



**NATIONAL
ASSOCIATION
FOR THE
VISUAL ARTS**

25 February 2022

Department of
Infrastructure, Transport,
Regional Development
and Communications

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Parliament House
Canberra ACT 2600

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Re: COPYRIGHT AMENDMENT (ACCESS REFORMS) BILL 2021

NAVA welcomes the opportunity to respond to the Copyright Amendment (Access Reforms) Bill 2021.

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. We have long been committed to ensuring copyright entitlements for visual creators and, in 1995, were responsible for the establishment of Viscopy, Australia's visual arts copyright collecting agency, now part of Copyright Agency. NAVA has long been a vigorous advocate for the introduction of both moral rights and resale royalty rights legislation.

This submission will focus on the potential impact of the proposed reforms on visual artists, designers and makers who are the main creators and owners of copyright material within the visual arts sector that NAVA represents.

[Recent research](#) undertaken by NAVA has revealed the ongoing impacts of the devastating Omicron wave on an already weakened visual arts sector. Australian visual artists reported declines in artwork sales by 49% and declines in their art making by 53%. The impact on mental health has been devastating, with 52% of artists reporting declines in confidence in their future as artists. In each of these areas, 36% say this is a significant or extreme decline. While the statistics are distressing on their own, NAVA is concerned that some of the proposed reform measures in the Exposure Draft could further devalue the position of artists in Australia and will not support the creative economy recovery.

If individual artists are to gain the full economic benefit to which their creative endeavour entitles them, their intellectual property in their work must be adequately protected against unauthorised exploitation or appropriation. The copyright held by some visual artists and craft practitioners in the works that they create contributes in varying degrees to their economic survival.¹

Instances of copyright infringement, misattribution and derogatory treatment of artworks are often brought to NAVA by independent visual artists who are looking for ways to recover their reputation and be remunerated fairly for the use of their artwork. Although the current laws allow a level of protection to artists and there are avenues by which they can stop any unpermitted use and recover payment, the Australia Council's economic study of professional artists in Australia, *Making Art Work*, found that while a quarter of artists experience copyright infringement, only some 40% of those artists take action, with some 60% of those actions being successful, meaning that "the majority of those suffering infringement finish up with no redress." Of artists whose rights were infringed:

- 56% of visual artists and 89% of craft practitioners had their work repurposed without attribution;
- 48% and 54% respectively had work repurposed without permission;
- These were among the higher rates of rights infringement in comparison to practitioners of other artforms.²

NAVA supports the policy intent as expressed by Minister Fletcher in his announcement of this consultation:

Australia's copyright system underpins our creative economy and these reforms seek to provide clear and reasonable access to copyright materials, while maintaining the incentives and protections for content creators.

Where the proposed reforms deviate from this intent, NAVA advises that they be removed or changed.

NAVA's submission will refer to the following schedules of the Exposure Draft:

- Schedule 1—Orphan works
- Schedule 2—Fair dealing for quotation
- Schedule 3—Libraries and archives etc.
- Schedule 4—Education

While NAVA supports the need for changes to the outdated Copyright Act 1968, the Copyright Amendment (Access Reforms) Bill 2021 is likely to create scenarios in which artists are less likely to be remunerated for their work and are more likely to be exploited.

¹ David Throsby and Katya Petetskaya (2017), [Making Art Work: An Economic Study of Professional Artists in Australia](#), Department of Economics: Macquarie University; p. 103

² Ibid 107

In response to the provisions of the bill, NAVA advises the following:

1. LIMITATION ON REMEDIES FOR USE OF ORPHAN WORKS

NAVA agrees that the use of genuine ‘orphan works’ (where the copyrighted material has not been attributed to an owner and they cannot be found) will “open up access to a larger collection of cultural, historic and educational works held by our cultural and educational institutions, and enable use of orphaned material in modern creative endeavours.”³ However, the drafting of this schedule does not uphold the policy intent to offer appropriate incentives and protections to content creators.

1.1 A ‘reasonably diligent search’ and what constitutes an ‘orphan work’

The Exposure Draft discussion paper explains that copyrighted material will become orphaned when:

- a ‘reasonably diligent search’ has been undertaken within a ‘reasonable time’, and
- the copyright owner cannot be contacted or identified.

There are many reasons that attribution may and has become separated from an artwork, including:

- historically objects and artworks of significance to Aboriginal and Torres Strait Islander communities have been removed and provenance lost
- the online and social media environment exposes images to greater risk of being screenshot, downloaded, shared, copied and communicated from their original context which can then separate the creator’s name from the image
- the use of an image in different contexts and for new purposes through licensing agreements may not include ready access to the creator’s name.

While NAVA acknowledges that for orphan works to be used and celebrated in Australian society a mechanism needs to be in place to isolate these works, but a loose and mostly undefined mechanism under the law offers opportunity for copyrighted work to be used in a derogatory manner and without remuneration to the creator.

The Government is in support of the repatriation of First Nations sacred objects and their return to Aboriginal and Torres Strait Islander communities⁴, yet these reforms will likely undermine the repatriation and healing process. Where provenance is lost and attribution almost impossible to know, these reforms will allow for the use and dissemination of culturally sacred images. Indigenous Cultural and Intellectual Property (ICIP) is not comprehensively protected under Australian copyright law and is not considered at all in this schedule. Special consideration must be given to the protection of First Nations traditional knowledge and sacred cultural material.

There are also many reasons why a known creator or copyright owner is not responding to contact attempts, not limited to:

³ Discussion paper—Exposure Draft Copyright Amendment (Access Reform) Bill 2021, p.10

⁴ <https://www.arts.gov.au/what-we-do/cultural-heritage/indigenous-repatriation>

- no internet access
- no or limited English speaking or reading skills
- email messages are filtered or sent to spam
- their contact information is not readily available.

These reasons should not negate an artist's rights to their work, including moral rights and the right of payment.

1.2 Payment for past use and preventing ongoing use

The Exposure Draft is clear in explaining that if a creator is later identified and comes forward there will be no compensation for the past use of a work.

NAVA holds the view that both incentives and protections of the artist are undermined through this proposed change. Through the [Code of Practice for the Professional Australian Visual Arts, Craft and Design Sector](#) NAVA advocates for fair pay to artists for their time, ideas, labour, skills, creative work and the use of that work.

While fair dealing exceptions currently exist under the Copyright Act 1968 creating reasonable expectations for the use of copyright material, this proposed reform creates a context for which the use of creative work has zero monetary value. While this is a dangerous precedent for the economic valuing of creative work, it also undermines the incentive for Australian artists to make original work.

It is not unreasonable for the user of copyright material to expect to pay for the use of a creative work, whether they are aware of the owner and engaged in a license agreement prior to the use of that work or with the expectation that the owner of an 'orphan work' may later become clear and request payment for that prior use.

It is not clear in the Exposure Draft if once a creator/copyright owner comes forward they can stop the continued use of the work under the law (this right is clearly offered to the user), or is only offered the option to negotiate payment for ongoing use. Where the use of the work is derogatory and impinges on the moral rights of the creator it is critical that they have the right to immediately request the use be stopped and the removal of that work from any derogatory context.

1.3 NAVA's position

The mechanism by which 'orphan works' are proved to be truly abandoned needs to be reconsidered and defined more clearly. This process of reconsideration requires engagement and consultation with Aboriginal and Torres Strait Islander communities to ensure protections of ICIP. Collecting societies and peak industry bodies should also be consulted on the most comprehensive, but fair, processes for sourcing the attribution of a work.

Payment for past use of works and the right of an artist to prevent future use of the work must be included in the reforms in order to retain incentives and protections for artists.

Artist Contribution: Bronwyn Bancroft, Bundjalung Woman and Artist

The Copyright Act has afforded Aboriginal and Torres Strait Islander artists a singular property right over the work that we create. A property right allows disadvantaged First Nation families and communities the right to utilise their parent's work 75 years after their death.

There is no other example in Australian law that does this for us. We were informed by multiple governments that we lived, existed and survived for 80,000 years in a land that was empty. The concept of Terra Nullius eradicated our existence, and it was easier to plunder and squat in our Nations. Why is it that the hard work of creative beings, who live on bare incomes to follow their artistic and cultural journeys are constantly being attacked by governments that have no empathy around our essential need to record our existence.

I implore the government's committee to strengthen and protect the ingeniousness of our artistic community.

2. NEW FAIR DEALING EXCEPTION FOR NON-COMMERCIAL QUOTATION

As an affiliate of the Australian Copyright Council, NAVA points to and is in support of their response to the fair dealing exception for non-commercial quotation of the Exposure Draft. In particular the highlighted concern that this new fair dealing exception may operate similarly to a fair use exception.

2.1 Commercial considerations and moral rights

The Exposure Draft discussion paper explains that new reforms to 'quotation' would allow for:

- the copying and sharing of entire artistic works for non-commercial purpose or for a purpose that is immaterial to the commercial value of the product or service in which it is used, and
- quotation by libraries, archives, educational institutions, federal and state governments for their own purposes, or by a person or organisation for the purpose of research.

The broad drafting of this exception not only allows the copy and communication of works for non-commercial purposes, but further allows for the use of works in a way 'where this does not interfere with the commercial market'⁵. Neither purpose is clearly defined within the Exposure Draft leaving this exception open to broad interpretation and risking not only the potential for artists to be remunerated for the use of their work, but also for the misuse of an artist's work.

Where an artist/copyright owner is left out of decisions concerning the use of their artwork the user risks interfering with the artist's commercial market as well as exposing the artwork to derogatory treatment. The user cannot know the extent of ongoing license agreements and other forms of use of the artwork, nor will they know how the artist intended for that work to be understood and engaged with without including the artist in the decision making process.

While the policy intent of this schedule refers to safeguards around copyright owner's commercial markets, there is no consideration for the potential derogatory treatment of an artwork, nor the impact on ICIP.

⁵ Discussion paper—Exposure Draft Copyright Amendment (Access Reform) Bill 2021, p.14

2.2 NAVA's position

NAVA is recommending that the new fair dealing exception for non-commercial quotation be redrafted in consideration of moral rights and ICIP, and that the purposes for 'non-commercial purpose' and use of works in a way 'where this does not interfere with the commercial market'⁶ be far more explicit.

NAVA would also encourage the Government to think more broadly about what else may be required to educate users beyond changes to the law. Investment into educational resources for libraries, archives, educational institutions, governments and potential organisation and individual users will be critical to ensuring artworks are not exposed to derogatory and harmful treatment.

3. UPDATE AND CLARIFY LIBRARY AND ARCHIVES EXCEPTIONS

NAVA endorses the submissions provided by the Australian Copyright Council, the Copyright Agency and the Australian Society of Authors on this schedule who all hold concern that the extended exceptions will have unintended consequences on the digital commercial market of creator's works.

We note in particular this excerpt from the Australian Copyright Council:

The reforms contained in the Exposure Draft provide for significant broadening of the existing exceptions in the Act. Under the proposed new exceptions, libraries, archives, galleries, museums (GLAM sector) and educational institutions would be permitted to copy and make available online copyright materials without a licence from copyright owners. This has a knock-on effect to both the economic and non-economic rights of creators.

The ACC submits that the provision of new free exceptions for use of copyright material by the GLAM sector and by educational institutions is in direct conflict with the commercial licensing activities of copyright owners (whether under the statutory licence or under a voluntary licence scheme). Libraries in particular, would be in economic competition with the way in which copyright owners derive value from their works by making them available to the public.⁷

4. UPDATE AND RESTORE EDUCATION EXCEPTIONS

NAVA again voices its support for affiliate organisations, the Australian Copyright Council, the Copyright Agency and the Australian Society of Authors, who are clear in their concern that the update to the exceptions in the Act relating to educational institutions will undermine statutory license schemes resulting in dramatically reduced copyright payment to creators.

NAVA has engaged in a long history of advocating for the rights of artists, a core tenet of this work is that artists are fairly remunerated for their work. The stated intent of this policy by the Government is to streamline the use of copyright material for the benefit of users, whilst protecting the creator. While

⁶ Discussion paper—Exposure Draft Copyright Amendment (Access Reform) Bill 2021, p.14

⁷ Australian Copyright Council submission (2022), *Response to Discussion paper—Exposure Draft Copyright Amendment (Access Reform) Bill 2021 & Review of Technological Protection Measures Exceptions*

NAVA is in full agreement with this policy intent, the consequences of updating the education exceptions as currently drafted will likely result in less opportunities for artists to make a living from creative work.

5. TPM EXCEPTIONS AND FINAL RECOMMENDATIONS

NAVA stands with art industry calls for serious reconsideration of the Copyright Amendment (Access Reforms) Bill 2021 and on the technological protection measure exceptions in the Copyright Regulations 2017.

NAVA is an affiliate of the Australian Copyright Council and we endorse their responses to the technological protection measure exceptions in the Copyright Regulations 2017. We join the Copyright Council in not supporting the removal of safeguards which enable further exemptions in overriding access control to TPMs.

NAVA supports the Government in its overall policy intent, as stated by Minister Fletcher in his announcement of this consultation:

Australia's copyright system underpins our creative economy and these reforms seek to provide clear and reasonable access to copyright materials, while maintaining the incentives and protections for content creators.

While the intent is clear and fair, the Exposure Draft puts forward reforms that conflict with the stated intent. The proposed changes consistently reinforce the inherent value of copyrighted material, of artwork, yet under the reforms artists are less likely to be remunerated for their work and are more likely to suffer from exploitation.

NAVA strongly encourages the Government to reconsider the drafting of the Copyright Amendment (Access Reforms) Bill 2021 to include:

- Protections for moral rights and Indigenous Cultural and Intellectual Property (ICIP)
- Increased commercial protections for artists
- Mechanisms that pay creators for the use of their copyright materials in recognition that increased access should not undermine the livelihoods of creators

Please do not hesitate to contact me for any further information I can provide.

Sincerely,

Georgie Cyrillo
Interim Deputy Director