

Copyright (Artist's Resale Right) Amendment Bill

23 November 2007

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: COPYRIGHT (ARTIST'S RESALE RIGHT) AMENDMENT BILL

1. We have considered the Copyright (Artist's Resale Right) Amendment Bill (the 'Bill') (PCO 12774/3), for consistency with the New Zealand Bill of Rights Act 1990 (the 'Bill of Rights Act'). We understand that this Bill will be considered by the Cabinet at its meeting on 3 December 2007.
2. We have concluded that the Bill appears to be consistent with the Bill of Rights Act. In coming to this conclusion we considered whether an issue arises with section 14 of the Bill of Rights Act.

PURPOSE OF THE BILL

3. The Bill amends the Copyright Act 1994 to introduce an artist's resale royalty right. The resale right will entitle visual artists to receive a royalty payment each time an original art work is resold on the secondary art market.
4. A compulsory collective management scheme will manage the resale right by:
 - creating a liability for payment of the royalty under the Bill;
 - empowering a private copyright collection agency to collect the royalty; and,
 - creating a right to information concerning the resale.
5. The liability for payment is joint and several between the seller and one of the following, as appropriate: the agent of the seller; if the seller does not have an agent, the agent of the buyer; or if there are no agents, the buyer.

CONSISTENCY WITH SECTION 14 OF THE BILL OF RIGHTS ACT

6. Section 14 of the Bill of Rights Act provides:

"Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form."

7. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.[\[1\]](#) We also note that freedom of

expression should be defined widely and questions of limits on the right should generally be determined pursuant to section 5 of the Bill of Rights Act.

8. Clause 204M of the Bill creates a right to information for the collection agency. The information must be necessary for the purpose of securing payment of the resale royalty that is due. In addition the collection agency may request, if the request for information is not made to the correct person, the name and address of a person who is liable for resale royalty payment.
9. Clause 204N creates an obligation that a person to whom a request is made under 204M must make his or her best endeavour to supply the information within 60 working days of receiving the request. The collection agency may apply to a court of competent jurisdiction for an order requiring the person to whom the request is made to supply the information.
10. Information about who purchased, and the price paid for, a particular artistic work is factual information and is not normally expressive. This factual information, however, may create an inference as to the opinion of the buyer concerning the quality and worth of the work and possibly support for the message contained in the art work.
11. In the Canadian Supreme Court case of *Slaight communications inc. v. Davidson*^[2] the Court considered whether compelling an employer to provide a reference letter containing on its face uncontested factual information infringed the freedom of expression under the Canadian Charter of Rights and Freedoms. The majority held that an order directing the employer to give the employee a letter containing factual information could be considered, because of the inferences that could be drawn from the letter, a *prima facie* limit on the employer's freedom of expression.
12. We note that the idea that there may be expressive content associated with the resale of a good is unique to artistic works and more particularly to controversial works of art. We further acknowledge that the possibility that the requirement to provide information about who purchased, and the price paid for, an artistic work would cause a chilling effect on dissemination of controversial art is remote.
13. But the possibility, however small, does exist and for this reason we have considered whether, if the provisions place a limit on freedom of expression they are justifiable in terms of section 5 of the Bill of Rights Act.
14. Where a provision is found to be *prima facie* inconsistent with a particular right or freedom, it may nevertheless be found to be consistent with the Bill of Rights Act if the inconsistency is considered to be a reasonable limit that is justifiable under section 5 of that Act. The inquiry under section 5 is essentially two-fold:^[3]
 - does the provision serve an important and significant objective; and
 - is there a rational and proportionate connection between that objective and the provision?

15. The resale royalty right for visual artists is essential for visual artists to realise an economic return on their work similar to the copyright benefits available to writers and composers. The provision looks to those liable to pay the royalty to provide information. The information is necessary for the scheme to work. In our view, this is a significant and important objective.
16. The Bill appropriately balances the concerns about compelled expression and possible chilling effect with the economic rights of the artist. The information to be provided by those liable to pay the royalty is limited to factual information necessary to find out who will, in fact, pay the amount and how much. The Bill also provides that this information must be treated as confidential. Moreover, without this information, it would be impossible to determine when the artist would receive the royalty and the amount of the royalty.
17. We consider the provision for compelled information to be rationally connected and proportionate to the need to ensure that visual artists have meaningful economic rights in their artistic work after the work's first sale.

CONCLUSION

18. Based on the analysis set out above, we have concluded that the Bill appears to be consistent with the Bill of Rights Act.

Jeff Orr	Stuart Beresford
Chief Legal Advisor	Acting Manager
Office of Legal Counsel	Bill of Rights/Human Rights Team

1 Butlers *The New Zealand Bill of Rights Act: A Commentary* (Wellington: 2005) at 13.27.

2 [1989] 1 S.C.R. 1038.

3 See *Moonen v Film Literature Board of Review* [2000] 2 NZLR 9 and *R v Oakes* [1986] 1 S.C.R. 103.

In addition to the general disclaimer for all documents on this website, please note the following: This advice was prepared to assist the Attorney-General to determine whether a report should be made to Parliament under s 7 of the New Zealand Bill of Rights Act 1990 in relation to the Copyright (Artist's Resale Right) Amendment Bill. It should not be used or acted upon for any other purpose. The advice does no more than assess whether the Bill complies with the minimum guarantees contained in the New Zealand Bill of Rights Act. The release of this advice should not be taken to indicate that the Attorney-General agrees with all aspects of it, nor does its release constitute a general waiver of legal professional privilege in respect of this or any other matter. Whilst care has been taken to ensure that this document is an accurate reproduction of the advice provided to the Attorney-General, neither the Ministry of Justice nor the Crown Law Office accepts any liability for any errors or omissions.

