

2 April 2004

Ms Fiona Phillips
The Director
Copyright Law Review Committee Secretariat
Attorney- General's Department
Robert Garran Offices
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Patrons
Pat Corrigan AM
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Dear Ms Phillips

**re: Submission re Crown Copyright to the Crown
Copyright Law Review Committee**

The National Association for the Visual Arts (NAVA) welcomes this opportunity to lodge this submission to the above inquiry and thanks you for allowing us an extra week.

NAVA is the peak body representing and advancing the professional interests of the Australian visual arts and craft sector. Since its establishment in 1983, NAVA has been a had a high degree of success in bringing about policy and legislative change to encourage the growth and development of the visual arts and craft sector and to increase professionalism within the industry. It has also provided direct service to its almost 3,000 members through offering expert advice, representation, resources and a range of other services.

NAVA's constituency includes visual artists, craft practitioners and designers, other arts professionals including curators, educators, arts writers and critics, arts administrators and agents, and a range of organisations including public, artist run and commercial galleries, arts agencies, arts service organisations, educational institutions, arts publications, manufacturers and retailers.

Submission

We submit that

- sections 176(2), 177 and 178(2) should be repealed as they unfairly give the government preferential treatment in relation to the first ownership of copyright; and
- the government should be subject to the same provision under section 35 of the Copyright Act 1968 (Commonwealth) in relation to commissioning works and
- the definition of what constitutes the Crown needs clarification, particularly as it is unclear what entities form part of the Federal, State and Territory governments.

Background

Federal and State/Territory governments are major commissioners of artistic works.

Under the current crown copyright provision, where an artistic work is made under the 'direction and control 'of the Crown, the Crown retains copyright in the work not the artist.

Where the artist wishes to obtain the copyright in their work , they must persuade the Crown to re-assign the copyright back to the artist. The reality is that artists' lack of bargaining power; the fact that such commissions are rare and highly competitive, and the impervious bureaucracy that one faces in order obtain a special concession means the artist has little chance of getting their copyright back. This means the artist has no control over how the work is used or reproduced (apart from moral rights) and in the majority of instances is denied any share of royalties if the work is reproduced. eg on postcards or in books.

For all other commissions, section 35(2) of the Copyright Act provides that the artist is the first owner of copyright unless there is an agreement to the contrary or the artist is an employee. This means that the artist is able to

control the uses and reproduction of their work as well as sharing in any copyright licence revenue.

NAVA views the Crown's preferential treatment to be unfair. Artists should be able to retain their copyright when commissioned by the Crown to create works. Artists , as copyright owners should also be able to negotiate a share of any royalties arising from exploitation of their works.

NAVA has been very concerned in relation to complaints it has received from some of its members, of instances of where their work has been reproduced and/or the reproduction have been sold by governments and government agencies without the artist's knowledge or remuneration.

We note that there is confusion of what agencies or department fall under the definition of "Crown". For instance local governments often argue crown copyright in relation to their commission and community art projects, and some museums, galleries and libraries seem to believe they fall under this definition.

Conclusion

We believe the government should be setting a best practice example when dealing with artists and copyright, particularly in light of the findings of the federal government commissioned Myer Inquiry into the Contemporary Visual Arts and Craft Sector. Myer indicated that a swathe of changes were necessary in order to ensure the sustainability of this sector, including the Government taking measures to eliminate unjustified preferential treatment for the Crown.

We also refer the committee to the recently published Throsby Report "Don't Give up your Day Job" which demonstrated the dire economic circumstances of artist, where at least one third are living below the poverty level and the median

earned income level of visual artists is \$22,900 from both arts and non-arts sources.

Copyright is an increasingly valuable asset for artists and is essential for their economic survival. Artists are entitled to gain the full economic benefit from their intellectual and creative endeavors, and they should not be expected to surrender their entitlements to the Crown. In our view, the government should be in the same position as anyone else in relation to first ownership of copyright, irrespective of the subject matter.

We look forward to this suggested change being implemented in demonstration of governments' honouring the obligations it expects from the rest of the community.

Yours sincerely

Tamara Winikoff
Executive Director

