

In Confidence

Office of the Minister of Commerce and Consumer Affairs

Chair, Cabinet Economic Development Committee

Review of the *Copyright Act 1994*: Release of Issues Paper

Proposal

- 1 I seek agreement to release for public consultation an issues paper, which forms the first stage of the review of the *Copyright Act 1994*.

Executive summary

Background

- 2 In June 2017, the previous government agreed to initiate a review of the *Copyright Act 1994* (the *Copyright Act*) and released the terms of reference for the review (annex 1) [EGI 17 MIN 0129 refers, confirmed by CAB-17-MIN-0287.01].
- 3 I agree that a review of the *Copyright Act* is needed, given the significant technological changes since the last review in 2008. I seek your agreement to release the issues paper attached in annex 2 (the *Issues Paper*) as part of the first stage of the review.

Issues Paper

- 4 The purpose of the Issues Paper is to collect information and evidence on how the *Copyright Act* is functioning and identify what problems there may be with the current regime. The next stage of the review will look at developing solutions that are appropriate for New Zealand.
- 5 Although stakeholders' views on copyright are highly polarised, I consider that releasing the Issues Paper to the public is low-risk. This is because the primary purpose of the Issues Paper is to seek information on and evidence of any problems from stakeholders.

Wai 262

- 6 One part of the Issues Paper I would like to draw your attention to is the section entitled 'Copyright and the Wai 262 Inquiry'. The section discusses the Waitangi Tribunal's recommendations in its 2011 Wai 262 report (sometimes referred to as 'flora and fauna' claim) on the protection of mātauranga Māori and expressions of mātauranga Māori (which the Tribunal called 'taonga works' and 'taonga-derived works').
- 7  In the interim, the 'Copyright and the Wai 262 Inquiry' section of the Issues Paper seeks submitters' views on this proposed process, and how the government should engage with Treaty partners and the community on the Wai 262 recommendations (in Chapter 1 of the report) on taonga works.

- 8 Including the 'copyright and Wai 262 inquiry' section in the Issues Paper will create an expectation among stakeholders and Māori that the Government will develop policy to protect taonga works, taonga-derived works and mātauranga Māori, and that this work will be coordinated with the *Copyright Act* review.

Background

What is copyright?

- 9 Copyright is an intellectual property right that gives creators of original works, like books, films and artistic works, exclusive rights to control the production and dissemination of their works for a set period of time.
- 10 Copyright enriches our culture, enables innovation and helps creators earn some income from their works. To do all this, the copyright regime must strike a balance between:
- 10.1 providing incentives for the creation of original works;
 - 10.2 allowing new works to build on existing works (called 'follow on creation');
 - 10.3 ensuring people can access knowledge and creative content.

Why is a review needed?

- 11 The *Copyright Act* was last reviewed in 2008. The pace of technological change in the last ten years has been such that the changes made in 2008 are now out-of-date. For example, the use of streaming to deliver audio-visual content was in its infancy in 2008. Now it is a key mechanism for watching movies and television programmes. However, there is uncertainty as to how the *Copyright Act's* provisions apply to streaming. Other changes include the use of cloud technology, big data and data mining.
- 12 Both creators and users of copyright works have been calling for a review for some time. There are high levels of interest in the review. Officials have met with a diverse range of stakeholders and several (without prompting) have produced very detailed papers to inform the Issues Paper.
- 13 A review of the *Copyright Act* was intended to take place in 2013. This review was put on hold pending the conclusion of the Trans-Pacific Partnership Agreement negotiations [CAB Min (13) 15/6]. There is no longer any reason to prevent this review from proceeding. The implementation and bringing into effect of the copyright changes for the Comprehensive and Progressive Agreement for Trans-Pacific Partnership will not be affected by the review.

Previous government decision to review the Copyright Act

- 14 In June 2017, the previous government agreed to initiate a review of the *Copyright Act* [EGI 17 MIN 0129, confirmed by CAB-17-MIN-0287.01] and released terms of reference for the review (annex 1).
- 15 I support proceeding with the review of the *Copyright Act*. Technological advances since the last review of the *Copyright Act* in 2008 have significantly changed the way copyright works are created and disseminated. It is important for the *Copyright Act* to reflect these changes and remain fit-for-purpose.

Comment

The issues paper

- 16 I am seeking your agreement to release the Issues Paper, as attached in annex 2.
- 17 The Issues Paper is intended to be the first stage in the review of the *Copyright Act*. The paper takes a “first principles” approach to considering issues with the copyright regime. It will be used to test officials’ understanding of the status quo, potential problems that they and stakeholders have identified and the size of those problems.
- 18 The Issues Paper asks the public to provide their views and evidence on how the *Copyright Act* currently functions. This is because stakeholders’ views are highly polarised. The paper is intended to draw out problems with the current regime. Officials are encouraging stakeholders to prepare evidence-based submissions to support their views.
- 19 The length of the Issues Paper is necessary to properly identify the multitude of potential issues, but also (through careful explanation) to make very technical matters that have been raised with officials, accessible to ordinary readers. In this way, it lays the foundation for informed submissions that will enable officials to credibly evaluate how well the copyright regime is working.
- 20 The release of the Issues Paper will be supported by strategies for assisting interested groups to participate in the examination of issues, including a two-page document (annex 3) designed to help people navigate the Issues Paper and a number of public workshops planned by my officials.
- 21 Submissions will enable officials to scope out issues for the next stage of the review. During the next stage, time will be spent developing solutions that are appropriate for the New Zealand context. In doing this, I anticipate that, for some issues, it may not be possible to develop solutions that are acceptable to all stakeholders.

Key issues

- 22 The paper covers a range of issues. Those most likely to generate interest are:
- 22.1 whether the exceptions regime facilitates data mining and artificial intelligence and, if not, whether it should;
 - 22.2 whether New Zealand should adopt a fair use exception, like the United States, which adopts a principles-based approach to the main copyright exceptions rather than a prescriptive one;
 - 22.3 educational exceptions to copyright, their interface with licensing arrangements and whether they reflect current teaching practices;
 - 22.4 library and archive exceptions and their role in digitisation processes;
 - 22.5 Internet Services Providers’ responsibility for providing links to infringing copyright material.
- 23 However, the main section I would like to draw your attention to is the ‘Copyright and the Wai 262 Inquiry’ section.

- 24 The Wai 262 inquiry was the Waitangi Tribunal's first whole-of-government inquiry, looking at the place of Māori culture, identity and traditional knowledge in New Zealand's laws, government policies and practices. In its 2011 Wai 262 report, the Tribunal made recommendations on the protection of mātauranga Māori and expressions of mātauranga Māori (which the Tribunal called 'taonga works' and 'taonga-derived works'). Taonga works and taonga-derived works are often also copyright works.
- 25 The 'Copyright and the Wai 262 Inquiry' section of the Issues Paper covers the relationship between copyright, and Māori rights and interests in taonga works and mātauranga Māori, as considered in the Wai 262 report.
- 26 The Waitangi Tribunal did not make recommendations on changes to the copyright regime. Rather, it recommended that protections be implemented to protect taonga works and mātauranga Māori in a new legislative regime. However, many stakeholders and Māori will expect to find a discussion of the Wai 262 taonga works recommendations in the *Copyright Act* review Issues Paper.
- 27 I consider that these recommendations warrant a separate work stream, running parallel to the *Copyright Act* review. In this context, the 'Copyright and the Wai 262 inquiry' section discusses the Tribunal's recommendations, and seeks submitters' views on this proposed process, and how the government should engage with Treaty partners and communities on the Wai 262 taonga works recommendations. Including the section in the Issues Paper will create an expectation among stakeholders and Māori that the Government will develop policy to protect taonga works, taonga-derived works and mātauranga Māori, and that this work will be coordinated with the *Copyright Act* review.

Inclusion of new objective for the review of the copyright regime

- 28 The Issues Paper invites comment on the objectives contained in the terms of reference that were released in June 2017. These did not include an objective regarding the Treaty of Waitangi. I now seek agreement to add the objective of 'ensuring the copyright system is consistent with Crown obligations under the Treaty of Waitangi'. This objective has been included in the Issues Paper, subject to Cabinet's agreement.

Proposed timeframes

- 29 I propose that the Issues Paper be released for public consultation in July 2018, for a period of 16 weeks.
- 30 Officials will report back to me on the results of the consultation process, their analysis of submissions, and the next stage of the review process – the development of an options paper to consider possible changes to the *Copyright Act*. [REDACTED]

Stakeholder views

- 31 While there is a broad consensus that copyright protection is important, there is heated debate about what the settings should be.
- 32 Stakeholders who are mainly users of copyright works, like technology companies, educational institutions, libraries and consumer groups, suggest that the current copyright settings give too much emphasis to copyright owners' commercial interests. They argue that this inhibits innovation and follow-on creation. They generally call for more flexible exceptions for using copyright works.
- 33 On the other hand, stakeholders who are primarily creators of copyright works, like entertainment companies, and music and print licensing organisations are concerned about the piracy of their works, particularly over the internet. They seek stronger copyright protection and greater power to enforce their copyright. They generally oppose extending the exceptions for using copyright works.
- 34 At this stage of the review, the Issues Paper does not take positions on these matters, but rather seeks information on, and evidence of, problems with the copyright regime.

Consultation

- 35 The Treasury; Ministry for Culture and Heritage; Ministry of Justice; Department of Internal Affairs; Ministry of Education; Te Puni Kōkiri; New Zealand Customs Service; Ministry of Foreign Affairs and Trade; and the Department of the Prime Minister and Cabinet have been consulted on the Cabinet paper and attached Issues Paper.

Financial implications

- 36 There are no financial implications arising from this paper.

Human rights, gender and disability implications

- 37 The proposals in this paper are consistent with the *New Zealand Bill of Rights Act 1990* and the *Human Rights Act 1993*.
- 38 There are no gender or disability implications associated with the proposal.

Legislative implications

- 39 There are no legislative implications arising from this paper.

Regulatory impact analysis

- 40 A regulatory impact analysis is not required for the Issues Paper. An impact analysis will be required to inform Cabinet decisions on making changes to the legislation.

Publicity

- 41 I will release a media statement publicising the release of the Issues Paper and encourage the public to take the opportunity to make a submission.

- 42 The Ministry of Business, Innovation and Employment will publish the Issues Paper and supporting materials on its website and advise stakeholders when the paper is released. The Ministry will also publish this Cabinet paper, with any necessary redactions.

Recommendations

The Minister of Commerce and Consumer Affairs recommends that the Committee:

- 1 **note** that the previous government agreed to initiate a review of the *Copyright Act* and released terms of reference for the review [EGI 17 MIN 0129 refers, confirmed by CAB-17-MIN-0287.01];
- 2 **note** that, in light of the technological changes since the last review of the *Copyright Act*, I support proceeding with this review of the *Copyright Act*;
- 3 **note** that for the first stage of the review, the Ministry of Business, Innovation and Employment has prepared the attached Issues Paper seeking public submissions on how the *Copyright Act* is currently functioning;
- 4 **note** that:
 - 4.1 the attached issues paper contains a section on 'Copyright and the Wai 262 Inquiry';
 - 4.2 this section will create an expectation among Māori and stakeholders that the Government will develop policy to protect taonga works, taonga-derived works and mātauranga Māori, and that this work will be coordinated with the *Copyright Act* review;
- 5 **agree** to a new objective for the review of ensuring the *Copyright Act* is consistent with Crown obligations under the Treaty of Waitangi;
- 6 **agree** to release the Issues Paper for public submissions in July 2018, for a period of 16 weeks;
- 7 **authorise** the Minister of Commerce and Consumer Affairs to make editorial or minor content changes to the Issues Paper prior to its public release;
- 8 **authorise** the Ministry of Business, Innovation and Employment to make a suitably redacted version of this Cabinet paper publicly available on its website.

Authorised for lodgement

Hon Kris Faafoi

Minister of Commerce and Consumer Affairs