New Zealand Law Society
Te Kāhui Ture o Aotearoa

Resale Right for Visual Artists Bill

26/04/2023

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1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Resale Right for Visual Artists Bill (**Bill**).

1.2 This submission has been prepared with input from the Law Society's Intellectual Property Law Committee.[1]

1.3 The Law Society wishes to be heard.

2 Visual artwork created by artificial intelligence (clause 8(2))

2.1 Clause 8(2) of the Bill defines "visual artwork", and includes various examples of such works. These examples include "visual works of art created using computers or other electronic devices" (example (f)). It is unclear whether an artwork created by, or utilising, artificial intelligence (**AI**) would come within this example, as AI is not generally considered to be a "computer" or an electronic device".

2.2 Given the rapid evolution of technology, and the increasing use of AI to produce visual artworks, we suggest amending clause 8(2) to more clearly specify whether such works qualify as "visual artwork".

2.3 If the policy intention is for such works to be included in the proposed resale royalty scheme, we suggest amending clause 8(2):

(a) To specify that such works come within example (f) (i.e., "visual works of art created using computers or other electronic devices"); or

(b) To explicitly refer to works created by, or utilising, AI in the examples provided under clause 8(2).

3 Meaning of "visual artwork" (clause 8(2))

3.1 Clause 8(2) states that literary works, dramatic works, and musical works are excluded from the definition of "visual artwork", as these terms are defined in the Copyright Act 1994. This exclusive definition gives rise to some issues relating to multimedia works and compilations.

3.2 Section 2(1) of the Copyright Act states that "literary work" includes a "compilation", which in turn includes:

(a) Compilations consisting wholly of works or parts of works; and

(b) Compilations consisting partly of works or parts of works; and

(c) Compilations of data other than works or parts of works.

3.3 Under that Act (and the broad definition of "compilation"), copyright protections extend to multimedia compilations comprising a wide range of existing literary, musical and dramatic works.[2]

[1] See the Law Society's website for more information about this Committee: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/intellectual-law-committee/.

3.4 As literary, dramatic and musical works are excluded from the definition of "visual artwork" in clause 8 of the Bill, artworks which are compilations are also automatically excluded from that definition (and the proposed resale royalty scheme). However, the examples of "visual artwork" provided under clause 8 appear to include compilations of works or parts of work – for example, a collage, or a work of art created using a computer, could be compilation of existing paintings, drawings, prints and photographs. As a result, it is unclear whether compilations also come within the proposed resale royalty scheme (and the Departmental Disclosure Statement and the Regulatory Impact Statement for the Bill do not address this issue).

3.5 We also note that the examples of "visual artworks" in clause 8 include "visual works of cultural expression" of Māori and Pacific peoples. Such visual artworks are likely to include multimedia works/compilations which comprise, for example, musical works, sound recordings, films and communication works (which, as discussed above, attract copyright protection under the Copyright Act). While such works are expressly included in the Resale Royalty Right for Visual Artists Act 2009 (Australia) (the **Australia Act**),[3] there is no equivalent provision in this Bill which would allow for these works to come within New Zealand's resale royalty scheme.

3.6 As this Bill seeks to "be inclusive of the range of artworks sold in New Zealand",[4] and the examples in clause 8 expressly include visual works of cultural expression of Māori and Pacific peoples, it may be appropriate to extend the scope of the proposed resale royalty scheme to multimedia works/compilations.

3.7 The above issues could be addressed by replacing the exclusive definition of "visual artwork" in clause 8 with an *inclusive* definition which includes multimedia works and compilations. This definition could be modelled on section 7 of the Australia Act which defines "works of visual art" using an inclusive definition, and expressly includes multimedia artworks. An inclusive definition would also be consistent with the definitions of equivalent terms in the Copyright Act and the Australia Act (and therefore assist with interpreting the New Zealand legislation by looking to how the courts interpret the relevant definitions in those Acts).

4 <u>"Parties" to a resale (clauses 9 and 21)</u>

4.1 Clause 9(2)(a)(i) of the Bill states that a resale would be a professional resale if "at least 1 party to the resale is … an art market professional acting in that capacity".

4.2 Clause 11 then provides that an "art market professional" could be an auctioneer or an art consultant. These individuals are not generally considered to be *parties* to the resale

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2 Section 14 of the Copyright Act states that copyright exists in "original works" which are literary, dramatic, musical or artistic works, as well as sound recordings, films and communication works. Therefore any compilations which consist wholly or partly of "original works" attract copyright protection. Also see *Laddie, Prescott and Vitoria: The Modern Law of Copyright* (5th ed, LexisNexis Butterworths, 2018) which states at [3.51]: "Even though a work contains a substantial part derived from earlier material, the work can still be the subject of copyright provided sufficient further independent skill, useful labour, knowledge, taste or judgment have been bestowed on it. …Thus compilations ..may be the subject of copyright."

3 See section 7(2).

4 Explanatory Note of the Bill.

between the buyer and the seller. The description of an art market professional as a "party" to a resale is therefore incorrect. If this description remains, sales from one party to another party through a dealer (a common scenario) would not be subject to the resale royalty scheme. We do not think this is what is intended.

4.3 We note that comparable international instruments do not refer to "parties" to a resale:

(a) The Free Trade Agreement between the European Union and New Zealand (**NZ-EU FTA**) refers to resales "involving" art market professionals.[5]

(b) The Free Trade Agreement between New Zealand and the United Kingdom of Great Britain and Northern Ireland (**NZ-UK FTA**) also refers to resales "involving" sellers, buyers, or intermediaries.[6]

(c) The Australia Act similarly refers to commercial resales which "involve" art market professionals.[7]

(d) The Artist's Resale Right Regulations 2006 (UK) (the **UK Regulations**) provides that a sale of a work is a resale if the buyer or the seller (or their agent), "is acting in the course of a business of dealing in works of art".[8]

4.4 Given the policy objectives of the Bill are to meet New Zealand's obligations under the NZ-EU FTA and the NZ-UK FTA, it would be appropriate to align the language in the Bill with the language used in the free trade agreements. Therefore, we recommend amending clause 9(2) of the Bill by removing the references to "party" to the resale, and instead, referring to resales *involving* art market professionals, publicly funded art galleries and publicly funded museums.

4.5 This amendment would improve the clarity and workability of New Zealand's legislation, and assist with interpreting these provisions in future (by looking to how the courts interpret the legislation and develop the common law in the above jurisdictions).

4.6 We note that clause 21 of the Bill also refers to an art market professional being a "party" to a resale. We recommend making similar amendments to this clause to improve the clarity of the Bill.

5 <u>Rights relating to joint works (clause 12)</u>

5.1 Clause 12 provides for resale rights where an original visual artwork is created "by the collaboration" of two or more artists. However, in some circumstances, a visual artwork may be created 'jointly', but not in collaboration, with other artists (i.e., where the artwork is a compilation which builds on an existing piece of work, without the input or involvement of the artist(s) who created the existing work).[9]

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5 Article 18.14.

6 Article 17.46.

7 Section 8.

8 Regulations 12(2) and (3).

9 For example, some of Andy Warhol's work builds on existing artwork produced by other artists. These works were not created in collaboration with the artists involved in producing the original art used in Mr Warhol's work.

5.2 In such circumstances, the artist who created the existing artwork may wish to negotiate ownership shares and resale rights relating to the new artwork or compilation. However, the inclusion of the term "collaboration" means the Bill does not presently contemplate, or provide for, resale rights for these artists.

5.3 There does not appear be a policy rationale for excluding this cohort of artists from the proposed resale royalty scheme, and this exclusion may simply be an unintended consequence of the use of the term "collaboration".

5.4 It would be appropriate to align the resale royalty scheme with the rights already recognised under the Copyright Act, by removing the words "the collaboration of" in clause 12(1). Alternatively, we suggest modelling the provisions relating to joint works on section 16 of the Australia Act (which does not refer to "collaboration").

5.5 In making this suggestion, we draw attention to the Explanatory Note of the Bill, which clarifies that this new legislation is only required "because the alternative, amending the Copyright Act 1994, is not desirable because that Act is under review with no expected time frame for completion". The lack of an expected timeframe reinforces our view that it is desirable to align the resale royalty scheme with the copyright regime. Any future amendments to the Copyright Act can then also incorporate amendments to what will by then be the Resale Right for Visual Artists Act, to maintain alignment.

6 References to comparable legislation

6.1 The Departmental Disclosure Statement for the Bill states "[m]any of the policy details of this Bill are based closely on policy settings within the UK and Australian Artist Resale Royalty schemes".[10] However, the Bill does not contain any footnotes which cross-reference the relevant sections of the Australia Act and the UK Regulations.

6.2 Other intellectual property law statutes contain such references to assist with interpreting and understanding the New Zealand legislation. For example:

(a) The Trade Marks Act 2002 refers to the relevant sections of the Trade Marks Act 1998 (Singapore);

(b) The Patents Act 2013 refers to the relevant sections of the Patents Act 1990 (Australia); and

(c) The Designs Act 1953 refers to the Registered Designs Act 1949 (UK).

[10] Departmental Disclosure Statement, page 11.

6.3 We recommend including similar cross-references to the relevant sections of the Australia Act and the UK Regulations in the Bill, to assist in addressing any difficulties in interpreting this legislation at a later date.

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