

Sharon Thomas
Secretariat
Advisory Council on Intellectual Property
P.O. Box 200
WODEN, ACT
Email: mail.acip@ipaaustralia.gov.au

23rd January 2015

**The National Association for the Visual Arts (NAVA) Submission
re: Review of the Designs System.**

NAVA welcomes the opportunity to make a brief submission in response to the Advisory Council on Intellectual Property (ACIP)'s Options Paper 'Review of the Designs System'.

NAVA is the peak body representing and advancing the professional interests of the Australian visual and media arts, craft and design sector, comprising an estimated 25,000 practitioners, other art professionals, galleries and other art support organisations. Since its establishment in 1983, NAVA has worked to promote appropriate policy and legislative changes to encourage the growth and development of the sector and to increase professionalism within the industry.

NAVA supports the Second Option and some aspects of the Third Option in ACIP's Options Paper to address the problems of the copyright/design overlap and the shortcomings of the patent system and also the value of harmonization between Australian law and that of other countries through the Hague Agreement. Our reasons follow.

In relation to the Review of the Design System, NAVA's major concern is to ensure protection of the rights of visual and media arts, craft and design practitioners' intellectual property and capacity to earn income from their practice. The current difficulties faced by practitioners are fivefold:

- i) the nature of artistic/design practice is increasingly hybrid;
- ii) artworks are not eligible for patent protection;
- iii) there are problematic anomalies in the cross-over between copyright and design regimes;
- iv) many creators are unaware of the limitations and requirements of IP law and regulation;
- v) there is a cost deterrent to design registration.

1. Hybrid Practice

Art/design practitioners are increasingly entrepreneurial and diverse in the way they develop their professional careers and earn income from their creative practices. They are usually very creative people whose work is interdisciplinary, elastically collaborative (forming expedient partnerships as project opportunities arise) and

PO BOX 60, POTTS POINT, NSW 1335 | +61 2 9368 1900 | VISUALARTS.NET.AU | NAVA@VISUALARTS.NET.AU

NAVA gratefully acknowledges the assistance provided by the Australian Government through the Australia Council, its arts funding and advisory body, and by the Visual Arts and Craft Strategy, an initiative of the Australian, State and Territory Governments.

Patrons: Pat Corrigan AM, Mrs Janet Homes à Court AC, Professor David Throsby AO. ACN 003 229 285 / ABN 16 003 229 285

crosses boundaries between personal practice and commercial production. They may work in several different modes either concurrently or sequentially, producing 2D and 3D work for exhibition and sale, being commissioned to design things for others, running a small production business and/or undertaking their own or commissioned projects alone or in partnership with colleagues.

It would be common to find a craftsperson designing an object which is both an artwork and able to be put to a utilitarian purpose. The creator may not anticipate the 'success' of a work at the start of its making but over time respond to demand and continue to make works to the same design. If they do not register the design prior to its production, in these circumstances they could lose both copyright and design protection because once they have crossed the 50 objects line, according to the current IP regime their work is no longer protected by copyright. However, if it hasn't been registered at the start it will no longer be regarded as 'new' and therefore not eligible for design registration protection either.

In the case of artists who are also designers, NAVA does not agree that "things which are essentially functional and intended for mass protection should not get the very extensive protection of copyright law". As indicated above, works made by contemporary creators can have both the character of an artwork but also be functional and be produced in numbers, sometimes slowly or intermittently according to demand.

As acknowledged in the Designs Review document, another limitation of the current system is that it does not deal well with non-material designs. 'Design thinking' is an approach to problem definition and problem solving which may result in a process or system design eg applying design principles to services (like the examples mentioned in the review document of customer interactions with service providers). The question then arises whether it is eligible for patent registration.

2. Copyright Design crossover

As the Review is aware, a major difficulty with the current system is the cross-over between copyright and design registration (& patents). for the reasons mentioned above, NAVA would strongly recommend that in the Australian system of protection for designs, copyright should subsist regardless of whether design registration is required or chosen, especially in light of the international trend toward joint protection under both copyright and design law and the rapid changes in manufacturing technology.

It would obviate the necessity to clarify the distinction between the design and making of artistic and industrial objects, and would provide much greater protection for vulnerable artistic creators and designers.

NAVA also agrees with the case being made by the Arts Law Centre of Australia that "under section 77 of the Copyright Act an unauthorised person making a product embodying an artist's work does not infringe that artist's copyright in their artistic work where a corresponding design of the artistic work has been applied industrially

by the artist themselves. This means that although an artist may freely make unlimited two-dimensional reproductions and have those reproductions protected under copyright law, if that artist makes a small number of three-dimensional reproductions that protection is lost. This results in an environment where artists are unable to fully commercially exploit their interest in their own work, and if they do, they run the risk of having their work freely copied and reproduced by others.”

NAVA strongly recommends that the law be changed to allow copyright to subsist in visual and media art, craft and design works regardless of whether or not these works are registered designs.

3. Patent protection system shortcomings

Problems with hybrid forms of practice also can arise with works or elements of works that might fall under the patent regime. For example an artist may produce a new software system in the design of media based artworks or a sculptor may design a new construction system for producing various sculptures. In each case there would be consistency in the system used but it may be applied in many different artworks and might be of value to other artists or indeed be applied beyond the art field. However, because it is created for application to a ‘fine art’ rather than a ‘useful art’ it will not be patentable. This disadvantages the creator compared with those who apply similar inventions to more seemingly utilitarian purposes.

In the process of making changes to the Designs System, NAVA recommends that the Patent system should be changed to allow artists to patent their inventions - as implied in Option 3.

4. Lack of familiarity with the law

A major challenge for artists is their lack of familiarity with and confidence in understanding the law and consequent regulatory requirements. As often one-person micro-businesses, the nature of their enterprise does not usually conform with traditional business models. Artist/designers often have little legal or business sophistication lacking the resources of larger commercial enterprises to familiarize themselves with the many areas of the law and regulation that impact on their practice. Though arts service organisations like the Arts Law Centre of Australia, Australian Copyright Council and NAVA do make efforts to provide information and professional development training, the complexity of the overlapping areas of law are daunting to understand. The Review has acknowledged that many Australian designers and design firms are not presently well-educated in intellectual property law. This also applies to visual and media artists and craft practitioners.

NAVA recommends that the Government funds and works with key industry bodies like NAVA, the Australian Design Alliance, the Arts Law Centre of Australia and the Australian Copyright Council to better educate Australian creators about IP law.

5. Cost deterrent

According to the most recent economic arts industry study¹, 50% of artists are unable to meet their minimum income needs from all the work they do both within and outside the arts. Being able to minimise the cost of producing their art/design work is critical to their being able to continue as creative producers. For these people on low incomes the costs of registering designs is a deterrent and many will be unable to pay, thus risking the loss of control of their design IP. Copyright offers them free protection for a lifetime plus 70 years; registering a design covers them for only up to 10 years and it is costly. For artists at least being able to continue to have copyright protection in the case of 50+ production of designs would help sustain the viability of their usually low income careers.

NAVA recommends that the costs of registering designs be substantially reduced for individual creators and low-income micro businesses to make it affordable for them to protect their rights through the design registration process.

6. International harmonisation

Australia should be in step with the trend towards international harmonisation of copyright laws allowing for the protection of intellectual property rights in industrially-applied designs through copyright. Particularly with the ubiquitous on-line availability of ideas, information and visual representations, consistency of IP regimes between countries would facilitate ease of understanding and compliance by those wishing to use their own or others' IP. Joining the Hague Agreement could also extend the maximum term of protection from 10 years to 15 years.

NAVA supports:

- **Australia joining the Hague Agreement**
- **introduction of at least a 6 month grace period, as this would align with patents and harmonise with the Hague System**
- **the introduction of measures to enable seizure by Customs of allegedly infringing articles which are identical to Registered Designs.**

NAVA would be pleased to provide further evidence and responses if required.

Yours sincerely



Tamara Winikoff OAM
Executive Director

¹ Throsby D. and Zednick A. (2010) 'Do you really expect to get paid: an economic study of professional artists in Australia', Australia Council for the Arts