

Online Copyright Infringement Consultation
Commercial and Administrative Law Branch
Attorney-General's Department
copyrightconsultation@ag.gov.au
3–5 National Circuit
BARTON ACT 2600

1st September 2014

Re: Submission in Response to the Online Infringement Discussion Paper

The National Association for the Visual Arts (NAVA) welcomes the opportunity to respond to the Online Infringement Discussion Paper.

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. It is a membership organisation with around 3,000 individual and organisational members. Since its establishment in 1983, NAVA has been influential in bringing about policy and legislative change to encourage the growth and development of the visual arts sector and to increase professionalism within the industry.

NAVA provides advocacy and representation for the sector and sets 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 agency for Australia. NAVA also was a vigorous advocate for the introduction of both moral rights and resale royalty rights legislation in Australia.

NAVA provides professional services to its constituents through offering expert advice and referrals, grants, career development opportunities and training, on-line and hard copy resources and a range of other services. Of the estimated 2,500 requests for advice received by NAVA each year, approximately 13% are about copyright.

2. NAVA's Position on Copyright

NAVA is dedicated to achieving the most conducive possible environment for Australian visual culture. This means ensuring the viability of artists' careers and the sustainability of their support organisations. It also means trying to secure legislation, policy and regulation that achieves this purpose.

NAVA understands the tension that may at times exist between protecting freedom of expression, ensuring the ability of artistic creators to sustain a career in the arts and the need for community access to IP.

PO BOX 60, POTTS POINT, NSW 1335 | +61 2 9368 1900 | VISUALARTS.NET.AU | NAVA@VISUALARTS.NET.AU

NAVA gratefully acknowledges the assistance provided by the Australian Government through the Australia Council, its arts funding and advisory body, and by the Visual Arts and Craft Strategy, an initiative of the Australian, State and Territory Governments.

Patrons: Pat Corrigan AM, Mrs Janet Homes à Court AC, Professor David Throsby AO. ACN 003 229 285 / ABN 16 003 229 285

For NAVA an important consideration in online infringement is the question of moral rights protection. Most artists want their work to reach the largest possible audience and seek opportunities for it to be made widely and publicly available. However, for artists the building and protection of their reputation is as an important currency as is immediate financial remuneration. In this regard, the necessity for correct attribution and protection against 'derogatory treatment' cannot be overestimated.

3. Artist Considerations

In considering the digital environment, it is important to acknowledge that artists' contribution to the community not only has economic value, but also social and cultural value, the first enabling the other two.

It is also important to recognise that artistic creators are key contributors to the digital economy through the innovative systems and programs they generate for the on-line environment. Some of the most interesting and valuable technological advancements have been made by artistic practitioners.

The latest research by respected cultural economist Professor David Throsby¹ reveals that in 2007/8 the mean income from the creative work of visual artists was \$15,300 and of craft practitioners \$22,000. Their mean total arts income was \$23,100 and \$29,800 respectively and their total income from all sources was \$34,900 and \$38,300 respectively. Copyright payments formed part of this income. This research indicated that 19% of visual artists and 29% of craft practitioners had received payments from a copyright collecting society in the previous 12 months, though for visual artists, royalties and advances constituted only 2% of their creative income.

NAVA's recent research conducted in August 2014, which surveyed 459 artists and arts industry professionals, asked the question "**Do you believe copyright is an important right for artists to have?**" 88.2% of survey respondents identified copyright as important for artists to have to protect their work against use by others without their permission.

NAVA's 2014 research also confirmed that 20.1% of respondents have had their copyright infringed at some time in the course of their professional career in the digital realm. In the cases of infringement only 29.3% of respondents were successful in having the infringing material taken down.

In this research NAVA asked the question "**Have you ever had your copyright infringed in an online environment? If yes, how?**" Responses included:

"Artwork & design images from my website have been used on other peoples websites."

¹ The most recent of the regular reports is: David Throsby and Anita Zednik, 'Do You Really Expect to Get Paid: an economic study of professional artists in Australia' published in 2010 by the Australia Council.

PO BOX 60, POTTS POINT, NSW 1335 | +61 2 9368 1900 | VISUALARTS.NET.AU | NAVA@VISUALARTS.NET.AU

NAVA gratefully acknowledges the assistance provided by the Australian Government through the Australia Council, its arts funding and advisory body, and by the Visual Arts and Craft Strategy, an initiative of the Australian, State and Territory Governments.

Patrons: Pat Corrigan AM, Mrs Janet Homes à Court AC, Professor David Throsby AO. ACN 003 229 285 / ABN 16 003 229 285

“Artwork used for advertising and on products for sale.”

“An online magazine sourced my pictures from another website and used them without consent.”

“People are always stealing my images and using them for their own pages, cd covers, to build up followers in social networks, and even to share viruses.”

“A photo of mine was reproduced without my permission in an annual travel guide for 3 years running. I believe it was taken from the internet. I wasn't aware of it until the 3rd edition.”

“Images downloaded and used on other sites. Images downloaded and expressed as someone else's work.”

“Video embedded into another website.”

Proposal 1 - Extended Authorisation Liability

The Government's proposal to extend authorising liability through an amendment to the Copyright Act demonstrates a positive intention to protect the rights of copyright holders in a digital environment. However NAVA supports the submission made by the Australian Copyright Council, which expressed concerns on Proposal 1 achieving its goal, and has provided the government with two possible alternatives:

- 1) Mandating a code of conduct.
- 2) Develop a scheme based on wilful blindness as put forward in the submission of Music Rights Australia (MRA).

NAVA supports these proposals, detailed by the Australian Copyright Council, as mechanisms for establishing ethical and economic systems that will not detrimentally effect content production, of which artists are significant producers.

NAVA believes copyright protections should support artists to maintain the role of innovators, by affording them the appropriate rights over their creations and to be financially recompensed for making them publicly accessible. Extended authorisation liability should ensure there are appropriate steps artists can take if they have had their copyright infringed in the digital environment. This can be achieved by developing protocols and policies to assist artists that require internet service providers, search engines and internet content hosts to remove user created content immediately where it infringes the creators copyright. In the August 2014 research 61% of respondents agreed that Internet Service Providers should take reasonable steps to prevent infringement.

PO BOX 60, POTTS POINT, NSW 1335 | +61 2 9368 1900 | VISUALARTS.NET.AU | NAVA@VISUALARTS.NET.AU

NAVA gratefully acknowledges the assistance provided by the Australian Government through the Australia Council, its arts funding and advisory body, and by the Visual Arts and Craft Strategy, an initiative of the Australian, State and Territory Governments.

Patrons: Pat Corrigan AM, Mrs Janet Homes à Court AC, Professor David Throsby AO. ACN 003 229 285 / ABN 16 003 229 285

Question 1: What could constitute ‘reasonable steps’ for ISPs to prevent or avoid copyright infringement?

NAVA supports the Australia Copyright Council’s position that ‘reasonable steps’ should not be seen as something separate from ordinary principles of good governance and that it requires active risk management.

NAVA believes that new protocols and policies are required to provide artists and rights holders with the means to ensure compliance by Internet Service Providers, search engines and internet content hosts, including providers of cloud computing facilities. This should include effective ‘take down notice’ procedures that would require these internet intermediaries to remove works from caching and indexing services where there has been a copyright breach.

A failure by ISPs to act on a notification from a copyright holder, should not be considered a ‘reasonable step’ in avoiding copyright infringement.

NAVA believes that creators’ rights need to be more effectively and fully protected, including by ISPs which could potentially look at more equitable licensing arrangements with content producers rather than shifting the risk onto the consumers.

Question 2: How should the costs of any ‘reasonable steps’ be shared between industry participants?

Costs could be shared between the communications industry (ISPs) and the content users/consumers. NAVA does not condone the legitimization of people’s use of copyright material without permission and/or payment just because it is becoming a ‘social norm’ and believes the digital environment offers the opportunity for efficiencies in licensing and that these can be developed between the content creators and the communications industry including ISPs.

Question 3: Should the legislation provide further guidance on what would constitute ‘reasonable steps’?

NAVA supports the Australia Copyright Council’s position that ‘reasonable steps’ requires a certain amount of flexibility and negotiation between different parties (creators, providers, users, media) and that guidance by legislation would impact this flexibility. NAVA suggests that perhaps best practice standards or industry guidelines should be developed to generate an industry understanding of what constitutes ‘reasonable steps.’

There should also be provisions for 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.

Question 4: Should different ISPs be able to adopt different ‘reasonable steps’ and, if so, what would be required within a legislative framework to accommodate this?

PO BOX 60, POTTS POINT, NSW 1335 | +61 2 9368 1900 | VISUALARTS.NET.AU | NAVA@VISUALARTS.NET.AU

NAVA gratefully acknowledges the assistance provided by the Australian Government through the Australia Council, its arts funding and advisory body, and by the Visual Arts and Craft Strategy, an initiative of the Australian, State and Territory Governments.

Patrons: Pat Corrigan AM, Mrs Janet Homes à Court AC, Professor David Throsby AO. ACN 003 229 285 / ABN 16 003 229 285

As mentioned previously there needs to be a certain amount of flexibility on 'reasonableness' to ensure no activities contravene principles of freedom of expression and that content creation in no way hindered through this process adversely affecting Australian content producers.

Question 5: What rights should consumers have in response to any scheme or 'reasonable steps' taken by ISPs or rights holders? Does the legislative framework need to provide for these rights?

There should be a right for both content creators and consumers to respond to any 'reasonable steps' taken by ISPs. There should be a clearly defined process and/or pathways for ISPs, consumers or creators to respond to decisions that may affect them in a negative manner. This process should be clearly articulated in any code of practice documents and clarify steps parties need to take to address their issues and concerns.

Proposal 2 - Extended Injunctive Relief

International hosting has proven particularly difficult for artists, restricting their ability to seek action for copyright infringement and reproduction of their artistic works.

In answer to the question **"Have you ever had your copyright infringed in an online environment? If yes, how?"** Artists' responses included:

"Images were copied from my website and the art works offered for sale by an overseas website."

"My content has been posted by other people on sites including video sharing sites (sic) without my permission."

"I regularly have my work uploaded without my permission to "Pinning" sites (sic). Then people take my work from there, remove my name, and include it in their blog or upload it to other sites as their own."

"My photography was (sic) used as a sale banner to sell clothing by singular person in European country."

"I have had paintings copied and used online without permission, mostly in a non-profit way, but several are advertised on a Chinese site which offers copies for sale."

NAVA supports the Government's proposal to seek injunctive relief to block overseas hosted sites that infringe copyright creators rights.

NAVA supports both the Australian Copyright Council's and Music Rights Australia's position that there is no reason to introduce 'dominant purpose' into the legislation as precedent in the Federal Court of Australia already exists. In relation to whether an injunction can be granted ordinary equitable principles should be applied.

PO BOX 60, POTTS POINT, NSW 1335 | +61 2 9368 1900 | VISUALARTS.NET.AU | NAVA@VISUALARTS.NET.AU

NAVA gratefully acknowledges the assistance provided by the Australian Government through the Australia Council, its arts funding and advisory body, and by the Visual Arts and Craft Strategy, an initiative of the Australian, State and Territory Governments.

Patrons: Pat Corrigan AM, Mrs Janet Homes à Court AC, Professor David Throsby AO. ACN 003 229 285 / ABN 16 003 229 285

Question 6: What matters should the Court consider when determining whether to grant an injunction to block access to a particular website?

NAVA believes the court should consider all evidence, documentation of the alleged infringement including ~~the~~ exclusive rights as the copyright owner, description and evidence on the infringement of these rights and actions taken for notification of infringement.

Proposal 3 - Extended Safe Harbour Scheme

Question 7: Would the proposed definition adequately and appropriately expand the safe harbour scheme?

NAVA supports the Australian Copyright Council's concerns regarding the extension of the safe harbour to service providers other than ISPs, as it would be detrimental to content producers if they were economically disadvantaged by other service providers not entering into licensing agreements or adhering to moral rights principles.

Building the Evidence Base

Question 8: How can the impact of any measures to address online copyright infringement best be measured?

As part of the development of any industry codes and policies, a framework for evaluation should also be developed.

This should set out clear goals for any legislative changes, a clear methodology of how data will be gathered whilst ensuring a broad representation of stakeholder's experiences. An independent body or representative peak bodies of the different sectors could conduct this research through the provision of access to different constituencies.

Question 9: Are there alternative measures to reduce online copyright infringement that may be more effective?

NAVA's constituents who have had their copyright infringed online have taken a range of actions to prevent address copyright infringement. Our August 2014 research of this particular constituency provides examples of current actions taken.

NAVA members and the arts industry were asked the question **"Do you try to protect your work that is displayed online?"** Responses included:

"By adding a watermark to my images and with a notice that my work does not belong in the public domain."

"Copyright notice on my website, and invitation to contact me for usage rights."

"Watermark, transparent gif over screen images, clearly stated copyright ownership in image descriptions, copyright ownership recorded in EXIF data on each image."

PO BOX 60, POTTS POINT, NSW 1335 | +61 2 9368 1900 | VISUALARTS.NET.AU | NAVA@VISUALARTS.NET.AU

NAVA gratefully acknowledges the assistance provided by the Australian Government through the Australia Council, its arts funding and advisory body, and by the Visual Arts and Craft Strategy, an initiative of the Australian, State and Territory Governments.

Patrons: Pat Corrigan AM, Mrs Janet Homes à Court AC, Professor David Throsby AO. ACN 003 229 285 / ABN 16 003 229 285

“My website (sic) makes images more difficult to just 'rightclick, save' I always name my images carefully, the credits usually go with the image, as most users don't rename stuff. If I don't put up large files, work can only be shared online, as small files do not print well. I'm usually fine for people to share my work online, if asked. Or if I have put up images in an app like Pinterest where that 'sharing' is the whole point.”

“1. Member of CAL (Copyright Agency) (sic) 2. member of Viscopy 3. I have the copyright act at home 4. I use small file images 5. I name my work.”

However many of these actions have not always resulted in successful outcomes for the artist themselves often due to international regulatory environments or inactivity from the infringer and ISP.

NAVA supports the proposal made by the Australian Copyright Council for an industry code of conduct which we believe will provide the framework for ISPs to take action against copyright infringement. It should be noted that this code should be developed between each of the sectors, the communications industry, the content creators and the users and that this code has governmental support to ensure compliance.

NAVA supports the proposal made by the Australian Copyright Council to include a range of strategies for dealing with copyright infringements in an online environment including:

- changes to business modelling so they no longer rely on providing 'free' access to copyrighted content
- 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.
- 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.

Regulation Impact Statement

Question 10: What regulatory impacts will the proposals have on you or your organisation?

NAVA provides a range of resources, advice and activities for artists on copyright. These would need to be revised and distributed to the industry to generate a cohesive understanding of how the changes would impact artists and the broader arts sector.

PO BOX 60, POTTS POINT, NSW 1335 | +61 2 9368 1900 | VISUALARTS.NET.AU | NAVA@VISUALARTS.NET.AU

NAVA gratefully acknowledges the assistance provided by the Australian Government through the Australia Council, its arts funding and advisory body, and by the Visual Arts and Craft Strategy, an initiative of the Australian, State and Territory Governments.

Patrons: Pat Corrigan AM, Mrs Janet Homes à Court AC, Professor David Throsby AO. ACN 003 229 285 / ABN 16 003 229 285

Question 11: Do the proposals have unintended implications, or create additional burdens for entities other than rights holders and ISPs?

While Australian research does not reveal what proportion of this income is earned from digital copyright, NAVA knows anecdotally that for artists it is increasingly an important potential source of income from licensing and royalties.

NAVA does not believe that the widespread disregard and abuse of copyright law especially in the digital environment justifies current non-compliance practices. Rather, NAVA believes that creators' rights need to be more effectively and fully protected to supporting innovative content producers and invest in Australia's creative future.

PO BOX 60, POTTS POINT, NSW 1335 | +61 2 9368 1900 | VISUALARTS.NET.AU | NAVA@VISUALARTS.NET.AU

NAVA gratefully acknowledges the assistance provided by the Australian Government through the Australia Council, its arts funding and advisory body, and by the Visual Arts and Craft Strategy, an initiative of the Australian, State and Territory Governments.

Patrons: Pat Corrigan AM, Mrs Janet Homes à Court AC, Professor David Throsby AO. ACN 003 229 285 / ABN 16 003 229 285