

the **TOO HARD BASKET**

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Moral rights and multimedia.

In June 1994, the Federal Government released a discussion paper 'Proposed Moral Rights Legislation for Copyright Creators' in which it outlined the proposed legislative regime to protect the moral rights of artists and authors. Subject to the holding of a federal election, it is anticipated that the legislation, by way of an amendment to the *Copyright Act 1968* (Cth), will be introduced by September or October of this year.

Alas the paint is not even dry and yet it is becoming evident that unless a new gloss is soon applied the proposed scheme will become quickly outdated. The glaring omission in the Discussion Paper is the failure to acknowledge multimedia (there is one reference to it in a general discussion on new technology being a driving force behind the introduction of moral rights legislation). Considering that only two months after the release of the Discussion Paper multimedia was the primary feature of the Creative Nation statement, its absence in the Paper is somewhat ironic.

One of the difficulties in presently implementing moral rights protection for multimedia creators is the uncertainty surrounding the copyright status of such a work which governs whether a creator will be accorded moral rights — for example, a record producer who makes a sound recording and thus owns copyright in that subject matter will not be accorded moral rights, although a film producer will. There have been recommendations by a number of copyright commentators for the introduction of a new broader category of copyright work of 'audio-visual work' which would incorporate cinematograph film and include multimedia.¹ In the interim there needs to be more dialogue on where multimedia sits in the proposed moral rights scheme.²

Scope of the proposed legislation

Moral rights are personal rights that belong to authors — in the broad copyright sense — in association with their creative work, that is, authors of literary, dramatic, musical and artistic works and the producer or director of cinematograph film.

There are two principal rights which form the basis of moral rights:

- The right to be identified as the author of a work (known as the right of attribution); and
- The right to object to any material alteration, distortion or other derogatory treatment of a work which is prejudicial to the author's honour or reputation (known as the right of integrity).

The legal foundation for the international protection of moral rights (and copyright) is the Berne Convention for the Protection of Literary and Artistic Works. Australia has been a member of the Convention since 1928 but is one of the few member states that have not given full effect to the minimum standards of moral rights protection as prescribed under Article 6 bis of the Convention. The delay in fully adopting this Article into Australian law was a belief that the existing laws (copyright, trade practices and defamation legislation as well as

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the tort of passing off and contract law) were sufficient to directly or indirectly protect an author's moral rights. In addition, the concept of moral rights was difficult to reconcile with the sanctity accorded to private property under the common law. Such intangible personality rights place a fetter on how one can use or enjoy certain works under the *Copyright Act*, something that fairly nonplussed the Australian delegates at the Rome Revision Conference of 1928³ and likely to continue to confound users of copyright material when moral rights legislation is eventually introduced.

The Discussion Paper sensibly recommends that the legislation provide that the rights apply only where it is reasonable in all the circumstances rather than the prescriptive approach adopted by the United Kingdom and New Zealand.⁴

The aim of the former approach is to strike a balance between the rights of creators, the rights of users and producers of copyright material and the community generally. To assist all parties, the courts included, it is proposed that a list of factors be included in the legislation which will determine whether moral rights are enforceable in respect of a particular use by a third party.

For example, the factors to be taken into account in determining whether an author of an artistic work has the right to be identified include:

- a. the nature of the work;
- b. the purpose or character of the use of the work;
- c. the context in which the work appears;
- d. any industry practice relevant to the work or use of the work;
- e. any difficulty or expense to be incurred as a result of identifying the author of the work;
- f. whether the work has been created in the course of employment; and
- g. whether the work of the author is identifiable or is part of a collective work. [para. 3.26]

Instances cited by the Discussion Paper where the right of attribution may be reasonable include:

- an author's literary or dramatic work is included in a database which can be accessed by individual users;
- on a painting or drawing reproduced in a publication or exhibited in public; or
- on a program for a concert where a composer's work is to be performed.

The other right — the right of integrity — is a far more difficult right both in terms of defining its scope and applying it in practice. The playwright Edward Albee, whose critically acclaimed work 'Three Tall Women' is currently showing in Sydney, was asked in a television interview about his reported strictness on how his works are interpreted and performed. He replied that it was to protect the integrity of his plays but added 'there is a fine line between free interpretation and distortion'.⁵

In our media-soaked society there is an increasing trend towards commodification and trivialisation of creative product. Moral rights will become an important tool in maintaining the integrity of one's works from debasement and contextual distortion. We see instances of this cultural protection all the time. Charles Duthuit, the grandson of Henri Matisse and beneficiary of his estate, places strict controls on the forms of merchandising of Matisse's work. He has been quoted as saying — in true Gallic style — that: 'Copyright is a moral right'. Last year the grandchildren of composer Richard Rodgers, and also beneficiaries to his estate, visited

Australia to negotiate the rights for an Australian season of the musical 'South Pacific'. They too extend a firm hand on how the work is produced to ensure it conforms, both in form and style, to the original productions.

This desire for creative control is understandable and obviously made easier when, as in the above two examples, you also own and control the copyright. He who controls the purse strings! But what of the situation where a person has been granted permission to do certain things to a work, such as a right to adapt a novel into a screenplay. The whole essence of adaptation is to change the original form and re-interpret for a new medium, perhaps in a new context. Where does one draw the line before the moral rights of the novelist, who may not be party to the adaptation rights agreement, are infringed? There is no neat answer and this will generally come down to the circumstances of each case, which is often a question of degree — the 'fine line' that Albee refers to. It will be difficult law to adjudicate on but conceptually no different to many copyright and defamation actions in which the court attempts to find a balance between freedom of expression and protection of property or reputation.

The majority of the Copyright Law Review Committee in its Report on Moral Rights in 1988 highlighted the theoretical inconsistencies of the minority's view (which in essence is the approach the Government has adopted in its Discussion Paper). The majority asks: is the protection directed to the work or the author? Is the protection founded in personality or property? If the former, why is it that after the author's death his or her heirs may exercise these personality rights for as long as the economic copyright exists in the work. The majority argues that this inconsistency and the criterion of reasonableness as to whether moral rights can be asserted will create uncertainty, delay and costs for those investing in creative works — producers, publishers and record companies — and thereby lead to an economic downturn in the arts and entertainment industry.⁶

Obstacles for authors

The Government is conscious of this problem and has recommended that moral rights of the author of a work or the producer or director of a film may be waived by instrument in writing signed by the author or producer/director forgoing their right. The waiver may relate to a specific work or film, or to works in general, and may relate to existing or future works. The waiver may also be conditional or unconditional. Furthermore, where the waiver is made in favour of an owner or licensee of the copyright it may be invoked by any person authorised by the owner or licensee to use that work, unless there is an indication to the contrary in the waiver.

As the minority of the Copyright Law Review Committee acknowledges (although still supporting a broadly defined waiver provision):

In situations of disparity of bargaining power, the power of an author to waive his or her moral rights, may mean that they will invariably be waived. If waiver occurs in substantial numbers of cases, the rights will be valueless and the legal position of the author will remain much as it now is.⁷

At a seminar on Moral Rights and Film at the Arts Law Centre last year, the entertainment lawyer Michael Frankel reported that since the commencement of moral rights legislation in the United Kingdom in 1988, a blanket waiver of moral rights had become the standard feature of all film production agreements. Put simply, if you don't sign a docu-

ment waiving your moral rights, you are unlikely to get the job.

Only recently the Centre advised a young illustrator about an assignment agreement for the use of his work in a CD ROM product. The assignment sought all the copyright in the work 'for all uses', for the full term of copyright in the work and throughout the territory, defined as the universe (!). In addition, there was the following clause:

So far as permitted by law, the Artist hereby waives any so-called 'moral' or similar rights that the Artist or its heirs or successors may have pursuant to any law anywhere in the world.

Ultimately if such industry practices of blanket waivers develop, moral rights legislation will have little practical effect for artists. It will only engender cynicism and be counter to the underlying goal behind moral rights — to encourage, develop and respect creative endeavours and thereby maximise the quality of that all important end product: content.

Rather than a broad-based waiver provision that applies to both existing and future works (how can an author make an informed opinion as to whether or not to waive his or her rights for works that are not even in existence?) a preferable approach would be one in which the author and user of the author's work specifically negotiate the manner in which the work can be used or altered without breaching the author's rights. Such an approach is reflected in the *Visual Artists Rights Act* in the United States:

The rights . . . may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified.⁸

Waiver is not the only impediment that will restrict an author's right of action. The other is the realpolitik of commencing such an action; somewhat ironic in light of the Government's commitment to improve the community's access to justice as provided under the Justice Statement.

There are potentially four hurdles for an author to clear if he or she is to succeed in any application based on a moral rights breach. First, it must be established that such a claim is reasonable in all the circumstances. Considering one such factor is industry practice, in which there may exist already entrenched practices that undermine artist rights, this will be a barrier for many applicants. Second, the Government proposes that the onus is on the applicant to bear the burden of establishing that his or her claim is reasonable in all the circumstances. Third, for the right of integrity — which arguably will be the more litigious of the two rights — the applicant must also prove that the modification or derogatory treatment of the work was prejudicial to his or her honour or reputation. Finally, there is the access to justice issue. The reality is that most artists cannot afford to retain the services of a private solicitor and barrister to bring a moral rights action and yet are ineligible to receive legal aid assistance as such disputes, like copyright disputes, are usually considered to be 'commercial' disputes. Even the filing fees in the Federal Court for such an action — \$800 (\$300 as application fee and a further \$500 to have the matter set down for hearing) — can be a real deterrent.

Unless these issues of waiver and access to justice are seriously reconsidered by the Government, moral rights will remain in the same form as its critics so dismissively label it: a lot of hot air!

Applying moral rights to multimedia

The emergence of digital media has enabled once distinct classifications of creative activity such as writing, musical works, visual arts, etc. to be combined and stored on one digital medium. The medium can be distributed in hardcopy format such as CD-ROM or via an on-line service, including the Internet, or other forms of communications delivery system. The end user can access this information through computer technology and manipulate its content.

As we head into an online future, increasingly we shall see artistic practice, and information in general, take on a multimedia character. The growth in computer processing power, digital compression techniques and optic fibre links will facilitate this transformation. Moral rights infringements won't just be the domain of monomedia artists whose works have been morphed or sampled and treated in a derogatory fashion. It will also include multimedia creators who likewise may have a valid moral rights claim against a publisher, service provider or end user.

In light of the above comments it is instructive to examine in more detail the Government's approach to film and moral rights as both are generally collaborative mediums in which a number of creative contributors participate — the director, the screenwriter, the producer, the composer, the designer, the performer etc. In a bid to reach a 'workable compromise' between all these competing interests, the Discussion Paper proposes that moral rights be accorded to the individual or individuals who make the 'decisive creative contribution' to the making of the film. This is to be determined in contract between the producer and the director (interestingly no other 'creative contributor' is mentioned) or, failing that, and where uncertainty exists, moral rights shall lie with the producer.⁹

The rationale for this position is that as film is a special collaborative medium the producer must have certainty in the exploitation of copyright in the final product so as to attract investment and effectively market the film.

By contrast the position in the United Kingdom and, to my knowledge, all European countries, is that either the director, or the director and other designated creators (for example, the screenwriter) are granted moral rights protection.

There are a number of problems with the Government's position. One is the uncertainty as to the full ambit of protection for film. Producers may be able to assert moral rights in the film but does that necessarily extinguish the moral rights of the creators of the underlying works to the film? The Discussion Paper is silent on this point and yet this has important ramifications not only for film but also multimedia.

Second, deeming such rights in the film producer is counter to the whole philosophical foundation on which moral rights is based. Moral rights derive from the notion that a work incorporates the authorial persona of an author, in that the author's personality pervades and is intrinsic to the work. Therefore, any destruction or distortion of the work can constitute an attack on the reputation or honour of the artist. Although any moral rights regime needs to be tempered in light of practical considerations — for example, the notion of reasonableness as to whether a moral rights action is enforceable — surely it is stretching a legal fiction to imbue producers with this type of personality rights.

Third, film is not the only activity which is collaborative in nature and involves investment of large sums of money.

Musicals, opera and other large scale performing arts productions also involve these elements but are not treated in a special manner.

The issue as to whether multimedia producers — like their film producing counterparts — are likely to be accorded moral rights is very muddled due to the Government's failure to address the issue, no doubt due to the lingering uncertainty surrounding the copyright status of the multimedia product as a whole.

At present multimedia could be protected as a compilation or a computer program (both come under the category of 'literary works') or as a cinematograph film but as the Copyright Convergence Group and the Australian Copyright Council note probably none of these categories is adequate.¹⁰ This uncertainty as to copyright protection, at least for the multimedia product as a whole, spills over into the moral rights arena too.

Perhaps what is more constructive is the question: should multimedia producers be accorded moral rights? Although the online world is still in its infancy, albeit growing very rapidly, one can anticipate interference by end users or service providers (say, for censorship purposes) which may merit seeking a remedy under moral rights legislation. Moreover, where CD-ROM production is generally collaborative and therefore analogous to film making, with the growth of multimedia authoring software, clip art agencies and do-it-yourself stocklists, it is envisaged that more work will be created by multi-talented individuals who will be both creators and self-publishers. The dawning of digital Promethean man!

The paradox of collective administration

I would argue that moral rights rather than copyright will be the appropriate instrument to provide creators with the ability to control their work and prevent abuse and distortion in the not too distant future.

Copyright in works will increasingly become subject to collective administration in the form of copyright collecting societies or stock houses that provide low cost sound recordings, film clips, photographs and so on. There are five collecting societies currently operating on behalf of composers, writers and publishers and Viscopy, the new collecting agency for visual artists, should be fully operational in the next few months. Furthermore, there are calls for the introduction of a performers' copyright, or at least extended performers' rights, which some argue will necessitate a performers' collecting society.¹¹

Shane Simpson, the author of the recent report 'Review of Australian Copyright Collecting Societies', has suggested a joint venture between the collecting societies. Members may either be listed for identification purposes only, in which case the user must negotiate with the rights holder direct, or confer on the organisation the right to collectively administer their multimedia rights in return for equitable remuneration.¹²

Collective administration of copyright provides owners with the ability to exploit their rights cost effectively and ensure equitable remuneration. It also assists multimedia producers in identifying and clearing copyright use. This one-stop shop approach, however, does diminish the control rights owners have in how their work is used or exploited. This is where moral rights should play a vital role.

There is just one snag to this scenario: moral rights! The one-stop shop is not going to be so nearly efficient if the rights

user still has to chase up the rights owner (which, of course, may not be the creator) and obtain a moral rights waiver release. Moral rights cannot be assigned or licensed to the collecting society and surely it would be inimical to what collecting societies stand for to be seeking moral rights releases from their members. Unless some other arrangement can be put in place to deal with moral rights, the administrative efficiency of these collecting societies will be seriously undermined.

References

1. For example, see Copyright Convergence Group, 'Highways to Change', AGPS, 1994.
2. At the date of writing the author has received a copy of the issues to be considered by the Copyright Law Review Committee in its reference to review and simplify the *Copyright Act 1968*. It includes the implications of moral rights for multimedia.
3. Ricketson, Sam, 'Moral Rights and the Droit de Suite: International Conditions and Australian Obligations', [1990] 3 *Ent.LR* 79.
4. Paras 3.20 to 3.23.
5. Interview with Melvyn Bragg, broadcast on SBS-TV on 3 July 1995.
6. Copyright Law Review Committee, 'Report on Moral Rights', AGPS, 1988, pp.10-20.
7. Copyright Law Review Committee, p.106.
8. Section 106(e)(i) *Visual Artists Rights Act* of 1990 (US).
9. Paras 3.10 to 3.12.
10. Copyright Convergence Group, above, p.65; Australian Copyright Council, 'Multimedia Producers and Copyright', Bulletin 87, May 1995, pp.40-41.
11. See the position of the Media Entertainment and Arts Alliance and the Musicians Union of Australia in Music Industry Advisory Council, 'Performer's Copyright', August 1994, p.11.
12. Simpson Shane, 'Multimedia and the Hunger for Rights', pp.6-8, paper delivered at the Law Asia Intellectual Property, Adelaide, 26-29 March 1995.

Arts Law Centre

The Arts Law Centre of Australia is a community legal centre which provides legal and accounting advice on arts related issues to artists and organisations throughout Australia. It was established in 1983 with the support of the Australia Council and currently receives financial assistance from the Council, the NSW Ministry for the Arts and the Australian Film Commission amongst others.

The Centre provides information and advice on a wide range of legal and accounting matters, including contracts, insurance, business structure, defamation, employment, income taxation, sales tax and accounting. Advice is given to practitioners in all artforms: visual arts, music, literature, performing arts and film.

The Centre's advice services are available nationally through its toll-free 1800 line. This is supplemented by the legal advice night services currently operating in Sydney, Adelaide, Perth and Hobart, and anticipated for Melbourne in late 1995, in which experienced arts and entertainment lawyers donate their time by providing face-to-face consultations on legal matters. It also provides a legal and accounting referral service.

A primary objective of the Centre is to equip artists with resources such as sample contracts, information sheets and specific arts law publications to assist them with their practice. It also provides seminars and workshops to tertiary arts institutions and support groups.

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