

Department of Industry, Innovation and Science
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14 February 2017

Re: response to the Final Report of the Productivity Commission Inquiry into Intellectual Property Arrangements.

The National Association for the Visual Arts (NAVA) thanks the Government for the opportunity to comment on the Final Report of the Productivity Commission on Intellectual Property Arrangements.

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 3,500 individual and organisational members and 15,000 subscribers. 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 a commitment to ensuring 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.

Brief summary of NAVA's recommendations:

- any changes to Copyright law must ensure artistic creators' work is respected and adequately remunerated when their art works are used by others;
- make changes to the existing fair dealings regime rather than replacing it with 'fair use'. These should include changes to the law as it relates to: public art; incidental inclusion of an artwork in a film; Indigenous art; transformative use; protection of artists' moral rights; extending copyright to cover registered designs; and regulation of third party commodification of user generated remix content;
- harness the opportunities being opened up by technological development and applying industry-led licensing systems;
- make changes to intermediary liability and provide a better functioning safe harbour regime;
- if statutory licence fees for education and government users are removed, Government must make up the full financial shortfall;
- ensure individual creators can gain access to justice;
- if changes are to be made to Australia's IP arrangements, Government should provide resource for a community education campaign.

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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

Copyright Principle

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 wishes to acknowledge that the Productivity Commission faces a challenge in trying to address the complexities of the existing Copyright regime, and understands the need for the legislation to not unreasonably impede access by users and creators themselves to information and ideas. However, we have serious reservations about the principles and attitudes contained in the Commission's inquiry report which unduly privileges the interests of users over the creators of content.

Despite the broad-scale dissatisfaction expressed by the arts industry with the earlier versions of the Commission's report and its recommendations, very little has been modified. The Report continues to propose introduction of the flawed and potentially very damaging 'fair use' regime and gives perfunctory treatment to significant issues raised by the industry such as the need for protection of moral rights and Indigenous rights. Reprehensible is the contempt and disregard demonstrated by this report for the value of what is contributed by artists to the public good and the Australian economy and the importance of ensuring these artistic creators are able to have sustainable long term careers. Indeed, the copyright industry and Australia's cultural life are dependent on it.

In principle, NAVA supports the proposition that culture is a public resource that should be freely available for others to access, alter or build upon. However, we also maintain that this needs to be balanced against the rights of creators to have their work and their professional reputation respected and to earn income if they wish from commercial use or adaptation of their work by others.

NAVA believes that Australia's current system of exceptions and statutory licences, 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 their investment in their creation of thought, time, skill and resources.

Proposed Changes

However, NAVA proposes that the copyright law needs the following modifications:

- there is an exception loophole that needs to be closed in relation to public art ie sections 65 and 68 should be repealed;
- section 67 needs to be repealed which allows the ‘incidental’ inclusion of an artwork in a film, and also section 68 which allows the film to be shown and broadcast;
- new sui generis legislation is required to deal with the complexities of the copyright principle as it should apply to Indigenous art
- copyright should subsist in visual and media art, craft and design works regardless of whether or not these works are registered designs
- in relation to transformative use by other artists, NAVA contends that a new ‘non-commercial personal-use’ exception should be developed which considers:
 - 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.

Adaptive Reuse

Artists have always drawn on the inspiration of their predecessors and peers and assert the needs for this kind of artistic freedom. Currently, artists who use adaptive processes support the introduction of a ‘non-commercial personal-use’ exemption, although they acknowledge there are significant challenges in defining non-commercial usage. They also propose the need for regulation of third party commodification of user generated remix content.

Design Protection

Under the current Australian intellectual property (IP) laws, unlike for works of ‘fine art’, creators of applied art objects that are produced in quantity are generally not entitled to copyright protection, and are left vulnerable to blatant copying unless they apply for design protection. In submissions to previous government reviews, NAVA has called for changes.

In 2015, the Government’s Advisory Council on Intellectual Property (ACIP) called for responses to its Options Paper ‘Review of the Designs System’. Then in 2016, the Productivity Commission asked for submissions in response to its ‘Intellectual Property Arrangements Draft Report. The reports both recognise that there are some flaws in Australia’s IP arrangements but fail to suggest adequate viable alternatives, such as extending the term of protection or creating unregistered design rights.

In its submissions to both of these inquiries, NAVA recommended the changes we believe are required to support a flourishing Australian craft and design sector, in particular to protect craft practitioners and industrial, fashion, furniture and lighting designers.

Australian designers are seeing local and overseas replicas of their work being sold from which they earn nothing. This stymies the building of viable Australian craft and design businesses. Therefore, NAVA contends that copyright should subsist in visual and media art, craft and design works regardless of whether or not these works are registered designs.

Policy Coherence

NAVA asserts that the Government's policies should have coherence and consistency. Submission have recently closed for the Government's 'Inquiry into innovation and creativity: workforce for the new economy' which focuses in particular on how Australia's tertiary system can meet the needs of a future labour force focused on innovation and creativity. With artists being the pre-eminent exemplars of applying creativity in their work and spearheading innovation, surely there needs to be coherence in policies which enable this creativity and innovation to be appropriately encouraged and rewarded in practice.

Harness Technology

To this end, NAVA continues to assert the fundamental principle that the copyright system should focus on streamlining copyright and sharing of content on fair terms in particular, ensuring fair compensation to creators. Rather than radically changing the legislative framework, NAVA believes that the best way to shape the system in future is to harness the opportunities being opened up by technological development and applying industry-led licensing systems.

As an example, the most important outcome of the 2011 UK copyright review is the adoption of the Copyright Hub, a system of open source technology to enable the online licensing, for payment (or free in some cases), for high volume low value transactions. 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. Australia should learn from both the innovation and avoid the mistakes of other countries. Rather than yielding to the 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.

Fair Use vs Fair Dealing

As has been repeatedly asserted in previous submissions, the 'fair use' regime changes the balance of power unduly in favour of those wishing to financially exploit the effort of creators without regard to their right to benefit from their own creation. Australia's current fair dealing regime has evolved over time to provide exceptions as needs arise and can be justified. This makes the terms of use reasonably clear, enabling free access under agreed circumstances where exceptions exist. It establishes specific parameters for exception to the rule rather than relying on interpretation by courts of the vague term 'fair use'. As has been demonstrated in the US, a fair use regime leads to contradictory judgments being made and results in a lack of certainty on all sides. Almost invariably it is the creators who lose out because they do not have the resources to pursue the infringers through the legal systems.

Statutory Licence Fees

The Productivity Commission proposed an end to the practice where education and government users pay statutory licence fees for online material. A substantial proportion of the proposed saving of \$18 million per annum to taxpayers is what is currently going to remunerate the creators of the IP being copied. There is no proposal by the Productivity Commission to find a substitute for this essential source of income for creators. If the Government wishes to remove this responsibility from education and government users, it is essential that the shortfall be made up by government through some other means to ensure continuation of support for Australian creativity and innovation.

Access to Justice

In enforcing adherence to fair dealing in copyright, a key element is to enable individual creators to gain access to justice. Usually the situation is one where an artist is trying to assert their rights against exploitation by major commercial interests with infinitely greater power and resources. 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.

Community Education

Finally, we propose that if changes are to be made to Australia's IP arrangements, the Government should provide resource 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 given the valuing, protection and reward they deserve as major contributors to Australian innovation, economy, social and cultural wellbeing and international diplomacy and trade. The introduction of 'fair use' risks visual artists being made even more the victims of *unfair* use.



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