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Copyright in the Digital Environment

The National Association for the Visual Arts (NAVA)'s submission in response to the ALRC's Issues Paper 42

The National Association for the Visual Arts (NAVA) welcomes the opportunity to respond to the ALRC's Copyright in the Digital Environment Issues Paper 42 (IP 42).

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, approx 13% are about copyright.

2. NAVA's Position on Copyright

NAVA is dedicated to achieving the most conducive possible environment for Australian visual culture to flourish. 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.

Within the current copyright regime, NAVA supports the access principle so long as artistic creators who are the owners of copyright are consulted about the use of their work and appropriately remunerated. An exception would be that they have made a decision to the contrary without being placed under duress.

NAVA believes the current system of exceptions and statutory licences applies fairly within the digital environment and does not require extensive modification, but with the following provisos:

- **there is an exception loophole that needs to be closed in relation to public art ie sections 65 and 68 should be repealed;**
- **the repeal of section 67 which allows the ‘incidental’ inclusion of an artwork in a film, and 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.**

2.1 Artists’ Pecuniary Rights

NAVA is only too aware of the constrained financial circumstances of the majority of Australian artists. 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 expanding the exemptions to condone current non-compliance practices. Rather, NAVA believes that creators’ rights need to be more effectively and fully protected through:

- 2.1.1 developing a copyright code of conduct to guide users in best practice¹;**
- 2.1.2 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;**
- 2.1.3 promoting the regulation of conditions of use adopted by on-line intermediaries (such as high profile entities Facebook, Youtube, Pinterest and Google) to ensure that creators’ rights are better protected, known and understood;**
- 2.1.4 the introduction of a statutory licensing system to deal with collecting institutions making their collections available digitally online;**
- 2.1.5 repealing sections 65 and 68 of the Copyright Act covering public art;**
- 2.1.6 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.**

NAVA believes that better access should be facilitated through:

- 2.1.4 developing a more efficient permission regime and licensing process, which makes copyright material easier to access for all potential users;**
- 2.1.5 creating one central contact point for permissions and licensing.**

¹ NAVA has had substantial experience in the development of codes and protocols for the visual arts industry and would be pleased to advise and assist in this regard. As an example, refer to NAVA’s Code of Practice for the Professional Australian Visual Arts, Craft and Design Sector (Ed 3), now widely adopted across the industry.

2.2 Artists' Moral Rights

Throughout the issues paper, for NAVA an elephant in the room 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 publicly available. However, for artists the building and protection of their reputation is as an important a currency as is immediate financial remuneration. In this regard, the necessity for correct attribution and protection against 'derogatory treatment' cannot be overestimated.

NAVA asserts that:

2.2.1 artists' professional reputations must be protected and promoted through the exercise of and respect for their moral rights, especially in the digital environment.

2.2.2 where transformative reuse of artists' works is proposed, this first needs to be agreed by the creator of the works.

3. NAVA's Answers to Selected Questions

The Inquiry

Question 1. The ALRC is interested in evidence of how Australia's copyright law is affecting participation in the digital economy.

It has been recognised through copyright legislation that for the contributors of 'content' to be able to sustain themselves as generators of IP, they need to have rights over their creations and to be financially recompensed for making them publicly accessible. In the case of artists who are generally very low income earners, this is a significant factor in their ability to maintain the role of innovators running a small (usually one person) business. Copyright law provides the regulation of their pecuniary and moral rights in making this contribution.

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 these people.

Participation by artists in the digital environment is often aimed at reaching a broad audience and generating personal economic outcomes, but securing this income has been difficult to realise. Devising the means to improve artists' earnings from their IP would be a way of ensuring their ability to continue to be a hothouse of creativity and innovation over the course of their working lives (see NAVA's proposals at 2. NAVA's Position on Copyright above). 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.

The latest research by respected cultural economist Professor David Throsby² 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.

² 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.

However, from NAVA's own recent research conducted in October 2012, 53% of respondents said that copyright payments were either quite important or very important to their ability to work as an artist. In the last 12 months 92% of the respondents had received a copyright payment either from statutory licence distribution or from licensing their work themselves.

Throsby's research also tell us that 30% of visual artists and 38% of craftspeople have had their copyright infringed, the highest rate for all artists. In relation to moral rights, 29% of visual artists and 24% of craft practitioners have had their rights infringed.

NAVA's recent research confirms an even higher proportion with 44.4% of respondents saying their copyright had been infringed at some time in the course of their professional career.

In answer to the question "*Have you ever had your copyright infringed? If Yes, would you mind telling us how?*", some examples of the answers were:

"I found my images passed off as artwork of someone else overseas on the web. I removed all my images and only put watermarked ones up now."

"Clients do not understand the basic rights of a creator and exploit artwork every opportunity they get. The web has really watered down people's perceptions of ownership."

"Found images of mine published in books and magazines without byline, permission or payment."

"The problem is, I just don't know. Online articles have used my images - they have been credited, but I wasn't aware they were going to use my images. Is this a copyright issue? The internet has completely changed the copyright landscape, in particular for young and emerging artists (me) who never grew up without computers, so I don't know anything different."

Guiding principles for reform

Question 2. What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, help it to evaluate whether exceptions and statutory licences in the Copyright Act 1968 (Cth) are adequate and appropriate in the digital environment or new exceptions are desirable?

NAVA believes that the Australian Copyright Council Expert Group's statement of four principles (2011) 'Directions in Copyright Reform in Australia' are still applicable. However, the last sentence "and in a manner which takes account of evolving technologies, social norms and cultural values" requires further definition.

An underlying ambition for a competitive and progressive Australia is for ideas and information to be readily accessible to the community to encourage innovation and evolutionary change. Copyright applies not to ideas themselves but where ideas take material form. Access is only restrained by the requirement of users to provide fair payment to the creators of this material. Taking account of evolving technologies, the digital environment offers the opportunity for efficiencies in licensing and making payments on-line, which would make access to IP simpler and quicker.

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'.

As specified in 'NAVA's Position on Copyright' in point 2 above, there are a number of measures which NAVA proposes can be introduced which will preserve content creators' ability to have sustainable careers while allowing for fair access to their work by the community.

Cloud computing

Question 5. Is Australian copyright law impeding the development or delivery of cloud computing services?

NAVA's position is that cloud-based service should be licensed. If any changes are to be made to the Copyright Act to assist the operation of cloud computing services, they should be restricted to apply in ways that do not impact adversely on artists and other rightsholders.

Question 6. Should exceptions in the Copyright Act 1968 (Cth) be amended, or new exceptions created, to account for new cloud computing services, and if so, how?

New protocols and policies are required to provide artists and rightsholders 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 require these internet intermediaries to remove works from caching and indexing services where there has been a copyright breach.

The UK exception mirroring Article 13 of the European E-Commerce Directive that allows a provider to cache copyright material but adding certain conditions seems like a good way forward.

Copying for private use

Question 7. Should the copying of legally acquired copyright material, including broadcast material, for private and domestic use be more freely permitted?

NAVA does not see a need to extend the existing private copying exceptions. However, NAVA supports Arts Law's position that a levy scheme related to blank recording media and recording technology should be a pre-requisite, should there be any extension of the current exemptions for copying of legally acquired copyrighted material but for private and domestic uses only.

Copyright and the Digital Economy

Question 8. The format shifting exceptions in the Copyright Act 1968 (Cth) allow users to make copies of certain copyright material, in a new (eg, electronic) form, for their own private or domestic use. Should these exceptions be amended, and if so, how? For example, should the exceptions cover the copying of other types of copyright material, such as digital film content (digital-to-digital)? Should the four separate exceptions be replaced with a single format shifting exception, with common restrictions?

NAVA supports the policy of the current exceptions for format shifting and believes an extension to the exception is unnecessary.

Question 9. The time shifting exception in s 111 of the Copyright Act 1968 (Cth) allows users to record copies of free-to-air broadcast material for their own private or domestic use, so they may watch or listen to the material at a more convenient time. Should this exception be amended, and if so, how? For example:

(a) should it matter who makes the recording, if the recording is only for private or domestic use; and

(b) should the exception apply to content made available using the internet or internet protocol television?

NAVA supports the submission made by Screenrights that if a new exception is adopted to allow time shifting by means of cloud based personal video recorders (PVRs), it would need to be remunerated.

Question 10. Should the Copyright Act 1968 (Cth) be amended to clarify that making copies of copyright material for the purpose of back-up or data recovery does not infringe copyright, and if so, how?

On the face of it, this seems fair. However, individual consumers should be able to make a back-up of copyrighted material that has been legally acquired. It must be clear that the only use for this copy is to compensate if the original is lost, damaged or becomes unusable as provided in the Canadian Copyright Modernisation Act, C-11 2012 (Canada) s. 29.24.

Online use for social, private or domestic purposes

Question 11. How are copyright materials being used for social, private or domestic purposes—for example, in social networking contexts?

Anecdotally NAVA knows that artistic creators make extensive use of social media to communicate with one another and to promote their ideas and work to a wider constituency. However, what many of them don't realise and get burned with is that they can be exposing their work to unintended or unauthorised use by others.

Facebook for example, has in its conditions the granting by users of a non-exclusive transferable sub-licensable royalty free world-wide licence covering use of any IP posted. During the time that this content remains on Facebook, it can be sub-licensed to a commercial user without reference to the creator who posted the content. While Facebook makes clear that this licence ends when the person posting deletes their content, it may already have been shared many time over and be out in the digital landscape and beyond the creator's ability to track or control.

The more recent Pinterest platform, is designed specifically for image sharing. Again, users may be unaware of their vulnerability. Pinterest says its policy "in appropriate circumstances and at its discretion" is to disable and/or terminate the account of users who repeatedly infringe or are repeatedly charged with infringing the copyright of others. However, this is not instantaneous but requires the lodgement of a Notice of Alleged Infringement with Pinterest's "Designated Copyright Agent". It is neither clear what are the 'appropriate circumstances' nor does this policy deal with a single infringement.

NAVA asserts that the use of copyrighted works for private or domestic purposes should be distinguished from use on a social networking site such as Facebook, Pinterest or YouTube, where it is available for access by a much broader mass audience or user group and is neither private nor domestic.

In NAVA's recent questionnaire to members, we asked: *"How would you feel, if someone posted your work, without your permission and without any payment, to a social media site like Facebook, Pinterest or YouTube?"* The responses varied eg:

"It depends on the purpose of the post. If they are not breaching my copyright - ie, they're posting for study, critique, or review, that's fine. Other unlicensed uses would also be fine, provided I was credited. I would not be happy if someone exploited my image for commercial gain of any kind, claimed authorship of my work, or used my work to promote

products or causes without my permission. Sharing to Pinterest, Facebook or YouTube with suitable credit would actually be welcome, as I would consider it a promotion of my work.”

“It would depend on the context. If it's just a personal comment to share amongst friends that would be fine.”

“I wouldn't like it - hence I watermark images on the net.”

“I would feel like I have no control over the matter and that it is an accepted practice, with advantages and disadvantages.”

“OK if they leave my watermark on, credit me and/or link to my site.”

“It's been done. I usually think of it as promotion but if I were to see it used in the promotion of others' work or business I wouldn't be happy.”

Question 12. Should some online uses of copyright materials for social, private or domestic purposes be more freely permitted? Should the Copyright Act 1968 (Cth) be amended to provide that such use of copyright materials does not constitute an infringement of copyright? If so, how should such an exception be framed?

Definitions become important here. What exactly is the scope especially of ‘social’ use? As said above, social media is far from being ‘private’ or ‘domestic’ though content may have been created and uploaded privately. Once it is available on the net it is no longer private or contained within a domestic context. It also has the potential to prejudice the moral rights of artists where the original is used without permission. NAVA does not believe an exception is justified.

Question 13. How should any exception for online use of copyright materials for social, private or domestic purposes be confined? For example, should the exception apply only to (a) non-commercial use; or (b) use that does not conflict with normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

Since social networking platforms operate as commercial enterprises the status of private or domestic ‘non-commercial’ copyrighted works placed on these platforms is actually public and being used for commercial purposes. Defining ‘non-commercial’ reuse in a digital environment, especially the social media platforms, becomes challenging when:

- the site may have the appearance of not making income from what is posted, but may actually be receiving income from associated advertising; or
- a re-user receives income from advertising or licences associated with the use of their new creation.

Transformative use

Question 14. How are copyright materials being used in transformative and collaborative ways—for example, in ‘sampling’, ‘remixes’ and ‘mashups’. For what purposes—for example, commercial purposes, in creating cultural works or as individual self-expression?

Question 15. Should the use of copyright materials in transformative uses be more freely permitted? Should the Copyright Act 1968 (Cth) be amended to provide that transformative use does not constitute an infringement of copyright? If so, how should such an exception be framed?

Question 16. How should transformative use be defined for the purposes of any exception? For example, should any use of a publicly available work in the creation of a new work be considered transformative?

Question 17. Should a transformative use exception apply only to: (a) noncommercial use; or (b) use that does not conflict with a normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

Question 18. The Copyright Act 1968 (Cth) provides authors with three 'moral rights': a right of attribution; a right against false attribution; and a right of integrity. What amendments to provisions of the Act dealing with moral rights may be desirable to respond to new exceptions allowing transformative or collaborative uses of copyright material?

Answer to Questions 14 - 18

Recent changes to the Copyright Act allow for criticism or review and parody or satire. But the reuse proposition can go beyond these authorised exemptions. Especially since the 20th century legitimisation of 'post modern' appropriation in art, transformative use is an area of potential contention in the art community.

Nevertheless, the great majority of artists agree that making content available for transformative use should be at the discretion of the IP creator. Their agreement is likely to be a matter of:

- 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.

Artists' moral rights can be the victim in the reuse of material in such a way that it is regarded by the artist as damaging their reputation. Artists will usually err on the side of generosity and the original creators will usually agree to reuse as long as it does not unreasonably prejudice their legitimate interests.

A recent moral rights and copyright example which has been reported in the media concerned an artist who used works which were clearly copies of photographs by other artists and after very minor digital manipulation passed them off as his own creation. When a complaint was lodged, he claimed that his works were a reinterpretation and a legitimate transformative use. It is difficult to make a clear judgement on what degree of change is required from the original before the work becomes a new work. It is in the eye of the beholder. In this case the 'transforming' artist's representing commercial gallery withdrew its representation and denied him his promised exhibition.

In the recent questionnaire to members NAVA asked two questions

j) When, if ever, are you happy for others to use your work in a new work they are creating, without your permission and without payment?

Some answers:

"Without permission, never. Without payment if I agree."

"I support reinterpretation as long as it is clear my work was the original."

“Not ever. If they wish to use my work (appropriation or exploitation) they should seek my permission. If they modify it to the point where it becomes a completely new work, this is different, but it would be a matter of some difficulty to determine at what point the work became a new work. Of course under copyright law they can use my work for parody or satire, or if they are reviewing or critiquing it, but if we are talking about simple reproduction of my work labelled as theirs, not at all.”

ii) When do you think you should be able use someone else's work in your work, without their permission and without payment?

“Other than reproducing an image for review, critique or satire, I think that any appropriated work should be modified to the point of being seen by a reasonable person as an entirely new work; alternatively, if something of mine were to be used as a minor element in a much larger work I think that might be okay.”

“I'm not sure - it really does depend on the use my work would be put to. I would object to someone claiming my work as their own so I would apply the same ethic to the use of another artist's work, were I to incorporate a reference to it for some reason. It gets tricky with art!”

“Without permission, never. Without payment if maker of work agrees.”

“As inspiration. As a very small part in a large design.”

“If I use an insignificant portion of their work/idea or extend or distort the idea/image to a point in which the original artist's work/idea is not being referenced/copyright infringed/ or commented on.”

“hard question.. I would love to say never, but I have appropriated photo journalism pictures sourced from the media in my works before without permission or payment. But none of the works were for sale or displayed in public places, and they all comment on the masses of images we filter through daily in the media.”

Given that most artists will be reasonably open to allowing the reuse of their work for creative purposes, NAVA asserts that at the very least out of respect for artists' moral rights, permission should be sought from the creator of the original work for any transformative use by others. This does not require an exception.

Libraries, archives and digitisation

Question 19. What kinds of practices occurring in the digital environment are being impeded by the current libraries and archives exceptions?

Question 20. Is 200AB of the Copyright Act 1968 (Cth) working adequately and appropriately for libraries and archives in Australia? If not, what are the problems with its current operation?

Question 21. Should the Copyright Act 1968 (Cth) be amended to allow greater digitisation and communication of works by public and cultural institutions? If so, what amendments are needed?

Answer to Questions 19 - 21

While NAVA concurs that it is the responsibility of collecting institutions like libraries, galleries and archives to ensure the broadest possible access to their collections, the reproduction of works in their collections especially digitally needs to be tempered by respect for the rights of copyright holders. In the case of galleries, reproduction technology is now so sophisticated that it is possible to produce copies that are difficult to

distinguish from the original. Galleries are earning substantial income from these reproductions at the expense of artists. They can damage the artists' ability to sell more of their original works by placing them in competition with high quality copies sold at a much-reduced rate to that of the originals.

NAVA asserts that If galleries are to make their collections available digitally online, they should take responsibility for ensuring remuneration of the creators or copyright owners by using a statutory licensing system.

Question 22. What copyright issues may arise from the digitisation of Indigenous works by libraries and archives?

In relation to digitization of Indigenous works, current copyright law does not give sufficient protection to traditional Indigenous knowledge and cultural expression both because of its limited duration and because it does not recognise communal moral rights.

NAVA contends that reproductions of Indigenous artworks should not be digitized without the express consent of the relevant communities and ensuring that cultural protocols are followed.

Moreover, for many years, NAVA has called for new sui generis legislation to provide more culturally sensitive and appropriate forms of protection for the production, distribution and sale, reproduction, exhibition, publication and conservation of Indigenous art.

Other free-use exceptions

Question 48. What problems, if any, are there with the operation of the other exceptions in the digital environment? If so, how should they be amended?

Question 49. Should any specific exceptions be removed from the Copyright Act 1968 (Cth)?

There is a glaring anomaly in sections 65 and 68 of the Copyright Act, which allows the free copying and publication of some public art and artistic works. This has resulted in the artists whose sculpture or work of artistic craftsmanship is a permanent fixture in public places having no control over or reward from the commercial reproduction of images of their work. Often these works become emblematic of particular places, towns and cities. Their easy accessibility exacerbates the problem. Commercial uses of reproductions are often in the form of postcards, calendar and diary images which are widely sold.

As recommended in the report of the Myer Inquiry into the Contemporary Visual Arts and Craft Sector in 2002, NAVA asserts that these provisions should be repealed to bring the rights of public artists into alignment with those of artistic creators whose work is shown or otherwise made available in all other circumstances.

As with other sections of the issues paper, NAVA asserts that the difficulties associated with enforcement of copyright in this case is not a justifiable rationale for distinguishing between sculptures and work of artistic craftsmanship on public display and reproduction rights in other artworks.

For a similar reason, section 67 which allows the 'incidental' inclusion of an artwork in a film, and section 68 which allows the film to be shown and broadcast should be repealed. This exception is denying visual artists an opportunity for accreditation and income and is inconsistent with the rights enjoyed by other creators.