

3 June 2016

NAVA RESPONSE to the PRODUCTIVITY COMMISSION REPORT, May 2016

I write on behalf of that National Association for the Visual Arts (NAVA) and thank you for the opportunity to respond to the Productivity Commission's 2016 *Intellectual Property Arrangements* DRAFT Report, Canberra.

NAVA is the peak national body representing and advocating on behalf of the professional visual and media arts, craft and design sector. With a constituency of over 25,000 visual arts professionals with whom we maintain close and regular contact, we can give an evidence based arts industry response to this report – please refer to the attached survey conducted in the last two weeks and a selection of comments from this survey about their experience.

1. Getting the Balance Right

In reviewing evidence about the operation and consequences of current Australian copyright legislation, the Productivity Commission (PC) has come to the conclusion that rights have swung too far in favour of rights owners in comparison to users (Draft Report pg 6). We would strongly contest this assertion. For rights holders who are the creators of IP, our experience shows that exactly the opposite is the case, with artists facing the overwhelming challenge of gaining access to justice in seeking to counter the widespread illicit exploitation of their IP.

According to NAVA's survey, of the 463 artists who participated in the survey 43% have had their copyright infringed, with only about 20% succeeding in having some remedy, either having their work removed or credited. While around 40% have earned some income from copyright payments, only 9.24% reported that they received fair payment for the use of their work.

Survey after survey shows that overwhelmingly artists want to be consulted about the use of their work and credited as the creators. While in some cases where there is mutual benefit, they may be willing to negotiate free use, where there is a profit involved they believe they have a right to a share in this profit and that the terms must be fairly negotiated without them being put under duress. It is true that it is the practice of some visual artists in the creation of works to appropriate parts of existing works by others. However, our survey results show that over 95% are not happy for other artists to use their work and make a profit from it without their permission or payment.

In relation to the overall recommendation for Australia to relinquish the protections of the "fair dealing" environment for a US styled "fair use" regime, on examination, we do not believe any nominated benefits will not be greatly outweighed by the further confusing of artists as to their rights and rendering the prospects of them defending their interests in their works even more uncertain and costly.

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

It is all too evident that any further loosening of copyright regulation will seriously disadvantage visual artists in relation to their already generally modest and insecure earnings. The great majority of artists are low income earners with the last national survey¹ showing that the mean total arts income earned by visual artists was \$23,100 a year and for craft practitioners was \$29,800. About 30% of visual artist earn below the poverty level.

It is NAVA's submission that, in a disrupted and rapidly changing digital environment it is imprudent, to say the least, to quite unsystematically identify particular instances of awkward, inefficient or unfair consequences of current copyright protections. Creative practice is changing and new distribution methods are developing at such a pace that answers to questions about access, comparative pricing etc must be considered in an environment of rapid evolution. There are already new genuinely fair solutions to the challenge of access – see in Clause 5 below.

2. Challenges for Artists

Some fundamental issues remain remarkably constant; the continuing difficulty of visual artists and other creators to reasonably protect their works from unfair exploitation both economically and morally. It is the constant scourge of visual artists to find their artworks purloined, being 'orphaned', whole works or substantial elements reproduced commercially as part of marketing material or for direct product sales or even co-opted in service of illustrating government or corporate web pages, no one having bothered to check the original source or having the vaguest awareness of or interest in respecting the creators' rights to permission or payment.

NAVA members therefore have not found the imbalance reported by the PC to operate in relation to them. Rather they have an overwhelming sense of being ripped-off at every turn and always being the underdog when attempting to assert their rights. It therefore came as no surprise that even the PC, in weighing the equity of existing copyright arrangements, would resort to use of trivialising and demeaning devices. Sadly, it is the case that artists' economic power individually is weak and respect for them exercising their moral or pecuniary rights over their creative work is commensurate.

3. 'Fair' Use?

In searching the draft PC report for some reassurance for arts practitioners we found, notwithstanding a degree of openness in relation to possible advantages with the introduction of fair use, no reassurance or advantage but rather the prospect of greatly reduced ability for artists to assert rights to exploit their works or to better protect them. We therefore completely reject, in so far as visual artists are concerned, the PC's underlying assertion that creators are being coddled by current copyright provisions. Indeed we would submit that the recommendations are generally too broad with no evidence presented of the different circumstances of

¹ Professor David Throsby and Anita Zednik, 'Do you really expect to get paid? an economic study of professional artists in Australia', Australia Council for the Arts (2010), pg 45

visual artists and the likely differential impacts of the recommendations on different parts of the creative sector. The prospect of possibly unintended impacts for visual artists and others is therefore of great concern to NAVA.

It is insufficient, in our view, for the PC to adopt its position in rejecting evidence put to it in other submissions from rights owners, of the possible impacts of moving to a US style fair use model. In considering the impacts on the Canadian educational publishing industry of the change to Canadian law, to simply point to other possible contributing weaknesses in the industry is not enough to reassure NAVA's members that the PC has been diligent in examining the possible unintended consequences of some of its recommendations, but in particular the broad adoption of US style fair use. If 'following the money' is ever a useful device in tracking consequences of policy change it is highly likely that visual artists will only see disadvantage and that the class of 'users' most likely to benefit will not be individuals but a few, major, corporate entities.

All who work creatively in the visual field: illustrators; photographers; craftspeople and designers; as well as visual and media artists; will be deleteriously impacted by any substantive changes to the current statutory licensing arrangements. It is hard enough to devote a life to being an artist subsidising the public's access to cultural experience through the public exhibition of work, without seeing the state become the accomplice to greedy exploiters at the expense of those who make tangible our individual and collective imaginings. A change to the fair use regime would be a further disincentive for artists and could cause them to abandon their artistic careers to Australia's great loss.

4. NAVA's response to ALRC Report

In responding to the report of the Australian Law Reform Commission (ALRC) in 2015 NAVA expressed its concern that the report focused on provisions in the legislation (the Copyright Act) that provide exceptions to the general requirement for a licence or permission (with or without payment) to use someone else's content. The ALRC's key recommendation was for the introduction of a new broad exception based on the 'fair use' regime in US copyright law. The main difference between the new exception and existing exceptions was the removal of a purpose test, which is essentially a public interest test. This means that the exception could apply if certain criteria were met, irrespective of whether the outcome had sufficient public interest to outweigh the artist's entitlement to manage and derive income from their work.

The main concerns NAVA and other organisations which represent the interests of creators had about the 'fair use' exception proposed by the ALRC then were that it would:

- give an unfair advantage to users of content with greater bargaining power than content creators;
- require litigation to determine its interpretation and application, with consequent uncertainty and expense; and

- impede, rather than facilitate, efficient and fair solutions for legitimate use of content, including innovative new uses.

NAVA outlined then what it saw as some of the possible adverse outcomes of the introduction of a fair use exception which we set out here again.

i) Viscopy licences:

We anticipate that licensees for Viscopy licences, such as auction houses and galleries, would seek to reduce their licence fees or not renew their licences if a broad new exception were introduced. This would reduce or cut off a source of income for artists.

ii) Copyright Agency licences:

As followed the introduction of a fair use exception in Canada, we anticipate a similar impact on Copyright Agency revenue flowing to visual artists upon licensees seeking to reduce licence fees or not renew their licences at all, preferring to exploit a new and untested environment. These licences cover images.

iii) Appropriation art:

Australian law already allows an artist to use another artist's work for criticism of that or another work, as well as for the purposes of parody or satire. While some artists may want the freedom to draw on the work of others, when faced with the prospect of others doing the same to them and making profits at their expense, they almost always draw the line. Australian artists fear what they see as a manifestly unfair outcome in the controversial *Cariou v Prince* litigation in the US to not be worth the risk. Prince's artworks, largely comprising Cariou's photographs, sell for millions with no compensation to Cariou. We also noted the criticism of that outcome in another case, highlighting the uncertainty and unpredictability of the fair use exception in the US.

In responding to the ALRC's recommendations NAVA was concerned that no attention had been paid to existing exceptions that hurt artists. We now see nothing in the PC recommendations that would be supportive of Australian artists, with the thrust of the report to assist users overshadowing completely any specific impacts on visual artists and other creators.

5. Better Solution

NAVA is not suggesting that some changes to copyright law in Australia might not be good for both creators and users but departs from the PC from the outset in the singularity of its 'user' focus. NAVA believes that Australia's copyright system should focus on streamlining copyright and sharing of content on fair terms including, where appropriate, fair compensation to creators. In most respects this requires harnessing of technological developments and industry-led licensing solutions (including free licensing where appropriate) rather than changes to the legislative framework.

Arguably the most important outcome of the 2011 UK copyright review is the Copyright Hub, a system of open source technology to enable the online licensing, for payment or free, for high volume low value transactions. The Hub is industry-led, but has been supported by the UK government through an initial feasibility study and now technical assistance. Supported by the UK government it is now also receiving serious attention from the US government as it reviews its own legislative and operational arrangements. Key to the operational changes are transformations to the registration of copyright works and many industry-led innovations are being considered, including the PLUS Registry, which enables tens of thousands of images with their associated metadata to be quickly and cheaply uploaded then searched. This in an effort to move back from the issues that arise in any legislative environment that is buffeted by rapid technological change.

The broader application of a fair use model of itself does nothing to develop mechanisms for the efficient management of rights and access.

Conclusion

Because the practice of most visual artists is isolated and links only occasionally to any corporate structures (for sales and/or distribution) artists are on their own. Yet their contribution to both the economy and the cultural richness of Australian society is disproportionate to their number and cost. They are arguably an increasingly important part of our local and national economy. As an example refer to the enormous success of the Museum of Old and New Art at the core of a suite of accessory activities in transforming the economy of Hobart if not Tasmania more broadly.

It does nothing to bolster the respect for or confidence of Australian visual artists to read the recommendations of the PC report positioning them as part of a pandered group at best and exploiters at worst.

We respectfully request that visual creators be given the respect that they deserve as major contributors to Australian innovation, economy, social and cultural wellbeing and international diplomacy, but with a high degree of vulnerability to exploitation. 'Fair use' risks visual artists being made victims to increased **unfair** use.

Yours sincerely

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Executive Director