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# Artist resale right: an interpretation of new media art as original works of art in Kenya

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Artist Resale Right:

An Interpretation of New Media Art as Original Works of Art in Kenya

Ngurumi Andrew Waithumbi

Submitted in Partial Fulfilment of the requirements for the Degree of Master of Laws at  
Strathmore University



Strathmore law School

Strathmore University

Nairobi, Kenya

June, 2019

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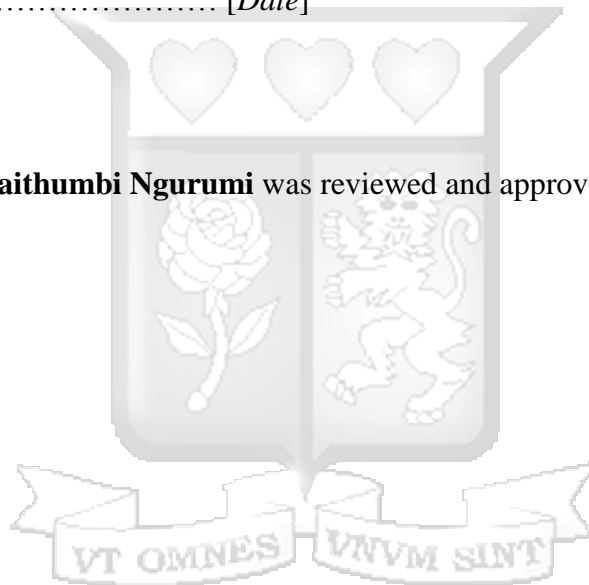
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## ABSTRACT

*Artist resale right* is intended to ensure that visual artists whose works are resold in the secondary market of art share in the increased value of their artwork. Visual artists share in the increased value of their work through receiving artist resale royalties. The resale royalties are a proportion of the price of the works of art in the secondary market. In order to ensure that visual artists in Kenya receive artist resale royalties, the Copyright (Amendment) Bill, 2017 (“the Bill”) set out the provisions for grant of artist resale right.

The Bill, provides that artworks eligible for artist resale right are original works of art. A non-exhaustive list on what original works of arts entail was initially set out but following further amendments this list was excluded. The Bill now provides that original works of art created by the artist or under their authority are eligible for artist resale right. At the same time the Bill provides that works of art produced in identical copies by artists or under their authority are not eligible for artist resale right. This implies that original works of art are defined as *the one and only physical embodiment*, as used traditionally in artist resale right legal frameworks. Thus visual artists creating identical copies of work of art are not able to receive royalties.

This research investigates whether the lack of a definition of “original works of art” in the artist resale right Bill will deny resale royalties to artists making new media art. A basis for exclusion of their works is that they exist in multiple identical copies. In so doing the finding of this project reveals that “original works of art” ought to be defined broadly as works created by the artist himself or under his authority within artist resale right legislation. A redefinition of “original works of art” will help ensure visual artists creating new media art will receive resale royalties.

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## LIST OF STATUTES

Copyright Act No 12 of 2001 (Kenya).

Copyright (Amendment) Bill, No. 33 of 2017 (Kenya).

Intellectual Property Code, 2016 (France).

Resale Royalty Right for Visual Artists Act 2009, No. 125, 2009.(Australia).



## LIST OF INTERNATIONAL INSTRUMENTS

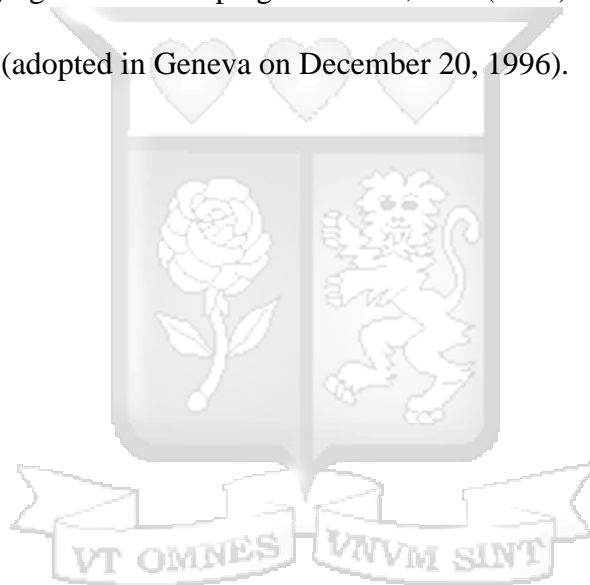
Berne Convention for the Protection of Literary and Artistic Works, 1883 (Paris Text, 1971).

Directive on the resale right for the benefit of the author of an original work of art, 2001/84/EC of the European Parliament and of the Council of 27 September 2001.

Proposed international artist resale right Treaty, 2015.

Tunis Model law on Copyright for Developing Countries, IGC (1971) /11/11.

WIPO Copyright Treaty, (adopted in Geneva on December 20, 1996).



## LIST OF CASES

Alternative Media Limited v Safaricom Limited [2005] eKLR

Faulu Kenya Deposit Taking Microfinance Limited v Safaricom Limited [2013] eKLR

Feist Publication, Inc., v Rural Telephone Service Co., 499 U.S 340 (1991).

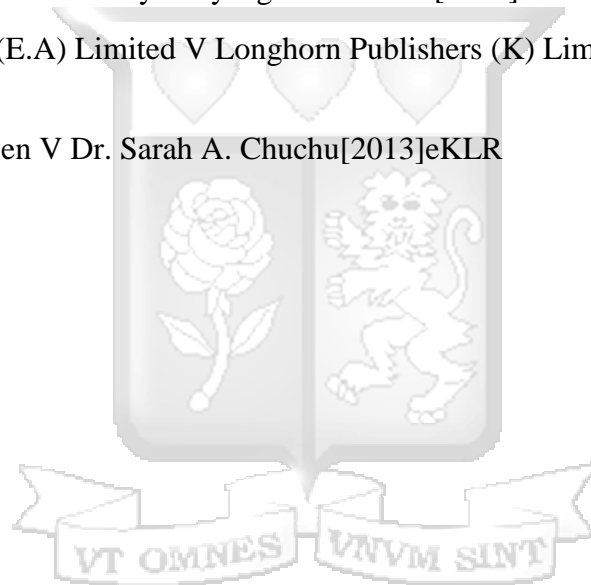
Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519 (2013).

Nevin Jiwani v Going Out Magazine & another [2002] eKLR

Nzele David Nzomo v Moses Namayi Anyangu & another [2018] eKLR

Oxford University Press (E.A) Limited V Longhorn Publishers (K) Limited & 4 Others [2010] eKLR

Rhoda Ondeng Wilhelmsen V Dr. Sarah A. Chuchu[2013]eKLR



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I dedicate this thesis to Dad, Mum, Kelvin, Loise, Jane, and my friends for their love and encouragement



# CHAPTER ONE

## ARTIST RESALE RIGHT

### 1.1 Introduction

*“Artists do not live on thin air. And because they enrich the world with their art, they should be protected. So it is fair that those who trade in their works pay them a share of what they earn. That is the purpose of the resale right: to share all forms of enrichment.”*<sup>1</sup>

The term *artist resale right* is based on the notion that an artwork has sustained value. Artists can could sell a work of art for a low price at a time when they are unknown and have little bargaining power.<sup>2</sup> At a later time, if the artist’s reputation grows, that painting may be resold for continually increased sums. The artist resale right enables the artist to claim a proportion of either the gross or net proceeds expected for a work when the current owner of the work subsequently sells it.<sup>3</sup>

The artist resale right is not waivable, in that the artist cannot sell a work of art and exclude a buyer’s obligation to pay a resale royalty through a contract. The right is also not assignable, in that the right to collect resale royalties in a given work cannot be voluntarily transferred from the artist to another person using contracts.<sup>4</sup> Artist resale right, however, follows the normal rules of succession of property, such that the artist’s heirs and representatives may benefit from resale royalties.<sup>5</sup> At the international level, grant of artist resale right is generally voluntary and the implementation between and amongst states is based on the principle of reciprocity.<sup>6</sup>

The benefits for an artist resale right are: first, to provide the artist with a reliable income stream; second, to empower artists by allowing them to share in the financial benefits attributed to the

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<sup>1</sup> Ousmane Sow, Senegalese Sculptor, ‘Artist’s Resale Right’ CISAC, EVA, GESAC (2014) 7.

<sup>2</sup> Bently. L and Sherman. B, ‘Intellectual Property Law’ Oxford University Press, 4<sup>th</sup> Edition (2014) 369.

<sup>3</sup> Hansmann H, ‘Royalties for Artists Versus Royalties for Authors and Composers,’ *John M. Olin Center for Studies in Law, Economics, and Public Policy Working Papers. Paper 250.* (2001) 1.

<sup>4</sup> Hansmann H, ‘Royalties for Artists Versus Royalties for Authors and Composers,’ 1.

<sup>5</sup> World Intellectual Property Organisation (WIPO), *Guide to the Berne Convention for the Protection of Literary and Artistic Works(Paris Act, 1971)*, 1978 at 91.

<sup>6</sup> Article 14ter of the Berne Convention for the Protection of Literary and Artistic Works Paris Act of July 24, 1971, as amended on September 28, 1979.

success of the work in order to effectively assert their interests and reduce instances of exploitation in the art market; third, to recognize and reward the link between the artist's reputation and the increased value of their work since the artist's creative labour contributed to their reputation; and fourth, to allow artists to benefit from reciprocal arrangements as a result of introducing artist resale royalties in different countries that are signatory to the Berne Convention.<sup>7</sup>

## 1.2 Background

In Kenya, artist resale right is set to be introduced under the Copyright (Amendment) Bill, 2017 ("the Bill") as a right of an artist or group of artists or successors to receive a royalty on the commercial resale of an artwork.<sup>8</sup> The subject matter for protection is original works of art or copies considered works of art in themselves.<sup>9</sup> The artist resale right enables artists to receive royalties based on a percentage of the resale price of an original work of art in the secondary market of art: that is where an art market professional resells the work at an auction house or a gallery.<sup>10</sup> It does not apply to resale of a work between individuals.<sup>11</sup>

The Bill<sup>12</sup> before the National Assembly had initially set out a list of original works of art as, "original works of art include batiks, carvings, ceramics, collages, drawings, engravings, fine art jewelry, glassware, lithographs, fashion design, paintings, photographs, pictures, prints, sculptures, graphics, weavings, or any other works as may be included by regulation and copies considered works of art."<sup>13</sup> However, the Bill passed by Parliament where this list of original works of art was set out was done away with before the being forwarded to Senate for further deliberations.

Currently, the Bill before the Senate provides for the term original work of visual art to refer to artworks as the subject matter of artist resale right, that is, "artwork means an original work of visual art created by an artist or artists, or produced under their authority." On the one hand in line

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<sup>7</sup> Commonwealth Department of Communications, Information Technology and the Arts, *Report of the Contemporary Visual arts and Craft Inquiry*, 2001, at 161.

<sup>8</sup> Section 2, Copyright (Amendment) Bill (No. 33 of 2017).

<sup>9</sup> Section 2, Copyright (Amendment) Bill (No. 33 of 2017).

<sup>10</sup> Section 2, Copyright (Amendment) Bill (No. 33 of 2017).

<sup>11</sup> Section 2, Copyright (Amendment) Bill (No. 33 of 2017).

<sup>12</sup> The Bill was published in the Kenya Gazette Supplement No. 142 of 2017 and passed by the National Assembly, with amendments, on July 25th, 2018.

<sup>13</sup> Section 2 of the Copyright (Amendment) Bill (No. 33 of 2017).

with the Berne Convention for the Protection of Literary and Artistic Works<sup>14</sup> (“the Berne Convention”), the Bill provides that the author of original works of art is eligible for artist resale right,<sup>15</sup> the Bill also states that, “artist resale right shall be valid as long as copyright continues to subsist in an original work of art.”<sup>16</sup> Thus all artworks produced by visual artists are eligible for artist resale right in Kenya.

On the other hand, the Bill provides that, “there shall be no resale royalty payable on commercial resale of an artwork... if the works of fine art produced are of identical copies.”<sup>17</sup> In this provision works of art existing in multiple copies are not eligible for artist resale right. Thus as in the Proposed International Treaty on droit de suite/resale royalty right for visual artists (“Proposed International Treaty”)<sup>18</sup>, the interpretation of original works of art could also be, “the first or original tangible or physical embodiment of the work.”<sup>19</sup> Thus artworks created by visual artists in multiple copies are not eligible for artist resale right in Kenya.

A definition of original works of art as the first or original tangible embodiment finds favour in critic Walter Benjamin’s position that “the presence of the original is the prerequisite to the concept of authenticity.”<sup>20</sup> When a painting, sculpture, or similar artistic product is original in terms of being a unique object, it derives its value exclusively from the knowledge that it is unique.<sup>21</sup> Thus the term original works of art is defined to denote works that are capable of existing as a tangible object that is unique: that is, the one and only embodiment. In so doing such works should be eligible for artist resale right. A question beckons, however: Are works of art created in the digital environment original works of art and hence eligible for artist resale right?

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<sup>14</sup> Paris Act of July 24, 1971, as amended on September 28, 1979.

<sup>15</sup> Article 14ter of the Berne Convention for the Protection of Literary and Artistic Works Paris Act of July 24, 1971, as amended on September 28, 1979.

<sup>16</sup> Section 15 (26D) (1), Copyright (Amendment) Bill (No. 33 of 2017).

<sup>17</sup> Section 15 (26D) (6) (d), Copyright (Amendment) Bill (No. 33 of 2017).

<sup>18</sup> Academic Study Prepared by Sam Ricketson, June 2015, 8.

<sup>19</sup> Academic Study Prepared by Sam Ricketson, June 2015, 8.

<sup>20</sup> Benjamin W, ‘The Work of Art in the Age of Mechanical Reproduction’ (1935)

<http://www.arthistoryarchive.com/arthistory/modern/The-Work-of-Art-in-the-Age-of-Mechanical-Reproduction.html>

<sup>21</sup> Hauser R, ‘The French Droit de Suite: The Problem of Protection for the Underprivileged Artist under the Copyright Law,’ *Copyright Society U.S.A.* (1959) 94.

The digital environment and the internet at large has affected the art world in ways that photography changed 20th century painting.<sup>22</sup>In photography, for instance, there is no original moment expressed in material form, provided quality is high, it is impossible to distinguish an original print from the other copies.<sup>23</sup> In computer works there is actually no original out there, but rather a user not the real author or producer brings the work into life on machines as a reproduction.<sup>24</sup> The concept that computer works are reproductions is enunciated in the WIPO Copyright Treaty<sup>25</sup> in the provision, “the storage of a protected work in digital form in an electronic medium constitutes a reproduction.”<sup>26</sup>

In the age of computers and the internet artists use them as mediums to create artworks referred to as new media art: consisting of internet Art, virtual reality, robotics and agents, artificial life forms, digital art and plurimedia/multimedia art.<sup>27</sup>New media art is considered to have fluidity, intangibility, “liveness”, variability, replicability, connectivity, interactivity, computability and chance.<sup>28</sup> Such artworks had long been sidelined in the discourse of contemporary art, but are now taking centre stage.<sup>29</sup>For instance, in the Circle Art Auction, 2015, Lot 18 Antony Kaminju a Kenya visual artist, sold his photographic digital print in the auction for Ksh 211,320.00.<sup>30</sup> Additionally, Kenyan born, Paris, France based visual artist Evans Mbugua exhibited his digital artwork prints at Circle Art Gallery in the exhibition Spectacular Now, 2019.<sup>31</sup> In the event that the works, though existing in identical copies, are resold in an auction such artists ought to receive artist resale royalties.

### 1.3 Problem Statement

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<sup>22</sup> Vincent A, ‘How has the internet changed art?’ 1<sup>st</sup> October 2014 <https://www.telegraph.co.uk/culture/art/art-features/11130492/How-has-the-internet-changed-art.html>

<sup>23</sup> Bowrey K, ‘Copyright, Photography and Computer works- the fiction of an original expression,’ *UNSW Law Journal*, Volume 18 (2) (1995) 282.

<sup>24</sup> Bowrey K, ‘Copyright, Photography and Computer works- the fiction of an original expression,’ 279.

<sup>25</sup> Adopted in Geneva on December 20, 1996.

<sup>26</sup> Agreed Statement concerning Article 1(4), WIPO Copyright Treaty, adopted in Geneva on December 20, 1996.

<sup>27</sup> Morris S, ‘Museums & New Media Art’ A research report Commissioned by the Rockefeller Foundation, (2001), 9.

<sup>28</sup> Morris S, ‘Museums & New Media Art’, 9.

<sup>29</sup> Farago J, ‘How much has the internet changed the art world’ 26<sup>th</sup> March 2014 <http://www.bbc.com/culture/story/20140326-how-has-the-internet-changed-art>

<sup>30</sup> <https://artauctioneastafrica.com/auction-lots/lot-18-2015/>

<sup>31</sup> <https://www.circleartagency.com/online-gallery/exhibitions/recent-exhibition/a-spectacular-now/>

Generally, artist resale right applies where copyright subsists in the original works of art. These original works of art are artworks created by the artist or under their authority. Thus all artworks are eligible for artist resale right. The Kenya Copyright (Amendment) Bill explicitly provides that works of fine art produced in identical copies are excluded from receiving artist resale right. This implies that the term “original works of art” under the Bill also adopts the historical interpretation that such works are the one and only physical embodiment. The effect of this interpretation is to essentially create ambiguity and deem visual artists creating new media art ineligible from receiving artist resale royalties. This is a huge problem as the application of an anachronistic concept of original works of art that precludes knowledge or recognition of the value of digital artworks at a high level and the necessary protections for the artist who produce them.

#### **1.4 Justification and Significance**

The main justification for this study is that there is scarcity of literature analysing the legal framework in relation to eligibility of artist resale royalties in new media art in Kenya. In particular, there is no local study that has to date been undertaken with a view to identify gaps and suggest possible legislative and policy interventions in Kenya. Therefore it is expected that the findings of this thesis will contribute to legal knowledge in the area of artist resale right in new media. Such knowledge could be utilized by legal practitioners, policy makers and key stakeholders keen on ensuring that visual artist receive royalties from their works of art.

The study is significant in that it identifies and addressed several important shortcomings in the proposed Kenyan legal framework for artist resale right in respect to new media art to receive royalties. The study benchmarks comparatively against Australia and France as countries that allow visual artist creating new media art to receive royalties. It seeks to spur further scholarly investigations into other legal provisions relating to the artist resale right that may have shortcomings.

#### **1.5 Statement of objective**

The core objective of this research project is to analyse the proposed legal provisions relating to works covered under artist resale right and determine the extent to which the interpretation of the

term “original works of art” allows visual artists creating new media art to receive artist resale royalties in Kenya.

In this regard, there are two specific research objectives in this project, namely:

1. To review and examine the proposed legal framework on artist resale right in Kenya with a view to identify the gaps in the statutory provisions for interpreting the term original works of art.
2. To identify and discuss key legal provisions on the interpretation of the term original works of art from France and Australia that may be used as best practices while legislating for artist resale right in new media art in Kenya.

## 1.6 Literature Review

The works of art eligible for artist resale right date back to France with the enactment of *droit de suite* or artist resale right law. These works were enumerated in the Copyright Act, 1920, which allowed artists to claim a percentage of the gross sales price received on each public sale of their works provided that the given work was original.<sup>32</sup> The term original was not defined but was conceived to exclude a reproduction.<sup>33</sup> Similarly in France’s 1957 amendment to the Copyright Act, the new provisions did not define the term original.<sup>34</sup> Due to the lack of a definition of original in the provisions on artist resale right, in its application original works were taken to mean paintings, sculptures, and illustrated manuscripts to the exclusion of works that afford the artist gain by virtue of their reproduction and large scale sale.<sup>35</sup> While *droit de suite* applied to paintings, sculptures, and illustrated manuscripts, a difficulty ensued in the case of lithographs, engravings, woodcuts, medals, jewelry and other objects that were generally mechanically produced in quantity for sale.<sup>36</sup>

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<sup>32</sup> Hauser R, ‘The French Droit De Suite: The Problem of Protection For The Underprivileged Artist Under The Copyright Law’ 98.

<sup>33</sup> Hauser R, ‘The French Droit De Suite: The Problem of Protection For The Underprivileged Artist Under The Copyright Law’ 98.

<sup>34</sup> Hauser R, ‘The French Droit De Suite: The Problem of Protection For The Underprivileged Artist Under The Copyright Law’ 98.

<sup>35</sup> Hauser R, ‘The French Droit De Suite: The Problem of Protection For The Underprivileged Artist Under The Copyright Law’ 112.

<sup>36</sup> Hauser R, ‘The French Droit De Suite: The Problem of Protection For The Underprivileged Artist Under The Copyright Law’ 98.

The support for artist resale right in paintings, sculptures, and illustrated manuscripts as works, according to Reddy, is based on a notion that such works are original in their one and only perfect embodiment hence assuming a special quality that has no equivalent in other fields.<sup>37</sup> Original works of art are assumed to be a quality that cannot be matched even by the best reproduction.<sup>38</sup> This one and only embodiment is a considered the source of artistic enjoyment by the art market participants.<sup>39</sup> Through resale of the work, new users of this one and only work share in the intrinsic value of the original works.<sup>40</sup> The artist resale right in turn affords the artist a share in the increased value of their work in that one and only embodiment.<sup>41</sup>

Despite the case for granting artist resale right to visual artists who produce unique works like painting and sculpture considered original work of art, Price notes that concept of an original work is itself obsolete as a basis for artist resale right since artists are diversifying from such concrete and unique one and only physical embodiments of their creative works.<sup>42</sup> The creation of works in multiple copies, due to the proliferations of the industrial techniques, has considerably weakened the concept of an original as the one and only embodiment.<sup>43</sup> In photography, for instance, it is impossible to distinguish an original print from the other copies.<sup>44</sup> Thus, according to Price, “the rude intrusion of technology into the craft of the parlour and the rampant extension of the artistic imagination renders obsolete such notions as paintings, originals, authentic.”<sup>45</sup>

Noting the impact of new technology in the creation of visual art, the United States Copyright Office is making a case for artist resale right legislation, pointed out that, “as the market expands, both in popular appeal and in the creation of art forms that are more suitable to production in a meaningful number of copies or multiples, more artists may see benefits under the existing law.”<sup>46</sup> Under the Copyright Office recommendation, artworks subject to resale royalties are referred to

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<sup>37</sup> Reddy M, ‘The Droit de Suite: Why American Fine Artists Should Have a Right to a Resale Royalty,’ *Loyola of Los Angeles Entertainment Law Review* (1995) 517.

<sup>38</sup> Reddy M, ‘The Droit de Suite: Why American Fine Artists Should Have a Right to a Resale Royalty,’ 517.

<sup>39</sup> Reddy M, ‘The Droit de Suite: Why American Fine Artists Should Have a Right to a Resale Royalty’ 518.

<sup>40</sup> Reddy M, ‘The Droit de Suite: Why American Fine Artists Should Have a Right to a Resale Royalty’ 518.

<sup>41</sup> Reddy M, ‘The Droit de Suite: Why American Fine Artists Should Have a Right to a Resale Royalty’ 518.

<sup>42</sup> Price M, ‘Government Policy and Economic Security for Artists: The Case of the Droit de Suite,’ *The Yale Law Journal*, Vol. 77, No. 7 (1968) 1340.

<sup>43</sup> Price M, ‘Government Policy and Economic Security for Artists: The Case of the Droit de Suite’ 1341.

<sup>44</sup> Bowrey K, ‘Copyright, Photography and Computer works- the fiction of an original expression,’ 282.

<sup>45</sup> Price M, ‘Government Policy and Economic Security for Artists: The Case of the Droit de Suite’ 1365.

<sup>46</sup> Office of the Register of Copyrights, US Copyright Office Report, ‘Resale Royalties: An updated analysis,’ (2013) 69

as works of visual art<sup>47</sup> as defined in Section 101 of the Copyright Act.<sup>48</sup> The proposal to reevaluate visual art as defined within the Copyright Act raised concerns on the difference in treatment of “unique” works and works which numerous copies are made. As Lazerow has pointed out, “for resale royalty purposes, there is a significant difference between paintings and drawings on the one hand, which are usually unique, and sculptures, of which numerous copies are often made. Sculptures are only included in the definition of “work of visual art” if there are 200 or fewer in number, consecutively numbered by the artist, and bear either his signature or his mark. One of the first questions that Congress needs to confront is whether a work that is not unique deserves to generate resale royalties.”<sup>49</sup> In the digital environment there are possibilities of producing innumerable copies of a work of art.

New technology in visual art makes use of not only industrial techniques but also the digital medium on computers or the internet to create art.<sup>50</sup> Such works created using the computer seemingly do not constitute an original since it is the user who brings the work into life on machines in the form of a reproduction.<sup>51</sup> The incorporation of the user to bring out the copy further blurs the boundaries of an original work.<sup>52</sup> In sum the very essence of works made in the digital medium is in the form of a copy rather than an original.<sup>53</sup> Therefore, limiting the parameters of artist resale right to original works of art being the one and only embodiment, legislators potentially disincentivize new media artists from creating new art because of the threat of unauthorized copying, especially because their copies can be a perfect substitute for the original.<sup>54</sup>

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<sup>47</sup> Section 101 of the Copyright Act defines work of visual art as

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

<sup>48</sup> Office of the Register of Copyrights, US Copyright Office Report, ‘Resale Royalties: An updated analysis,’ (2013) 76

<sup>49</sup> Lazerow H, ‘Art resale royalty options,’ University of San Diego *Law Faculty Works*. 7. (2015) 5.

<sup>50</sup> Mucinskas K ‘Moral Rights and Digital Art: Revitalizing the Visual Artists’ Rights Act?’ *Journal Of Law, Technology & Policy* (2005) 294.

<sup>51</sup> Bowrey K, ‘Copyright, Photography and Computer works- the fiction of an original expression,’ 279.

<sup>52</sup> Mitran A, ‘Royalties Too?: Exploring Resale Royalties for New Media Art,’ *Cornell Law Review* (2016) 1352.

<sup>53</sup> Mucinskas K ‘Moral Rights and Digital Art: Revitalizing the Visual Artists’ Rights Act?’ 309.

<sup>54</sup> Mitran A, ‘Royalties Too?: Exploring Resale Royalties for New Media Art’ 1365.

## 1.7 Hypothesis

Visual artists creating digital art, multimedia art, and video art in Kenya will not be able to receive artist resale royalties as proposed in the Copyright Amendment Bill, 2017 because their works are not considered “original works of art.”

## 1.8 Research Questions

- i. What is the definition of “original” under the amendment Bill and the Copyright Act?
- ii. How does the definition of original in the artist resale right provisions and Copyright Act impact visual artists creating new media art?
- iii. How can Kenya benefit from France and Australia experience in legislating for new media art as eligible works of art for artist resale right?

## 1.9 Theoretical Framework

### 1.9.1 Economic Theory

Under economic theory of intellectual property, artists are encouraged to create more through provision of incentives in the form of rewards to those who create socially beneficial goods.<sup>55</sup> The reward system is designed to benefit those who create works considered of great utility to the society.<sup>56</sup> Such rewards are meant to incentivize artists to continue creating works of art.<sup>57</sup>

The increase in value of works of art is attributed to the artist being the author of a work. This increase in the value of the work is considered a positive externality borne as a result of the establishment of the artist’s name and reputation.<sup>58</sup> The artist resale right then allows the artist to possess an interest in the future value of a work and also act as an incentive to maintain the value.<sup>59</sup>

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<sup>55</sup> O'Dwyer A, 'The Artists' Resale Right: "The Greatest Good"?' *Edinburgh Student Law Review Volume III, Issue 2* (2017) 131.

<sup>56</sup> Fisher W, 'Theories of Intellectual Property' (1999) 9.

<sup>57</sup> Hansmann H and Santilli M, 'Royalties for Artists *versus* Royalties for Authors and Composers' 265.

<sup>58</sup> Dilmaghani M, 'Visual Artists' Resale Royalty: An Application of The Principal And Agent Model' *Review of Economic Research on Copyright Issues*, (2008), 37.

<sup>59</sup> Solow J, 'An Economic Analysis of the Droit de Suite' *Journal of Cultural Economics* (1998) p.211.

Such an artist is incentivized to create a significant body of work to enhance their reputation and thereby increase the amount they receive in royalty payments.<sup>60</sup> Further, the residual interest in early works provided by the resale royalty gives the artist an incentive to maintain the value of those works that would be absent without the royalty.<sup>61</sup> Thus artist resale right is justified as it encourages creation and also since the artist is the author of the work, they are considered responsible for the increase in value of their works.<sup>62</sup>

## 1.10 Conceptual Framework

### 1.10.1 Starving Artists Rationale

Historically, resale royalty rights, also known as *droite de suite*, emerged, in France to address the issues of extreme poverty and weakness of artists in comparison with the wealth and wellbeing of their buyers.<sup>63</sup> This led to artists having a low bargaining power in contrast with art dealers and collectors in the initial sale of their artworks.<sup>64</sup> Artist resale rights were granted to artists to allow them to share in the increased value of their artworks after a resell of their artworks in astronomical values.<sup>65</sup>

The starving artists' rationale for granting artist resale right was considered a "myth" since resale royalties solely benefit successful and esteemed artists.<sup>66</sup> Additionally, it has been argued that artist resale rights do not fully address the imbalance between the interactions of visual artists and collectors.<sup>67</sup> The availability of artist resale rights, however, has enabled young artists to work on their careers to the level of successful artists and eventually their artistic efforts would be rewarded through resale royalties.<sup>68</sup> Artist resale royalties have been a way of redistribution of income

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<sup>60</sup> Turner S, 'The Artist's Resale Royalty Right: Overcoming the information *Problem*' *UCLA Entertainment Law Review* (2012) p.345.

<sup>61</sup> Solow J, 'An Economic Analysis of the *Droit de Suite*,'211.

<sup>62</sup> Bently. L and Sherman. B, 'Intellectual Property Law' Oxford University Press, 4<sup>th</sup> Edition (2014) 369.

<sup>63</sup> Price M, 'Government Policy and Economic Security for Artists: The Case of the *Droit de Suite*'1335.

<sup>64</sup> Price M, 'Government Policy and Economic Security for Artists: The Case of the *Droit de Suite*'1335.

<sup>65</sup> Price M, 'Government Policy and Economic Security for Artists: The Case of the *Droit de Suite*'1335.

<sup>66</sup> Merryman J, 'The Wrath of Robert Rauschenberg.' *The American Journal of Comparative Law*, Vol 41, (1993) 109.

<sup>67</sup> Rub G, 'The unconvincing case for Resale Royalties' *The Yale Journal Forum*, (2014) 6.

<sup>68</sup> Hansmann H and Santilli M, 'Royalties for Artists Versus Royalties for Authors and Composers,' 7.

among successful artists and even younger artists, thus providing favourable incentives for possibly strong, though young, artists to enter into the profession and persist.<sup>69</sup>

In addressing the issue of whether artist resale right benefits artists, the US Copyright Office has noted that successful visual artists will benefit but further contended that, “artist resale right cannot be the only solution to the challenges faced by visual artists.”<sup>70</sup> Thus artist resale rights is one of the mechanisms through which visual artists challenges can be addressed.

### **1.10.2 Discrimination against Visual Artists Rationale**

Exclusive rights under copyright law are available to all authors such as visual artists, musicians, writers and film makers. Visual artists, however, are not able to fully exploit those exclusive rights.<sup>71</sup> This was so since traditionally artworks, such as paintings, were only produced once hence reproduction rights would not apply to visual art in the same way as books that are produced in multiple copies.<sup>72</sup> A sale of a traditional artwork is a single final occurrence and the copyright legal framework does not offer alternatives for obtaining benefits of a continued monetary stake in future sales and resale of the artwork.<sup>73</sup> This is referred to as the premium on uniqueness, which does not allow artist to benefit from derivatives or reproductions.<sup>74</sup> The inability to fully benefit in future reproductions of a work in the case of visual artist was deemed to be discriminatory.<sup>75</sup> In so doing artist resale rights were granted to address the inherent discrimination in copyright law.<sup>76</sup>

In the case of novelists and their publishers, along with song writers, every purchaser gets the same work, for the same value as the original, despite millions of downloads, and the author is rewarded for each transaction.<sup>77</sup> In visual art, at least in its old conception, there is “but one painting, drawing, print, or sculpture and one purchaser,” and therefore visual artists are limited to one monetary interest and in some cases this interest accrues in a few limited editions of the work, as

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<sup>69</sup> Hansmann H and Santilli M, ‘Royalties for Artists Versus Royalties for Authors and Composers’, 7.

<sup>70</sup> Office of the Register of Copyrights, *Resale Royalties: An updated Analysis*, 2013, at 78.

<sup>71</sup> Office of the Register of Copyrights, *Resale Royalties: An updated Analysis*, 2013, at 10.

<sup>72</sup> Office of the Register of Copyrights, *Resale Royalties: An updated Analysis*, 2013, at 10.

<sup>73</sup> Price M, ‘Government Policy and Economic Security for Artists: The Case of the Droit de Suite’, 1343.

<sup>74</sup> Schten A, ‘No more starving artists: Why the art market needs a universal artist resale royalty right,’ *Notre Dame Journal of International & Comparative Law*: Vol. 7 : Iss. 1 , Article 6. (2017) 117.

<sup>75</sup> Price M, ‘Government Policy and Economic Security for Artists: The Case of the Droit de Suite’, 1343.

<sup>76</sup> Price M, ‘Government Policy and Economic Security for Artists: The Case of the Droit de Suite’, 1343.

<sup>77</sup> Office of the Register of Copyrights, *Resale Royalties: An updated Analysis*, 2013, at 10.

in a series of numbered prints or sculptures.<sup>78</sup> Over time, however, the uniqueness of an artist's work tends to enjoy appreciation in value more than other artists.<sup>79</sup> The benefits, however, accrue to collectors or investors other than the original artist.<sup>80</sup> A resale right enables artists to benefit in whatever way possible from the rising value of their work.<sup>81</sup>

Further, a work of visual art often exists only in a single copy. Upon sale of that unique work first sale doctrine prevents artists in sharing in the increased value of their works the way composers, playwrights and choreographers are able to.<sup>82</sup> By contrast, a literary author may sell rights to their novel to a publisher, sell the right to create a screen play to a writer, or sell the right to create a motion picture from the screen play. In each of this stages the author will earn income from the original book without having to write another book or restrict the number of books available in the market for purchase.<sup>83</sup> The situation for most visual artists is that they earn little or no income from other uses besides the original use and they are likely to remain excluded from any income of their work's appreciation.<sup>84</sup> Thus visual artists have been forced to live off initial or primary market sales of their original works, which are value based on singularity, scarcity and the reputation of their creators.<sup>85</sup>

Under copyright law, a visual artist is expected to recoup the full expected value of their artwork in the initial sale of that particular work.<sup>86</sup> Additionally, visual artists, unlike other authors, are excluded from the most significant profits a particular copy of a work may generate over time, which is a form of discrimination.<sup>87</sup> A resale royalty is enacted to enable all visual artists get benefits proportional to the general success of their work in the market place be it in the primary market or in the secondary market.<sup>88</sup>

### **1.10.3 Appreciation in Value Rationale**

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<sup>78</sup> Office of the Register of Copyrights, *Resale Royalties: An updated Analysis*, 2013, at 10.

<sup>79</sup> Schten A, 'No more starving artists: Why the art market needs a universal artist resale royalty right,' 117.

<sup>80</sup> Office of the Register of Copyrights, *Resale Royalties: An updated Analysis*, 2013, at 11.

<sup>81</sup> Schten A, 'No more starving artists: Why the art market needs a universal artist resale royalty right,' 117.

<sup>82</sup> Office of the Register of Copyrights, *Resale Royalties: An updated Analysis*, 2013, at 11.

<sup>83</sup> Office of the Register of Copyrights, *Resale Royalties: An updated Analysis*, 2013, at 11.

<sup>84</sup> Office of the Register of Copyrights, *Resale Royalties: An updated Analysis*, 2013, at 11.

<sup>85</sup> Office of the Register of Copyrights, *Resale Royalties: An updated Analysis*, 2013, at 32.

<sup>86</sup> Rub G, 'The Unconvincing case for Resale Royalties' *The Yale Journal Forum*, (2014) 6.

<sup>87</sup> Office of the Register of Copyrights, *Resale Royalties: An updated Analysis*, 2013, at 32.

<sup>88</sup> Office of the Register of Copyrights, *Resale Royalties: An updated Analysis*, 2013, at 32.

Artist Resale Right is justified as it encourages creation and the artist as the author of the work, is considered responsible for the increase in value of the work.<sup>89</sup> Prowda proposes that the artist, having created the work, is intrinsically entitled to a stake in its appreciated value.<sup>90</sup> The royalty provides a mechanism through which the artist can share in the realization of the latent value of the artwork and thus have an incentive for creativity.<sup>91</sup> Artists deserve to share in the economic appreciation of their output because they created it and are deserving of such a stake.<sup>92</sup> Therefore if prices increase the artist is morally entitled to share in the proceeds of the work and when prices decrease it is morally inappropriate to hold artists accountable.<sup>93</sup>

It is important to note that an increase in an artwork's value cannot be solely be used to justify artist resale right since, first, resale proceeds are based on market driven resale price and not intrinsic value in the artwork.<sup>94</sup> Second, any increase in the resale price can be attributed to both the artists for continuing to create a body of highly regarded work as well as activities of dealers who bought and sold the work in the secondary market.<sup>95</sup> Third, the owner of a work of art is expected to share the profits while he is the only one to bear the losses, which is replacing one injustice with another.<sup>96</sup> Granting, artist resale right would provide means through which authors who invest time and labour in producing works of art can recoup their investment and reap a profit proportional to the popularity of their work.<sup>97</sup> The artist has an incentive to build their reputation by benefiting from the increase in value of the entire artists works.<sup>98</sup>

Using the economic theory of intellectual property and the concepts of participating in the increased value of the work, proving an equal platform under copyright law for all artists, this thesis shall data gathered to examine whether the interpretation of original as used in the legal framework for artist resale right facilitates new media artists to receive royalties.

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<sup>89</sup> Bently. L and Sherman. B, *Intellectual Property Law*, Oxford University Press, London, 4<sup>th</sup> Edition, 2014, 369.

<sup>90</sup> Prowda J, *Visual Arts and the Law*, 130.

<sup>91</sup> Prowda J, *Visual Arts and the Law*, 130.

<sup>92</sup> Prowda J, *Visual Arts and the Law*, 130.

<sup>93</sup> Prowda J, *Visual Arts and the Law*, 130.

<sup>94</sup> Merryman J, 'The Wrath of Robert Rauschenberg,' 109.

<sup>95</sup> Merryman J, 'The Wrath of Robert Rauschenberg,' 111.

<sup>96</sup> Merryman J, 'The Wrath of Robert Rauschenberg,' 113.

<sup>97</sup> Bently. L and Sherman. B, *Intellectual Property Law*, 38.

<sup>98</sup> Hansmann H, 'Royalties for Artists Versus Royalties for Authors and Composers,' 7.

### **1.11 Approach and Methodology**

This is a qualitative research that examines rules, principles, norms, interpretive guidelines and values of the term “original works of art” under artist resale right legal framework. It seeks to interrogate the essential features in the interpretation of original works of art under artist resale right legal framework. This methodology provides a critical analysis of the meanings and implications of the term “original works of art” under artist resale right legal framework to determine whether new media art is a subject matter for resale royalties in Kenya. The data will be collected using desk based research.

With regard to the research questions, the data collected includes published records and materials, primary and subsidiary legislations, textbooks, judicial decisions, journal articles, reports, speeches, magazine articles, among other materials. This data was collected from various physical locations including Strathmore University Library. The electronic data was sourced from various online sites accessed through Strathmore University Online/Offline Library Portal, the National Council for Law Reporting website among other online sources.

The research adopts a historical approach where we will consider the development of the artist resale right and what works are eligible for resale royalties. This research will endeavor to provide an interpretation of the term original as used in artist resale right. It will interrogate whether the term original works of art under the Bill renders new media art ineligible for resale royalties? This research also seeks to benchmark best practices in France and Australia in respect to artist resale right legal framework for new media art. The best practices will be distinguished with the practice in the United States of America where despite their being calls for artist resale right for visual artists, this right has been deemed to be inapplicable due to the first sale doctrine.

### **1.12 Limitation**

The research is limited in scope to the legal framework on artist resale right under the Bill and the copyright legal framework. The study will be limited in respect to borrowing best practices from the following countries in relation to artist resale right:

1. France in respect to the definition of the term original in grant of resale right to new media art and the conditions that copies of works of art have to meet to be eligible for artist resale right.
2. Australia in respect to the definition of the term original and works of art that are eligible for artist resale right.

### **1.13 Assumptions**

This research is based on the assumptions that:

1. The provisions requiring the artworks to be original renders visual artists creating multimedia art, digital art and video art not eligible to receive royalties because their works are considered a copy of the original.
2. The practices in France and Australia in artist resale right may provide useful lessons for Kenya on how to address challenges in the Bill while legislating for artist resale right.

### **1.14 Chapter Breakdown**

The first Chapter provides an introduction, background to the problem, research problem, conceptual framework, hypotheses, research questions, methodology and approach and chapter layout

Chapter 2 concerns the use of the term original works of art in artist resale right as subject matter of works eligible for artist resale royalties. The traditional and current conceptions of the term original in artist resale right generally, particularly in the use of digital technology to create artworks. The use or non-use of original when artist resale rights are included in Kenya's copyright legal framework and the use or non-use of the term original when a distinct legislation for artist resale right is enacted.

Chapter 3 discusses from a historical perspective the works covered under the artist resale right looking at Australia and France as legal models. The impact of including the term original works of art while legislating for artist resale right in works of art created through digital technology.

Further, it addresses the developments that have come about in determining the works covered by artist resale right as a result of the use digital technology to create artworks.

Chapter 4 this chapter draws lessons from Australia and France for incorporating artworks created in the digital environment as works eligible for artist resale royalties. The use or non-use of the term original works of art while legislating for artist resale right. It also sets out challenges that Kenya may face while legislating for artist resale rights.

Finally, in chapter 5, I conclude the research by answering the research questions, and confirming the hypotheses. I also provide a summary and conclusions based on the findings.



## **CHAPTER TWO**

### **INTERPRETATION OF ORIGINAL WORKS OF ART UNDER ARTIST RESALE RIGHT AND COPYRIGHT LAW**

#### **2.1 Introduction**

In chapter 1 the main question posed is what is the use and definition of the term original works of art in artist resale right legislation and the impact traditional interpretation of this term in artworks made in the multiples such as photography and prints. The chapter provides an introduction of artist resale right, the development of works eligible for artist resale right from paintings, acceptance of photography and prints as eligible works for artist resale right in the age of mechanical production, and posed the question whether new media art created in the age of digital production is eligible for artist resale right. The basis for grant of artist resale right in order to allow visual artists benefit from increased value of their work, have a higher bargaining power and reduce discrimination in implementation of copyright law royalties.

This chapter also examines the use of the term original works of art in the Berne Convention, the Proposed International Treaty on artist resale right, the Bill and Kenya's copyright law. In these statutes the point of concern is whether the definition of the term original works of art does affect the eligibility for artist resale royalties in new media art. This chapter concludes with a discussion on whether the term "original works of art" ought to be interpreted differently within artist resale right to enable visual artist creating new media art to receive resale royalties.

#### **2.2 Original works of art in the age of mechanical production**

It has been argued that a work of art, in principle, has always been reproducible and historically the two known procedures of technically reproducing works of art were founding and stamping.<sup>99</sup> These techniques were used in bronze, terracota and coins while works of art such as paintings were unique and could not be mechanically reproduced.<sup>100</sup> According to Walter Benjamin the ability to mechanically reproduce works of art begun with the woodcut, then engraving and

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<sup>99</sup> Benjamin W, 'The Work of Art in the Age of Mechanical Reproduction,' Illuminations (1969) 2.

<sup>100</sup> Benjamin W, 'The Work of Art in the Age of Mechanical Reproduction,' Illuminations (1969) 2.

etching, followed by lithographs and later photography surpassed these inventions.<sup>101</sup> The effect of the technique of mechanical reproduction is to substitute a plurality of copies for a unique and authentic work of art.<sup>102</sup>

It was conceived that reproductions water down the concept of authenticity as it solely relies on the presence of an “original”,<sup>103</sup> that is, the one and only physical embodiment. It was only that one and only embodiment of a work that was deemed to be unique since one could trace changes in terms of the physical condition and changes in ownership.<sup>104</sup> In so doing copies of a work of art even in their most perfect form of reproduction could not be referred to as unique and original work of art.<sup>105</sup> Thus the one and only perfect embodiment was been considered to have special quality that has no equivalent in other fields.<sup>106</sup> A quality that cannot be matched even by the best reproduction.<sup>107</sup> This one and only embodiment is a considered the source of artistic enjoyment by the art market participants.<sup>108</sup> As a result of the uniqueness and authenticity in the works of art, artist resale right was traditionally granted to original works of art while copies were ineligible.

### **2.3 The notion of original works of art in the age of digital production**

In the age of digital reproduction the distinction of the original and reproduction is watered down.<sup>109</sup> An initial work and copy are so intertwined with each other that it is impossible to determine where one begins and the other ends.<sup>110</sup> Further, due to the increase of the industrial techniques and the internet works of art are created in multiple copies which has considerably weakened the concept of an original, as the one and only physical embodiment.<sup>111</sup> In photography, for instance, there is no original moment expressed in material form and it is impossible to distinguish an original print from the other copies.<sup>112</sup>

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<sup>101</sup> Benjamin W, ‘The Work of Art in the Age of Mechanical Reproduction,’ *Illuminations* (1969) 2.

<sup>102</sup> Benjamin W, ‘The Work of Art in the Age of Mechanical Reproduction,’ *Illuminations* (1969) 4.

<sup>103</sup> Benjamin W, ‘The Work of Art in the Age of Mechanical Reproduction,’ *Illuminations* (1969) 2.

<sup>104</sup> Benjamin W, ‘The Work of Art in the Age of Mechanical Reproduction,’ *Illuminations* (1969) 2.

<sup>105</sup> Benjamin W, ‘The Work of Art in the Age of Mechanical Reproduction,’ *Illuminations* (1969) 2.

<sup>106</sup> Reddy M, ‘The Droit de Suite: Why American Fine Artists Should Have a Right to a Resale Royalty,’ 517.

<sup>107</sup> Reddy M, ‘The Droit de Suite: Why American Fine Artists Should Have a Right to a Resale Royalty,’ 517.

<sup>108</sup> Reddy M, ‘The Droit de Suite: Why American Fine Artists Should Have a Right to a Resale Royalty,’ 518.

<sup>109</sup> Davis D, ‘The work of Art in the Age of Digital reproduction (An evolving Thesis: 1991-1995),’ *Leonardo*, Vol. 28, No. 5, Third Annual New York Digital Salon, pp. 381-386 (1995), 381.

<sup>110</sup> Davis D, ‘The work of Art in the Age of Digital reproduction (An evolving Thesis: 1991-1995),’ 381.

<sup>111</sup> Price M, ‘Government Policy and Economic Security for Artists: The Case of the Droit de Suite’ 1341.

<sup>112</sup> Bowrey K, ‘Copyright, Photography and Computer works- the fiction of an original expression,’ 282.

Besides, visual artists' ability to create works on digital medium that is interactive with the user, live and dynamic has challenged notions of paintings, which exist as physical embodiments, as the sole original and authentic works of art.<sup>113</sup> This is because in the digital age the authenticity and uniqueness reside not in the thing itself but in the originality of the moment as expressed in a work of art.<sup>114</sup> The aura, which has been termed as that which creates the originality of a work, resides outside the work in the digital age: it resides in the electronic field that allows people to order, reform and transmit almost any idea, or word, toward what lies beyond, toward the transient and indescribable.<sup>115</sup> Such works of art are referred to as new media art which is digital art in its various forms.<sup>116</sup>

The use of digital technologies as a medium implies the work of art is produced, stored, and presented in digital format and makes use of the inherent possibilities of the medium.<sup>117</sup> Thus new media art is characterized by fluidity, intangibility, liveness, variability, replicability, connectivity, interactivity, computability and chance.<sup>118</sup> Thus in the digital medium the extent to which one can interact with a work of art beyond merely experiencing the artwork has made it difficult to define the boundaries of an "original" work.<sup>119</sup> As Morris argues new media art is like a live performance, the work is transient in that it exists as an experience in time which unless recorded it vanishes after completion.<sup>120</sup>

The forms under the category of new media art are, a) net art which is art made using the internet, b) virtual reality which are synthetic environments that might utilize head mounted display or glove worn by the viewer and the user can interact with the synthetic world and directly manipulate objects within it, c) artificial life forms that is using genetic engineering and bioengineering to make art, d) digital art can refer to all the arts that use digital means or can refer to physical manifestations such as prints and photographs rendered digitally, e) plurimedia used to describe

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<sup>113</sup> Price M, 'Government Policy and Economic Security for Artists: The Case of the Droit de Suite' 1365.

<sup>114</sup> Davis D, 'The work of Art in the Age of Digital reproduction (An evolving Thesis: 1991-1995),' 386.

<sup>115</sup> Davis D, 'The work of Art in the Age of Digital reproduction (An evolving Thesis: 1991-1995),' 386.

<sup>116</sup> Paul C, 'Renderings of Digital Art,' *Leonardo*, Vol. 35, No. 5, pp. 471-484, (2002) 471.

<sup>117</sup> Paul C, 'Renderings of Digital Art,' 471.

<sup>118</sup> Morris S, 'Museums & New Media Art,' A research report commissioned by the Rockefeller Foundation, (2001), 9.

<sup>119</sup> Mitran A, 'Royalties Too?: Exploring Resale Royalties For New Media Art,' 1352.

<sup>120</sup> Morris S, 'Museums & New Media Art,' 9.

the use of more than one medium in the same piece that entails crossovers and combinations of media.<sup>121</sup>

## **2.4 Original works of art under The Berne Convention**

In the Berne Convention provisions on artist resale right were enacted by the Brussel's Act of 1948. Kenya acceded to the Berne Convention on 11<sup>th</sup> June 1993, which now forms part of our national laws. In the Berne Convention an author or the heirs can, "with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work."<sup>122</sup> The term "original works of art" is not defined neither is there an elaboration on what constitutes original works of art. The term original works of art, however, has been interpreted to denote authorship of the work<sup>123</sup> in terms of artist resale right to the effect that all artists, including new media artists, are eligible to receive resale royalties. In so doing, artist resale right looks after the interests of artists and other makers of artistic works through profiting from the increase in value of the work each time it changes hands.<sup>124</sup>

## **2.5 Original works of art under the Tunis Model Law for Developing Countries, 1971**

In the Tunis Model Law for Developing Countries ("Tunis Model Law") the provisions on artist resale right required that the authors of graphic and three dimensional works (and manuscripts) have an inalienable right to a share in the proceeds of any sale of their original work (or manuscripts) by public auction or through a dealer, whatever the methods used by the latter to carry out the operation.<sup>125</sup> This provision was interpreted that artist resale right only applies to original works that is, to the copy or copies made by the artist himself, but does not apply to works of architecture or applied art because such works are generally replicas.<sup>126</sup> In so doing the Tunis

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<sup>121</sup> Morris S, 'Museums & New Media Art,' 9.

<sup>122</sup> Article 14<sup>ter</sup> Berne Convention for the Protection of Literary and Artistic Works Paris Act of July 24, 1971, as amended on September 28, 1979.

<sup>123</sup> World Intellectual Property Organisation (WIPO), *Guide to the Berne Convention for the Protection of Literary and Artistic Works*(Paris Act, 1971), 1978 at 90.

<sup>124</sup> World Intellectual Property Organisation (WIPO), *Guide to the Berne Convention for the Protection of Literary and Artistic Works*(Paris Act, 1971), 1978 at 90.

<sup>125</sup> Section 4<sup>bis</sup>, Tunis Model law on Copyright for Developing Countries, IGC (1971) /11/11.

<sup>126</sup> Paragraph 30, UNESCO and WIPO, *Commentary on Tunis Model law on Copyright for Developing Countries*, 1976 at 169.

Model Law also associated original works of art with authorship of the work. The grant of artist resale right under the Tunis Model Law was deemed to be an equitable way in which the author shares in the increased value of the work on a subsequent sale.<sup>127</sup>

## **2.6 Original works of art under European Union Directive on Artist Resale right, 2001**

In the European Union artist resale right are set out to the, “benefit of the author of an original work of art, a resale right, to be defined as an inalienable right, which cannot be waived, even in advance, to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author.”<sup>128</sup>

Original works of art are defined as, “works of graphic or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs, provided they are made by the artist himself or are copies considered to be original works of art.”<sup>129</sup> In looking at the possible interpretation of original works or art the preamble states that the intention is to ensure that authors of graphic and plastic works of art share in the economic success of their original works of art.<sup>130</sup> It further states that the subject matter of the resale right is the typical physical work, namely the medium in which the protected work is incorporated.<sup>131</sup> At the same time, however, “copies of works of art covered by this Directive, which have been made in limited numbers by the artist himself or under his authority, shall be considered to be original works of art and such copies will normally have been numbered, signed or otherwise duly authorized by the artist.”<sup>132</sup> This implies that works of art that exist in identical copies such as new media art are considered original works of art by virtue of being created by the artist.

## **2.7 Original works of art under the Proposed International Treaty on Artist Resale Right, 2015**

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<sup>127</sup> Paragraph 29, UNESCO and WIPO, *Commentary on Tunis Model law on Copyright for Developing Countries*, 1976 at 169.

<sup>128</sup> Article 1 (1) Directive 2001/84/EC of The European Parliament and of The Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art.

<sup>129</sup> Article 2 (1) Preamble to the Directive 2001/84/EC.

<sup>130</sup> Preamble to the Directive 2001/84/EC.

<sup>131</sup> Preamble to the Directive 2001/84/EC.

<sup>132</sup> Article 2 (2) Preamble to the Directive 2001/84/EC.

In the Proposed International Treaty on Artist Resale Right, “Original works of art’ are defined as the first physical or tangible embodiment of any artistic work falling within the meaning of article 2(1) of the Berne Convention.<sup>133</sup> Ricketson, the proponent for an international artist resale right treaty states that, “the adjective ‘original’ in the expressions ‘original work of art’ and ‘original manuscript’ is used in the sense of meaning the first tangible embodiment or fixation of the work, in contradistinction to its other meaning of ‘creative’ or involving some element of intellectual contribution by the author.”<sup>134</sup> Such an interpretation deviates from the conception of original works of art from an authorial perspective to a tangible medium which in effect excludes new media art as it exists in identical copies.

## **2.8 Original works of art within Kenya Copyright Law**

In the Bill, artist resale right is valid as long as copyright continues to subsist in an original work of art.<sup>135</sup> An artistic work, the author or creator, is eligible for copyright protection if sufficient effort has been expended on making the work to give it an original character; and the work has been written down, recorded or otherwise reduced to material form.<sup>136</sup> Thus so long as the basic criteria of fixation and originality are met copyright protection arises automatically by operation of law.<sup>137</sup>

### **2.8.1 Interpretation of artistic works as having an original character under the copyright law**

While elucidating that a work has an original character as the criteria for copyright protection in the case of *Faulu Kenya Deposit Taking Microfinance Limited v Safaricom Limited*, it was held that, “the Plaintiff’s submission, the work in issue here, being the concept paper, did indeed disclose the investment of time, skill and labour in its compilation by the Plaintiff and was thereby protecting by copyright.”<sup>138</sup> To further cement an interpretation of works of art considered original in the copyright law in the case of *Oxford University Press (E.A) Limited V Longhorn Publishers (K) Limited & 4 Others [2010] Eklr*, it was held, “in my opinion, the clearer definition was to be

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<sup>133</sup> Ricketson S, ‘Proposed international treaty on droit de suite/resale royalty right for visual artists’ (2015) 59.

<sup>134</sup> Ricketson S, ‘Proposed international treaty on droit de suite/resale royalty right for visual artists’ (2015) 60.

<sup>135</sup> Section 15, (26D) (1) The Copyright (Amendment) Bill, 2017.

<sup>136</sup> Copyright Act, No 12 of 2001 (revised 2016).

<sup>137</sup> Rhoda Ondeng Wilhelmsen V Dr. Sarah A. Chuchu[2013]eKLR

<sup>138</sup> Faulu Kenya Deposit Taking Microfinance Limited v Safaricom Limited [2013] eKLR

found in the case of *Auvi Private Ltd v Electronics Co.* (1991) LRC (Comm) 852, a High Court of Singapore decision, in which Judge Chao Hick Tin held:

“The law on this is clear. Originality in this regard does not mean novelty or uniqueness; nor does it necessarily involve inventiveness. All that needs to be shown is that the author created it and has not copied it from another and that he has expended towards its creation a substantial amount of skill or labour.”<sup>139</sup>

## **2.8.2 Interpretation of photography as having an original character under the copyright law**

In the case of *Nevin Jiwani v Going Out Magazine & another* it was held that, “I am also persuaded that the plaintiff has done sufficient work by way of photography, development, design artwork colour separation, and the publication of the said photographs to confer on them an original character. And with regard to the logo and design in dispute, I am similarly persuaded that sufficient labour and skill has gone into them by way of design and formatting as to confer on them some original character. The same applies to the literary text or script: I am persuaded that sufficient mental labour has gone into its collection, collation, arrangement and creative expression to confer on it an original character.”<sup>140</sup>

From these cases, copyright subsisting in a work of art in Kenya implies that at first such an artistic work is the product of sufficient knowledge, labour and skill.<sup>141</sup> In photography, as a form of an artwork that is heavily dependent on mechanical production, sufficient effort and skill in obtaining the photograph and the various design elements gives the work completely original character.<sup>142</sup> In computer generated works it has been argued that in determining whether such work is original courts ought to ask a hypothetical question: “if the same works had been generated by a human author would it have required the exercise of a substantial amount of skill, labour, and effort? If so, then the computer generated work would be original.”<sup>143</sup> In the case of new media art, provided that sufficient knowledge, labour and skill is expended such a work is original and hence protected under copyright. Thus, if artist resale right exists and continues to subsist so long as a work is

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<sup>139</sup> Oxford University Press (E.A) Limited V Longhorn Publishers (K) Limited & 4 Others [2010] Eklr

<sup>140</sup> Nevin Jiwani v Going Out Magazine & another [2002] eKLR

<sup>141</sup> Nzele David Nzomo v Moses Namayi Anyangu & another [2018] eKLR

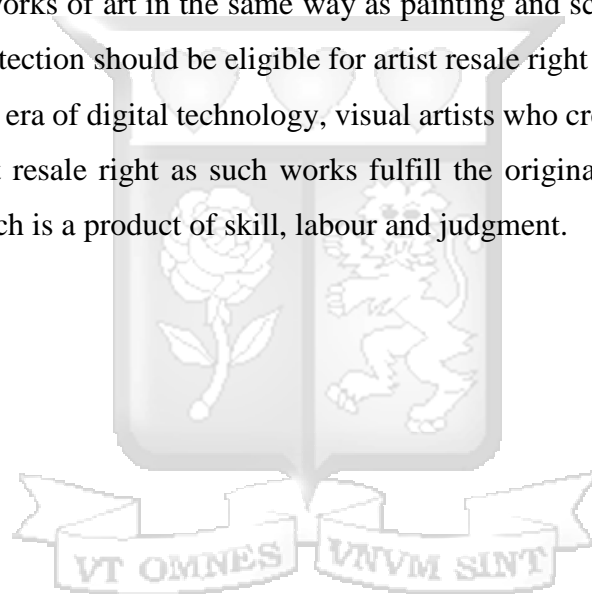
<sup>142</sup> Alternative Media Limited v Safaricom Limited [2005] eKLR

<sup>143</sup> Bently. L and Sherman. B, ‘Intellectual Property Law’ Oxford University Press, 4<sup>th</sup> Edition (2014) 117.

protected under copyright in Kenya, then all forms of new media art produced by an artists are eligible for artists resale right. The mere fact such works exist in multiple copies should not be a basis to exclude such works from artist resale royalties.

## **2.9 Conclusion**

Thus the interpretation of the term original works of art has developed from the initial understanding of that one and unique embodiment of a work that has a certain aura and authenticity. The development has been attributed to the introduction of technical means in the creation of works of art as exemplified in photography and recently in new media art. Photographs are considered original works of art in the same way as painting and sculptures. All works of art eligible for copyright protection should be eligible for artist resale right by virtue of being created by the artists. Thus in the era of digital technology, visual artists who create new media art should also be eligible for artist resale right as such works fulfill the originality criteria for copyright protection in Kenya, which is a product of skill, labour and judgment.



## CHAPTER THREE

### BENCHMARKING IN FRANCE AND AUSTRALIA

#### 3.1 Introduction

This chapter demonstrates how France and Australia have implemented the artist resale right especially for visual artists creating new media art. I seek to demonstrate how the term “original works of art” has been used in legislating for artist resale right. A development from purely graphic and plastic art as original works of art, to introduction of photography and prints and finally the digital age. The main question being what is the interpretation of the term original works of art under artist resale right.

#### 3.2 Artist Resale Right/ Droit de Suite in France

France is credited as the source of *droit de suite* or artist resale right. The major elements of artist resale right entailed the length of term, types of work, measurement of the royalty and inalienability.<sup>144</sup> The initial proposals were based on creation of an official registry to maintain a directory of works of art but later artists were able to receive part of the resale price as they went ahead to certify their works as authentic.<sup>145</sup>

In 1909, two artists’ rights societies were formed and submitted two Bills in 1914 and 1918 to the legislature for the inclusion for a resale royalty that gives artists two percent from the auction sales price of their works of art.<sup>146</sup> In 1920, France officially recognized the *droite de suite*.

##### 3.2.1 The 1920 Law

The law of May, 1920 granted artists an inalienable right to a percentage of the sales price of the work sold at a public auction. *Droit de suite* applied to public sale of works such as paintings and sculpture, which had to be original and represented a personal creation of the artist. The right subsisted as long as the work was under copyright and belonged to the artist’s heirs and successors

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<sup>144</sup> United States Copyright Office, *Droite de suite: The Artist’s Resale Royalty*, 1992, at 10.

<sup>145</sup> United States Copyright Office, *Droite de suite: The Artist’s Resale Royalty*, 1992, at 10.

<sup>146</sup> United States Copyright Office, *Droite de suite: The Artist’s Resale Royalty*, 1992, at 11.

in title.<sup>147</sup> *Droit de suite* was collected in the total sale price of each work whether there is an appreciation of value or not.<sup>148</sup>

### 3.2.2 1957 Amendment

In 1957, the 1920 artist's rights law and rules were repealed and made part of the French law relating to copyright.<sup>149</sup> It provided for a flat three percent royalty on the resale price on all graphic and plastic works sold for more than 100 francs.<sup>150</sup> The right was applicable to both public auctions as well as sales through a dealer and subsisted for the life of the author plus fifty years.<sup>151</sup>

#### 3.2.2.1 Works of art covered in 1920 law and 1957 amendment

The 1920 law applied to pictures, sculptures and drawings considered original and embody the author's personal creation. In the 1957 law, *droit de suite* applied to graphic and plastic works. In works that existed in more than one copy such as sculptures, engravings, tapestries, or photos the artists' representative and auctioneers had specific agreements as to the number of copies whereby royalties would be applicable.<sup>152</sup> For instance, sculpture eight copies, 100 copies for engravings and six copies for tapestry work provided that such works are numbered and signed by the author.<sup>153</sup>

#### 3.2.2.2 Original works of art in 1920 law and 1957 amendment

Both 1920 Law and 1957 law did not define original explicitly but it had been considered that an original work of art has a special quality that has no equivalent in other creative fields.<sup>154</sup> "It was generally viewed as the one and only perfect embodiment of that work which cannot be matched by the best reproduction and thus it is the only source of complete artistic enjoyment."<sup>155</sup> It is based on the concept that the ultimate value of fine art lies in its unique quality as a one-of-a kind original

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<sup>147</sup> United States Copyright Office, *Droite de suite: The Artist's Resale Royalty*, 1992, at 11.

<sup>148</sup> United States Copyright Office, *Droite de suite: The Artist's Resale Royalty*, 1992, at 12.

<sup>149</sup> United States Copyright Office, *Droite de suite: The Artist's Resale Royalty*, 1992, at 14.

<sup>150</sup> Reddy M, 'The Droit de Suite: Why American Fine Artists Should Have a Right to a Resale Royalty,' 516.

<sup>151</sup> Reddy M, 'The Droit de Suite: Why American Fine Artists Should Have a Right to a Resale Royalty,' 516.

<sup>152</sup> A report by the United States Copyright Office, 'Droite de suite: The Artist's Resale Royalty,' (1992) 15.

<sup>153</sup> A report by the United States Copyright Office, 'Droite de suite: The Artist's Resale Royalty,' (1992) 16.

<sup>154</sup> Reddy M, 'The Droit de Suite: Why American Fine Artists Should Have a Right to a Resale Royalty,' 517.

<sup>155</sup> Reddy M, 'The Droit de Suite: Why American Fine Artists Should Have a Right to a Resale Royalty,' 518.

in comparison to books, plays, song and music that have the potential for mass reproduction of performance.<sup>156</sup> Under such law, works created in identical copies were not eligible for artist resale right.

### **3.2.3 Original works of art under the Intellectual Property Code, 2016**

According to Article L 122-8, “Authors of original graphic and plastic works who are nationals of a Member State of the European Community or of a State Party to the Agreement on the European Economic Area enjoy a resale right, which is an inalienable right of participation the proceeds of any sale of a work after the first assignment made by the author or his successors in title, where a professional of the art market intervenes as a seller, buyer or intermediary. By way of derogation, this right does not apply when the seller has acquired the work directly from the author less than three years before the sale and the sale price does not exceed 10,000 euros.”

While implementing the European Union Artist Resale Right Directive, in the Intellectual Property Code, 2016 works of art eligible for artist resale right were based on the authorship of the work. In so doing the works of art listed in article R. 122-1 of the Intellectual Property Code as original graphic or plastic include works created by the author himself, such as “paintings, collages, paintings, drawings, engravings, prints, lithographs , sculptures, tapestries, ceramics, glassware, photographs and plastic creations on audiovisual or digital media. This is a non-exhaustive list.”<sup>157</sup>

Under Intellectual Property code, "Original works" refer to works created by the artist himself and copies made in limited quantities by the artist himself or under his responsibility.<sup>158</sup> The works have to be made in limited number of copies, numbered or signed or duly authorized in another way by the author. These include: “(a) Original engravings, prints and lithographs drawn in limited numbers from one or more planks; b) Editions of sculpture, limited to twelve copies, numbered copies and artist's proofs combined; (c) Tapestries and hand-made textile art, based on original models provided by the artist, limited to eight copies; (d) Enamels entirely executed by hand and bearing the signature of the artist, within the limit of eight numbered copies and four artist's proofs; e) Signed photographic works, in the limit of thirty copies, whatever the format and the medium;

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<sup>156</sup> Reddy M, ‘The Droit de Suite: Why American Fine Artists Should Have a Right to a Resale Royalty,’ 534.

<sup>157</sup> <https://www.adagp.fr/en/author-right/property-rights/resale-right> accessed on 30th May 2019

<sup>158</sup> Intellectual Property Code - Art. L122-8.

and f) Plastic creations on audiovisual or digital media, up to a limit of twelve copies.”<sup>159</sup> Thus works of art created by new media artists are eligible for artist resale right.

### 3.2.4 Benefits of Resale right in France

As at November 2012, ADAGP a collecting society in France in the field of visual art had over 10,000 members in France and a little more than 110,000 members from all over the world,<sup>160</sup> as by 2017 the members were 130,000.<sup>161</sup> The collecting society was formed in 1953 and one of functions of the collecting society is collecting and distributing the copyright royalties accruing to its members for the use or resale of their works.<sup>162</sup> The benefits are:

#### 3.2.4.1 Ensuring social fairness and equity

Due to the disparities in between the initial sale price tag of a work at the beginning of their careers and the eventual substantial resale sums obtained by art dealers, artist resale right has allowed for a just and equitable benefit to the family and the artist of the appreciation of the artwork.<sup>163</sup>

Additionally, fairness has been achieved not only between the artists and art dealers but also between visual artists and the other copyright owners because most visual artists unlike writers, are involved in minimal reproduction, artist resale right provides a steady flow of income for visual artists and their heirs.<sup>164</sup>

#### 3.2.4.2 Economic incentive for the creators

The resale right has allowed artists to not only monitor progress of their work and sales but also provides the authors with proper rewards in terms of monetary compensation in line with the rising value of their work in the market.<sup>165</sup> Although the amounts are much lower for upcoming artists,

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<sup>159</sup> Intellectual Property Code - Art. R122-3.

<sup>160</sup> ADAGP, ‘Response to the Notice of Inquiry on Resale Royalty Right,’ 2012, 1.

<sup>161</sup> Ferry-Fall M, *The Resale Right in France*, 2017 at 2.

<sup>162</sup> ADAGP, ‘Response to the Notice of Inquiry on Resale Royalty Right,’ 2012, 1.

<sup>163</sup> ADAGP, ‘Response to the Notice of Inquiry on Resale Royalty Right,’ 2012, 2.

<sup>164</sup> ADAGP, ‘Response to the Notice of Inquiry on Resale Royalty Right,’ 2012, 2.

<sup>165</sup> ADAGP, ‘Response to the Notice of Inquiry on Resale Royalty Right,’ 2012, 4.

they still get some additional income that may be used to purchase artistic supplies, thus stimulating further artistic creations.<sup>166</sup>

#### 3.2.4.3 *Effect of the market turnover*

Art dealers feared that the resale right would negatively affect the art market since collectors would sell their artworks in markets that do not have artist resale right. The art market responded to artist resale right in different way as at 2012, countries that had enacted the resale right such as the United Kingdom's the market represented a proportion of 19.4% of the total worldwide market, with a 24% increase in sales from \$1.81 billion in 2010 to \$2.24 billion in 2011, France's share was 4.5%, with an increase of 9% in sales from \$478 million in 2010 to \$521 million in 2011, and Germany recorded a 23% increase in sales and a market share of 1.8%.<sup>167</sup> Notably, as at 2016, € 12.8 million and € 37 million as at 2019 in resale royalties was received by ADAGP.<sup>168</sup>

#### 3.2.5 **Conclusion**

The experience in France demonstrates that artist resale right is highly beneficial for visual artists and their heirs without having adverse effects on the art market.<sup>169</sup> In the same vein, visual artists creating new media in France could benefit from artist resale royalties as their works are considered original works of art in the sense that they are produced by the artist or under their authority.<sup>170</sup>

### 3.3 **Artist Resale Right in Australia**

In recommending for artist resale royalty right in Australia, it was emphasized that, "it is possible to imagine a future for the sector where artists and craft practitioners enjoy a higher status within the community, where they are faced with fewer economic uncertainties, where there are greater opportunities to exhibit and sell works of art and where the financial and market success of their

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<sup>166</sup> ADAGP, 'Response to the Notice of Inquiry on Resale Royalty Right,' 2012, 4.

<sup>167</sup> ADAGP, 'Response to the Notice of Inquiry on Resale Royalty Right,' 2012, 5.

<sup>168</sup> <https://www.adagp.fr/fr/adagp/chiffres-cles> accessed on 30th May 2019.

<sup>169</sup> ADAGP, 'Response to the Notice of Inquiry on Resale Royalty Right,' 2012, 7.

<sup>170</sup> Intellectual Property Code - Art. R122-3.

work is not taken as the sole measure of quality.”<sup>171</sup>In order to for the visual arts and craft industry to build on its achievements and provide opportunities for its potential to be realized in terms of expanding the funding source for the sector it was recommended that it is essential to protect the rights of visual artists and craft practitioners through introducing an artist royalty arrangement.<sup>172</sup>

Artist resale royalties collection in Australia begun earnestly in around 9<sup>th</sup> June 2010.<sup>173</sup> This was after the *Resale Royalty Right for Visual Artists Bill* of 2008 was passed into law. This Bill provided that an artwork is an original work of graphic or plastic art that is either: “(a) created by the artist or artists; or (b) produced under the authority of the artist or artists.”<sup>174</sup> This provision was included in the *Resale Royalty Right for Visual Artists Act 2009*. The Bill, in Australia, went on to state that, “works of graphic or plastic art include pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs.”<sup>175</sup> In the Resale Royalty Right for Visual Artists Act 2009, this provision was expanded to include new media art such as video art and multimedia artworks.

The Copyright Agency, a body appointed by the Australian Government, is in charge of collecting and distributing royalties to artists after resale of their work under the artists’ resale royalty scheme.<sup>176</sup> This scheme applies to existing as well as new works, range of original works including limited edition prints authorized by the artist and can be extended to artworks from countries that have a similar scheme.<sup>177</sup> The resale royalty scheme does not apply to a private sale from one individual to another, if the seller acquired the work before 9<sup>th</sup> June 2010 and if it is more than 70 years from the end of the year in which the artist passed on.<sup>178</sup>

### 3.3.1 Works of art covered under artist resale right

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<sup>171</sup> Quote by Rupert Myer in the Contemporary Visual Arts and Craft Inquiry produced by Commonwealth Department of Communications, Information Technology and the Arts, ‘*Report of the Contemporary Visual arts and Craft Inquiry*, 2001, at 2.

<sup>172</sup> Commonwealth Department of Communications, Information Technology and the Arts, *Report of the Contemporary Visual arts and Craft Inquiry*, 2001, at 14.

<sup>173</sup> <https://www.resaleroyalty.org.au/> accessed on 30<sup>th</sup> May 2019.

<sup>174</sup> Section 7 (1), Resale Royalty Right for Visual Artists Bill 2008 (Australia).

<sup>175</sup> Section 7 (2), Resale Royalty Right for Visual Artists Bill 2008 (Australia).

<sup>176</sup> <https://www.resaleroyalty.org.au/> accessed on 30<sup>th</sup> May 2019.

<sup>177</sup> <https://www.resaleroyalty.org.au/> accessed on 30<sup>th</sup> May 2019.

<sup>178</sup> <https://www.resaleroyalty.org.au/> accessed on 30<sup>th</sup> May 2019.

Visual artists are not only creating new media art but they are also exhibiting the works on the internet.<sup>179</sup> In relation to artist resale right applying to such works the main question was whether, “the right would extend to all artistic works as currently defined within copyright law, or would it only apply to selected works within this definition? In overseas models, the traditional forms of artistic works, such as paintings, drawings and sculpture are invariably included. Original photos, lithographs and engravings are also included in many jurisdictions, and in some jurisdictions, original literary and musical manuscripts are included. Where an artwork is produced in limited multiples, these may also be included.”<sup>180</sup>In a further report<sup>181</sup> examining whether it would be desirable to introduce artist resale arrangement in Australia recommended that the resale royalty scheme should, generally, cover all original and tradeable works of contemporary visual art.<sup>182</sup>

### **3.3.2 Resale Royalty Right for Visual Artists Act 2009, No. 125, 2009**

The proposals and recommendations in the reports were effected in the Resale Royalty Right for Visual Artists Act 2009. In this Act, resale royalty right is defined as the right to receive resale royalty on the commercial resale of an artwork.<sup>183</sup> An artwork is defined as an original work of visual art that is either, “a) created by the artist or artists or b) produced under the authority of the artist or artists.”<sup>184</sup> Thus an original work of visual art denotes authorship.

The works of visual art are listed as “(a) artists’ books, batiks, carvings, ceramics, collages, digital artworks, drawings, engravings, fine art jewellery, glassware, installations, lithographs, multimedia artworks, paintings, photographs, pictures, prints, sculptures, tapestries, video artworks, weavings and any other things prescribed by the regulation.”<sup>185</sup> This is a non-exhaustive list that incorporates new media art such as video artworks. This definition of the term original

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<sup>179</sup> Commonwealth Department of Communications, Information Technology and the Arts, *Report of the Contemporary Visual arts and Craft Inquiry*, 2001, at 87.

<sup>180</sup> Commonwealth Department of Communications, Information Technology and the Arts, *Report of the Contemporary Visual arts and Craft Inquiry*, 2001, at Appendix J: Resale Royalty, 382.

<sup>181</sup> Department of Communications, Information Technology and the Arts, *Proposed Resale Royalty Arrangement*, 2004-2007 at 24.

<sup>182</sup> Department of Communications, Information Technology and the Arts, *Proposed Resale Royalty Arrangement*, 2004-2007 at 24.

<sup>183</sup> Section 6, Resale Royalty Right for Visual Artists Act 2009, No. 125, 2009.

<sup>184</sup> Section 7(1), Resale Royalty Right for Visual Artists Act 2009, No. 125, 2009.

<sup>185</sup> Section 7(2), Resale Royalty Right for Visual Artists Act 2009, No. 125, 2009.

works of art allows for clarity in the implementation of artist resale right. Works of art that are exist in identical copies are also eligible for artist resale right.

### **3.3.3 Benefits of artist resale right**

The benefits that accrue to visual artists as result of having resale royalties are, first, providing the artist with a reliant income stream which is not readily available, second, empower artists by permitting them to enjoy a direct financial benefit from the success of the work their financial status improves and thus artists are able to affirm their interest more effectively in with art dealers and collectors and minimize ill-treatment of their disadvantaged position, third, recognizing the relationship between the artist and their work, and the degree to which an artist's reputation is linked to the physical product of their creative labour, and fourth, allowing artists to benefit from reciprocal provisions when resale royalties are introduced in other countries.<sup>186</sup>

### **3.3.4 Impact of artist resale right**

As at 2013, the impact of the Resale Royalty Right for Visual Artists Act 2009 and the resale royalty scheme that allows for all visual artist to receive resale royalties has been a generation of over \$1.5million in royalties to 650 artists as recorded by Australia Council for the Arts.<sup>187</sup> The resale royalties benefited both the artist and their beneficiaries so long as copyright in the work of art exists.<sup>188</sup> In 2017, \$5 million in royalties had been generated and the systems and processing was working well signifying that the market had adapted well and there was good compliance.<sup>189</sup> More than 1400 artist were eligible for artist resale right who are either emerging, mid-career or established.<sup>190</sup> As at 31<sup>st</sup> March 2019, royalties generated has kept on increasing where the total is more than \$6.9 million and the number of artists has grown to 1,760 artists.<sup>191</sup>

In Australia, these resale royalty payments have enabled visual artists to have a much better understanding of the value of their work in the market in order to make sound decisions about who

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<sup>186</sup> Commonwealth Department of Communications, Information Technology and the Arts, *Report of the Contemporary Visual arts and Craft Inquiry*, 2001, at 161.

<sup>187</sup> Australia Council for the Arts, *Review of the Resale Royalty Scheme*, 2013 at 4.

<sup>188</sup> Australia Council for the Arts, *Review of the Resale Royalty Scheme*, 2013 at 4.

<sup>189</sup> Grady J, *Presentation to the WIPO International Conference on Resale Right*, 2017, at 2.

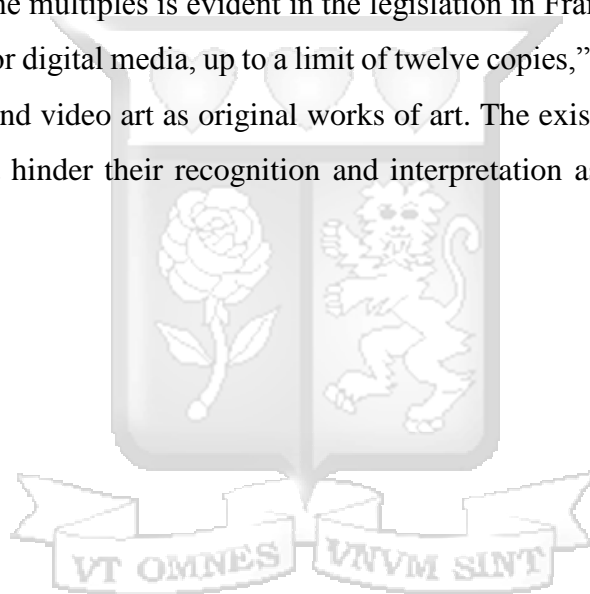
<sup>190</sup> Grady J, *Presentation to the WIPO International Conference on Resale Right*, 2017, at 2.

<sup>191</sup> <https://www.resaleroyalty.org.au/> accessed on 30<sup>th</sup> May 2019.

they sell to and for how much.<sup>192</sup> All visual artist who are registered with the Copyright Agency whose works are resold are eligible for the royalties. The mere fact that an artist does produce works that exist in identical copies does not prevent them from receiving royalties as demonstrated by enumerating multimedia and video artworks as subject matter for artist resale right.

### 3.4 Conclusion

In as much *droit de suite* was particularly designed to protect artists who produce unique works of art such as paintings and sculptures, it is now evident that visual artists are moving away from such concrete and unique embodiments of their creative conception.<sup>193</sup> The recognition of the ability to produce works of art in the multiples is evident in the legislation in France that provides, “Plastic creations on audiovisual or digital media, up to a limit of twelve copies,” and in Australia inclusion of multimedia artworks and video art as original works of art. The existence of new media art as identical copies does not hinder their recognition and interpretation as original works of art in France and Australia.



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<sup>192</sup> Grady J, *Presentation to the WIPO International Conference on Resale Right*, 2017, at 3.

<sup>193</sup> Price M, ‘Government Policy and Economic Security for Artists: The Case of the *Droit de Suite*,’ 1341.

## **CHAPTER FOUR**

### **ARTIST RESALE ROYALTIES FOR NEW MEDIA ART IN KENYA**

#### **4.1 Introduction**

In Chapter 3, this research interrogated the use and interpretation of the term original works of art in Australia and France. More specifically, this research looked at the incorporation of new media art as eligible works of art for resale royalties as original works of art. It was concluded that the term original works of art as traditionally conceived should not be used to limit new media artworks from artist resale royalty.

The legislative options available for Kenya in relation to granting resale right to new media art has to deal with the question of exhaustion of exclusive rights granted under Kenya copyright law framework. The exhaustion of the exclusive rights in particular, distribution right, has been the basis for not granting artist resale right. In addition to the doctrine of exhaustion or the first sale doctrine more potential challenges such as shift in the market and increase in transaction cost that ought to be considered in legislating for artist resale right.

In the legislative options this Chapter discusses the works covered under artist resale right, and the definition of the term “original works of art”. The recommendations are based on best practices in France and Australia as leading countries in the granting artist resale right to visual artists creating new media art.

#### **4.2 Artist resale royalty for new media art in Kenya**

The justifications for grant of artist resale right are, first, a way of redistribution of income among the successful artists thus providing more incentives for potentially strong artists to enter into the profession and endure.<sup>194</sup> Second, since over time the uniqueness of an artist’s work tend to increase in value more than other artists.<sup>195</sup> The benefits, however, accrue to collectors or investors other than the original artist.<sup>196</sup> A resale right enables artists to benefit in whatever way possible

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<sup>194</sup> Hansmann H, ‘Royalties for Artists Versus Royalties for Authors and Composers, 7.

<sup>195</sup> Schten A, ‘No more starving artists: Why the art market needs a universal artist resale royalty right,’ 117.

<sup>196</sup> Office of the Register of Copyrights, US Copyright Office Report, ‘Resale Royalties: An updated analysis,’ 11.

from the rising value of their work.<sup>197</sup> Third, artist resale right provide means through which authors who invest time and labour in producing works of art can recover their investment and reap a profit proportionate to the reputation of their work.<sup>198</sup> The artist is incentivized to build their reputation by benefiting from the increase in value of the entire artists oeuvre.<sup>199</sup>

### **4.3 Limitation and potential challenges in legislating for artist resale right in new media art**

#### **4.3.1 Limitation on the exclusive rights in an original work of art**

All works of visual art eligible for artist resale right are copyrightable. In fact, artist resale right exists as long as copyright subsists in the work of art.<sup>200</sup> Copyright is granted to literary, musical or artistic works in form of exclusive rights exercised within Kenya, to control reproduction, translation or adaptation, distribution to the public by way of sale, rental, lease, hire, loan importation or similar arrangement, communication to the public and the broadcasting of the whole work or substantial part of the work.<sup>201</sup> The work subject to these exclusive rights has to be either in the original form or in a form clearly derived from the original.<sup>202</sup>

##### **4.3.1.1 The doctrine of exhaustion**

The exercise of exclusive rights granted to literary, artistic, musical or audio visual works, particularly the right of distribution, is subject to the doctrine of exhaustion. The doctrine of exhaustion, or the first sale doctrine, provides that when an embodiment of a work that is protected by intellectual property right passes from the rights holder to a consumer, the rights holder's power over that particular work is extinguished.<sup>203</sup> Specifically, once the copies have been put in the market with the rights holder's consent,<sup>204</sup> the doctrine allows for the resale of those copies without further authorization. Therefore, the first sale doctrine limits the rights holders' exclusive right of distribution. Particularly it extinguishes an author's right in a particular copy of a creative work

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<sup>197</sup> Schten A, 'No more starving artists: Whay the art market needs a universal artist resale royalty right,' 117.

<sup>198</sup> Bently. L and Sherman. B, 'Intellectual Property Law' Oxford University Press, 4<sup>th</sup> Edition (2014) 38.

<sup>199</sup> Hansmann H, 'Royalties for Artists Versus Royalties for Authors and Composers,' 7.

<sup>200</sup> Section 15 (26D) The Copyright (Amendment) Bill, 2017

<sup>201</sup> Section 26 (1) Copyright Act No. 12 of 2001 (Revised 2016).

<sup>202</sup> Section 26 (1) Copyright Act No. 12 of 2001 (Revised 2016).

<sup>203</sup> Perzanowski A and Schultz J, 'Digital Exhaustion,' 59, *UCLA Law Review*, 889 (2011), 891.

<sup>204</sup> Goldstein P and Hugenholtz, *International Copyright: Priciples, Law, and Practice*, Oxford University Press, London, 3<sup>rd</sup> Edition (2013), 311.

once it is sold.<sup>205</sup> Visual artists would not be able to receive resale royalties as a result of the extinction of their rights.

#### 4.3.1.2 *The effects of doctrine of exhaustion on artist resale right*

Generally, the purpose of the first sale doctrine is to give effect to the transferability of movable goods without restraints, remove the administrative burden on courts in trying to enforce restrictions upon difficult to trace and readily movable goods and avoid the enormous task of enforcing such an administrative task.<sup>206</sup> It has been argued that artist resale right puts a restriction on free alienability or property by demanding for a further payment upon resale of an artwork<sup>207</sup> and that artist resale right provides extra economic protections to visual artists at the expense of other professions.<sup>208</sup> Thus implementing artist resale right has been deemed, in the United States for instance, to be a violation of the first sale doctrine whose effect is to prevent buyers of the artwork from ever obtaining complete ownership over the artwork.<sup>209</sup>

#### 4.3.2 **The Costs of resale Royalty rights**

It has been argued that enacting resale rights may be considered ineffective and inefficient in some cases since, first, buyers are forced by the law, that is artist resale right, to share their future resale earnings with artists and this causes the value they attach to a work and the willingness to pay will to decrease.<sup>210</sup> The buyers' ability to pay reflects the values expected from the artworks they bought and especially potential proceeds from future resale transactions.<sup>211</sup> Second, the effect of the resale royalties is not to increase the income of visual artists but to redistribute some of it distinctly among a select few artists and estates<sup>212</sup> mostly the successful artists.<sup>213</sup> Third, resale right introduces

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<sup>205</sup> Bussey A, 'The Incompatibility of Droit de Suite with Common Law Theories of Copyright,' 1089.

<sup>206</sup> *Close v Sotheby's Inc.*, No. 16-56234 (9<sup>th</sup> Cir. 2018).

<sup>207</sup> Bussey A, 'The Incompatibility of Droit de Suite with Common Law Theories of Copyright,' 1089.

<sup>208</sup> Bussey A, 'The Incompatibility of Droit de Suite with Common Law Theories of Copyright,' 1089.

<sup>209</sup> Janevicius M, 'Droit de Suite and Conflicting Priorities: The Unlikely Case for Visual Artists' Resale Royalty Rights in the United States.' *DePaul Journal of Art, Technology & Intellectual Property Law*, Vol. 25, Iss. 2 383 [2015], 402.

<sup>210</sup> Rub G, 'The unconvincing case for Resale Royalties,' 6.

<sup>211</sup> Rub G, 'The unconvincing case for Resale Royalties,' 6.

<sup>212</sup> Bussey A, 'The Incompatibility of Droit de Suite with Common Law Theories of Copyright,' *Fordham Intell. Prop. Media & Ent. L.J.* [Vol. 23:1063, (2013) 1081].

<sup>213</sup> Rub G, 'The unconvincing case for Resale Royalties,' 6.

significant transaction costs in the running of resale right system, such as, locating the authors and their successors in law as well as costs of monitoring and litigation.<sup>214</sup>

Thus the resale royalty system has been termed as highly ineffective as it creates a distortion in the market through giving incentives to art dealers and collectors who are resellers to use private sales.<sup>215</sup> This happens in instances where the the sellers, that is artists, are convinced to give buyers perpetual transferable licenses in order to avoid paying licenses in the future.<sup>216</sup> At the same time buyers of visual artworks could require selling artists to transfer the copyright together with the artworks themselves.<sup>217</sup>

#### **4.3.3 Artist Resale right work only when there is a benefit**

Artist resale right is said to allow visual artists to gain extra income as they are deemed to be principally responsible for the increase in value of the work.<sup>218</sup> Queries arise when the value of the artwork decreases, should the artist participate in the loss or in repaying part of the first sale price to the cosignor?<sup>219</sup> According to Prowda, if prices increase the artist is morally entitled to share in the proceeds of the work but when prices decrease it is morally inappropriate to hold artists accountable.<sup>220</sup>

#### **4.3.4 Failure to appreciate other participants in artist's work life**

The resale right has been deemed to discriminate against other art market players in that it does not take into consideration interests of collectors, museums, dealers and auction houses.<sup>221</sup> Thus artist resale right is granted based on an argument of artists as the only one group among the interested parties in the resale proceeds right.<sup>222</sup> The failure to consider interest of the other players is to impose a tax on resale transactions for the benefit of artists while impairing the interests of

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<sup>214</sup> Rub G, 'The unconvincing case for Resale Royalties,' 7.

<sup>215</sup> Rub G, 'The unconvincing case for Resale Royalties' *The Yale Journal Forum*, (2014) 7.

<sup>216</sup> Rub G, 'The unconvincing case for Resale Royalties,' 8.

<sup>217</sup> Rub G, 'The unconvincing case for Resale Royalties,' 8.

<sup>218</sup> Merryman J, 'The Wrath of Robert Rauschenberg,' 113.

<sup>219</sup> Merryman J, 'The Wrath of Robert Rauschenberg,' 113.

<sup>220</sup> Prowda J, *Visual Arts and the Law*, Lund Humphries is part of Ashgate Publishing, (2013) 130.

<sup>221</sup> Merryman J, 'The Wrath of Robert Rauschenberg,' 118.

<sup>222</sup> Merryman J, 'The Wrath of Robert Rauschenberg,' 118.

dealers, and auction houses.<sup>223</sup> The tax imposed potentially reduces the dealers' financial ability to support and promote the artist's work.<sup>224</sup> The effect of the tax and costs associated with implementing artist resale right may be a shift in the secondary market transactions to other jurisdictions that do not impose artist resale royalties.<sup>225</sup>

#### 4.3.5 Conclusion

In as much as these challenges exist in relation to the implementation of artist resale right it has been argued that, "it would be unreasonable to expect all fine artists to forfeit this potentially lucrative reward simply because, as in any other enterprise, those who have the greatest success will benefit the most."<sup>226</sup> Thus generally artist resale rights should be granted to ensure that visual artists share in the increased value of their work. There shouldn't be discrimination in the nature of the works that are eligible for artist resale right as doing so would end up going against the very foundation of artist resale right which is to create equality amongst copyright owners.

#### 4.4 Legislating for artist resale right in new media art Kenya

Due to the lack of a definition of original works of art in the provisions on artist resale right in Kenya, in its application original works of art were taken to mean paintings, sculptures, and illustrated manuscripts to the exclusion of works that afford the artist gain by virtue of their reproduction and large scale sale.<sup>227</sup> As time went on, while *droit de suite* applied to paintings, sculptures, and illustrated manuscripts a difficulty ensued in the case of lithographs, engravings, woodcuts, medals, jewelry and other objects that were generally mechanically produced in quantity for sale.<sup>228</sup> In France for instance, "original works" denotes works created by the artist himself and copies made in limited quantities by the artist himself or under his responsibility.<sup>229</sup> In the same light, Australia considers the term original in relation to an artwork as either, "a)

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<sup>223</sup> Merryman J, 'The Wrath of Robert Rauschenberg,' 118.

<sup>224</sup> Merryman J, 'The Wrath of Robert Rauschenberg,' 118.

<sup>225</sup> Merryman J, 'The Wrath of Robert Rauschenberg,' 116.

<sup>226</sup> Reddy M, 'The Droit de Suite: Why American Fine Artists Should Have a Right to a Resale Royalty' 531.

<sup>227</sup> Hauser R, 'The French Droit De Suite: The Problem of Protection For The Underprivileged Artist Under The Copyright Law' 112.

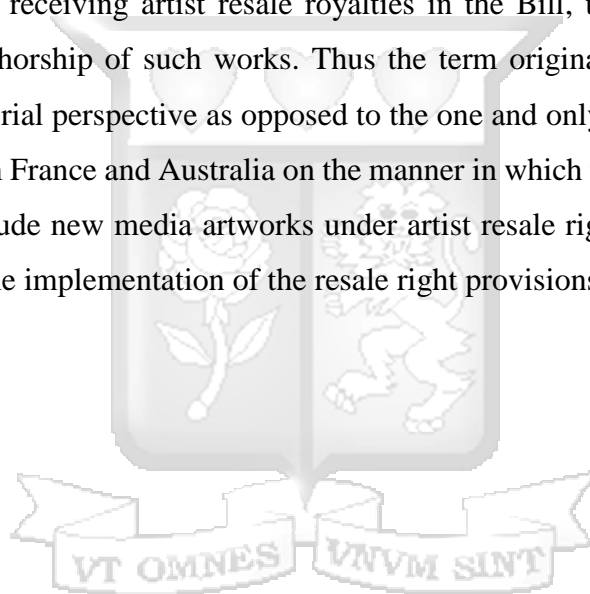
<sup>228</sup> Hauser R, 'The French Droit De Suite: The Problem of Protection For The Underprivileged Artist Under The Copyright Law' 98.

<sup>229</sup> Intellectual Property Code - Art. L122-8.

created by the artist or artists or b) produced under the authority of the artist or artists.”<sup>230</sup> Therefore the “the adjective ‘original’ should not be a reference to the first embodiment of the work,”<sup>231</sup> since such a definition would only seek to prevent visual artists creating new media art from receiving royalties.

#### **4.5 Conclusion**

These potential challenges and limitation ought to be considered while legislating for an artist resale right so that the potential benefits to visual artists are not outweighed by the potential challenges and limitation. In particular for works considered new media art in Kenya, which are expressly excluded from receiving artist resale royalties in the Bill, their eligibility should be determined based on authorship of such works. Thus the term original works of art should be interpreted from an authorial perspective as opposed to the one and only physical embodiment of a work. Experiences from France and Australia on the manner in which the term original works of art has developed to include new media artworks under artist resale right can be used to inform possible regulations on the implementation of the resale right provisions in the Bill in Kenya.



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<sup>230</sup> Section 7(1), Resale Royalty Right for Visual Artists Act 2009, No. 125, 2009.

<sup>231</sup> Ricketson S, ‘Proposed international treaty on droit de suite/resale royalty right for visual artists’ (2015) 31.

## CHAPTER FIVE

### SUMMARY AND CONCLUSION

#### 5.1 Summary

In Chapter 1, this project set to investigate whether or not the interpretation of term original in the proposed Bill in respect to artist resale right is sufficient to maximize the interests of New Media artists in Kenya. In order to carry out this investigation, this project asks three questions on the use and interpretation of the term original under artist resale right in international and national laws. This projects assumes that the core function of a legal framework on artist resale right is to provide mechanisms for visual artists whose works are resold in the commercial secondary market to receive artist resale royalties. It is also assumed that artist resale right legal framework may be rendered insufficient if there are ways in which artist considered visual artists creating works of art may be ineligible to receive artist resale royalties.

Specifically, in the case of the proposed artist resale right in Kenya, Chapter 1 explains that an interrogation in two leading countries that have benefitted from collecting artist resale royalties; that is France and Australia, may be useful to inform Kenya's approach in legislating for new media artists. In undertaking this interrogation, Chapter 1 provides a conceptual framework based on artist benefitting, in monetary terms, from increase in value of their artwork, ensuring equity amongst copyright holders and incentivizing artist to continue producing valuable works of art.

In Chapter 2, this project examines the interpretation of the term original works of art. The conceptions of the term original works of art as works eligible for artist resale right. This examination is essential as it demonstrates historical development in the use of original works of art under artist resale right internationally. Original works of art was traditionally used to denote the one and only work of art as used in France 1920 law on Artist resale right. The development of use of mechanical production to create artworks such a photography which exists and has the potential to be made in multiples copies challenged the idea of the one and only work of art. In spite of this, photography was still rendered to be eligible for artist resale right. In the age of digital technology, new media works of art are not only created in the multiples but there are perfect replicas of each other. They are identical copies.

Indeed, the Bill includes photography as works of art eligible for artist resale right but it explicitly excludes works of art created in identical copies such as new media art. Visual artists creating new media art will therefore be ineligible for artist resale right royalties in Kenya. In as much as artist resale right is meant to create equity amongst copyright holders, in disallowing new media art from artist resale royalties leads to further discrimination within the copyright law system.

In Chapter 3, this project contextualizes and problematizes artist resale right from their establishment in France in 1920 to the inclusion the Berne Convention in 1948 and the proposal to include them through an amendment to the Copyright Act in Kenya. This Chapter indicates that artist resale right has evolved over the years to allow visual artists to receive artist resale royalties from the commercial exploitation of their work of art in the secondary market. This Chapter indicates that the evolution has been attributed to the interpretation of the term original works of art in respect to artist resale right. This Chapter demonstrated that the evolution of artist resale right has been from the interpretation of original from one and only embodiment of work of art to include multiple and identical works of art. The evolution has been to increase the artists bargaining powers with buyers and collectors, to reduce instances of discrimination in comparison with other copyright authors and to share in the increase in value of the works of art.

In the data presented in Chapter 3, it is clear that both France and Australia experiences are instructive in regard to the interpretation of the term original works of art under artist resale right. In both France and Australia the term original is defined as a work created by an author or under their authority. The works of art eligible for artist resale right include new media art such as digital art in France and multimedia and video art in Australia. In addition to this, France further provides that works of art that fit in the category of new media art should be produced in a limited number of copies and signed off by the artist. In so doing, visual artist creating new media art are eligible for artist resale royalties in France and Australia. Therefore, Kenya should interpret the term original works of art to include new media art. The explicit requirement that identical copies of works of art are not eligible for artist resale right should be done away with to allow visual artist creating new media art to receive artist resale royalties.

With regard to the proposal made in the Bill to amend Kenya's copyright law and introduce artist resale right, Chapter 4 considers experiences of two leading countries in the artist resale rights in the internationally, namely France and Australia. From this analysis, the study indicates that there

are several important legal provisions that may be borrowed and used by Kenya to adequately address artist resale right in her copyright law framework. In this regard data collected indicates that both France and Australia have put in place provisions to allow visual artist creating new media art to receive artist resale royalties.

This chapter also examines efficiency of artist resale right on grounds that it leads to shift in the art market, increase in transaction costs, an assumption that artist are the sole drivers of value in works of art and an increase in the prices of the works of art rendering the art market to be inaccessible to many. In as much as these inefficiencies are present, this Chapter strongly suggests that the benefits for having artist resale right outweigh the costs. Particularly for new media art, the justifications to render such works in eligible for artist resale right are solely based on the inefficiencies artist resale right may potentially cause in the market.

## **5.2 Conclusion**

In sum, this research concludes that a definition of the term original works of art in the legal framework for artist resale right is key to ensuring visual artist creating new media art receive artist resale royalties. A definition of original works of art that includes visual artist creating new media art depends entirely on the provisions relating to artist resale right within the copyright legal framework. The provisions ought to ensure that visual artists creating new media art are not further discriminated within the copyright legal framework. Such artists ought to share in the increased value of the works of art in the secondary market through receiving artist resale royalties. Therefore any proposal to amend Kenya's copyright legal framework to include artist resale right should not exclude new media art from artists resale royalties based on the nature as identical copies.

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