the ringing of the bell from the church on the horizon marks the end of a day's work.

make multiple copies through discs and cash in on every act of reproduction and communication to the public.

While ARR has obvious advantages, it is still not applied globally, the need to have it has been and still is widely debated, both professionally and politically (Tomasovszky, 2021, p. 17). Since 2014, the International Confederation of Societies of Authors and Composers (CISAC) has actively campaigned for ARR in the international copyright agenda and called for reform of the law in favour of visual artists (Jewell, 2017, p. 1).

Article 14ter (1) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Text, 1971), calls for resale royalties but does not make them mandatory. Since intellectual property rights (IPRs) are territorial in nature, it is not compulsory to enact them. ARR is instead presented as a reciprocal right. This means that for the artists to benefit from this right, their home country, and the country in which the art may be resold should have legislated ARR. This is an unusual provision because it is one of the only exceptions to the Berne Convention's obligation that member states treat other member states in the same way they would treat their citizens (Janevicius, 2015, p. 391). Botswana is a signatory to the Berne Convention; it has not, however, codified *droit de suite* because, according to Article 14ter (2), the obligation is not mandatory. The consequence of not codifying and implementing ARR is that Botswana artists cannot receive a resale royalty when their artwork is resold on the international secondary art market in a country that has codified ARR.

Some of the basic issues raised about ARR have been adequately studied and scholarship on the subject is polarised. Supporters of ARR have put forth several rationales, for instance, that the ARR legally sets artists at par with other creatives. Further, artists should be compensated fairly for their reputation. On the other hand, critics contend, for instance, that artists do not require any special treatment; that the right harms artists, sellers, and the art market generally and that it rarely gets en-

forced in practice (Turner, 2012, p. 332). There has been advocacy albeit not in collective voices, for Botswana to codify ARR. In December 2021, the then Assistant Minister of Presidential Affairs, Governance and Public Administration, Mr Dumezweni Mthimkhulu, stated that the lack of resale royalty laws in Botswana denies creatives an opportunity to gain financial rewards from the resale of their artworks in secondary markets, and therefore advocating for the amendment of the domestic copyright law to recognise the ARR (The Parriot News Online, 2021).

The purpose of this paper is therefore to explore the ARR practice to guide the policymakers and the public on whether Botswana should adopt it, and how Botswana can implement it to bear good fruit. Generally, literature is scarce on intellectual property (IP) in Botswana, let alone on ARR. To determine whether Botswana should legislate ARR, this article probes into the longstanding global scholarly conversation surrounding the right. The authors conclude with some general recommendations.

This article proceeds in six substantive parts. Part I is the introduction. Part II discusses the art market and ARR in the context of Botswana. Part III discusses the polarised debates on ARR, and the authors note that a common problem mars each side of the divide in that their debate lacks empirical data to support their claims. Part IV evaluates ARR implementation highlighting collection and distribution models. It points out why several countries that codified ARR failed to implement it and further proposes solutions towards implementation. Part V addresses the main question of whether Botswana should legislate ARR or not. Finally, this article discusses the implications of such legislation and concludes under Part VI.

II. VISUAL ARTS IN BOTSWANA

The development of visual arts in Botswana began in the late 80s and has since grown rapidly. In the 80s, baskets and pottery dominated the art market and there was less attention on paint-

ing and sculptors (Campbell, 2012, p. 207). Several significant art fora have been established which have since become part of the national calendar of activities. These include the Tsabong Cultural Centre for Arts and Crafts Exhibitions, National Art, and the Basket and Crafts exhibitions. Authentic handmade crafts and basket works, common in the Northern and Western parts of Botswana, are examples of thriving arts in Botswana. These works symbolize and reflect the character and identity of the people in the region and have become an integral part of their culture.

Today, visual arts play a great role in preserving Botswana's culture. Drawing, painting, designing, and sculpting are among the subjects studied in schools in a bid to enhance visual arts and foster artistic aptitude at an early age (Campbell, 2012, p. 209). However, fine art practice is minimal in Botswana because it is only practised by the few who studied it in schools. Despite this, those who studied art are not full-time artists due to the limited art market in Botswana (Tlthankane, 2016, p. 10). Most of the activities in the visual arts space have been geared towards the use of the artworks in textbooks. However, as a result of recent improvements aimed at expanding the sector, museums like the National Museum, the Nhaba Museum and the Kgosi Sechele I Museum are now hosting art exhibitions. Notably, the Government of Botswana made a big contribution to this market in the year 2007 by ordering government agencies and the civil service to procure artwork created by local artists.

There are several centres of excellence for fine art and craft practices in Botswana. Such include the Thapong Visual Arts Centre which holds exhibitions, and workshops hosting artists from all over the country to share and exchange ideas on their practice. It also houses local artists who open their studios in the Centre. Further, there is also the Kuru Art Project which was established to create greater autonomy, capacity, and social advancement for the San of the Ghanzi District of Botswana (Tlthankane, 2016, p. 10). From these projects, artists have exhibited and sold their work internationally in various galleries,

including the United States of America (USA) and Europe. One artist from Kuru named Cg'ose Ntcox'o had one of her paintings selected by British Airways (BA) in the year 1997 to be included in BA's revamped corporate image. Eight BA aeroplanes had her artwork on their tailfins (Matome, 2007, p. 5).

Though few, Botswana artists interact with artists from other nations through the cultural exchanges that the government of Botswana has with the nations. These include the People's Republic of China (PRC) and South Africa, among others. This is to exchange ideas on how to improve their skills, attend workshops, and even take part in exhibitions. Several artists from Botswana like Wilson Ngoni, Neo Matome, Stephen Mogotsi, Kentse Bogatsu, and Moitshepi Madibela have received recognition for their artwork across the world (Matome, 2007, p. 5). In Botswana, recognition is achieved through exhibitions, print media services, gallery showcases, and museum activities. The Botswana Visual Art Association assists artists to speak with one voice regarding their practice. To motivate artists to develop quality artworks that contribute towards developing the art sector, artists are rewarded through the Thapong Artist of the Year Award (TAYA), which attracts more entries yearly. Despite these great attempts, artists still grapple with limited markets to sell and exhibit their artwork locally.

The National Arts Council (NAC) was established in mid-2021 as a development to accelerate the industry forward. The NAC is however faced with the mammoth task of standardizing various aspects of the practice such as price-setting and quality control. The study on the Economic Contribution of Copyright Industries in Botswana conducted in the year 2019 found that there are several copyright associations in the country, but the majority exist only in name with no functional secretariats. The importance of associations and other advocacy groups cannot be emphasized; therefore, it is envisaged that the Council will regulate artist associations to ensure that they function optimally (BIDPA, 2019, p. 49).

A. The current state of Artist Resale Right in Botswana

Currently, there is no provision for the resale right in Botswana's law. There is also a gap in literature on the status and performance of the art market in Botswana. For a better understanding of the ARR, one must view it from the wider perspective of copyright and the type of rights it confers (O'Dwyer, 2017, p. 104). Copyright, by nature, is a bundle of economic and moral rights. Although unpopular among scholars, there is a view that holds ARR as a moral right, positing that it cannot be transferred or abandoned and that it provides a personal eternal linkage between the art and its artist.

The other view holds that ARR protects the economic interests of visual artists and therefore fits the description of an economic right (Liu, 2022, p. 38). Economic rights are those that when exercised, allow the owner to derive monetary benefits from the use of the work. They include the right to reproduce the work, distribute copies of the work, publicly perform the work, broadcast the work, or other communications of the work to the public, and the right to translate and to adapt a work into other formats (WIPO, 2016, p. 12).

The Botswana Copyright and Neighboring Rights Act (As Amended in 2006) does not have ARR provisions. This means that artists do not benefit legally from the resale of their works. The copyright law was last amended in the year 2006 and it is unclear if ARR provisions will be included in future amendments and to what extent. The looming question is whether Botswana should provide for ARR in its law. Although Botswana has a handful of visual artists, it is observed that these visual artists do not make an adequate living from their profession. Most of them supplement their income through formal employment and view art as part-time work (Campbell, 2012, p. 210).

Both the primary and secondary markets in Botswana are almost non-existent. Further, there are very few commercial art galleries namely, the Botswana Craft, the Frame Gallery, and

others. Farchy *et al.* (2017) write that for Africa, the number of galleries remains very small generally, but even in emerging countries, the number of galleries participating in large western fairs such as Art Basel and Fiac is low (p. 5). According to Matome (2017) past efforts to alleviate the situation internationally include the 1993 exhibition Botswana Live at the Commonwealth Institute in London, the Secure the Future exhibition funded by Bristol-Myers Squibb, the Soul of Africa 2005 exhibition, sponsored by the Development Bank of Southern Africa in Johannesburg, and the 2006 exhibition of Botswana art at the National Museum of China in Beijing (p. 5).

However, it is observed that even today, sales remain unsatisfactory; artists have raised concerns about the waning local art market (BIDPA, 2019, p. 49). There is a direct correlation between the success of ARR and the success of the art market in each location. For ARR benefits to be actualized in Botswana, the art market must experience significant growth where not only locally based artists sell their art abroad and within Botswana, but also where other players like auction houses and galleries are active. Should codification happen now, it will benefit an insignificant number of artists at the start, due to the nascent local art market. However, as the market grows, more artists are bound to benefit from this codification.

B. Artist Resale Right and the reciprocity rule in the international market

Farchy *et al.* (2017) report that, although the level of international trade of artworks and collections in Africa and Oceania is insignificant; it does not mean that artists from these areas are absent from the international stage. Rather, when and where they are present, their works are traded outside of their continent (p. 12). For instance, in October 2021, a US-based Botswana artist, Meleko Mokgosi, sold his artwork titled 'Bread, Butter and Power' for seven hundred and fifty thousand US dollars, (BWP 8.4mil), at Art Basel in Switzerland (Motsumi, 2021, p. 1). Fur-

ther, a study on the galleries and artists who participated in the Art Basel fair shows that the number of African galleries present went from one to two between the years 2005 and 2012. The study goes on to show that at the same time, the number of African artists on display in all booths increased from twenty-five to ninety-four. Displaying in foreign galleries rather than in African ones may have caused the increase in the number of African artists represented at the fair (Farchy *et al.*, 2017, p. 12).

In the year 2018, global art sales were estimated at sixty-seven point four billion US dollars, and the Art Basel and UBS Bank reported that the growth of an African market represents a new frontier for an industry previously dominated by advanced economies (McBain, 2020, para. 1). These figures can be interpreted to mean that African artists, including artists from Botswana practice art at an international level. They are therefore even featured in the secondary market with the potential to benefit from ARR. However, it should be noted that the importance of recognition of ARR in African countries lies as much in the reciprocity rules as in the actual recognition within the countries themselves. For artists whose work is traded in the European Union (EU), reciprocity is extremely important (Farchy *et al.*, 2017, p. 30).

Société des Auteurs Dans Les Arts Graphiques et Plastiques (ADAGP), the French Society for the collection and distribution of copyright in the field of graphic and plastic arts, has published on their website, (<https://www.adagp.fr/en>) a list of ninety-five countries whose legislation provide for ARR. Twenty-two of these are African countries.⁵ However, it is established that most of the countries that have the ARR provision in their laws are yet

⁵ Algeria, Benin, Burkina Faso, Cameroon, Chad, Democratic Republic of Congo, Djibouti, Gabon, Gambia, Guinea, Ivory Coast, Kenya, Madagascar, Malawi, Mali, Mauritius, Republic of Congo Brazzaville, Senegal, Togo, Tunisia, and Uganda. Visual artists in Senegal have become the first since 1972 to receive remuneration for their work. The historic distribution in Senegal, announced on 24 October 2009, comes after efforts to improve the effectiveness of the country's collective management system.

to implement it. In many African countries, such as Kenya, the laws are quite recent. The Copyright Act of Kenya of 2019, for example, provides for ARR as an inalienable right. When it comes to rates, it provides that the royalty shall be payable at the rate of five per cent of the net sale price of twenty thousand Shillings (USD 168) or above. The liability to pay royalties is on the seller, the art market professional, the agent and the buyer. The right may be managed by a Collective Management Organisation (CMO). However, Kenya is yet to implement this provision. Where it is implemented, ARR by design may appear to have collected insignificant amounts of money as it does not apply to the first sale after implementation. Further, on average, items are resold every ten to twenty years, which means it will be a long time before a true review of the scheme can take place to assess its impact (Farchy *et al.*, 2017, p. 29).

South Africa has no ARR legislative framework. Their art market professionals, specifically Aspire Art, motivated by the wish to improve the economic conditions of artists, and help keep them making art became proactive and implemented ARR schemes on their own from its very first auction held in the year 2016. About sixteen living artists benefited from the inaugural auction, and forty from the second auction. The same was noted in the UK, where several galleries such as Lisson Gallery and Victoria Miro paid artists royalties from the sales of their work (Boicova-Wynants, 2019, p. 1) without a legislative basis. This means that ARR can be realised despite the lack of codification and reciprocity rules, but in such instances, it is more of charity than it is a right.

III. THE POLARISED DEBATE ON ARTIST RESALE RIGHT

A. The case for Artist Resale Right

ARR is a salient topic that has been debated by several scholars across the globe, with disagreement mostly revolving around

whether ARR will increase the welfare of artists and the art market's efficiency. However, there are several normative rationales put forward by the proponents of ARR, the primary rationale behind the resale right is to allow visual artists to participate in the profits or fruits of their labour and to receive equal treatment in line with the rewards provided by copyright to other creators. The rewards available to comparative creators, such as writers and composers, primarily derived from the right of reproduction and performance, rights which are not conferred upon visual artists to a similar extent (O'Dwyer, 2016, p. 131).

Scholars are divided regarding the justification of the resale royalty right. Some argue that it is justified, because it encourages artists to make artwork, prevents the unfair treatment of artists, and enables artists to share in the value of their work equitably. Others argue that it is not justified, because it is unnecessary, inequitable, and inefficient (Frye, 2017, p. 5). From an economic standpoint, some proponents posit that ARR encourages artists to create a significant body of quality work to increase the chances of significant royalties once their artwork is resold (Dilmaghani, 2008, p. 37). Those opposed to ARR rebut that it does not encourage artists to create more, as most visual artists create art based on their inspiration, not whether they will receive economic compensation from the creation. Most of the speculations on whether a resale royalty would increase creativity are not supported by solid evidence. Other advocates believe that ARR has made a huge difference for visual artists in the countries in which it is enacted. This has prompted visual artists and other proponents to clamour for a treaty that will make ARR mandatory for them to benefit from their works.

B. Arguments against Artist Resale Right

The opponents of ARR emphasize the complexity of the system, its inconsistencies and the fact that it essentially tries to solve a non-existent problem (Boicova-Wynants, 2019, p. 3). The

arguments against instituting ARR vary from conceptual to financial reasons. Although these rationales have held strong over the years, the scholarly attitude toward the resale royalty right has commonly been negative (Hansmann & Santilli, 2001, p. 261). Sprigman and Rub (2018) argue that resale royalties are only for the ‘rich, and the dead.’ They argue that these artists do not need money. They also argue that resale royalties will depress art markets because buyers are sensitive to price. O’Dwyer (2016) argues that the greatest failure of ARR resulted directly from it being framed as a ‘copyright’ as opposed to an ‘author’s right’ as understood in the civil law tradition.

Some critics of a resale royalty bill believe it would interfere with the first sale doctrine of copyright law (Frye, 2017, p. 12). The first sale doctrine gives the right to the purchaser of a lawfully produced copy of a copyrighted work to dispose of it as they wish without permission from the copyright owner. Furthermore, these critics believe that implementing this right would violate this doctrine by preventing buyers of the artwork from ever obtaining a complete title over the artwork. In response to this, it is argued that ARR would not violate the first sale doctrine because a resale royalty only requires payment when the artwork is resold and does not prevent the free transfer of property (Shiple, 2017, p. 10). Another response to this view is that the current owner of the artwork would not be prevented by a resale royalty from reselling the work of art freely because ARR would be considered more of a tax instead of a property restriction.

Other critics simply disagree with the rationales as a normative matter. Such critics argue, for example, that visual artists do not realistically receive unfair treatment relative to authors and composers: while authors’ and composers’ royalties are associated with the reproduction of a work of art, resale royalties for artists are based on resales of the original work (Hansmann & Santilli, 2001, p. 267).

Regarding common law countries, in particular, opponents often denounce the right because they consider it to conflict with

fundamental common law principles, such as the free alienability of property and freedom of contract (Rushton, 2001, p. 247). For example, Merryman (1993) asks ‘Why should the artist who wishes to do so be unable to transfer his resale proceeds right along with the painting, drawing or sculpture on the first sale to the collector or museum?’ (p. 110). These critics point out that no similar rule prohibits authors or composers from selling their works for a lump sum and waiving their rights to future royalties, so making the right inalienable seems to undercut the rationale that artists should be treated similarly to other creative persons (Turner, 2012, p. 346). It is argued that since artists have no options for resale rights, there is no way they can have options of freedom of contracts as compared to others such as authors or composers. Therefore, it is a fallacy for artists to lack the right to continue reaping benefits.

Another argument against the right is the increased compliance and administrative costs associated with collecting royalties and distributing them to the right recipients (Tarsis, 2020, p. 6). With the preferred collection method being the CMO system, which deploys minimal resources to collectively collect for many, this argument is unfounded. There is also an argument that introducing ARR will cause a price drop in the primary art market because buyers who will later become sellers already know that they will in future split profits with artists (Doubner, 2011, p. 1).

Frequent argument cited by other opponents of ARR is the fact that it is sometimes cheaper to pack an artwork, ship it away to a location with no ARR regulation and sell it there, instead of paying the royalty (Schten, 2017, p. 136). While many businesses would prefer business locations with few taxes, this assertion seems speculative and lacks evidence. Ricketson (2015) alludes that the introduction of ARR in EU countries does not appear to have caused an exodus of art businesses out of the EU. Similarly, the introduction of the ARR in the UK does not appear to have caused any exodus to countries such as Switzerland (p. 21). The fear of art business exodus is the basis for the view that ARR im-

plementation should be made universal through an ARR treaty, to combat the probable implications such as the transfer of art businesses to non-ARR countries among many other foreseeable implications (Schten, 2017, p. 23). In that regard, one could take the argument further to question the reciprocity provision of the Berne Convention as to whether it is necessary, especially given the dichotomy of national treatment vis-a-vis the reciprocity provision of the Convention.

Collection, administration, and distribution expenses are also cited to be an additional unnecessary burden. One other challenge with ARR is the duty to pay ARR even in case of a loss or depreciation. In other words, if a painting was initially sold for one thousand US dollars and ten years later is sold at an auction for five hundred US dollars, ARR is still due (subject to other qualifying criteria). To resolve this, ARR would have been linked to a profit instead of the entire sum of a transaction. On the other hand, that would have added yet another layer of administrative complexity to the system. The stock market is ever volatile, and the value of the currencies vary over the years making it daunting to calculate actual profits in some cases. The resale royalty rights do not increase the total income of artists, but instead inefficiently redistribute wealth to older and more successful artists while generating wasteful transaction costs (Rub, 2014, p. 7).

Lastly, some opponents point out that the resale royalty right is not enforced in practice. They argue that, in many countries where the right has been enacted, it is neglected, underused, and even moribund (Turner, 2012, p. 347). This assertion could be true for some jurisdictions especially those that took up ARR in the early years. An example of this is Senegal which enacted ARR in the year 1972 but only distributed resale royalties for the first time in the year 2019, where one hundred and three visual artists benefited, following the reciprocal agreement between Société Sénégalaise du Droit D'auteur et des Droits Voisins (SODAV) and ADAGP of France (CISAC, 2019, para. 1).

IV. IMPLEMENTATION OF ARTIST RESALE RIGHTS

A. ARR Collection Models

Countries with ARR implement it in various ways. There are three models in which the resale royalties are commonly collected and distributed. These are: the direct system, in which auction houses also play the role of collecting the resale royalty and subsequently distributing it directly to artists; the collective management system in which a CMO or a similar organization such as the Resale Royalty Organisation (RRO) does both the collection and distribution to artists; and, the complex system in which the collection is done by a different body and collections passed on to different bodies for distributions to members (McAndrew & Dallas-Conte, 2016, p. 57-61).

Works of art are often sold internationally through exhibitions and auctions. They are also sold through the internet, and this makes it practically difficult for rights holders to enforce their rights in foreign countries. It is also burdensome for buyers to deal with requests from multiple rights-holders and this makes CMOs the more convenient and preferred system in many jurisdictions. CMOs and RROs collect resale royalties and distribute them to their members reducing transaction costs on the collection of resale royalties. Artists join CMOs and RROs, which collect resale royalties from auctioneers and dealers and then distribute those royalties to their members. In other words, artists receive a proportional share of the royalties collected (Frye, 2017, p. 10). Several countries like Australia,⁶ Finland, Denmark, and the UK with ARR laws, have provisions for collecting societies, which generally collect royalties from the sellers and distribute them to the artists once a resale has been made.

The success of ARR administration relies heavily on the

⁶ According to the Australian Copyright Agency, Australian Indigenous artists received approximately USD 260 000 per year. ARR was enacted in Australia in 2009 because the government was concerned about the exploitation of Indigenous artists.

availability of information on provenance and details of sales such as how much the work was sold and to whom. It requires transparency and honesty between industry players. However, secrecy norms pervade the art market, especially in the US, making such information difficult, if not impossible (Turner, 2012, p. 330). In the UK, the law empowers an authors' society to request information, to save auctioneers and dealers from being overwhelmed with individual requests (Ficsor, 2002, p. 63). The structure of the right requires that various parties have access to information about sales to carry out the requirements of resale royalty laws. Policymakers are therefore confronted with the challenge of establishing effective systems for resale royalty collection and artist remuneration. CMOs enable a transparent and efficient resale royalty scheme application and lifts a heavy burden from the art market (Jewell, 2017, p. 7). Stephens (2020) notes that countries from the Global South need support from those that have established collecting societies in building the infrastructure that will enable them to operate resale royalty schemes successfully and effectively.

B. The implementation problem

Several countries that have codified ARR have not been able to advance into implementation. For instance, of the twenty-two African countries that have codified ARR, only a few such as Burkina Faso and Senegal have moved into implementation (DALRO, 2018, para. 6). Though for Senegal, this was after a long time of over forty years (since the enactment). Although Senegal has had a CMO for more than forty years, efforts had to be made over the years to educate the public about their obligations to pay for use of works and improve the efficiency of the CMO system. Many CMOs in Africa are marred with challenges such as non-compliance by users, lack of manpower, low levels of copyright awareness et cetera, ultimately stifling their efficiency (Monyatsi, 2014, p. 37). The inefficiency of CMOs could be the other reason why ARR, where enacted, is not implemented.

In other instances, implementation hindrance is attributed to procedural and administrative difficulties. In the UK for example, the Whitford Committee on Copyright and Designs Law, as established by the British Government to assess the potential implications of implementing the revised Berne Convention, including the ARR, cited the same concerns on procedural and administrative challenges against ARR (Pfeffer, 2004, p. 8). While there is no sufficient literature to succinctly point out why implementation could be an issue, a contributory factor to the procedural and administrative difficulties could be the information or asymmetry problem that seems to be common in the art resale market as Turner (2012) alludes.

Asymmetry has been found to exist between buyers and sellers, where a work of poor quality may be passed as a high-quality work and sold at an unfairly high price. It also exists around provenance and ownership of the artwork; the identity of buyers and sellers and the value of the artwork are usually kept discreet, in turn making it harder for buyers to attach any concrete value to the artworks being sold (Tomasello, 2018, pp. 17-19). Therefore, the consequences of secrecy on art transactions make it difficult to collate empirical evidence on critical aspects of ARR and the art market. Unfortunately, this could inhibit scholarly research on the subject as well as policymakers and implementers when evaluating the efficacy of the right (Turner, 2012, p. 369).

In solving these hindrances, the role of imitation cannot be overlooked; imitating the 'tried and tested' actions of others may be a rational thing to do to avoid reinventing the wheel. However, imitation should be done cautiously because it can potentially lead to a misinformed cascade of followers of bad practices (Moureau, 2014, p. 8). It should also be borne in mind that although ARR as a concept is more than a century old, it is quite recent in many countries that have enacted it and are bound therefore to experience teething problems in those jurisdictions.

Over the years, artworks have moved around the globe as ownership has changed. Without a systematic way of doing things, it makes acquiring transactional data or provenance a complex pursuit, which contributes to the information problem alluded to above. Therefore, the law needs to make it mandatory for stakeholders to avail information in a manner that is useful to other relevant stakeholders. A good example of this is Germany's law that obliges auctioneers to provide the collection society with information regarding sales. The collection society has the right to then examine the records of the sellers regarding matters such as prices, identity, and location of the seller for verification purposes (McAndrew & Dallas-Conte, 2016, p. 47).

The advent of blockchain technology presents a whole new world of opportunity in the art world for artists to have ownership and control over transactions involving their artworks. Blockchain as defined in the WIPO magazine 'is a form of distributed ledger technology, which creates a secure, transparent record of every transaction and reports the transactions undertaken to everyone on the blockchain platform' (Rose, 2020, para. 3). Blockchain is a decentralized mechanism that enhances transparency, accountability, and good governance, making traceability of artworks an easy task. For this reason, many authors such as Zhao (2021) even deem it a possible alternative to CMOs while others see it as a mechanism that can assist the efficiency of collections by CMOs (Zhao, 2021, p. 24).

Zheng (2021) argues that blockchain solves the transparency issue as it allows users to store all the information about an artwork privately and securely and can be retrieved and presented when needed and in the end ensuring that royalty payments are done effectively. Blockchain-based solutions, such as the Non-Fungible Token (NFT) are valuable solutions that can enable resale royalty payments for artists. 'NFTs are a cryptography tool that uses blockchain technology to verify and secure a record of the existence and ownership of digital and real-world assets' (Murray, 2022, p. 2). NFTs became popular when Mike

Winkelmann (otherwise known as Beeple) unexpectedly became the third richest living artist in terms of the pricing of his works. His artwork titled 'Everydays: The First 5000 Days' was sold as an NFT artwork collage for sixty-nine point three million US dollars in an auction on 21 February 2021 (Murray, 2022, p. 1).

However, the downside of blockchain and its various solutions like NFTs is that it is a complex phenomenon that may not be easily comprehensible to other people. This may be true for artists in remote areas whose lives are marred by resource scarcity and limited literacy levels. This presents a hindrance for artists to move with the times and be liberalized in a manner that is promised by blockchain. Therefore, artist groups and organizations including CMOs need to ensure that information is distributed generously to artists. Hence, the role played by CMOs in such cases cannot be overemphasized. Collective management of rights in its nature is based on an important value of joint defence of creative works, therefore it is more than just a scheme, it is a mechanism of advocacy (Salvadé, n.d. para. 4).

V. CODIFYING ARTIST'S RESALE RIGHT IN BOTSWANA'S LAW

ARR emerged to address the perception of artist abject poverty in contrast with the wealth of the buyers of their artworks, this narrative fuelled ARR legislative initiatives (Rub, 2014, p. 2). According to Rub (2014), these justifications for addressing the starving artists are weak and cannot justify ARR enactment. He believes that these justifications are taken out of context and have created a misleading impression as there is no convincing evidence that artists are in poverty.

However, it is argued that copyright law, as the name suggests, primarily advocates for non-visual artists as it deals more with copying, which in turn disfavours visual artists. ARR seeks to correct this anomaly hence advocacy for its enactment. The broader and more important question, as put by Alderman (1992), is whether as a matter of policy, legislators

want to help struggling artists or provide an economic right that only rewards successful artists. As already noted, the ARR rewards artists with a buoyant secondary market for their work, not struggling artists. Therefore, if legislators wish to provide successful artists with an additional source of income, then resale royalties will achieve this aim. However, if the intention is to aid the needy or nascent career artists then ‘royalties are an inappropriate mechanism to reallocate wealth to struggling artists.’ As noted by Pierredon-Fawcett & Kernochan (1991) in its current form, the ARR is not designed to come to the aid of struggling artists.

Notably, even in the absence of a law governing ARR in a particular country, some art market professionals may decide to be proactive and implement the resale royalty schemes on their own. For example, no legislative framework for ARR exists in South Africa, however, Aspire Art Auctions introduced ARR with a sliding scheme of royalties like the one in the EU, from its very first auction held in the year 2016. Also in the UK, even before the official introduction of ARR, several galleries, for example, the Lisson Gallery and the Victoria Miro, were already paying artists a share of the sales following the French *droit de suite* system. Even in the US, the Leo Castelli Gallery was known to be using the Artist’s Reserved Rights Transfer and Sale Agreement designed by Curator Seth Siegelau and Attorney Robert Projansky in 1971. As these authors note, however, these systems are more like charity than rights.

This article suggests that, although the provision for ARR in the law might appear meaningless at this point looking at the art resale market in Botswana, its inclusion into the law may encourage the Government to be robust in its support for the sector just as seen in the past with similar scenarios. As an example, provisions on collective management of rights were introduced with the 2005 amendment bill. Thereafter, robust Government support was seen where a seed capital, among other initiatives, was availed for the CMO to be established. Law forms the basis

for making policies that can develop visual arts and strengthen both the primary and secondary markets. Having the basis of protection in this regard may also attract more players from the private sector to invest along the value chain.

There is already advocacy from various artists and politicians calling for the codification of ARR into law. Should the Government consider the inclusion of the right into the law, the lawmakers will have to adopt a sensible structure for this right. They must ensure that all relevant parties such as artists, sellers, and CMOs have access to information about the art sales market. It took five years (2008-2013) for the Copyright Society of Botswana (COSBOTS) to collect and distribute royalties in the music industry (Monyatsi, 2014, p. 36). Comparatively, COSBOTS is one of the best-performing CMOs in Africa, thus holding a good potential for the efficient running of ARR owing to its well-oiled infrastructure and systems.

VI. CONCLUSION

ARR has been debated by several scholars across the globe, with disagreement mostly revolving around whether ARR will increase the welfare of artists and the art market's efficiency. Proponents of the right argue that it is unfair for visual artists to not share in the profits made off their artworks as they gain value over years. They further argue that visual artists do not receive equal treatment in line with the rewards available to other creators. Critics, on the other hand, argue that visual artists do not receive unfair treatment relative to other creators, they submit that other creators' royalties are associated with reproduction while resale royalties are based on resales, therefore this cannot be equated to unfairness. Opponents further point out that the resale royalty right does not get enforced in practice, citing that, in many countries where the right has been enacted, it is neglected, underused, and even moribund. This study agreed with this assertion as it found out that many countries

that provide for ARR do not implement it, and where they do, the implementation is delayed.

This study found that the main contributor to the lack of implementation is information asymmetry, where information regarding prices and provenance are usually kept a secret, hindering policymakers to measure the efficiency of ARR. There has been informal advocacy by artists and politicians advocating for the codification of ARR in Botswana for the benefit of the local artists. This paper explored the ARR practice to guide the policymakers and the public on whether Botswana should adopt it, and how Botswana can implement it to bear good fruit. To determine whether Botswana should legislate ARR, this paper probed into the longstanding global scholarly conversation surrounding the right.

The authors conclude that while the Botswana art market is still in its infancy, ARR must be codified as it is envisaged that its codification will encourage robust Government support for the art sector. Further, codification may attract more players from the private sector to invest along the value chain. This paper strongly supports ARR codification as a way of correcting the copyright protection deficiency that exists between multiple copy artists and visual artists.

However, this study recommends that prior to codification, policymakers must carry out studies on the status of the art market to better inform policies and strategies and benchmark from countries that have implemented ARR such as Senegal, Burkina Faso, and the UK to understand the ARR dynamics to adopt an efficient scheme of administering the right that has been tested out. On this background, further research into this matter by other researchers is recommended to give sound counsel.

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