

Copyright Regulation Consultation
Copyright Law and Policy Section
Department of Communications and the Arts
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6 October 2017

Re: Submission in Response to Exposure Draft of Copyright Regulations

The National Association for the Visual Arts (NAVA) welcomes the opportunity to respond to the Exposure Draft of Copyright Regulations October 2017 and the Copyright Legislation Amendment (Technological Protection) Regulations 2017.

NAVA's responses to the Exposure Draft addresses the questions where relevant to the visual arts, craft and design sectors.

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; comprising of 20,000 practitioners, galleries and other art organisations. 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, online and hard copy resources and a range of other services.

2. NAVA's responses to the consultation paper

Question 1: How should Copyright Regulations 2017 require items (such as notices and inquiries) to be published? In particular, how should the Copyright Regulations 2017 require the following to be published?

(a) A notice for the purposes of section 7 (Notice of intended publication of unpublished work kept in public library – paragraphs 52(1)(b) and (2)(b) of the ACT).

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NAVA gratefully acknowledges the assistance of the Visual Arts and Craft Strategy, an initiative of the Australian, State and Territory Governments, as well as the NSW Government through Create NSW and the NSW VACS agreements, and the Queensland Government through Arts Queensland.
Patrons: Pat Corrigan AM, Mrs Janet Holmes à Court AC, Professor David Throsby AO. ACN 003 229 285 / ABN 16 003 229 285

- (b) A notice for the purposes of Section 9 (Notice of intended making of record of musical work)**
- (c) Inquiries for the purposes of section 11 (Inquiries relating to previous records of musical works – section 61 of the Act).**
- (d) A notice for the purposes of section 121 (information on use of copyright material services for the Crown – subsection 183(4) of the Act).**
- (e) Notices for the purposes of section 63 Advertising applications and references).**

The National Association for the Visual Arts (NAVA) believes that requiring the publication of notices and inquiries ensures a transparency in process. However, while we acknowledge there are exemptions from this process outlined in Section 64(5) Subsection (1), we reiterate the need for the President to understand the economic capacities of artists and consider the cost of advertising for individuals.

Question 2: Is the Copyright Regulations Exposure Draft subsection 7(2) requirement that a relevant notice be published at least 2 months, but not more than 3 months, before the publication (or subsequent publication) of a new work sufficient? Should the requirement merely be that a relevant notice be published at least 2 months before the publication of a new work (with no upper limit on how far ahead of the publication a relevant notice may be published)?

As a promoter of artists' rights, NAVA strongly supports subsection 7(2) requirement of the Copyright Regulations Exposure draft in ensuring notice is given not more than 3 months ahead of publication.

Question 3: Are the prescribed requirements set out in proposed new section 18 appropriate?

The copyright sector incorporates a variety of industry codes of all natures, NAVA does not raise any concerns on implementing specific requirements. However, amendments to the safe harbour regulations should not be undertaken until all policy amendments have been made.

Question 5: What procedure should the Copyright Regulations 2017 prescribe for the development of an industry code for the purposes of paragraph (b) of the definition of industry code (section 116AB of the Copyright Act)?

NAVA believes Australia should learn from both the innovation of creators while avoiding the copyright mistakes of other countries. Rather than yielding to pressure from multinational companies that trade on their power to appropriate others' IP, we encourage the Government to explore ways of improving IP enforcement, such as changes to intermediary liability and ensuring a better functioning safe harbour

regime. NAVA supports the submission of the Australian Copyright Council (ACC) in this regard.

Question 6: Do you have any comments on the prescribed acts included in section 40 of the Copyright Regulations Exposure Draft or in the TPM Regulations Exposure Draft?

NAVA has submitted many documents during the course of successive governments' consideration of what changes might be needed to the Copyright Act. These have been based on surveys of our sector and the evidence of what happens in practice, demonstrated in the requests we get for advice and assistance in disputes in which we are asked to act as mediators. Of the estimated 4,000 requests for advice received by NAVA each year, approximately 13% are about copyright and many are from artists asking how to deal with breaches of their rights.

NAVA's primary concern with copyright is to ensure that the visual arts creators of intellectual property are appropriately protected and remunerated when their art works are used by others. On behalf of Australian visual artists, NAVA has continued to assert that legislation must ensure artists can have sustainable careers, including through earning income from copyright payments. This means that artists should have decision making power about by whom and under what circumstances their work can be reproduced and for what return.

NAVA believes that Australia's current system of exceptions and statutory licenses, if applied and monitored rigorously, would be a fair balance between the interests of creators and users including within the digital environment. It respects the fundamental principle of the right of a creator to benefit from the investment in their creation of thought, time, skill and resources.

NAVA also asserts that the constant development of new technology, including new online platform as a medium to share original works, increasingly pressures creators often with the expectation of them having the appropriate acknowledgement and ownership. Many artists do not have the knowledge or understanding of the Copyright Act to assert their legal rights.

NAVA supports the Australian Copyright Council's submission in response to this question and the issues they have raised in regard to definitions and enforcement of fair dealing, exemptions and the information provided to the Minister, and what the Minister should consider as evidence given the changes to content delivery mechanisms specifically in the online environment.

Question 7: Is the infringement notice scheme that is set out in Part 8 still necessary?

NAVA believes that by having this list, it provides directional support and, as a low-cost enforcement mechanism, is acceptable. However as noted by the ACC, there may be a better way of making the scheme a viable enforcement tool.

Question 8: How can the Copyright Regulations Exposure Draft be amended to better facilitate informal proceedings in the Copyright Tribunal?

NAVA supports the current proceedings of the Copyright Tribunal and we do not believe it needs any further amendments.

Question 9: Is the newspaper publication requirement in sub-section 63(1) too burdensome (in terms of costs, otherwise)? Should some other form of publication be required?

NAVA supports a consistent approach to advertising, however recognition must be given to low-income earners, especially artists, to ensure procedures are not prohibitive to receiving fair and equitable payments.

Question 10: Which matters (if any) should sections 70 and 72 prescribe for the purposes of item 1 of the table in new section 153A to be inserted by the DAOM Act (as matters to which the Copyright Tribunal must have regard in determining the relevant question), so far as it relates to an application under new subsections 113P(4) and 113s(4) to be inserted in the DAOM Act?

The current provisions in sections 70 and 72 are clear. NAVA also supports the amendment made by Screenrights and the Australian Copyright Council in providing context to the Tribunal of past licensee usage.

Question 11: Are the matters for the Copyright Tribunal to have regard to in 71(2) appropriate?


As previously discussed above.

With any proposed Copyright Act changes NAVA asserts that the Government needs to consider the rights of copyright creators at each stage. Disputes and issues for artists usually arise in a situation where an artist is trying to assert their rights against exploitation by major commercial interests with infinitely greater power and resources. Artists are protected through copyright collecting societies, who play a significant role in managing licenses and the use of imagery and original works. Like the Australian Copyright Council, we support the Commission's recommendations in relation to the Federal Circuit Court. We also urge the Government to consider other measures, such as an effective notice and takedown (or stay down) regime.

Finally, we propose that if changes are to be made to Australia's copyright arrangements, the Government should provide resources for a community education campaign and the running of test cases to establish the boundaries of any new legal parameters.

We respectfully request that the Government ensures that Copyright legislation should require that visual creators are valued as major contributors to Australian innovation, economy, social and cultural wellbeing and international diplomacy and trade.

Please do not hesitate to contact us if you would like to discuss any matters raised in this submission.

Handwritten signatures of Brianna Munting and Penelope Benton. The signature on the left is 'B. Munting' and the signature on the right is 'P. Benton'.

Brianna Munting and Penelope Benton
A/Co-Executive Directors
National Association for the Visual Arts