



22 July 2021

Right to Repair Inquiry
Productivity Commission
Australian Government
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Melbourne Vic 8003

repair@pc.gov.au

Re: RIGHT TO REPAIR

NAVA welcomes the opportunity to contribute to this inquiry through responding to the *Right to Repair Draft Report*.

The National Association for the Visual Arts (NAVA) leads advocacy, policy and action for an Australian contemporary arts sector that's ambitious and fair. We are the professional Membership body in our industry. Through our Code of Practice for the Professional Australian Visual Arts, Craft and Design Sector, NAVA sets national best practice standards in collaboration with the industry. Our network comprises over 50,000 artists, arts workers, galleries, arts organisations and industry bodies.

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. It has had a long commitment to copyright entitlements for visual creators and in 1995 led the establishment of Viscopy, Australia's visual arts copyright collecting agency, now part of the Copyright Agency. NAVA was also a vigorous advocate for the introduction of both moral rights and resale royalty rights legislation in Australia.

The climate emergency is an issue of critical importance to many of our Members and NAVA is supportive of considered government measures to reduce the environmental impacts associated with the production, consumption, and disposal of products. However, NAVA is deeply concerned about the possible unintended impacts for visual artists if a new 'fair use' exception is introduced to the Copyright Act 1968 as proposed in the *Right to Repair Draft Report*.

In 2016 The Productivity Commission undertook a government commissioned study of Australian intellectual property and produced a draft report which recommended changes to the Australian Copyright Act from 'fair dealing' to a 'fair use' system, similar to what is used in the United States. NAVA responded with concern that these changes pose a threat to artists' rights which could negatively impact on artists' incomes and protection of their professional reputation. Since the release of the report, NAVA has made several further submissions to this review.

Fifty years have passed since the Copyright Act was implemented. During this time, digital and social media have changed public, commercial and government expectations on what kinds of copyrighted material should be able to be accessed for free or manipulated into unauthorised uses. These changing expectations are not a justification for weakening laws which protect artists' rights; rather, they signal the need to strengthen those laws, as well as better educating the public, the corporate sector, and all levels of government that artists own the rights to their own work and that *free is not fair*.

'Fair use' claims to balance the interests of copyright holders with the public interest. However, it shifts the balance of responsibility to creators who have to legally prove that a use is unfair.

NAVA asserts that a 'fair use' regime would be incredibly detrimental to artists. This is because it would create a power imbalance where artists would be at the mercy of large enterprises who could see this as an opportunity to use copyright material for free. The onus would be on the artist to prove in court that a use is not 'fair.' This is a significant change to current Australian law.

NAVA's submission to the 2017 Productivity Commission Inquiry into Intellectual Property Arrangements emphasised:

- That while the 'fair dealing' framework can be improved, a 'fair use' approach facilitates the exploitation of artists and their work and is both unnecessary and unreasonable.
- Copyright, and not only moral rights, should be recognised to subsist in works of visual and media art, craft and design, regardless of whether those works are registered designs, bringing their status in harmony with written works.
- A principle of policy coherence and consistency should apply across relevant areas of government policy, recognising that detrimental changes to Australia's copyright laws risk triggering detrimental unintended consequences across policy areas in education, innovation, and workforce for the new economy.

NAVA is an affiliate of the Australian Copyright Council, and we endorse their submission to this Inquiry. We support the ACC's position that changes to the existing copyright law framework with its current exceptions is not appropriate for matters which are best dealt with by changes to consumer and competition law. Issues raised by the Productivity Commission are matters of trade and not of copyright policy.

Further, we note the following non-exhaustive list of concerns raised by the ACC:

- A 'fair use' doctrine will introduce significant legal uncertainty into the Australian legal system.
- It is ill-considered to import a section from an American statute in the context of the Australian experience and legal system, noting that Australian courts are not bound to follow American decisions.
- The US 'fair use' defence is a non-exhaustive list of illustrative purposes which may be fair use, which if applied here, will create less certainty for both users and rights holders. Australia currently has a clear and more certain exhaustive list of fair dealing exceptions.
- Further, the notion of fairness should also involve predictability. The less specific the drafting of a defence or exception, the less certainty involved in the applicability of that exception in preference to relying on a license. This will increase transaction costs for both users and creators.
- There is a stronger likelihood that a broad fair use exception will allow those in breach to simply claim 'fair use' thereby placing an even greater onus on rights holders to litigate.
- 'Fair use' in relation to 'right of repair' is not supported by sufficient evidence to potentially erode the work and investment of copyright owners.

NAVA does not support the introduction of 'fair use' and the weakening of Australia's copyright laws which would have impact for visual artists. We urge this inquiry to instead consider changes to consumer and competition law to improve access to repairs and counter the accelerated transfer of consumer goods into waste.

Please do not hesitate to contact us for any further information we can provide.

Sincerely,

Penelope Benton and Mimi Crowe
Co-Directors
National Association for the Visual Arts (NAVA)