

D'Art report number 1

# Defining Artists for Tax and Benefit Purposes

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International Federation of Arts Councils and Culture Agencies

D'Art aims to consolidate and maximise the expertise of the world's arts councils and culture agencies. For more information visit [www.ifacca.org](http://www.ifacca.org)

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## Introduction

This is the first report from IFACCA's *D'Art* program, which aims to consolidate and maximise the collective expertise of arts councils. Under the program, a member can pose a query to IFACCA's network of arts councils, culture agencies and other 'stakeholders' via the IFACCA secretariat. Responses are collated and analysed, and the analysis returned to respondents. The results are also placed on IFACCA's website for all to benefit and comment. For more information on *D'Art*, contact the secretariat or visit [http://www.ifacca.org/ifacca2/en/organisation/page01\\_dart.asp](http://www.ifacca.org/ifacca2/en/organisation/page01_dart.asp).

The first *D'Art* question came from Tamara Winikoff, Executive Director of the National Association for the Visual Arts (NAVA) in Australia:

### Question

I would be grateful if you could draw on the network of national arts funding bodies to find out how other countries have addressed the challenge in relation to the issues elaborated below.

What I need to know is **how professional artists are defined**.

What are the criteria used and what mechanisms are in place to formalise it?

Is there a professional artists registration system or body?

If so how does it work?

Is it supported by legislation which recognises artists professional status?

How comprehensive is it and where can we find a copy of it?

Does their tax department allow artists to claim their art practice expenses against all forms of income and what definition of artist is in place for this purpose?

What kind of tax concessions are in place for artists and who is eligible?

What arrangements are in place for social security entitlement for artists?

What arrangements are in place for other entitlements like superannuation, insurance, pensions, or other stipends?

The context for this question is provided in Appendix 1.

We received six responses to this query (respondents are listed in Appendix 2). These provided some interesting references and links, and we thank all respondents for their time and interest. Responses were, however, general in nature, so the IFACCA Secretariat undertook its own supplementary research.

Our research confirms that this is a substantial topic. Most countries need some way of determining whether or not a person is a 'professional' artist for tax and benefit purposes. A fully comprehensive international comparison of definitions must cover a large number of tax and benefit systems. A wide variety of approaches adds to the complexity of the task. The following analysis is not intended to be a detailed or comprehensive comparison of definitions of artists. Rather, it is introductory; its aim is to provide background and useful references for anyone wishing to pursue the issue in more detail.

If you can suggest further useful references or links, or have any other information you think would add to the discussion, or would simply like to comment on this topic, please contact us at [info@ifacca.org](mailto:info@ifacca.org). We welcome your comments.

## Comment and analysis

Most countries have some notion of what makes a professional artist for tax and benefit purposes. There is, however, little consistency in approach to definition - some countries even have different definitions within their own jurisdictions. Moreover, there appears to be no comprehensive analysis of the impacts of different definitions.

The original request sought details on definitions of artists for highly practical purposes (ie for determinations under tax and benefit systems). However, many responses focussed on definitions of who is an artist *in principle*, and on definitions for the purposes of academic research and policy analysis. Although these types of definition are broader than was sought in the query, it is worthwhile repeating them here, as they provide a useful backdrop and introduction to more specific aspects of definition. And, as Mitchell and Karttunen (1991; 2) point out, pragmatic definitions of artist are never entirely separable from broad conceptual definitions.

### Broad definitions

UNESCO's recommendation on the status of the artist proposes a formal definition for all artists:

'Artist' is taken to mean any person who creates or gives creative expression to, or re-creates works of art, who considers his [sic] artistic creation to be an essential part of his life, who contributes in this way to the development of art and culture and who is or asks to be recognized as an artist, whether or not he is bound by any relations of employment or association'  
UNESCO (1980).

Two recent formalised definitions used in the UK and Ireland establish what makes an artist professional *in principle*:

'While there are several interpretations of what constitutes a professional 'artist', a broad interpretation is any arts practitioner working in the arts (listed here for clarity as: architecture, dance, drama, film, video and animation, literature, music and opera, visual arts and new media), be they creative or interpretative, who either makes or endeavours to make a living from their work. A professional artist will also be defined through peer recognition.'  
From 'Arts Council of Ireland awards promotional literature' (*D'Art* respondent)

'The Year of the Artist defines artists as professional (defined by training or track record) practitioners, who are involved in the creation of work in any art form.'  
From 'the UK Year of the Artist, June 2000 to May 2001. The Year tried to ensure that all artists taking part were paid a minimum fee of £150 a day to emphasise that art is a profession' (*D'Art* respondent).

Researchers and academics have also identified the need to look more closely at the issue of definition. Two research papers by the Arts Council of Finland are indispensable for anyone interested in this issue (Mitchell and Karttunen, 1991; and Heikkinen and Karttunen, 1995). The 1991 research paper develops a broad framework for the different approaches to defining artists. It also investigates

differences in the population of artists that result from the adoption of different definitions. The 1995 research paper takes a broader look at the politics of definition within the Finnish context, focussing particularly on issues of power and hegemony.

Frustration over the plethora of definitions in cultural analysis has also led the Austrian Society for Cultural Economics to initiate ‘De-fine arts’, a project that aims to clarify definitions of culture, the arts and artists (Fokus, 2001).

### **Practical definitions for tax and benefit systems**

All tax and benefit systems impact on working artists. Some countries have specific schemes that attempt to account for the particular working patterns of artists, or that target specific arts policy outcomes. All tax and benefit systems therefore require some formalisation of what it means to be an artist or a ‘working’ or ‘professional’ artist. Examples where such determinations need to be made are:

- to allow the tax deduction of arts work expenses.
- to allow income averaging for artists.
- in deciding the tax treatment of trans-national/cross-border artists.
- for specific instruments such as Ireland’s special income tax exemption for artists (Revenue Ireland, 2001) and Croatia’s Freelance [Independent] Artists and Encouragement of Cultural and Artistic Creativity Law (Institute of Public Finance, 2001).

To operate effectively and equitably, such schemes require clear definitions. Yet, as Baker Tilly (2001) notes,

‘[m]any countries have no legal or fiscal definition of the term artists, despite having specific tax rules to deal with them.’

The formal definitions that do exist vary widely between countries and sometimes even *within* countries. In Europe, te Spenke (1996) notes,

[an] important inconsistency is that the definition of an ‘artist’ is not uniform throughout the EU... Priority should ... be given to a consistent application of the term ‘artist’. A completely unambiguous definition to be used within the EU should be formulated in order to reduce the risk for misinterpretations.

The many different approaches and contexts and the widespread ambiguity in definition make inter-country comparisons difficult. Although a comprehensive comparison and analysis is beyond the scope of this *D’Art* report, it is worthwhile summarising some common approaches to provide a flavour of the issues.

### **Some common approaches to definition**

The methods and criteria used to define artists for tax and benefit schemes vary widely between jurisdictions. Five common approaches are set out below with examples from a number of countries. Often a mixture of these approaches is adopted.

*1. Definition through membership:* a person is defined as an artist through membership of a recognised artist association (eg a society of professional artists).

One consideration for determining professionalism under Canada's Status of the Artist Act 1992 is whether an independent contractor is a 'member of an artists' association' (Department of Justice Canada, 2001; clause 18(b)iii).

Although administratively simple, this approach still begs the question of which *associations* are to be officially recognised. And, as Heikkinen and Karttunen (1995; 4) find, the complexity of definition is compounded by the need to adopt different membership criteria to ensure comparable definitions across the various art forms.

2. *Definition by committee*: artistic status is determined by a committee, such as a committee of 'experts' or of artistic peers.

In the Netherlands, an 'independent advisory body' determines the professional status of artists applying for eligibility under the Income Provision for Artists Act, or 'WIK' (Ministry of Education, Culture and Science, 1998). In Mexico, a committee of art 'experts' determines and ranks 'artists' under a scheme to allow artists to pay taxes with works of art instead of cash (The Washington Post, 1999). Under the Canadian Status of the Artist Act (1992), a tribunal determines who is and who is not a 'professional' artist for the purposes of actions under the tribunal's jurisdiction (Department of Justice Canada, 2001).

3. *Definition by authority*: the taxing authority determines eligibility.

Under Ireland's acclaimed artists exemption scheme, artists submit a claim to the Revenue Commissioners' Office (Revenue Commissioners' Office, 2001). While the Office makes the final decision, it is able to consult externally in making its decision.

The obvious problem of the designation by committee or authority approaches outlined above is how to ensure objectivity, fairness, or lack of bias in decision-making. Fairness depends on how decision-making is structured and how deciding bodies are appointed and overseen. This issue is particularly relevant since 'The Establishment' is regularly in tension with 'the arts', particularly the 'arts of social change' (Whitaker, 1993).

4. *Definition by association with artistic output*: the definition of an artist derives from the definition of artistic output; ie, an artist is someone who produces art (artworks, copyrighted materials and so on).

This type of definition exists in France (Syndicat National des Sculpteurs et Plasticiens, 2001), in the UK (Inland Revenue, 2001) and in the Republic of Ireland (Coffey, 1998; section 2.4). In the case of Ireland, the Revenue Commissioners' Office determines whether an 'original and creative work' has, or is generally recognised as having either cultural or artistic 'merit'.

In this approach, many of the problems of defining an *artist* are merely substituted with problems of defining *art* (or art products). Comprehensive definitions therefore tend to be long and complex, as in the four-page appendix defining eligibility under

Ireland's artists exemption scheme (Revenue Commissioners' Office, 2001). Schemes with these definitions also tend to be for the production of 'original' or copyrighted output, which favours 'creative' artists rather than 'interpretive' artists (see note in 'other issues' below).

*5. Definition by the nature of arts activity:* an artist is deemed professional if their arts work is undertaken in a 'businesslike' manner.

This type of definition is particularly evident for retail sales tax systems, such as Value Added Tax (VAT) and Goods and Services Tax (GST), and for tax averaging schemes. In these situations, determination must be made about the nature of arts work. Characteristics common to arts work pose a number of problems for making such a determination, as it is not always obvious from a financial perspective whether someone is undertaking arts work as a 'serious' artist or simply a 'hobbyist.'

To determine appropriate treatment under these and other tax schemes, it is the *nature of the work* that is critical (specifically, the financial intention of the artist). Yet, in making their determination, tax departments typically use other supporting evidence about the individual, some of which has been covered above.

The main challenge is to determine whether or not arts work is undertaken as a hobby or as gainful employment (or 'professionally'). In Australia, determination is made by the Commissioner of Taxation on a case-by-case basis, considering, among other things, whether the arts work is performed for the purpose of making a profit, the frequency of arts work and the person's education training and experience (Simpsons Solicitors, 2000). Unlike in other countries, the amount of time devoted to arts work is not a central condition for determining professionalism.

In Canada, '[t]he concept of profit is critical in determining whether a taxpayer's artistic activity or literary undertaking constitutes the carrying on of a business or is merely the furtherance of a hobby or interest' (Canada Customs and Revenue Agency, 2000). The Agency makes a determination based on a number of factors, including: the amount of time devoted to arts work; the extent of public exhibition or publication of arts output; professional representation by an agent; the individual's profit/loss track record; and past profit variability (Canada Customs and Revenue Agency, 2000).

The USA's Internal Revenue Service has nine criteria, including: whether the activity is carried out in a 'businesslike' manner; the amount of time and effort devoted to the activity; the profit 'track record'; and the level of business acumen (Riley, 2000).

### **Related issues**

Two issues appeared frequently while undertaking this research. It is worthwhile briefly discussing these here, as they have key implications for how artists are counted and treated under tax and benefit systems.

*Creative vs interpretive artists:* Many of the definitions outlined in the previous section are for *creative* artists only (eg writers, composers), particularly when

definition is by association with output, as in Ireland's artists exemption scheme. Yet in designing any definition for practical purposes, consideration must be made of the implications and intent of the definition for interpretive artists (eg actors, musicians). The line between the two types of artist is rarely clear, especially in that interpretation is an integral element of many creative acts.

A definition that is intended to cover *all* artists will cause inequities if based on *creative* artists only. To redress such inequities may mean developing a two-tiered definition. The definition used for Australia's income averaging scheme is a good example. To be eligible for income averaging, an artist must be determined to be a 'special' professional. The definition of what constitutes a 'special' professional artist is in two parts:

- i) a *creative* artist is a 'special' professional where the artist is 'engaged or commissioned to produce one or more specified works';
- ii) an *interpretive* artist is a 'special' professional where the artist uses 'intellectual, artistic, musical, physical or other personal skills in the presence of an audience or ... appear[s] in a film, on a tape or disc or in a television or radio broadcast' (Australian Taxation Office, 2001).

*Gross income vs artistic income:* Some schemes recognise the interdependency of artistic and non-artistic income (and, in particular, that arts work is regularly funded through non-arts work) by allowing the deduction of arts work expenses from *gross* income. Both performing artists and visual artists in the USA are able to deduct their arts business expenses from *gross* income (Karas, 2000; Riley, 2000). And the WIK benefit scheme in the Netherlands allows eligible artists to deduct professional expenses from gross supplementary earnings before their benefit is reduced (Ministry of Education, Culture and Science, 1998). Other schemes, such as Ireland's tax exemption scheme, apply only to income from artistic sources (Colley, 1998).

#### **Example of a definition: Status of the Artist Act, 1992, Canada**

A particularly interesting definition of 'professional' artists arose out of the Canadian Status of the Artist Act 1992, the Canadian Government's response to the UNESCO initiative on the status of the artist (UNESCO, 1980). Facsimiles of the actual paragraphs of the Act are reproduced here for information. The definition is a complex mixture of determination of professionalism by context (exchanges with audience), peer opinion, membership, copyright, and artform. For a more detailed discussion of the Canadian Act, see Cliche (1997).

#### **Definition of professional artist in Canadian Status of the Artist Act, 1992.**

Part II: Professional Relations

'Artist' means an independent contractor described in paragraph 6(2)(b)

Paragraph 6(2)(b)

This Part applies to independent contractors determined to be professionals according to the criteria set out in paragraph 18(b), and who

(i) are authors of artistic, dramatic, literary or musical works within the meaning of the *Copyright Act*, or directors responsible for the overall direction of audiovisual works,

(ii) perform, sing, recite, direct or act, in any manner, in a musical, literary or dramatic work, or in a circus, variety, mime or puppet show, or

(iii) contribute to the creation of any production in the performing arts, music, dance and variety entertainment, film, radio and television, video, sound-recording, dubbing or the recording of commercials, arts and crafts, or visual arts, and fall within a professional category prescribed by regulation.

**Paragraph 18(b)**

In determining whether an independent contractor is a professional for the purposes of paragraph 6(2)(b), whether the independent contractor

- (i) is paid for the display or presentation of that independent contractor's work before an audience, and is recognized to be an artist by other artists,
- (ii) is in the process of becoming an artist according to the practice of the artistic community, or
- (iii) is a member of an artists' association.



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# Appendix 1

## Context for D'Art question 2

For several years the National Association for the Visual Arts (NAVA) has been trying to improve public recognition of artists' professionalism. More recently with changes to legislation and policy, pressure on artists is intensifying in relation to taxation, social security, insurance, superannuation and potential new stipend arrangements like a living wage.

The basic question is how to define a professional artist for the purposes of gaining access to the kinds of entitlements which most other working people take for granted.

Over the last three years, NAVA has been the principle industry partner in a major Australian Research Council funded research project which has sought to define best practice by looking at the professional, legal and industrial issues impacting on artists' and crafts people's practice. The Visual Arts Industry Guidelines Research Project has just drawn to a conclusion and has launched two major documents: the *Code of Practice for the Australian Visual Arts and Craft Sector* and *Ideas for Policy and Legislation for the Visual Arts and Craft*, available on the NAVA website at [www.visualarts.net.au](http://www.visualarts.net.au). The second document draws on a number of research studies that were commissioned for the project. One of its recommendations is that Status of the Artist legislation should be introduced in Australia. This would be a means of endorsing artists' professionalism.

In relation to taxation, NAVA has been working in collaboration particularly with Arts Law and solicitor Judy Sullivan in negotiating with the Australian Tax Office. Over the last four years they have been trying to get a public ruling that recognises arts industry measures as the appropriate criteria in assessing whether artists are classified as being 'in business' or as 'hobbyists' for income tax purposes. This keeps getting stuck over the ATO using profitability as the principle measure.

The Income Tax Integrity Measures Bill 2000 proposed four tests of eligibility which allowed people to claim their business related expenses against all forms of income. After an intensive lobbying campaign by the visual arts sector this was amended to put artists in the same category as primary producers and allow them to make this claim if they could meet a fifth test: that they earned less than \$40,000 per annum from sources other than their arts practice. However, they still have to prove their professional status.

Equally in our negotiations with politicians in relation to industry support mechanisms, this question of the definition of professionalism is the critical one. What governments and public policy institutions want is some degree of certainty that unscrupulous people will not make false claims if special conditions are created to support artists.

Any comparative information would be incredibly useful at this important moment in visual arts and craft policy development.

## Appendix 2

### Respondents

Responses to this D'Art request were received from:

- Tara Byrne, Artists' Support Executive, The Arts Council of Ireland/An Chomhairle Ealaíon.
- Peter Inkei, Executive Director, Budapest Observatory on Financing Culture in East-Central Europe.
- Ann Bridgwood, Director of Research, Arts Council of England.
- Carla Delfos, ELIA Secretariat, <http://www.elia-artschools.org/>.
- Merijn Rengers, Doctorate student, University of Utrecht, The Netherlands.
- Risto Ruohonen, Chairman, Arts Council of Finland.

Thanks to all respondents!