



PO Box 60 Potts Point
NSW 1335 Australia
T +61 2 9368 1900
F +61 2 9358 6909
E nava@visualarts.net.au
www.visualarts.net.au
www.artscareer.com.au

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Patrons: Pat Corrigan AM
Janet Holmes à Court AC
Professor David Throsby

ACN 003 229 285
ABN 16 003 229 285



The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001
copyright@alrc.gov.au

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Copyright in the Digital Environment
The National Association for the Visual Arts (NAVA)'s submission in response to the ALRC's Discussion Paper 79 (DP 79)

The National Association for the Visual Arts (NAVA) welcomes the opportunity to respond to the ALRC's 'Copyright in the Digital Environment' Discussion Paper 79.

1. About NAVA

The National Association for the Visual Arts (NAVA) is the peak body representing the professional interests of the Australian visual and media arts, craft and design sector. Since its establishment in 1983, NAVA has provided advocacy and representation for the sector and set industry standards. It has had a long commitment to copyright entitlements for visual creators and was responsible for the establishment in 1995 of Viscopy, the visual arts copyright collecting society for Australia. NAVA also was a vigorous advocate for the introduction of both moral rights and resale royalty rights legislation in Australia. NAVA provides a range of professional services to its constituents including expert advice. Of the estimated 2,500 requests for advice received by NAVA each year, approx 13% are about copyright.

2. NAVA's previous submission

In November 2012, NAVA made a submission in response to the ALRC's Issues Paper 42. In this submission NAVA asserted the importance of ensuring the ability of artistic creators to be able to sustain a career in the arts. As generally very low income earners, artists find copyright payment can be a significant factor in their ability to maintain their role in running a small (usually one person) business. They are key contributors to the digital economy through the innovative systems, programs and imagery they generate for the on-line environment.

The constrained financial circumstances of the majority of Australian artists makes it essential that there is protection for the variety of forms of income they earn from various rights and entitlements. While Australian research does not reveal what proportion of this income is earned from digital copyright, NAVA knows anecdotally that for artists, income from licensing and royalties is increasingly valued as the online environment expands. In the past, the law has recognized the importance of protecting artists' ability to maintain copyright control over their intellectual property, both as a form of potential income and to protect their professional reputation through moral rights, ensuring respect for their work.

From NAVA's recent research conducted in October 2012, 53% of respondents said that copyright payments were either quite important or very important to their ability to work as an artist. In the last 12 months 92% of the respondents had received a copyright payment either from statutory licence distribution or from licensing their work themselves. NAVA's recent research confirms that 44.4% of respondents said their copyright had been infringed at some time in the course of their professional career.

NAVA reiterates that the widespread disregard and abuse of copyright law especially in the digital environment does not justify radically expanding the scope of exemptions to condone current non-compliance practices. NAVA has made it clear that it supports the access principle so long as artistic creators who are the owners of copyright are consulted about the use of their work, give permission for use and/or licenses without duress and are appropriately remunerated. In its previous submission, NAVA made a series of recommendations as to how better protection could be achieved while ensuring freedom of expression and enabling reasonable community access to content.

NAVA applauds the ALRC's 'Framing Principles for Reform':

1. Acknowledging and respecting authorship and creation
2. Maintaining incentives for creation of works and other subject matter
3. Promoting fair access to and wide dissemination of content
4. Providing rules that are flexible and adaptive to new technologies
5. Providing rules consistent with Australia's international obligations

However, NAVA believes that points 1, 2 & 5 are skewed by the measures being proposed to achieve 3. NAVA believes that achieving 4 does not necessarily require diminution of creators' rights protection.

3. Fair Use

NAVA is extremely concerned about and opposed to the proposal in the current ALRC Discussion Paper that 'fair dealings' provisions should be revoked and replaced by an open-ended 'fair use' exception, which would operate in a similar way to the system in the US.

Currently Australian copyright law allows for 'fair dealing' for research or study, criticism or review, reporting news and parody or satire. These are specific guidelines which indicate the circumstances under which the public or users can have access to copyright material without needing permission. They also provide guidance to creators and the creative industries about the limits of their use of other peoples' material without their permission.

NAVA understands that the ALRC has also drawn on the US model in proposing 'fairness factors' which include:

- the purpose and character of the use;
- the nature of the copyright material;
- where only a part of the copyright material is used, the amount or substantiality of the material used considered in relation to the whole; and,
- the effect on the potential market for or value of the material.

The ALRC provides 'illustrative purposes' which give the current fair dealing exceptions as examples of uses that may be fair. They also include the current fair dealing list as well as the following other categories of use:

- quotation
- public administration;

- education;
- private and domestic;
- and non-consumptive (caching, indexing and text mining).

However, none of these lists is exhaustive and under such a loose definition, other unauthorised uses of creative material could also be defended as being fair.

NAVA's concern is that the introduction of a fair use system in Australia introduces much greater uncertainty and is unpredictable in application and is not backed by case law. Because of the lack of legal precedent and lack of specificity about what can be regarded as 'fair' and therefore an allowable use, the system will become dependant on decisions being made by courts and through litigation. It will take many years for Australia to develop its own case law. Not only is this cumbersome and time consuming but for most artists, it is financially inaccessible. It can be reliably predicted to result in tipping the balance between the interests of copyright rights holders and those of copyright users in disproportionately in favour of users. Inevitably it will advantage those who can afford the process (eg Amazon, Facebook, Youtube, Pinterest and Google) and is likely to result in injustices and exploitation of the weak. The introduction of a fair use system would enable much greater disregard of artists' IP in the confidence that artists will not have the means or the will to expose themselves to the endurance test of litigation and the uncertainty of the result. It will mean that the judiciary, not the legislature, will be setting the ground rules for copyright.

Fair use also will create uncertainty for artists wanting to utilise a pre-existing work as an element in their practice for parody or satirical purposes, or for remix or mashup. It may even create uncertainty in the use of quotation for the purpose of reviewing others' work or for non-profit educational purposes. We know from artists who speak to us directly that they have become increasingly reluctant to put their work up on the internet for fear of image piracy. This militates against the success of their own careers in being able to reach a wide audience, potential buyers of their work and those who would wish to pay for the use of the IP. It also results in a lack of free public access to their ideas and enjoyment of their work. The undesirable consequence is a diminution of the cultural life of the community.

In the digital environment, fair use could kill off the golden goose.

4. Moral Rights

One of the key rights issues which has remained unaddressed and would be seriously compromised by the ALRC's propositions is artists' moral rights. Artists' moral rights can be the victim in the reuse of their IP in such a way that it is regarded by the artist as damaging to their reputation. In relation to transformative reuse, the great majority of artists agree that making content available should be at the discretion of the IP creator.

Their agreement is likely to be a matter of:

- degree of appropriation;
- whether it is reusing artistic concept, subject matter or style
- how many works are used;
- whether the original creator is attributed or would prefer not to be; and
- whether the reuse could cause damage to the originator's reputation by reflecting adversely on the integrity of the original work or being mistakenly thought to be a lesser work by the creator of the original.

Artists will usually err on the side of generosity and agree to reuse of their work as long as it does not unreasonably prejudice their legitimate interests.

The fair use principle does not make evident moral rights obligations and would enable users to pay it little regard. For artists whose success is so dependent on their profile and reputation, this will cause serious damage.

5. Quotation

For artists, the issue of being able to draw on the work of others is contentious and divides the community. NAVA supports the position by the Australian Copyright Council that this issue is better mediated by the concept of substantial part than by a specific exception. Quotation is already inherent in fair dealing for criticism or review.

However, if quotation is introduced as a new exception, NAVA proposes there should be some substantial provisos that;

- it is for the purpose of quotation;
- the quotation constitutes a fair dealing with the quoted material;
- the quote relates to part only and not the whole;
- it is subject to attribution with sufficient acknowledgement of the quoted material.

A list of discretionary matters to consider in determining whether the use of a 'quotation' satisfies 'fair dealing' could include:

- whether the quotation has been used in good faith;
- the extent of the quotation and whether or not this exceeds the purpose for which the quotation is used;
- the degree to which the quotation interferes with the commercial interests of the copyright owner of the quoted work; and
- whether the use of the quotation furthers the community interest in free speech and the freedom of artistic expression.

6. Statutory licences

The ALRC is proposing the repeal of a number of the statutory licences contained in Australia's Copyright Act including for:

- government;
- education;
- institutions assisting people with a print disability; and
- retransmitting free-to-air broadcasts.

NAVA does not believe that making the change to a voluntary licencing system rather than the current statutory system for educational institutions and governments would be fair. It is hard to credit that obtaining specific permission in advance from individual copyright owners to make copies would be practicable for major institutions with such large IP consumption rates. The practical difficulties and high transaction costs would seem insurmountable and are likely to be ignored. Artist would have great difficulty in securing justice up against the might and scale of these institutions.

In an increasingly market driven environment it is no longer correct to assume that governments and education institutions are using IP for public benefit purposes alone. NAVA believes that if changes are to be made, it will be important for educational institutions and governments to continue to be required to have broad blanket collective licensing arrangements with collecting societies, even if the existing statutory licences change their form.

The current system of statutory licences is reasonably efficient and cost effective though needs greater transparency and public education to be better understood. In NAVA's view, as technology improves it should be possible for a better system to be developed using automated data capture from multi-function devices and tools for reporting content made available from learning management systems, rather than relying on sampling which is somewhat anachronistic. Regardless of the system adopted, the aim should be to ensure that IP creators would receive compensation commensurate with the actual use of their works and the value of those uses.

NAVA believes the likely consequences of the changes proposed by the ALRC include:

- reduction in licence fees to artists and other creators
- increased administrative burden for content creators to manage licensing arrangements
- increased administrative burden for teachers
- reduction in content available to teachers.

Collecting Institutions

NAVA recommends the introduction of a new blanket licensing system to deal with collecting institutions when they are making their collections available digitally online. Use of this material by the institution beyond that of domestic record keeping, preservation or research or study could be another avenue to undermine artists' income generating potential.

NAVA agrees that Section 49 of the Copyright Act should be amended to provide that, where a library or archive (or gallery?) supplies copyright material in an electronic format in response to user requests for the purposes of research or study, the library or archive (or gallery?) must take measures to:

- (a) prevent the user from further communicating the work;
- (b) ensure that the work cannot be altered; and
- (c) limit the time during which the copy of the work can be accessed.

Other Recommendations

The other changes NAVA recommends are:

- the repeal of section 67 which allows the 'incidental' inclusion of an artwork in a film, and section 68 which allows the film to be shown and broadcast.
- closing the loophole in relation to public art ie sections 65 and 68 should be repealed;
- new sui generis legislation is required to deal with the complexities of the copyright principle as it should apply to Indigenous art.

Rather than making fair use a new avenue for avoiding legitimate payment for IP, NAVA believes that creators' rights need to be more effectively and fully protected through:

- 2.1.1 developing a copyright code of conduct to guide users in best practice;
- 2.1.2 developing protocols and policies to assist artists to require internet service providers, search engines and internet content hosts to remove user created content immediately where it does not observe fair dealing principles;
- 2.1.3 promoting the regulation of conditions of use adopted by on-line intermediaries (such as high profile entities Facebook, Youtube, Pinterest and Google) to ensure that creators' rights are better protected, known and understood;
- 2.1.4 the introduction of a statutory licensing system to deal with collecting institutions making their collections available digitally online;
- 2.1.5 repealing sections 65 and 68 of the Copyright Act covering public art;
- 2.1.6 implementing a public education strategy which makes it clear to the public that internet content by artistic creators and copyright owners must be respected and accessed through licences and that it is not necessarily available for free download and use or reuse.

NAVA believes that better access should be facilitated through:

- 2.1.4 developing a more efficient permission regime and licensing process, which makes copyright material easier to access for all potential users;
- 2.1.5 creating one central contact point for permissions and licensing.