

In Confidence

Office of the Minister of Commerce and Consumer Affairs
Chair, Cabinet Economic Growth and Infrastructure Committee

Review of the *Copyright Act 1994*: Terms of Reference

Proposal

1. I seek approval to launch a review of the *Copyright Act 1994* by releasing the attached Terms of Reference (see **Annex 1**).

Background

2. The *Copyright Act* protects original creative works (e.g. films, books, songs, photos) by granting the creator of the work certain exclusive rights (e.g. copying the work, issuing copies of it to the public, performing the work in public). It also provides a number of exceptions to these rights to allow for specific uses of works that are considered to be in the public interest (e.g. for the purposes of criticism, review or private study).
3. The copyright regime incentivises the creation and dissemination of original creative works. It affects how people create, distribute and access information. It is, therefore, a critical system to facilitate a knowledge-based economy.
4. The *Copyright Act* was last significantly reviewed more than 10 years ago, from 2001 to 2004 resulting in the *Copyright (New Technologies) Amendment Act 2008*. The scheduled review of these amendments in 2013 was put on hold pending the conclusion of the Trans-Pacific Partnership (**TPP**) negotiations (CAB Min (13) 15/6 refers). Copyright changes required under TPP were implemented in December 2016. I believe it is the appropriate time to launch a review.
5. A review is an opportunity to consider the appropriate balance in the regime. Without the ability to protect works from unauthorised copying/distribution, there would be fewer incentives to create and disseminate important social, cultural and commercial works. However, over-protective copyright settings can inhibit the creation and dissemination of copyright works by restricting competition and trade. Over-protective copyright settings may also impede follow on creation – that is, using existing creative works and the ideas underpinning them to create new works, ideas, products and services.
6. Aspects of the current regime are now out of date. Rapid technological change has resulted in significant changes in creative content delivery markets and the way that content is used. For example ‘streaming’, which is now a key content delivery mechanism, had only just emerged during the last review. Other examples include uses of big data and cloud storage.
7. Given the vast technological changes that continue to change the way we create, distribute and consume content, it is important to ensure that the regime is fit for purpose. I believe there is a solid economic case for moving forward with a review now.

Comment

8. Copyright issues are complex, pervasive and rarely tested in the New Zealand courts. Copyright law, therefore, needs to be monitored and updated to ensure that it is clear how it applies to new and emerging technology, such as ‘streaming’ or artificial intelligence. Outdated law can bring uncertainty, which results in costs to creators, right holders and users alike.

9. It is also important to ensure that the default rule (do not copy or distribute without permission of the copyright owner) does not apply in situations where there may be little policy rationale for requiring permission, such as copying necessary to facilitate basic functionality of new technology. Over-protection can inhibit innovation and important cultural activities.
10. A *Copyright Act* review will be an important step towards ensuring that New Zealand has regulatory settings that do not inhibit the development of innovative new products and services.
11. The Ministry of Business, Innovation and Employment, in consultation with the Ministry for Culture and Heritage, recently conducted a study into the role of copyright and designs in the creative sector (the **Study**) to deepen government's understanding of how copyright is used in practice and to help identify policy issues. The resulting report *Copyright and the Creative Sector* was published in December 2016.
12. The Study has gathered useful evidence of how copyright operates in context and has highlighted that the current regime is complex and unclear in its application to many modern practises.
13. The Study has also identified issues for possible consideration ranging from potential missed opportunities (e.g. lacking clarity around innovative or cultural activities that rely on copying, such as artificial intelligence or documentary-making), to difficulties enforcing rights (e.g. taking action can be resource-intensive and costly).
14. The Study's report emphasised that the Study was the start of a conversation and that one possible outcome was a review of the *Copyright Act*.

There have been increasing calls for a review

15. Since the 2013 Cabinet decision to delay the review there have been growing calls from stakeholders to review the *Copyright Act*. The conclusion of TPP has intensified these calls. There have also been media reports that the *Copyright Act* review is scheduled to take place this year.
16. Stakeholder views on the purpose of copyright and appropriate copyright settings are often polarised. While there is broad consensus that copyright protection is important, there is heated debate about what the ideal copyright settings should be.
17. Many stakeholders consider that the regime is out of date. Some stakeholders, such as technology companies, educational institutions, consumer groups and heritage organisations, suggest that current copyright settings inhibit innovation and follow-on creation and are too protective of commercial interests. They generally call for more flexible exceptions. Others, including larger rights holder organisations such as music and print licensing organisations and television producers, seek stronger or more effective protection such as enhanced enforcement provisions to ensure adequate economic returns in a digital environment.
18. Launching a review would respond to stakeholder calls for a review and be consistent with Cabinet's decision to review the *Copyright Act* following the conclusion of the TPP negotiations.

Signalling an open and flexible process

19. Copyright is a complex area, and we will not be able to resolve all issues to everybody's satisfaction. However, it is important that we do what we can to ensure the regime supports innovative new products and services and is fit for the digital environment.

20. I consider that the best way to prioritise the policies that are likely to create the biggest impact and to seek input and buy-in from stakeholders is to release a high level Terms of Reference which provides guiding principles for a legislative review.
21. This approach would:
 - 21.1 build on the momentum generated through the Study, in terms of both the currency of the information and the level of stakeholder engagement
 - 21.2 allow officials to engage openly with stakeholders and the public as an issues paper is developed
 - 21.3 allow the Government to signal its commitment to stakeholder input and getting the settings right.

Terms of Reference

22. The Terms of Reference provide context on copyright and the *Copyright Act*, and highlight developments that have occurred since the Act was last reviewed. The Terms of Reference also set out the objectives for the review, which are to:
 - 22.1 assess the performance of the *Copyright Act* against the objectives of New Zealand's copyright regime
 - 22.2 identify any barriers to achieving the objectives and their level of impact
 - 22.3 formulate a preferred approach to addressing these issues.
23. The Terms of Reference clearly signal that the identified objectives for copyright, together with the scope and staging of the review, will be informed by a public consultation process.
24. This approach will enable us to stage the later phases of the review to prioritise the policies that will have the greatest impact.
25. I aim to seek Cabinet approval to release an issues paper for consultation in early 2018 to seek public views on the issues that are identified. The Terms of Reference includes a high-level indicative process for the project. The overall scope of the review, and the staging of it, will be informed by the initial consultation process.

Consultation

26. The Treasury, the Ministry for Culture and Heritage, the Ministry of Justice and the Ministry of Foreign Affairs and Trade have been consulted on the Cabinet paper and the attached Terms of Reference.
27. The Department of Prime Minister and Cabinet has been informed.

Financial Implications

28. There are no fiscal implications from the proposals in this paper.

Human Rights

29. There are no human rights implications from the proposals in this paper.

Legislative Implications

30. There are no legislative implications from the proposals in this paper.

Regulatory Impact Analysis

31. Regulatory impact analysis requirements are not applicable to the proposal in this paper.

Publicity

32. MBIE will publish the Terms of Reference on its website. I may also release a media statement announcing the review.

Recommendations

I recommend that the Committee:

1. **note** that the Copyright Act 1994 was due for review in 2013 and Cabinet decided to delay the review pending the conclusion of the Trans Pacific Partnership negotiations;
2. **note** that the Ministry of Business, Innovation and Employment, in consultation with the Ministry for Culture and Heritage, recently conducted a study into the role of copyright and designs in the creative sector which deepened the Government's understanding of how copyright is used in practice and has identified issues for possible consideration in a review;
3. **note** that the copyright regime, which is a critical system to facilitate a knowledge-based economy,
 - a. is considered by many stakeholders to be out of date; and
 - b. could be inhibiting innovation and important cultural activities;
4. **agree** to a review of the *Copyright Act*;
5. **agree** to the public release of the attached Terms of Reference;
6. **note** that the process I am proposing for the review will allow the scope and staging of the review to be determined following consultation on an issues paper, enabling the Government to prioritise the policies that will have the greatest impact;
7. **authorise** the Ministry of Business, Innovation and Employment to make this Cabinet paper publicly available on its website;
8. **note** that I expect to seek Cabinet approval to release an issues paper in early 2018.

Hon Jacqui Dean
Minister of Commerce and Consumer Affairs

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