



A RESALE ROYALTY RIGHT FOR VISUAL ARTISTS

**Options for its possible application to
New Zealand**

DISCUSSION PAPER

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Call for Submissions

The government is considering the establishment of a resale royalty right for visual artists. It has been examining international developments relating to this right in other jurisdictions, and the possible impact of the application of such a right in New Zealand. This discussion paper provides an overview of this work. It also canvasses a number of options that could form the basis of a resale royalty right scheme, should one be implemented in New Zealand. Comment on each of these options is now invited, with the opportunity to make alternative suggestions.

Submissions on this discussion paper are invited from all interested parties, including artists, art collectors, art dealers, galleries and auctioneers, secondhand dealers, museums, art institutions, and any other person or group with an interest in the buying or selling of works of art. These submissions will assist the government's consideration of a resale royalty right scheme. Should a decision be taken to proceed with implementation, these submissions will assist in ensuring the scheme addresses considerations that may be particular to the New Zealand context. Submissions may also assist in the consideration of alternative ways to address copyright returns for visual artists.

To assist respondents in making submissions, a template for answering questions is attached to this discussion paper. This template is not intended to constrain other comment but to assist with analysis of the feedback received. Information that respondents can provide to assist consideration of a resale royalty right is welcome, as is information on specific characteristics of the New Zealand art market that may inform this consideration. This could include, for example, information on art sales that occur beyond the six main auction houses, such as sales that occur through dealer galleries or through other outlets such as art fairs, secondhand dealers or on the internet. It could also include comment or statistical data that may assist in considering any economic or compliance impacts of implementing a resale royalty right.

The closing date for submissions is **22 June 2007**. Submissions using the template provided should be sent to:

Resale Royalty Right Discussion Paper
Policy Group
Ministry for Culture and Heritage
PO Box 5364
WELLINGTON

Respondents are particularly encouraged to email submissions (also using the template provided). Submissions should be emailed to: resale.royalty@mch.govt.nz. Any questions about making a submission can also be directed to this email address, to the postal address above or by telephoning (04) 499 4229.

Publication of Submissions

Submissions on this discussion paper may be posted on the Ministry's website and are subject to disclosure under the Official Information Act 1982. Persons making submissions that include commercially or otherwise sensitive material that they wish the Ministry to withhold under the Official Information Act should clearly identify the relevant information and the applicable grounds under which the Ministry could withhold the information.

The contact details of respondents will not be made public. They will, however, be recorded and may be used for clarification of comments if required.

Copies of this Discussion Paper

Further copies of this discussion paper (and copies of the template for answering questions) may be downloaded from the website of the Ministry for Culture and Heritage at:

<http://www.mch.govt.nz/publications/resale-royalty/>

Executive Summary

A resale royalty right is also known as “droit de suite” or an “artist’s resale right”. It entitles visual artists to a royalty payment each time an original art work is resold on the secondary art market. It first became law in 1920 in France and, to date, over 50 countries have such a right.

Under a European Union Directive, member countries that did not already have a resale royalty right had to introduce it into domestic law by 2006. This Directive was issued in 2001 to phase in consistency and enable visual artists in all EU member states to enjoy the same basic resale royalty right.

In line with this Directive, Britain implemented The Artist’s Resale Right Regulations in February 2006. Ireland implemented interim regulations in June 2006 and intends to introduce a Bill this year.

The Australian government has rejected the adoption of a resale royalty right. In its 2006 Budget, the government announced it would allocate A\$6 million over four years to support visual artists as an alternative to introducing the right. The Australian Labor Party has stated that, if elected, it will establish a resale royalty right in its first term.

International developments, as well as international agreements, have led to New Zealand’s consideration of a resale royalty right. In 2005 the Labour Party, as part of its Arts, Culture and Heritage election manifesto, stated that it would examine developments internationally relating to resale royalties for artists and their possible application to New Zealand.

This discussion paper examines a resale royalty right in detail, and its possible application in a New Zealand context. The discussion paper contains a number of proposals that could form the basis of a resale royalty right in New Zealand. These proposals are designed to determine eligibility for a resale royalty right and to ensure a resale royalty right scheme can be viable in an art market the size of New Zealand. The proposals, therefore, concern the type of art work that would be covered by a resale royalty right scheme, which visual artists would be eligible for a resale royalty right, and the duration of this right. These proposals are aligned to the Copyright Act 1994, in that it is proposed that a resale royalty right would cover all artistic and graphic works as outlined in the Act (except for works of architecture) and that the right would apply for the same period as is covered by the duration of copyright.

Should a decision be taken to introduce a legal resale royalty right in New Zealand, the most appropriate vehicle for implementation would be the Copyright Act 1994. This would align with international practice and with

international copyright treaties such as the Berne Convention for the Protection of Literary and Artistic Works, to which New Zealand is a party.

Under the proposals in this paper, resale royalty obligations would extend to all auction houses, galleries, dealers and any other intermediary involved in the business of dealing in works of art. There would be joint liability for payment of a resale royalty between the art market intermediary involved in the sale and the seller. Work purchased directly from an artist would be exempt from a resale royalty on the first resale of that work, provided that resale occurred within three years of the first sale and provided the work was resold for less than a certain amount.

There would be a flat 5% resale royalty rate. This would be charged on the “hammer” or “ticket” price (that is, excluding GST, a buyer’s premium and an agent’s commission). A particular threshold might be put in place before a resale price attracted a royalty. There might also need to be consideration of an upper cap on the total amount of royalties due on each resale.

A resale royalty right would apply to the creator of an art work in which a copyright existed. This would be regardless of whether the creator had retained ownership of the copyright. A resale royalty right would be inalienable and unable to be waived or reassigned. This would prevent a change of resale royalty right ownership becoming a condition of any first sale.

In line with the World Trade Organisation’s Agreement on Trade Related Aspects of Intellectual Property Rights, a resale royalty right could be offered on a reciprocal basis to nationals of countries that have similar schemes and that offer reciprocal rights to nationals of New Zealand.

It is proposed that the collection of resale royalties be administered by one agency yet to be determined. Artists would not individually have the right to approach art market intermediaries for information or payment. The collection agency would administer the scheme in return for a fixed fee or percentage of each royalty, also known as a commission rate. It is anticipated that this commission would enable the scheme to be self-sustaining.

PART ONE: BACKGROUND

A Resale Royalty Right

A resale royalty right is also known as “droit de suite” or as an “artist’s resale right”. It entitles visual artists to receive a royalty payment each time an original art work is resold. It generally applies only to work sold through art market intermediaries such as dealers and auctioneers. It does not generally apply to art work sold privately.

Art work is usually first sold by artists (or their agents) or is gifted by an artist to a friend or debtor. At this point, the work can be worth relatively little but, as it is resold over time, it increases in value, usually in parallel to an artist’s growing body of work and reputation. At the time of the original transaction, artists may be in a vulnerable position, in that their need for money may be high yet their ability to extract a good price may be low. This original transaction is the only real opportunity a visual artist has to benefit from his or her creation. A resale royalty right can be seen as a means of addressing this limited access to economic benefit from the creation of a work.

Visual artists derive limited advantage from copyright legislation as it deals with reproductions or repeated use of a work, whereas they are involved for the most part in the creation of a one-off, original piece of work. The value of visual art is primarily in the original piece, rather than in reproductions of its image.

While there may be minimal royalties from reproduction of images in auction catalogues and other publications, artists do not necessarily retain copyright once their work is sold. Even when they do retain the copyright, they can miss out on royalties because of inexperience, lack of bargaining power, lack of legal understanding, and the cost and fear of challenging infringements. This was demonstrated in an Australian study which revealed that writers earned 18% of their creative income from royalties, composers 22%, and visual artists 2%.¹

There may be ways other than a mandatory resale royalty right to improve royalty returns for visual artists. Options such as a moral or voluntary resale royalty right are raised as part of this paper. This paper’s focus, however, is predominantly on legislating for a formal or mandatory resale royalty right, aligning with overseas developments and improving royalty returns for visual artists both domestically and internationally (through reciprocity).

¹ *Don’t give up your day job: An economic study of professional artists in Australia*, David Throsby and Virginia Hollister, Australia Council for the Arts, 2003.

Legislating for a mandatory resale royalty right is intended to address the relative inequities between visual artists and other artists, in terms of the returns they are able to gain from their work. A resale royalty right is in effect a variation of rights that currently exist under the Copyright Act 1994, a variation that recognises the unique nature of visual art. It is both an economic right, in that it provides an incentive to create and the ability to benefit from this creation, and a moral right in that it recognises an ongoing relationship between a creator and the work.

Legislating for a mandatory resale royalty right will not result in large payments for every visual artist. As is the nature of any right under the Copyright Act, a resale royalty right will reward those creators who are most in demand. The options in this paper, therefore, also take into account the likely overall resale royalty returns in an art market the size of New Zealand's. This consideration particularly informed options such as a minimum threshold level on qualifying resales, a cap on the total amount of royalties due on each work resold and the duration of a resale royalty right. This paper has thoroughly examined these options in respect to other jurisdictions to ensure that, should a scheme be implemented in New Zealand, it is able to be viable and self-sustaining.

Overseas Developments

A resale royalty right was first introduced in France in 1920, with similar systems established soon after in Belgium, Czechoslovakia, Poland, Uruguay and Italy. To date over 50 countries have a resale royalty right. A list of these countries is attached as Appendix 1.

There are variations among the schemes that countries operate. A summary of some of these schemes is attached as Appendix 2.

One of the key variations is the range of work covered. For example, some countries refer only to "works of art" or to "visual arts". Others more specifically cover "original painting, sculpture or work in glass" or "painting, sculpture, graphic art and drawing, original and signed by the artist". Several countries also include original manuscripts by writers and/or composers.

Other variations among resale royalty schemes include:

- the royalty rate (including whether the overall amount due is capped or not);
- the minimum threshold sale price (if any) before the royalty applies;

- the calculation of the amount due (including whether the royalty applies to the gross sale price, is net of costs (including taxation), or is payable only on the profit made over the previous sale);
- whether it applies only to living artists or, if it also applies to artists' estates, how long this remains in force; and
- whether the royalty is paid to the individual whose work is sold, or into a collective fund (used, for example, to provide grants for younger, emerging artists, to assist older artists as a type of pension, and/or to assist other artists in difficulty).

European Union Directive

Under a European Union (EU) Directive, member countries that did not already have a resale royalty right had to introduce it into their domestic law by 2006. This Directive was issued in 2001 to phase in consistency and enable visual artists in all EU member states to enjoy the same basic resale royalty right. It arose out of concerns that as long as some European countries had the scheme and others did not, this unfairly distorted the art market and meant sales could occur in another European country to avoid paying a royalty. While this was not considered particularly likely, the EU Commission considered that, with the aim of creating one internal European market, it had to eradicate all differences, no matter how small.

Britain

Britain implemented The Artist's Resale Right Regulations in February 2006. It resisted the EU Directive, and won a number of concessions before agreeing to comply. In part its resistance reflected fears that the British art market, the largest in Europe, might lose sales to places where royalties were not collected, such as Switzerland and New York (as the largest art market).

In acceding to the EU Directive, Britain achieved what it considered to be a balance of the needs of artists, traders and buyers. This balance included limiting its application to living artists until 2012, when it must be implemented in full to include estates for a period of 70 years following the death of the artist. Britain also pushed for the Directive to include an optional minimum sale-price threshold of up to €3000. In its own scheme, Britain settled on a minimum threshold of €1000 (approximately £680).

The royalty rate in Britain is based on a cumulative sliding scale, as follows:

<i>Portion of the sale price²</i>	<i>Percentage amount</i>
From €0 to €50,000	4% ³
From €50,000.01 to €200,000	3%
From €200,000.01 to €350,000	1%
From €350,000.01 to €500,000	0.5%
Exceeding €500,000	0.25%

These rates align to the EU Directive, and include a €12,500 cap on the maximum royalty that can be earned on each work of art. This applies to works sold for €2 million or more.

The British scheme enables joint ownership of royalty rights (to cover more than one creator of an art work). It also includes reciprocal arrangements with European Economic Area nationals and nationals from other countries which have similar schemes. While the EU Directive requires that royalty schemes apply to artists' estates by 2012 at the latest, Britain has agreed to apply it from 2010.

Ireland

In June 2006 Ireland established interim resale royalty right regulations, and intends to introduce legislation this year. The regulations impose a minimum sale price threshold of €3000 (the maximum allowable under the EU Directive). Art groups are lobbying for the legislation to lower the threshold to no more than €1000 to ensure that more visual artists benefit. The interim regulations apply only to living artists. The legislation, however, is likely to apply immediately a resale royalty right to the estates of artists for up to 70 years after the artist's death.

Australia

In Australia, a resale royalty right has not been adopted. In its 2006 Budget, the federal government announced it would allocate A\$6 million over four years to support visual artists, as an alternative to introducing the scheme. This support included "a A\$0.5 million per annum training package to help visual

² The sale price upon which royalty calculations is based is net of tax.

³ The EU Directive enables member states to set a higher percentage amount on the "€0 to €50,000" portion, of 5% rather than 4%.

artists enhance their engagement with the commercial arts market and an additional A\$1 million per annum to the National Arts and Crafts Industry Support programme to strengthen the significant indigenous arts industry in regional and remote communities”.⁴

In announcing its decision, the Australian government said resale royalty schemes mainly benefited successful artists late in their career and artists’ estates. It said the right would not advantage “the majority of Australian artists whose work rarely reaches the secondary art market and would also adversely affect commercial galleries, art dealers, auction houses and investors”.⁵

This decision followed the release of a 2004 discussion paper by the Department of Communications, Information Technology and the Arts. The discussion paper sought comment on whether Australia should introduce a resale royalty right and on whether alternative means of support for visual artists were more appropriate. Some 50 submissions were received, with 75% favouring a resale royalty right.

This discussion paper was preceded in 2002 by the Report of the Contemporary Visual Arts and Craft Inquiry (known as the Myer Report) which recommended a formal resale royalty scheme be set up in Australia to protect the rights of all visual artists and craft practitioners. This Report concluded the scheme would particularly benefit indigenous artists, families and communities.

The Australian Labor Party introduced a Private Member’s Bill in 2004, and again in March 2006, to establish a resale royalty right and to implement it by amending the Copyright Act 1968. These Bills, and the Myer Report recommendation, were supported by a range of art advocates, including the National Association for Visual Arts, the Australian Copyright Council, Arts Law Australia, and visual arts collection agency Viscopy (which has around 6000 members, including 1000 in New Zealand). There was also support from Aboriginal organisations, including Desart and the Association of Northern, Kimberley and Arnhem Aboriginal Artists.

A number of auction houses and dealers in Australia also supported a resale royalty right, and some currently operate moral contracts which voluntarily contribute a royalty to either a communal fund or directly to the artist or their estate. The royalty rate ranges from 1% to 10%, with little adverse buyer reaction reported. The Myer Report acknowledged these schemes but noted they relied on discretionary goodwill and, in the case of communal funds, artists were subsidising other artists and were not receiving a direct reward for the resale of their own work.

⁴ From *New Support for Australia’s Visual Artists*, a media release from the Attorney-General, Philip Ruddock, and the Minister for the Arts and Sport, Senator Rod Kemp, 9 May 2006.

⁵ Ibid.

North America

The United States of America does not have a national resale royalty right, although California has operated a scheme since 1977. California's right applies only to a painting, drawing, sculpture or original work of art in glass (excluding stained glass permanently attached to property), and to work sold during an artist's life or within 20 years of their death. The rate is a flat 5% of the resale price on work sold for US\$1000 or more, payable when the seller lives in California or the sale takes place there. The artist must be a US citizen or a resident of California for at least the two years prior to the sale. The sale price must also be for more than the seller originally paid for the work, before the right is triggered.

A 1992 US Copyright Office report advised against national adoption at that time and recommended awaiting the outcome of European harmonisation moves.

Canada is monitoring overseas developments but has not identified a resale royalty right as a domestic priority at this stage. It is first working through an extensive list of other copyright reforms, such as the status of audio-visual works and photographs, the Crown as owner and user of copyright works, performers' rights, rights management in an online environment, the term of protection, and traditional knowledge and folklore.

New Zealand Developments

International developments have led to New Zealand's consideration of a resale royalty right. Artists Alliance, which represents the professional interests of New Zealand visual artists, is a key advocate. Other commentators have put forward a range of views in professional and academic publications and the media. Links to this commentary, and to other information that may assist respondents' consideration of a resale royalty right, is provided on the Ministry for Culture and Heritage's website at www.mch.govt.nz/publications/resale-royalty/

There has also been public discussion on the strength of New Zealand's secondary art market, the growing interest in art, and the prices achieved (including a number of record prices for particular artists). This has been attributed to the economy and to New Zealand's increasing confidence in its cultural identity.

The state of New Zealand's art market, and its potential for further growth, has led to comment on the disparity between the prices obtained by artists for the first sale and the amount for which their work has subsequently sold.

The New Zealand Art Market

There has been significant growth in the local art auction sector, with total sales across the six main art auction houses in New Zealand doubling over the past decade. Sales reached a peak of nearly \$19.5 million in 2003 although they have settled back to around \$14 million for each of the past two years, as demonstrated below:

New Zealand Art Auction Sales

Year	Total NZ Auction Sales NZ\$
1996	\$5,566,636
1997	\$4,806,874
1998	\$5,347,725
1999	\$6,465,262
2000	\$11,410,159
2001	\$13,206,122
2002	\$13,702,385
2003	\$19,349,699
2004	\$17,362,996
2005	\$14,211,971
2006	\$13,911,672 ⁶

In Australia sales in 2006 surged to a new high of nearly A\$105 million (approximately NZ\$128 million). Both markets demonstrate the inherent volatility of the art market, with sharp rises and falls over the past 15 years.

Despite this volatility, New Zealand art auction sales figures still demonstrate steady growth over time. The level at which the New Zealand art auction market is currently performing is similar to around 2001-2002 but more than double the level of the late 1990s. Based partly on these growth patterns, art commentators are predicting another surge in New Zealand art auction sales in the next year or two.⁷

⁶ One of the smaller auction houses has yet to submit figures for 2006. Once it has, this figure may be several hundred thousand dollars higher, based on the previous year's figures for that auction house.

⁷ 'The Art of Investment', Bronwyn Sell, *The New Zealand Herald*, 29 December 2006.

These figures do not include the significant number of art sales that occur through dealer-galleries, or sales that occur through other outlets such as art fairs, secondhand dealers or on the internet. Auctioneer Peter Webb has estimated the total art market turnover (that is, including first sales and resales through auction and other outlets) may currently be around \$40-\$50 million per annum.⁸ Others have suggested it could be as high as \$80 million per annum.⁹ This would tend to suggest that sales outside of art auction houses make up more than two-thirds of the overall art market, although a significant proportion of this is likely to be first sales of works rather than resales.¹⁰

⁸

Ibid.

⁹

'Giving Artists a Cut on Resale of their Works', John Daly-Peoples, *National Business Review*, 8 December 2006.

¹⁰

Sales at auction and through secondhand dealers tend to be predominantly resales whereas art fairs, art galleries and art dealers tend to specialise in first sales.

PART TWO: DISCUSSION

Work undertaken to date by the Ministry for Culture and Heritage has identified a large body of overseas documentation on the establishment of a resale royalty right. This documentation demonstrates a clear split between those who favour a resale royalty right and those who are opposed. A summary of these various positions is outlined below.

The Ministry has also looked at how the establishment of a resale royalty right in overseas jurisdictions might inform the possible establishment of such a right in New Zealand. This work has included identifying the level of resale royalties that would be payable to a range of individual artists working in various visual media whose work sells at auction. It has also included identifying the possible level of royalties that may be due on auction sales of overseas artists in New Zealand should reciprocal agreements be established with other countries. In addition, the Ministry has attempted to establish the overall level of sales in the New Zealand art market, as far as possible, and the market's ability to sustain the implementation of a resale royalty right. The market extends beyond auction houses to include art dealers and others in the business of re-selling art.

The Ministry has outlined its findings below. It has also set out a number of questions relating to possible options that could form the basis of a resale royalty right scheme, should one be implemented in New Zealand. Comment on these questions and options is now invited, with the opportunity to make alternative suggestions.

Please note that these questions have been collated into a submission response form which is attached to this discussion paper. The Ministry requests that respondents who wish to make a submission on this discussion paper follow the order and format of this response form. This is not intended to constrain comment in any way but to assist in the considered analysis of the feedback received.

The Resale Royalty Right Debate

While overseas experience has shown there can be a clear split between those for or against a resale royalty right, these views are held across the arts spectrum. They are not necessarily divided into artists and key arts agencies on one side, and auction houses, art dealers and galleries on the other side. This is also a feature of the debate expected in New Zealand. Overseas, British artist David Hockney has been perhaps the highest profile opponent, and campaigned against the scheme in both Britain and Europe.

Support for a resale royalty right

Supporters of a resale royalty right point to the increasing investment in art and the record prices being achieved for particular works. The art work's value is usually based on the name of the artist (or particular circumstances such as the scarcity of available work or the artist's death), yet the artist (or his or her family) does not benefit from this increasing value. The key beneficiaries are sellers and their intermediaries (such as auction houses, dealers and galleries), who commonly charge a buyer's premium and a commission each time a work is sold.¹¹

A number of artists, both in New Zealand and overseas, have devised their own resale royalty right contracts. The ability of artists to insist upon such an arrangement, however, depends on their current reputation and disproportionately favours established artists. Even established artists may not benefit greatly from such voluntary contracts. This is because artists can usually only attach the arrangement to work that they are selling for the first time. They are unable to attach the arrangement retrospectively to work which was made and sold when they were less known even though its resale value may have subsequently increased. The legality of such contracts may also be problematic, particularly in terms of enforcing any resale royalty right conditions beyond the initial contract between an artist and the first buyer.

Some arts patrons voluntarily offer artists a share of the sale price, without entering into a resale royalty right contract. This is uncommon, however, and depends on the discretionary generosity of individual sellers. Some artists hold back early work, gambling that their reputation will increase to the point where a higher sale price can be achieved. Not only does this deny artists income earlier in their career, it distorts the art market as sometimes the best work remains hidden for some time. There is also the risk that the work may be damaged or lost, or fall out of favour.

Legislating for a mandatory resale royalty right would address the relative inequities between visual artists and other artists, in terms of the royalty returns they are able to gain from their work. It would also ensure equal protection for both established and emerging artists, rather than being contingent upon artists' relative bargaining positions. Assuming a resale royalty right was inalienable, it would guarantee the artist (or his or her family) would benefit, rather than the owner of the original work or the copyright holder (who may not be the artist).

¹¹ When an art work is sold, the sales agent (or art market intermediary) usually charges the buyer an additional premium based on a percentage of the "hammer" or "ticket" price of the work. An agent may also receive commission from the seller on this work which is also usually percentage-based. These charges can vary. In New Zealand they range between 10-15% , while overseas they can be as high as 20%.

A resale royalty right offers an economic incentive to be involved in creative work and to benefit fairly from that creation. It performs an educative function in strengthening an owner's awareness of the ongoing connection an artist can feel to his or her work. It also educates the wider public who, upon hearing news of soaring art markets, growing investment in art work and record prices for particular work, may erroneously believe that artists themselves are currently benefiting financially from this situation whereas, in fact, the only financial benefit to the artist was the value of the first sale.

Traditionally, some artists have preferred to concentrate on art to the exclusion or detriment of business practice. A resale royalty right assists in creating a business environment that encourages artists to consider the economic value of their work, as well as the creative value. It taps into the growing awareness among artists of the need to develop business knowledge, to consider art as both an economic and artistic pursuit, and to improve the sustainability of their artistic career.

A secondary benefit of a resale royalty scheme may be its provision of a transparent mechanism for tracking art sales in the course of ensuring the payment of royalties. This identifies the current owner of a work, enabling artists to access more easily their earlier catalogue of work and to mount retrospective exhibitions.

Opposition to a resale royalty right

Opponents dismiss a resale royalty right as idealistic. They say artists rarely benefit to any great extent, and most contemporary art work tends to decrease in value. This is particularly an issue in countries where a resale royalty right applies only when art work is sold for a higher value than its previous purchase price, with many artists not benefiting at all. This could be because the work did not increase in value since its previous sale or because it leads to protracted debate about deductions for costs before a profit amount is determined. Art that does rise in value may not do so until many years after its creation or until the artist dies. Even where a resale royalty right is applied to the total sale price rather than just to any profit, opponents say the real beneficiaries are established artists who do not need the money, or the estates of artists who have died.

Overseas evidence, and modelling carried out on New Zealand art auction sales, does show that established artists and the estates of dead artists may benefit more, in the short term, from the establishment of a resale royalty right than emerging artists. The right does, however, provide an incentive for emerging artists to continue their profession and holds out the possibility of royalty rewards at a later stage. The Myer Report suggested that these

delayed rewards could substitute for superannuation funds to which artists do not typically have the ability to access. It is also true that any copyright tends to reward those who are most successful and in demand.

Overseas there were fears that establishing a resale royalty right would depress the art market, which some commentators say is more price-sensitive and less buoyant than it might appear. The right would be considered by buyers as yet another tax and price increase. An established artist may be better placed to overcome the issue of price sensitivities but an emerging artist may not. There are a range of costs, however, that are inherent in the art market, such as a buyer's premium and the commission an agent charges a seller, often both on the same work. These charges rise from time to time only to be absorbed by the market. Despite a range of economic studies, there is little evidence that any of these costs have had any significant effect on the price people are ultimately prepared to pay for a work, or on reducing demand for art generally.

Another fear expressed was that the art market would move underground, with more royalty-exempt private sales taking place, or that sellers would move to a market such as New York which does not have a resale royalty right and which in 2003 accounted for nearly half the world's art sales. The fear of moving to another market was particularly prevalent in the British debate but was not a strong feature of the debate in Australia. It was considered that transportation and insurance costs would outweigh the benefits of avoiding royalty collection by moving to another market, and that Australian art obtained the best prices in an Australian market. Reports in the US and Britain also concluded that the market would easily absorb any extra costs, as it had done before, and that, together with a cap on each royalty payment, would not necessarily encourage particularly high-value sales to go offshore or underground.

Investors have argued they are carrying the financial risks of owning an art work, in terms of costs such as insurance, conservation, financing, and whether there will be increases or decreases in value over time. They consider it inappropriate for an artist to benefit from the resale but share none of the risks or costs in between sales. It also goes against the common law principle of ownership, with ownership and attendant rights transferring in full upon sale. For example, a person who sells a house or shares in a business does not retain a fiscal or moral connection and does not benefit from resales or improvements in value or hold any other rights once that ownership ends.

The cost of compliance has been a recurrent theme, with art market intermediaries worried about the cost of changing their business systems and spending time on collecting royalties. They are worried about having to absorb these costs and have accused collection agencies of empire-building, as they stand to collect a cut of the royalties, further decreasing the value of such a scheme for artists.

Opponents say artists are capable of extracting a fair price on the original sale and, if both parties are willing, can arrange their own resale royalty contracts without the attendant bureaucracy and cost of an official scheme. An official scheme may also disadvantage artists by depressing the price of first sales, as the price negotiation may include consideration of possible future royalty benefits for artists to the detriment of their immediate needs.

QUESTIONS FOR RESPONSE

The Ministry asks respondents to follow the order and format of the template of questions for submissions (attached to this discussion paper) and to insert their responses into this template. This template is not intended to constrain comment but to assist with analysis of the feedback received.

Even if you oppose the establishment of a resale royalty right, the Ministry encourages you to address all the questions in the template. Should a resale royalty right be established, your feedback will provide valued advice on the design of a scheme and ensure it is as effective as possible.

Question 1: Do you think a mandatory (that is, legislated) resale royalty right should be established in New Zealand? If not, what alternative ways to address copyright returns for visual artists would you prefer and why?

Range of Art Works Covered

Overseas resale royalty right schemes tend to be based on or incorporated into relevant copyright law. The type of art work that attracts such a royalty is, therefore, also closely related to copyright law.

In New Zealand, section 2(1) of the Copyright Act 1994 determines that artistic work “(a) means - (i) a graphic work, photograph, sculpture, collage, or model, irrespective of artistic quality; or (ii) a work of architecture, being a building or a model for a building; or (iii) a work of artistic craftsmanship, not falling within subparagraph (i) or subparagraph (ii) of this definition; but (b) does not include a layout design or an integrated circuit within the meaning of section 2 of the Layout Designs Act 1994”.¹²

Section 2(1) further interprets graphic work as including “(a) any painting, drawing, diagram, map, chart, or plan; and (b) any engraving, etching, lithograph, woodcut, print, or similar work”.¹³

¹² Section 2(1), Copyright Act 1994.

¹³ Ibid.

In line with the EU Directive issued in 2001, British resale royalty right regulations define the works covered as “any work of graphic or plastic art such as a picture, a collage, a painting, a drawing, an engraving, a print, a lithograph, a sculpture, a tapestry, a ceramic, an item of glassware or a photograph”.¹⁴

The regulations also include art work made in limited editions as long as they have been made by the artist or under his or her authority. There is no upper limit on the number of items in an edition.

The range of art work covered in these regulations is not exhaustive but provides examples of the type of graphic or plastic (applied) art work covered. It therefore also applies to artistic works such as unique pieces of jewellery or furniture that have been created by a named artist. In referring to any work of artistic craftsmanship and to similar (graphic) work, section 2(1) of New Zealand’s copyright legislation is as permissive as overseas legislation in defining an art work to which a copyright might apply.

The British regulations do not, however, apply to works of architecture (including a building or a model for a building) even though these works are defined as artistic work under the Copyright, Designs and Patents Act 1988, Britain’s copyright legislation. It is proposed that this distinction also apply in the New Zealand context.

Under the EU Directive, only works of art fall within the scope of a resale royalty right. The Directive states a preference for harmonising across the EU member states the various categories of works of art subject to the right. A few member states have historically applied the right to original manuscripts of writers and composers but the Directive specifically excludes this as a category it seeks to harmonise. Consequently, the resale royalty right granted under British regulations does not apply to original manuscripts of writers and composers. It is proposed that this distinction also apply in the New Zealand context.

Under Article 14*ter* of the Berne Convention, an inalienable resale royalty right applies to both original works of art and to original manuscripts of writers and composers. This article is, however, optional and allows for variation between countries in terms of the extent of coverage. Countries that exclude original manuscripts from a resale royalty right should not, however, expect reciprocity in this category from countries that do include original manuscripts.

The subsequent exclusion by various jurisdictions of composers and writers from a resale royalty right is understood to be based on their having protection elsewhere in copyright legislation which compensates them each time their

¹⁴ From The Artist’s Resale Right Regulations 2006, UK Statutory Instrument 2006 No. 346 (Intellectual Property, Artists).

work is reproduced. The nature of visual art, however, does not easily lend itself to reproduction and a resale royalty right attempts to address this by recognising that the value of visual art is in the original, rather than in reproduction.

A total of 3600 works of art were sold at auction by New Zealand artists during 2006.¹⁵ While the vast majority of these works were paintings, other significant categories included prints, lithographs and photographs. While many of the categories of art work as defined by the Copyright Act may not come up at auction for sale regularly, if at all (for example, maps or charts), there does not appear to be any merit in distinguishing between these items (other than works of architecture) in the application of a resale royalty right. This aligns with international practice and avoids unnecessary debate about the relative value being accorded to different art forms.

Further information on sales of New Zealand artists at auction in 2006 is attached, as Appendix 3.¹⁶

Question 2: Do you agree that the range of works covered by a resale royalty right in New Zealand should be defined as any artistic or graphic work in which a copyright exists, including limited editions made by the artist or under his or her authority, but excluding works of architecture (such as a building or a model for a building) and excluding original manuscripts of writers and composers?

The Scope of a Resale Royalty Right Scheme

Should a resale royalty right be established in New Zealand, it is proposed that it apply to all auction houses, galleries, dealers and any other intermediary involved in the business of dealing in works of art. While accurately capturing information on sales of art work outside of the auction houses is difficult, it is an issue not confined only to New Zealand and should not necessarily preclude such work from the implementation of a resale royalty right.

Applying a royalty scheme across the art market would be similar to Britain's regulations and to the EU Directive, thus similar to a number of the countries to which New Zealand may offer reciprocity. Applying payment of a royalty across the market would capture resales from a variety of sources such as art auction houses, art galleries, art dealers, secondhand dealers and internet sites such as Trade Me. To apply the royalty only to certain sectors of the art market

¹⁵ Auction data has been obtained from the Australian Art Sales Index, a database of past auction results of more than 11,000 artists who have either lived or worked in Australia or New Zealand and offered work for sale in Australia or New Zealand over the last 35 years. The figure of 3600 items includes art work sold at auction in both New Zealand and Australia.

¹⁶ The definition of a New Zealand artist, for the purpose of this work, includes artists who were born or who have lived or worked in New Zealand. It also includes artists who were born or lived or worked elsewhere for lesser or greater periods of time. Typically, however, the work that sells in New Zealand is work that is associated with the period they spent in New Zealand. Similarly, work sold in Australia or elsewhere reflects the period spent there.

might distort any competition between these different areas, with some people in the business of selling art facing royalty obligations while others would not. It might also risk the relocation of art work sales, with resales shifting to the sector/s of the art market not subject to payment of a royalty.

Submissions to this discussion paper are invited to outline any particular consideration that may need to be given to the logistics of including outlets such as secondhand dealers. A number of secondhand dealers sell art work that could just as easily be sold at auction (and vice versa) although this work tends to be at the lower-value end of the market. Other secondhand dealers may sell very little art work or sell it at low prices. The cost of monitoring sales and collecting royalties from all secondhand dealers therefore may be prohibitively high. In Britain only works selling over a certain value qualify for the resale royalty right, thereby excluding much of the secondhand dealer market. Applying a similar sales threshold in New Zealand is discussed below.

There may also need to be consideration of alignment with compliance requirements under other legislation such as the Secondhand Dealers and Pawnbrokers Act 2004. This requires licensed secondhand dealers and internet auction providers to maintain records on particular articles. This is primarily to discourage criminal activity and to aid the police in the recovery of stolen goods. The current list of articles covered by the Act does not include art work but this could be amended by regulation.

The British regulations do not apply a resale royalty obligation to individuals who are not commercially trading art for a profit, in part due to the difficulties and consequent higher costs of monitoring any sales between private individuals.

Question 3: Do you agree that resale royalty obligations should extend to all auction houses, galleries, dealers and any other intermediary involved in the business of dealing in works of art? If not, to whom should it extend and why?

The Resale Royalty Rate

It is proposed that a resale royalty rate in New Zealand be set at 5% of the net resale price (that is, on the “hammer” or “ticket” price and excluding taxes, the buyer’s premium, and commission¹⁷). This rate is common overseas while a rate of at least this amount would assist the scheme’s viability in an art market the size of New Zealand’s.

¹⁷ When an art work is sold, the sales agent usually charges the buyer an additional premium based on a percentage of the “hammer” or “ticket” price of the work. An agent may also receive commission from the seller on this work which is also usually percentage-based. These charges can vary. In New Zealand they range between 10-15%, while overseas they can be as high as 20%.

Within the EU, there are a variety of resale royalty rates. While the EU Directive notes the desirability of harmonising these rates to the widest possible extent, it invites rather than requires this.¹⁸ The Directive supports a tapering scale of rates for work sold at various price levels. The idea of a tapering scale, ideally harmonised throughout the EU, is based on trying to reduce the risk of higher-value work in particular being relocated for resale to a country where there are lower, or no, resale royalty rates.

The EU Directive sets out the following tapered scale as its desired model:

<i>Portion of the sale price</i> ¹⁹	<i>Percentage amount</i>
From €0 to €50,000	4% ²⁰
From €50,000.01 to €200,000	3%
From €200,000.01 to €350,000	1%
From €350,000.01 to €500,000	0.5%
Exceeding €500,000	0.25%

This scale, adopted by Britain, is cumulative, which means that if a work is sold for €300,000, the royalty must be worked out on each portion and added together to make the total royalty payable (that is, 4% on the first €50,000, 3% on the next €150,000, and 1% on the remaining €100,000).

Most countries, however, have flat royalty rates, which range from 3% to 10% of the resale price or up to 25% of the increase in the value of the work since its previous sale. Predominantly, the schemes are based on a flat 5% of the net resale price.

It is simpler for art market intermediaries and collection agencies to work out the royalties due on a flat percentage system rather than a complex, portioned scale. The requirements are straightforward and better enable compliance and cost-saving measures such as the collection of royalty payments aggregated together into lump sums. Others involved in the art market, such as artists, buyers and sellers, also have a clearer understanding of resale royalty expectations.

¹⁸ Many EU member states had existing resale royalty schemes, prior to the EU Directive being issued in 2001. The Directive more particularly applies to those countries that did not have a scheme before 2001 and to countries without a scheme that subsequently became part of the EU.

¹⁹ The sale price upon which calculations are based is net of tax.

²⁰ The EU Directive enables member states to set a higher percentage amount on the “€0 to €50,000” portion, of 5% rather than 4%.

Of the 3600 items of work sold at auction last year by New Zealand artists, the vast majority (over 99%) were sold for less than \$100,000. Only nine works sold for between \$100,000 and \$200,000, and only three for over \$200,000. Even when the total value of all works sold for each artist last year are taken into account, fewer than 5% of artists reached the \$100,000 mark on a cumulative basis. This suggests that while a tapering system may be an option, in reality the relatively low resale prices for New Zealand art would see only the lowest portion of this scale and one percentage applied. In effect, this would operate like a flat percentage system.

More information on the cumulative sales of New Zealand artists is attached, as Appendix 4.

Question 4: Do you agree that a resale royalty rate should be set at a flat 5% of the resale price (that is, excluding sales tax, a buyer's premium and a commission)? If not, what might be a more appropriate rate?

Setting a Minimum Threshold Level on Qualifying Resales

Setting a minimum threshold means that the sale price of a work must reach this level before a royalty applies. The royalty is then payable on the full amount. The setting of a minimum threshold is intended to ensure that the costs of collection and distribution do not outweigh the value of the royalty payment. The Ministry's research suggests a threshold of \$500 may be appropriate in New Zealand.

The EU Directive has set an optional minimum threshold which enables member countries either to not set a threshold at all or to set one at any amount up to €3000. Britain opted to set a threshold at €1000 (approximately £680 or NZ\$1860 although, because the threshold is defined in Euros, these amounts will fluctuate depending on exchange rates). Other countries such as Germany and France have lower thresholds, of €400 and €15 respectively.

Based on New Zealand auction figures for 2006, a **threshold of \$100** would exclude more than 200 works by around 140 New Zealand artists (out of a possible total of 2800 works by 636 artists), but it would have a minimal impact on the overall pool of royalties across all artists.²¹ A **threshold of \$500** would exclude just over 750 works by nearly 400 artists, while a **threshold of \$1000** would exclude just over 1200 works by nearly 500 artists.

²¹ These estimates of royalties are based on a flat 5% resale royalty rate on work by living artists and artists who have been deceased for up to 50 years, with no upper cap on each royalty payment. The estimates do not include royalties for artists from other countries.

A **threshold of \$2000** (roughly the equivalent of the British level) would affect around the same number of artists as a \$1000 threshold but would significantly impact on the number of works and on the overall pool of royalties across all artists. Nearly 2000 works would be excluded, 55% of all works sold at auction. This would reduce the royalty pool across all artists by 11%.

A number of artists may sell some higher-value work and, therefore, would still receive a resale royalty payment of some kind (albeit a reduced amount should any of their other work fall below any threshold level). The work of many other artists, however, often does not sell for a particularly high value and, the higher any threshold, the greater the number of artists who may be totally excluded from a resale royalty scheme. This would particularly impact on emerging artists and those undertaking certain art forms such as photography, prints and ceramics which attract lower resale prices than other art forms.

Should a low threshold of \$100 be considered, the lowest resale royalty payment would be \$5.00 based on a flat 5% system (possibly reducing to \$3.75 if a 25% collection commission was charged²²) and would not be economical to collect or distribute. Should such a low threshold be considered it might need to be on the provision that royalties be collected from art market intermediaries on a periodic basis and cover all works by a range of artists sold in that period of time, thus reducing compliance and collection costs. Royalty payments to artists owed small amounts might need to be held back until they reached a cumulative level that became viable to distribute.

A higher threshold of \$500 may have the effect of eliminating most sales through secondhand dealers and others who are not art specialists. This is likely to reduce the scheme's administration and compliance costs. It would make little difference to the overall pool of royalties collected and would effectively focus resale royalty obligations only on the art market intermediaries for whom the resale of art work was a significant part of their business. A threshold higher than \$500 would further tighten the focus of resale royalty obligations but, on the other hand, would affect the overall pool of royalties collected and might reduce the benefits of a resale royalty right scheme in a market the size of New Zealand.

Further information on the effects of a threshold on sales of New Zealand artists at auction in 2006 is attached, as Appendix 5.

Question 5: Do you agree that a minimum threshold of \$500 should be set before a resale price attracts a royalty? If not, what should the minimum threshold be?

²² The cost of administering schemes overseas varies from 10-25% commission on the royalties collected, although in the initial implementation stages, commission in some countries has been as high as 40%.

Setting a Cap on the Total Amount of Royalties Due

Setting a cap on the total amount of royalties due on each resale is, in part, designed to balance the needs of artists with those in the professional art market sector and to avoid the relocation of high-value art work to jurisdictions without resale royalty schemes. It applies to each resale, not to the cumulative total of all resales for any one artist in a year.

The British regulations and the EU Directive stipulate a mandatory €12,500 cap on the total amount of royalties due on each resale. In New Zealand, a **cap set at \$25,000** (roughly the equivalent of the EU level) would have little impact, as it would only affect works selling for more than \$500,000.²³ Over the past ten years, only three works by a New Zealand artist have fetched a higher price than this at auction.

Based on New Zealand auction sales in 2006, a **\$10,000 cap per sale** (for work selling over \$200,000) would have reduced royalty payments on just two works by one New Zealand artist. This would have had a minimal effect on the total pool of royalties across all artists, reducing it by 5%.²⁴ The artist's estate, however, would have been disproportionately affected, with estimated royalties on sales of the artist's works dropping from just over \$75,000 (with no cap on a total of 20 sales) to around \$50,000 (with a \$10,000 cap applying to two of those sales).

A royalty **cap of \$5000 per sale** (for work selling over \$100,000) would have also impacted on few artists in 2006, with only eight works by four artists reaching this level. This would, however, have a greater impact on the total pool of royalties across all artists, reducing it by 15% (from nearly \$500,000 to just under \$420,000).

Further information on the effects of applying a cap to the total royalties due on sales of eligible work by New Zealand artists at auction in 2006 is attached, as Appendix 6.

A lower cap, and therefore a smaller pool of royalties to distribute, would have the potential to increase each artist's share of the scheme's administration costs. These costs would be deducted at a flat percentage rate from each royalty payment. Should there be a smaller pool of overall royalties, the amount going to the collection agency might not be enough to cover its administration costs. It might, therefore, have to increase the flat percentage rate charged on each royalty payment, which might particularly affect artists whose work sold for a lesser value. With a higher cap or no cap at all, a few

²³ This assumes a flat 5% royalty rate.

²⁴ These estimates of royalties are based on a flat 5% rate of sales at auction in this country by New Zealand artists who are living or who have died in the last 50 years, in line with the current copyright period on art work. The estimates do not include artists from other countries.

artists whose work sold for large amounts would keep the pool of overall royalties high enough to cover administration costs and thus keep the flat percentage rate deducted from all artists' royalty payments as low as possible.

Given that Australia currently has no resale royalty scheme, it is possible a cap might discourage the relocation of high-value art across the Tasman. In Europe and Britain, the level of the cap took into account the cost of insuring and freighting an art work to a location such as Switzerland or New York. Relocation costs between Australia and New Zealand are difficult to determine but, depending on the value and fragility of a particular work, could range from around \$500 to possibly \$10,000 per work.

The risk of relocation of New Zealand art may not, however, be particularly high. Despite the proximity of Australia and the greater number of investors and collectors, the market for New Zealand art appears to be focused locally rather than overseas. This applies equally to work sold in Australia by Australian artists where it was also thought that the risk of relocation would be minimal if a resale royalty right had been implemented.²⁵

Currently, nearly 90% of work sold at auction in Australasia by New Zealand artists is sold in this country. This proportion has remained overwhelmingly in the New Zealand art auction market's favour for at least the past decade.

The Protected Objects Act 1975 may further discourage the overseas relocation of particular art works. This Act regulates the export of protected New Zealand objects, including artistic objects such as fine, decorative, and popular art. It applies to work that is more than 50 years old, is related to New Zealand and not owned by its creator. Exporting work of this nature, either temporarily or permanently, requires the permission of the Chief Executive of the Ministry for Culture and Heritage.

Question 6: Do you agree that no cap should be set on the total amount of royalties due on each resale? If not, at what level should it be set?

Liability for Payment of a Resale Royalty

It is proposed that, should a resale royalty right be implemented in New Zealand, liability for payment of the royalty should jointly rest with the art market intermediary involved in the sale and the seller.

Under the EU Directive, the liability to pay a resale royalty lies with the seller or their art market agent (or intermediary) but member countries have the option to assign liability for payment elsewhere. Britain has taken up this option and assigned joint liability to both the seller and their agent (or, if the seller has no agent, to the buyer's agent or the buyer).

²⁵ *Report of the Contemporary Visual Arts and Craft Inquiry*, Rupert Myer, 2002.

In practice, resale royalty payments in Britain are collected from the agents (such as auction houses, galleries and others involved in the business of art). These agents then pass on the cost to the buyer at the same time as they pass on costs such as sales tax and a buyer's premium. Agents could opt to pass the costs on to sellers instead, or to absorb or split the costs. They have chosen not to, as sellers are thought to be more price-sensitive than buyers and may go elsewhere, either to other agents or to other countries.

Making a sales agent jointly liable with the seller strengthens compliance. An agent is more likely than a private individual to be aware of the requirement to pay a royalty and can advise clients at the time of the transaction. This is more likely to ensure payment and, in the event of non-payment, businesses would be easier to monitor and to pursue than a wide range of private individuals.²⁶

Prior to the implementation of a resale royalty scheme in Britain, concerns were expressed in relation to private details of individuals who buy and sell art, particularly high-value works, possibly being revealed. Under joint liability, agents do not have to reveal an individual's identity or other details, unless a collection agency has reason to doubt the authenticity of an agent's records or royalty returns.

Question 7: Do you agree that there should be joint liability for payment of a resale royalty between the art market intermediary involved in the sale and the seller? If not, who do you think should be liable for payment of a resale royalty?

Exemptions from a Resale Royalty

Acquisitions by Museums and Public Art Institutions

Comment is invited on whether royalty payment obligations in New Zealand should apply to museums and public art institutions. The British regulations, which mostly align to the EU Directive, do not apply the royalty payment obligation to acquisitions made by museums, on the basis that they are not-for-profit and are open to the public. This is to encourage the growth of public art collections and acknowledges that museums are already struggling to make acquisitions, due to funding constraints and the rapidly rising cost of art work.

A counter argument, however, is that a museum may be more likely to hold an art work for a longer period of time than an art investor or collector. This in effect would remove the art work from the market and deny the artist the right to benefit from any resale royalty for a considerable time. This would be further

²⁶ Penalties for non-compliance will be addressed at a later stage but will be congruent with the Copyright Act 1994.

compounded if there was an exemption from paying a royalty when the work was initially acquired (through resale). On the other hand, the public acquisition of an art work can increase an artist's reputation and the value of their other work and thus the level of any royalties due when these works are resold.

Should museums be exempt from royalty obligations in New Zealand, this exemption would include public art institutions funded by either central or local government and any public art institution with charitable status.

A resale royalty right is, in effect, a variation of rights that currently exist within copyright legislation, a variation that recognises the unique nature of visual art. Museums and public art institutions are subject to these other types of copyright, and to other obligations such as GST and a buyer's premium when buying art work. It is debatable whether a resale royalty ought to be considered any differently.

Question 8: Do you agree that acquisitions by museums and public art institutions should be subject to payment of a resale royalty? What arguments or evidence can you provide to support your view?

Acquisitions from Artists

It is proposed that a New Zealand resale royalty scheme should exempt the first resale of work acquired directly from an artist. British regulations exempt such resales provided the work was bought directly from the artist less than three years prior to its subsequent sale. This is similar to an option outlined in the EU Directive and recognises particularly the situation of art dealers and galleries who support emerging artists by being the first to buy their work. Under these circumstances, the regulations do not consider the dealer or gallery (or any other seller) to be undertaking a resale for the purposes of calculating a royalty. This is provided the resale value of the work does not exceed €10,000 (approximately £6800 or NZ\$19,000). This exemption is not limited to art dealers and galleries but does, in particular, recognise their support for emerging artists and their acquisition of stock to sell.²⁷

The exemption encourages buyers to support emerging artists particularly but counters concern that a resale royalty may adversely impact on the value of the first sale. Without an exemption, buyers might adjust downwards the price they were prepared to pay in order to compensate for any future resale royalty obligations they may face.

²⁷ The exemption only applies to work bought directly from the artist. It does not apply to work held on behalf of the artist and sold on commission.

Comment is invited to assist in identifying a sale price at which works sold in New Zealand might no longer qualify for this exemption. In an art market of New Zealand's size, a cut-off limit equivalent to €10,000 (around NZ\$19,000) may be too high. It is possible that the level of any exemption may be stated in regulations to legislation, to enable the amount to be adjusted over time.

Question 9: Do you agree that work purchased directly from an artist should be exempt from a resale royalty on the first resale of that work? If so, do you agree that an exemption should only apply if the resale takes place within three years of the work being purchased directly from the artist or do you think an exemption should apply for a longer or shorter period? Do you agree that an exemption should also only apply provided the work is resold for less than a certain amount? What should this amount be?

Duration of a Resale Royalty Right

It is proposed that, in New Zealand, a resale royalty right should be applied to the creator of a work of art and that royalties should be payable to living artists or their estates for as long as copyright exists in that work (that is, for 50 years from the end of the year of an artist's death). This aligns to overseas practice where the duration of a resale royalty right tends to align closely with the relevant copyright law. The application of "life plus 50 years" would also assist the viability of a scheme in a market the size of New Zealand.²⁸

While the British regulations do not stipulate a specific term, they do state that the resale right shall exist for as long as copyright exists in that work. Currently, this is 70 years from the end of the year of an artist's death. This approach applies throughout the EU, following a 1993 Directive to harmonise the term of protection of copyright and certain related rights. In Australia and in the US, the term of copyright protection is also "life plus 70 years".

As part of agreeing to the EU Directive on resale royalties, Britain (and other countries which previously did not have domestic resale royalty schemes) sought and obtained a derogation limiting its application to living artists only. This derogation is until 2010, although it can be extended to 2012 at the latest. The derogation means that, until at least 2010, legal beneficiaries of a deceased artist whose work is still protected by copyright cannot collect royalties on this work if it is sold in countries such as Britain and Ireland, where

²⁸ Should a decision ultimately be taken to establish resale royalty right, it would not be retrospective and, therefore, would not apply to resales of art work that took place prior to the establishment of a right. It would, however, apply to all resales of work that took place subsequent to the establishment of a right. This includes work by living artists and artists who died subsequent to the establishment of a right. It also includes work by artists who were deceased at the time of the right's establishment provided their work remained in copyright (that is, for 50 years from the end of the year of that artist's death).

the right only currently applies to living artists. They can, however, collect royalties on sales made in countries that already extend the right to both living and deceased artists (such as France, Germany and Italy).

The derogation was intended to counter fears that the British art market, the largest in Europe, might lose sales to places where royalties were not collected such as Switzerland and New York (the largest art market in the world). It was also intended to give the British art market sufficient time to adjust to the implementation of what was considered to be a major change.

In reality, the impact of the derogation is unclear, particularly as resale royalties do not appear to have had the feared detrimental effect on the British art market as a whole or on contemporary art sales in particular. Art auction sales at Sotheby's in Britain totalled more than £622 million in 2006, up from £544 million in 2005 prior to implementation of the regulations, and interest in modern and contemporary work remains strong.

Sales of New Zealand artists' work sold at auction in this country totalled nearly NZ\$12.5 million in 2006.²⁹ Of this amount, just over half (\$6.5 million) was for sales of just 25 artists, 12 of whom are still living.

Of the 13 deceased artists, 10 died within the previous 50 years, the period for which copyright in artistic and graphic works applies under New Zealand's legislation. Thus, if resale royalty rights were to exist in New Zealand on the basis of current copyright conditions ("life plus 50 years"), nearly 90% of the top 25 most-traded artists would be eligible. Of those, 55% would be living artists.

Most of the living artists featured in the top 25 for 2006 are well-established. It is debatable whether a resale royalty right ought to be considered in terms of who may or may not be more deserving; that is, an established artist who may or may not still be producing work and receiving an income (from first sales), an emerging artist whose work may not be resold for some time if at all, or the family of a deceased artist who may or may not have benefited from that artist's work during his or her lifetime. This distinction is not made elsewhere under copyright legislation where the proceeds of a right go to each creator or to their estate.

Should a resale royalty scheme be applied only to living artists, the estimated royalties would drop significantly and might impact on the sustainability of a resale royalty scheme in a market the size of New Zealand, in that the cost of administration might outweigh the benefits of distributing a smaller pool of

²⁹ These figures do not include sales at auction by non-New Zealand artists (which accounted for a further \$1.5 million in 2006).

royalties. Based on the figures above, which only apply to auction house sales, estimated royalties for living artists and those who have died in the last 50 years would total nearly \$285,000. If a royalty applied to living artists only, this estimate would drop to \$107,000.³⁰

Question 10: Do you agree that resale royalties should be payable to living artists and/or to those entitled under a deceased artist's estate for as long as copyright exists in that work (that is, "life plus 50 years")? What arguments or evidence can you provide to support your view?

Inalienability of a Resale Royalty Right

The inalienability of a resale royalty right means that while an artist is living, the right cannot be assigned to another person or entity. It is also unable to be waived; that is, the right will always be enforced on each eligible resale.

In both the British regulations and the EU Directive, resale royalty rights are inalienable. These provisions do not prevent an artist, upon death, transferring the right to the legal beneficiaries of their estate or those beneficiaries further transferring the right. Beneficiaries can include one or more persons or charity.

Inalienability particularly benefits artists at the beginning of their careers when they may be more susceptible to giving up their rights. Giving up copyright is often raised as part of first sales of an artist's work. Should a resale royalty right be assignable, it is possible that an artist may be relatively powerless to prevent a change of resale royalty right ownership becoming a condition of any first sale, along with copyright.

Question 11: Do you agree that a resale royalty right should be inalienable and unable to be waived or reassigned and that it apply to the creator regardless of whether or not the creator retains ownership of the copyright? What arguments or evidence can you provide to support your view?

Reciprocal Resale Royalty Rights

Resale royalty rights are covered in the Berne Convention for the Protection of Literary and Artistic Works but are optional rather than a compulsory minimum standard. The World Trade Organisation's Agreement on Trade Related Aspects of Intellectual Property Rights allows for reciprocity of intellectual property protection if similar rights are offered in the country of origin. This

³⁰ These estimates are based on a flat 5% resale royalty rate, with no minimum threshold on the sale price and no upper cap on each royalty payment. The estimates only include royalties for eligible artists in the top 25 most-traded New Zealand artists at auction in New Zealand in 2006 and are not an estimate of overall royalties.

means that foreign resale royalty right schemes can only be accessed by a country if its domestic law permits it, and only if it has a similar scheme open to nationals of the country from which the right is being claimed.

Britain has reciprocity with nationals of countries that are in the European Economic Area (including non-EU members) and also with various countries outside this zone that have similar schemes open to British nationals (see Appendix 1). These countries are listed in a schedule to the regulations, enabling other countries to be added as appropriate.

The EU Directive suggests, but does not require, that where reciprocity occurs with countries outside the European Community, this be on the basis that these countries offer reciprocity to all member states. It also allows member states the option of offering the right to both nationals and habitual residents. Britain declined to offer reciprocity based on residency to non-EEA nationals, as it decided this would be too difficult to determine.

New Zealand may wish to consider taking up the option of facilitating its nationals' access to similar schemes in particular countries, and of specifically enabling nationals of those countries to access a scheme in New Zealand. A list of qualifying countries could form part of regulations to copyright legislation, enabling other countries to be added as appropriate.

In 2006, work by New Zealand artists made up 88.5% of overall auction sales in this country. British artists made up less than 3% of sales, European artists less than 1% and Australian artists 1.5%. Six percent of sales were by artists whose nationality or country association was unknown. These proportions have remained similar for at least the past decade. It is, therefore, likely that the level of any royalties going offshore will be limited.

Question 12: Do you agree that a resale royalty right should be offered on a reciprocal basis to nationals of countries that have similar schemes and offer reciprocal rights to nationals of New Zealand? What arguments or evidence can you provide to support your view?

Resale Royalty Collection and Distribution

Collective or Individual Management

The collection and distribution of royalties in most countries is administered by government agencies or copyright collection agencies in return for a fixed fee or percentage of the royalty. The EU Directive notes that administration should be transparently and efficiently managed and enable artists or their representatives to obtain the necessary information to secure payment. It allows artists to pursue this information individually or collectively through a collecting society.

Britain chose to implement a compulsory collective management system. Resale royalties can only be pursued through a collection agency. Artists do not individually have the right to approach art market intermediaries for information or payment. In Britain, this approach was considered the most cost-effective in terms of administration and compliance, particularly for small-business operators. It enables lump-sum payments and bulk requests for information from a limited number of collecting societies compared to smaller requests from a large number of individuals. Collective management also preserves the privacy of those who buy and sell art, particularly those who invest in or collect high-value work.

Collective management rather than individual collection of royalties may offer stronger protection to artists, in that collection agencies commonly have sufficient resources and experience to ensure compliance and, if necessary, to pursue legal action. They can more easily monitor the sales of works whereas an artist may lose track of their work once the first sale is made, particularly if subsequent sales occur years later through other sources. It is also easier for a collection agency, rather than any individual or art market intermediary, to manage the rights of deceased artists and to track down legal beneficiaries.

Question 13: Do you agree that a resale royalty right scheme should employ a compulsory collective management system? If not, what might be a more appropriate way of collecting royalties?

Number of Collection Agencies

The British regulations allow for more than one collection agency. Artists who do not nominate a particular agency have their resale royalties collected by the agency that collects copyright royalties on their work.

In Britain, there was debate over whether there ought to be one or more collection agencies able to administer the right, including objections to any one agency having a monopoly. Having more than one agency may introduce an element of competition, particularly in terms of the percentage deducted from each artist's royalty. Equally, having more than one agency may mean all agencies facing greater costs and financial risk, charging higher commission rates and reducing the benefits of a resale royalty right for artists.

The Design and Artists Copyright Society (DACS) was the first to collect royalties in Britain but, after controversy over its commission rates, the Artists' Collecting Society was set up to collect royalties also. As a result, DACS's commission rates dropped from 25% to 15% on royalties collected domestically

and 10% to 0% on royalties collected from countries with reciprocating schemes.³¹ Further drops may be possible in time once actual costs can be better determined and set-up costs are no longer a factor.

In New Zealand, the only agency that currently collects copyright payments for New Zealand visual artists is Australia-based Viscopy. Viscopy has a working relationship with Artists Alliance, the New Zealand organisation set up to support professional visual artists. During consideration of a resale royalty scheme in Australia, Viscopy expressed interest in collecting resale royalties for visual artists.

There may also be other collection agencies interested in collecting resale royalties. These agencies, while not expressly set up for visual artists, have experience in administering the collection of other rights for other creators and have a network of reciprocal arrangements with overseas collecting agencies. They do not, however, have existing relationships in the art market sector and do not administer collection or payment in the way that a resale royalty right is managed elsewhere.

It is also possible that an existing government agency or statutory body may be an appropriate collection agency. In Belgium, for example, the royalty is collected by the Ministry of Culture.

Reference in this discussion paper to any particular agency should not be construed as indicating its interest or otherwise in the potential collection of resale royalties. Comment is invited as to which government agency, statutory body or non-government agency might administer the collection of resale royalties in New Zealand.

The cost of administering resale royalties in a market the size of New Zealand may be a key factor in determining its sustainability. Nearly \$9.5 million of sales at auction by New Zealand artists in 2006 would have been eligible under a resale royalty scheme, with estimated royalties of nearly \$500,000.³² Should a 15% commission rate be charged on these royalties, the amount collected for administration costs would be approximately \$75,000. Under a 20% rate, this would increase to \$100,000 and, under a 25% rate, to \$125,000.

These estimates are based on commission rates on royalties from auction sales only. Applying obligations across the art market will increase the level of

³¹ The difference between national and international collection costs is due to DACS's sister societies charging their own administration fees before forwarding proceeds to Britain.

³² This is based on a flat 5% system, with no cap and no threshold, and applicable to living artists plus those who have died in the last 50 years. It does not include royalties from other parts of the art market such as dealers and galleries, nor does it include resales of work by non-New Zealand artists.

royalties payable and thus the amount derived from the commission rate. It is, therefore, anticipated that the scheme could be self-sustaining.

Question 14: Do you agree that the collection of resale royalties should be administered by one agency? If not, how many agencies should be able to collect resale royalties? Which type of agency do you think may be the most appropriate to administer the collection of resale royalties? Do you have any specific agency or agencies in mind?

Enabling Legislation

Should a decision be taken to introduce a legal resale royalty right in New Zealand, legislation would be required. An alternative option could be a voluntary scheme but this may prove ineffective in terms of monitoring and collecting royalties and may adversely impact upon establishing reciprocal agreements with other countries.

The most appropriate vehicle for implementation would be amending the Copyright Act 1994. Other countries which have adopted or considered resale royalty rights have done so in relation to copyright or intellectual property legislation or regulations. This is reinforced by reference to resale royalty rights in the Berne Convention, the oldest international copyright protection treaty.

A resale royalty right is both an economic right, in that it provides an incentive to create and the ability to benefit from this creation, and a moral right, in that it recognises an ongoing relationship between a creator and the work. As is the nature of any right under copyright legislation, resale royalties will reward those creators who are most in demand and will provide an incentive for emerging creators to continue to produce works of art.

Question 15: Do you agree that a resale royalty right in New Zealand should be established by amendment to the Copyright Act 1994? If not, what other option might be more appropriate?

Question 16: Are there any other comments and/or evidence you wish to provide in support of your submission?

INVITATION TO COMMENT

Comment is now invited on the questions and options outlined in this discussion paper. Please refer to the template for responses which is attached to this discussion document.

Countries that Operate Artist's Resale Rights³³

The European Economic Area (EEA)	Countries outside the EEA whose nationals may enjoy resale rights
<p>Austria Belgium Cyprus Czech Republic Denmark Estonia Finland France Germany Greece Hungary Ireland Italy Latvia Lithuania Luxembourg Malta Netherlands Poland Portugal Slovak Republic Slovenia Spain Sweden United Kingdom Iceland* Liechtenstein* Norway*</p> <p><i>* These countries are in the EEA, but are not members of the European Union.</i></p>	<p>Algeria Brazil Bulgaria Burkina Faso Chile Congo Costa Rica Croatia Ecuador Guinea Iraq Ivory Coast Laos Madagascar Mali Monaco Morocco Peru Philippines Romania Russian Federation Senegal Serbia and Montenegro Tunisia Turkey Uruguay</p>

³³ From www.dacs.org.uk, the website of the Design and Artists Copyright Society.

Summary of Some Resale Royalty Schemes³⁴

Country	Rate	Coverage	Other features (where available)
Algeria	5% of resale value	Works of graphic or plastic art	Not available
Belgium	100 to 10000 FB – 2% 10000 to 20000 – 3% 20000 to 50000 – 4% 50000 + – 6%	Paintings, sculptures, drawings and engravings sold at public auctions	<ul style="list-style-type: none"> ▪ Inalienable right, extended to heirs and successors of the artist ▪ The Ministry of Culture collects the royalty ▪ The right is granted to foreign authors on the basis of reciprocity
Benin	5% of resale value	Graphic and plastic works of art	
Brazil	20% of the increase in price, relative to the immediately preceding sale	Art or manuscripts, either original or reproductions signed by the author	<ul style="list-style-type: none"> ▪ Inalienable right ▪ The National Copyright Council collects the royalty
Burkina Faso	Not available	Graphic and plastic works of art	
Cameroon	Not available	Graphic and plastic works of art sold by dealer or public auction	
Chile	5% of any increase in the price of the work	Paintings, sculptures, drawings, sketches	
Congo	Not available	Graphic and plastic works of art sold by dealer or public auction	
Costa Rica	5% of resale price	Graphic and plastic works of art sold by dealer or public auction	
Denmark	5% of resale price, over a specified minimum	Works of art, or authorised copies thereof	
Ecuador	5% of resale price	Works of art sold by dealers or public auction	

³⁴ From *Proposed Resale Royalty Arrangement Discussion Paper*, Department of Communications, Information Technology and the Arts, Australia, 2004.

A Resale Royalty Right for Visual Artists

Country	Rate	Coverage	Other features (where available)
France	3% on works sold for more than 100 Francs	"Fine art" – drawings, paintings, sculptures etc	<ul style="list-style-type: none"> ▪ Inalienable. Currently, inheritable for 70 years after the artist's death ▪ Most often collected by private collection societies
Germany	5% on works sold for more than DM500 ³⁵	Visual arts	<ul style="list-style-type: none"> ▪ Collected by the "Bild Kunst" society
Greece	5% of resale price	Original works of art, sold by art dealers or public auction	<ul style="list-style-type: none"> ▪ Inalienable right
Guinea	5% of resale price	Graphic and plastic works of art sold by dealer or public auction	
Hungary	5% of purchase price	Paintings, drawings, reproduced pictorial graphic works, sculptures, tapestries etc sold publicly	<ul style="list-style-type: none"> ▪ The "Art Fund" collects the royalty ▪ If the buyer is a museum, the royalty only applies if the author is still alive
Iceland	10% of resale value	Original works of art	<ul style="list-style-type: none"> ▪ Inalienable right ▪ Payable to the author, the author's heirs, or the "Artists' Copyright Fund"
Italy	A percentage of the amount by which the first public resale exceeds the original sale (percentage varies between 2 and 10%)	Paintings, sculpture, drawings, prints and original manuscripts sold publicly	<ul style="list-style-type: none"> ▪ Unclear whether the royalty is collected
Ivory Coast	Not available	Graphic and plastic works of art sold by dealer or public auction	
Luxembourg	3% of resale price over a specified minimum	Visual or plastic art sold by a dealer or public auction	<ul style="list-style-type: none"> ▪ Inalienable, and inheritable for 50 years after the author's death
Mali	Not available	Graphic and plastic works of art sold by dealer or public auction	
Morocco	5% of resale value	Graphic and plastic works of art sold by dealer or public auction	
Norway	3% of all public resales	Painting, sculpture, graphic art and drawing, original and signed by the artist	<ul style="list-style-type: none"> ▪ Returns to public fund for all artists

³⁵ In November 2006 Germany implemented the EU Directive into its domestic law. This reset Germany's rate to 4% on works sold for more than €400.

A Resale Royalty Right for Visual Artists

Country	Rate	Coverage	Other features (where available)
Peru	A percentage of any increase in value of the work fixed by mutual accord between the parties	Painting, sculpture, sketches and drawings sold publicly	
Philippines	5% of resale price or lease	Paintings, sculptures, and manuscripts of a writer or composer	
Portugal	6% of resale value	Original works of art	
Rwanda	Not available	Not available	
Senegal	5% of resale value	Graphic and plastic works of art sold by dealer or public auction	
Spain	3% of works sold for more than 300,000 pesetas	Plastic art sold at public auction, in a commercial establishment or through a dealer or agent	<ul style="list-style-type: none"> ▪ The party responsible for the sale is obliged to inform the author within 2 months ▪ Inalienable, and inheritable for 60 years after the artist's death
Turkey	An appropriate portion of the increase in value, not exceeding 10%	Artistic works and manuscripts	
Tunisia		Not available	
United States (California only)	5% of resale price over \$1000	Original painting, sculpture or work in glass	<ul style="list-style-type: none"> ▪ The United States does not have a national <i>Droit de suite</i> ▪ The Californian right extends beyond California only when the work is sold by a Californian vendor
Uruguay	25% of the increase in the value of the work	All categories of intellectual works	

Resale Royalties Based on Sales of New Zealand Artists at Auction in 2006

Total number of art works sold at auction by NZ artists ³⁶	3600
Number of NZ works that would have been eligible for a resale royalty right ³⁷	2800
Total number of NZ artists whose work sold at auction	801
Number of NZ artists who would have been eligible for a resale royalty right	636
Total value of art works sold at auction by NZ artists	\$14.17m
Total value of art works sold at auction by NZ artists in NZ only ³⁸	\$12.36m
Value of NZ work that would have been eligible for a resale royalty right	\$9.96m
Amount of resale royalties that would have been collected on behalf of NZ artists whose work sold in NZ ³⁹	\$0.498m
Amount of resale royalties that would have been distributed to NZ artists whose work sold in NZ (assuming a 15% collection agency commission)	\$0.423m
Amount of resale royalties that would have been distributed to NZ artists whose work sold in NZ (assuming a 20% collection agency commission)	\$0.398m
Amount of resale royalties that would have been distributed to NZ artists whose work sold in NZ (assuming a 25% collection agency commission)	\$0.374m

³⁶ Totals are based on work sold by all New Zealand artists at auction in both New Zealand and Australia. This includes all artists with either a current or past New Zealand association. It does not include sales from other sources such as dealer-galleries, secondhand dealers or the internet.

³⁷ Estimates of those eligible for a resale royalty right are based on work sold at auction in New Zealand only, and only by living New Zealand artists and those who died within the previous 50 years. These figures are estimates only, due to incomplete biographical details for some artists.

³⁸ As Australia does not currently have a resale royalty right, sales that take place in that country would not be eligible.

³⁹ These estimates are based on a 5% royalty rate, with no minimum threshold and no upper cap on each royalty payment. Sales through sources other than auction houses could more than double these estimates, based on informal assessments of the total size of the art market in NZ. Reciprocal agreements with other countries will also increase these figures although not significantly, given that most resales of NZ art currently occur in NZ.

Cumulative Sales of New Zealand Artists Whose Work Sold at Auction in 2006

Cumulative sales range ⁴⁰	Number of artists in this sales range
Over \$1.5m	1
Between \$1m - \$1.5m	0
Between \$500,000 - \$1.0m	1
Between \$250,000 - \$500,000	11
Between \$100,000 - \$250,000	25
Between \$75,000 - \$100,000	7
Between \$50,000 - \$75,000	16
Between \$25,000 - \$50,000	39
Between \$10,000 - \$25,000	78
Between \$5000 - \$10,000	70
Between \$1000 - \$5000	221
Between \$500 - \$1000	107
Between \$100 - \$500	175
Under \$100	50

⁴⁰ This is based on all sales by all NZ artists whose work sold at auction in 2006. It demonstrates cumulative totals; that is, the total amount of sales for all works by that artist in that year.

Applying a Minimum Threshold to Sale Prices of Eligible Work by New Zealand Artists at Auction in 2006⁴¹

Total number of eligible works	2800
Total number of eligible artists	636

Impact of a threshold set at \$100⁴²

Number of works excluded under this threshold	220
Number of artists affected under this threshold ⁴³	138
Value of sales excluded under this threshold	\$0.061m
Reduction in royalties affected under this threshold	\$0.003m

Impact of a threshold set at \$500

Number of works excluded under this threshold	840
Number of artists affected under this threshold	373
Value of sales excluded under this threshold	\$0.276m
Reduction in royalties excluded under this threshold	\$0.014m

Impact of a threshold set at \$1000

Number of works excluded under this threshold	1297
Number of artists affected under this threshold	475
Value of sales excluded under this threshold	\$0.584m
Reduction in royalties excluded under this threshold	\$0.029m

Impact of a threshold set at \$2000

Number of works excluded under this threshold	1969
Number of artists affected under this threshold	570
Value of sales excluded under this threshold	\$1.135m
Reduction in royalties excluded under this threshold	\$0.057m

⁴¹ This is based on a flat 5% resale royalty rate on work by living artists and artists who have been deceased for up to 50 years, with no upper cap on each royalty payment. The estimates do not include royalties for artists from other countries.

⁴² This means the sale price of an art work must reach this amount before a resale royalty right is triggered. The royalty is then payable on the full amount.

⁴³ Artists whose work is excluded under particular thresholds may still receive royalties should their other work sell for a higher amount (although the higher the threshold, the less this is so).

Applying an Upper Cap to the Total Royalties Due on Sales of Eligible Work by New Zealand Artists at Auction in 2006

Impact of a cap set at \$10,000 (for works selling over \$200,000)⁴⁴

Number of works affected by this cap	2
Number of artists affected by this cap ⁴⁵	1
Reduction in royalties due to this cap ⁴⁶	\$0.026m
Reduced overall total of royalties that would have been collected on behalf of NZ artists whose work sold in NZ	\$0.472m
Percentage drop in royalties collected	5.5%

Impact of a cap set at \$7500 (for works selling over \$150,000)

Number of works affected by this cap	5
Number of artists affected by this cap	2
Reduction in royalties due to this cap	\$0.057m
Reduced overall total of royalties that would have been collected on behalf of NZ artists whose work sold in NZ	\$0.441m
Percentage drop in royalties collected	11.5%

Impact of a cap set at \$5000 (for works selling over \$100,000)

Number of works affected by this cap	8
Number of artists affected by this cap	4
Reduction in royalties due to this cap	\$0.076m
Reduced overall total of royalties that would have been collected on behalf of NZ artists whose work sold in NZ	\$0.422m
Percentage drop in royalties collected	15%

⁴⁴ An upper cap applies to the total amount of royalties due on each resale. It does not apply to the cumulative total of all resales for any one artist in a year. Estimates are based on a 5% royalty rate, with no minimum threshold.

⁴⁵ Affected artists would still receive a royalty, up to the level of the cap. They would also receive full royalties for works that sold under the level at which a cap applies.

⁴⁶ This based on the total amount of royalties that would have been due with a 5% royalty rate, no lower price threshold and no upper royalty payment cap (that is, \$0.498m as per Appendix 3).