THE MORE THINGS CHANGE THE MORE THEY STAY THE SAME
The New Moral Rights Legislation and Indigenous Creators

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This article examines the new Australian moral rights legislation. It looks at how the moral rights regime may (or may not) assist Indigenous creators, and considers why moral rights have been perceived as holding an integral place in providing adequate legal protection for Indigenous art in Australia. The article first outlines the history of moral rights, tracing their origins in French law, before examining Australian debates leading up to the enactment of moral rights as an amendment to the *Copyright Act* in late 2000. The two new moral rights — the right of integrity and the right of attribution — are discussed. The article argues that the new moral rights have limited value for Indigenous creators because they are individual rather than communal rights, and consequently false attribution or identity claims are not actionable. To make up for the deficiencies of the moral rights regime, the article concludes by proposing the development of *sui generis* legislation that accommodates Indigenous intellectual property laws and the concept of communal ownership and custodianship of art, stories and other knowledge concerning the management of the land.

Introduction

Unauthorised or inaccurate reproductions of Indigenous art can cause deep offence and damage to an artist and his or her community. While copyright law has, to some extent, provided some relief for Indigenous creators, it has more often than not yielded an unsatisfactory result. It is for these reasons that considerable emphasis had been placed on the introduction of the new moral rights regime. The regime, contained in the *Copyright Amendment (Moral Rights) Act* 2000 (Cth)[1] has been seen as one means of ameliorating some of the inadequacies of the present legal system in protecting the works of Indigenous creators from harm. The expectation is that a moral rights regime would protect those interests which are predominantly about the relationship that the artist has with their work. Enthusiasm about the introduction of a moral rights regime exists primarily because, until recently, questions of harm

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1 Hereafter referred to as the moral rights legislation or the Act.

of this nature were not specifically legally recognised.[2] This article considers why moral rights have been perceived as holding an integral place in providing adequate legal protection for Indigenous art in Australia. The article discusses the new moral rights legislation and how this may impact upon existing practices. In particular, it looks at how the moral rights regime may (or may not) assist Indigenous creators. In short, the article considers whether the new moral rights regime is all that it purports to be.

What are Moral Rights?

The term 'moral rights' is a transliteration from the French *droit moral* or *droit moraux*.[3] In French, these rights are the 'personal' or 'non-economic' rights of creators. Moral rights attach to the creator of a work primarily because of the bond between the creator and their work. They exist independently of the economic rights of copyright. In essence, moral rights focus on an affinity between a subject and their object.[4] Hence moral rights have been described as 'an emanation or manifestation of his (the artist's) personality or his spiritual child':[5]

> When an artist creates, be he an author; a painter, a sculptor, an architect or a musician, he does more than bring into the world a unique object having only exploitative possibilities, he projects into the world part of his personality and subjects it to the ravages of public use. There are possibilities of injury to the creator other than mere economic ones.[6]

Essentially what has evolved in French law are rights which can protect the interests of an artist or an author. In civil jurisdictions and in particular in France, there are four major moral rights: the right of disclosure; the right of withdrawal; the right of attribution; and the right of integrity.[7] The acknowledgment and subsequent protection of these rights have differed

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2 There has been some suggestion that there is a corpus of law developing by 'Aboriginal people to have communal title in their traditional ritual knowledge, and in particular in their artwork, recognised and protected by the Australian legal system': Justice Von Doussa in *Bulun Bulun v R & T Textiles Pty Ltd* (1997) 157 ALR 193 at 195. See A. Kenyon, 'The "Artist Fiduciary" — Australian Aboriginal Art and Copyright' (1999) 2 *ENTLR* 45.

3 S Ricketson, 'The Case for Moral Rights' (1995) *Intellectual Property Forum*, October, p 38.

4 S Ricketson, (1987) *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986*, The Eastern Press, p 456.

5 ibid; C Aide, 'A More Comprehensive Soul: Romantic Conceptions of Authorship and the Copyright Doctrine of Moral Right' (1990) 48 *University of Toronto Faculty of Law Review* 211.

6 M Roeder, 'The Doctrine of Moral Right: A Study in the Law of Creators, Authors and Creators' (1940) 53 *Harvard Law Review* 557.

7 M Cooper, 'Moral Rights and the Australian Film and Television Industries' (1997) 15 *Copyright Reporter* 167.

between countries governed by civil law and those governed by common law.[8] Where civil law countries have engaged moral rights as a matter of course in legal history, the progression of the common law countries — particularly Australia — to recognise moral rights has been less straightforward.

Moral Rights in Australia

The *Copyright Amendment (Moral Rights) Act* 2000 (Cth), which amends the *Copyright Act* 1968 (Cth), came into force on 21 December 2000. The Act introduces, for the first time, a moral rights regime in Australia for filmmakers and authors of literary, dramatic, musical and artistic works.[9] The legislation is the culmination of a long protracted history of moral rights discussion in Australia which began in 1928.

In 1928, moral rights became incorporated into international law via the *Berne Convention for the Protection of Literary and Artistic Works.*[10] Australia was a signatory to that convention. Article 6 protects two basic moral rights: the right of attribution and the right of integrity. Dworkin asserts that obligations set out in the Berne Convention in article 6 *bis* require that Australia has been bound by international law to protect moral rights since 1928.[11] However, there has been a great reluctance on the part of successive Commonwealth governments to include moral rights as a part of domestic law. Various government reports, including the Spicer Committee Report in 1959,[12] *The Report of the Copyright Law Review Committee* in 1988[13] and the 1994 Discussion Paper on *Proposed Moral Rights Legislation for Copyright Creators,*[14] have had difficulties conceptualising the implementation of what is considered to be an aberration of common law doctrine.[15]

The first attempt at legislation came in 1997 with the *Copyright Amendment Act*. Schedule 1 of that Act dealt with moral rights. In July of 1998, Schedule 1 was withdrawn from the Act to allow for further consultation between the government and stakeholders. In 1999, stand-alone legislation

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8 B Carey, 'Moral Rights in Australian Law' (1992), Working Paper Number 4, *The Macquarie Management Papers*.

9 Filmmakers are understood to mean producers, directors and screenwriters.

10 Hereinafter called the Berne Convention.

11 S Ricketson (1995) 'The Case For Moral Rights', p 39.

12 Commonwealth of Australia (1959), *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider what Alterations are Desirable in The Copyright Law of the Commonwealth*, Commonwealth Government Printer.

13 Copyright Law Review Committee (1988) *Report on Moral Rights*, Australian Government Publishing Service.

14 Attorney-General's Department (1994) *Proposed Moral Rights Legislation for Copyright Creators — Discussion Paper*, Australian Government Publishing Service.

15 This has also been an issue in the United States — see J Ginsburg and J Kernochan, 'One Hundred and Two Years Later: The US Joins the Berne Convention' (1989) 13 *Columbia-VLA Journal of Law and the Arts* 1.

containing moral rights, known as the Copyright Amendment (Moral Rights) Bill 1999, was introduced into the House of Representatives. However, almost a year elapsed before the Bill was debated. During this time, intense lobbying by affected parties continued. On 7 November 2000, the amended Bill was introduced into the Senate and it was debated a month later. The government moved several amendments,[16] and the Bill was passed into law as the *Copyright Amendment (Moral Rights) Act* 2000 (Cth).[17] The Act repealed the existing Part IX of the Act and substituted a new Part IX entitled 'Moral Rights of authors or literary, dramatic, musical or artistic works and cinematograph film'. While the Act has been touted as a comprehensive regime, it contains only two moral rights: the right of integrity[18] and the right of attribution.[19] The right of false attribution[20] is sometimes claimed as a third moral right;[21] however, it is the author's contention that the right of false attribution is the contrary position of the right of attribution.[22] The Act applies to literary, dramatic, musical and artistic works and cinematograph film in which copyright subsists.[23] The rights provided by the Act are conferred only on individuals,[24] and are in addition to any other rights in relation to the work that the author may have. The Act contains two consent provisions, one applicable to films and works used in films, the other applicable to all other works. In short, the consent provisions provide that it is not an infringement of a moral right to do, or omit to do, anything which has the consent of the author.[25] The impact of these provisions will be discussed later in this article. The next section will discuss why moral rights, and in particular the rights of integrity and attribution, are considered important for Indigenous creators.

Moral Rights and Indigenous Art

Of all the moral rights, it is the right of integrity that has been considered to offer the most potential to protect Indigenous creators. The unauthorised or inappropriate use of Indigenous works which violates the integrity of a work, causing harm to the artist, has arisen in a number of copyright actions. The

16 Many of which were drafted to address the concern of creator groups.

17 The Act received Royal Assent on 21 December 2000.

18 An author's right to object to derogatory treatment which may prejudicially affect his or her honour or reputation.

19 The right to be identified as the author of the work.

20 The right of an author to take action against another who falsely attributes a work to the said author.

21 Which is essentially the opposite of the right of attribution.

22 See explanatory memorandum, *Copyright Amendment (Moral Rights) Act* 1999 (Cth), p 1

23 See s 189

24 See s 190.

25 The consent may relate to all or any act before or after the consent is given. It may also relate to a specified work or works or a work of a particular description the making of which has not yet begun or is not yet completed.

inability of the court to provide relief for this harm in these cases has motivated commentators to consider that the right of integrity must be a better way of ameliorating this problem.

The first of the copyright actions was brought by the well known Aboriginal artist Johnny Bulun Bulun in 1989.[26] The artist brought actions in copyright and breaches of the *Trade Practices Act* 1974 (Cth) after a t-shirt manufacturer had reproduced two of his paintings without gaining permission. The artist settled with the t-shirt manufacturer and the two tourist shops in Darwin who sold the t-shirts giving undertakings to the court that they would cease sale and manufacturer of the articles and deliver up the remaining stock. The artist felt such shame and harm at this behaviour that he indicated his future as an artist in his community was jeopardised.[27]

The detrimental effect for an Indigenous artist of a breach of integrity will often extend beyond the personal boundaries of an artist and his work to the community, and the community's relationship with the work. This will almost always affect an artist's position within their community, as expressed by Johnny Bulun Bulun:

> This reproduction has caused me great embarrassment and shame and I strongly feel that I have been the victim of the theft of an important right. I have not painted since I learned about the reproduction of my art works ...
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> .. My work is closely associated with an affinity for the land. This affinity is the essence of my religious beliefs. The unauthorised reproduction of art works is very sensitive issue in all Indigenous communities. The impetus for the creation of works remains very important in ceremonys [sic] and the creation of art works is an important step in the preservation of important traditional custom. It is an activity which occupies the normal part of the day-to-day activities of the members of my tribe and represents an important part of the culture; continuity of the tribe. It is also the main source of income for my people, both in my tribe and for the people of many other tribes, and I am very concerned about the financial well-being of my family should I decide that I cannot go on painting.[28]

Following the Bulun Bulun action, Terry Yumbulul from northeastern Arnhem land brought a copyright action against the Reserve Bank of Australia involving a work known as 'morning star pole'. The work itself was made by the artist, but also formed an important role in the community ceremony and celebration. In relation to the harm caused by the reproduction, the court noted:

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26 *John Bulun Bulun v R & T Textiles Pty Ltd* (1998) 3 AILR 547.

27 C Golvan, 'Aboriginal Art and the Protection of Indigenous Cultural Rights' (1992) 14 *European Intellectual Property Review* 228.

28 An affidavit sworn by Johnny Bulun Bulun cited in ibid, p 228.

> Mr Yumbulul came under considerable criticism from within the Aboriginal community for permitting the reproduction of the pole by the bank It may well be that when he executed the agreement he did not fully appreciate the implications of what he was doing in terms of his own cultural obligations And it may also be that Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin. But to say this is not to say that there has been established in the case any cause of action.[29]

The problem of harm was again identified in *Milpurrurru v Indofurn Pty Ltd,* by Justice von Doussa when he said:

> The evidence discloses the likelihood that the unauthorised reproduction of the artworks has caused anger and offence to those owners, and the potential for them to suffer humiliation and repercussions in their cultural environment.[30]

These cases demonstrate how any violation of the integrity of a work will cause harm to both the artist and to the community to which the work belongs. As such, it is necessary to consider what the right of integrity is and how this may or may not provide adequate relief for Indigenous creators should a work be violated by unauthorised or inappropriate use.

The Potential Impact of Moral Rights

As mentioned earlier, it is important to consider in more detail the potential impact of the new moral rights for Indigenous creators. In particular, it is essential to contemplate what the specific rights of integrity, attribution and false attribution may actually mean. In addition to this, it is important to discuss the more general requirements in the legislation such as duration, beneficiaries, consent and the notion of reasonableness which may have considerable impact for Indigenous creators. These more general requirements will be discussed later in this article. The next section of this article will provide a more detailed discussion of the specific rights of integrity, attribution and false attribution.

The Right of Integrity

In general, a right of integrity is the right not to have a work subjected to derogatory treatment. The philosophy underlying this right holds that an artist, by creating a work, has embodied an element of her personality in the work that should be protected from distortion or mutilation.[31] The integrity provision is considered to be of great importance to Indigenous creators because it is a

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29 *Terry Yumbulul v Reserve Bank of Australia* (1991) 21 *IPR* 481 at 490.

30 (1994) 30 FCR 240 at 272.

31 A Dietz, 'The Creator's Right of Integrity Under Copyright Law — A Comparative Approach (1994) 25 *IIC* 181.

legal recognition that there is a sacred, spiritual and impenetrable bond between the artist and their work, something which has been a theme in a number of copyright cases involving Indigenous works.[32] In many instances, an appropriation of Indigenous art occurs when an image which is sacred is reproduced in an inappropriate context. An example of this would be reproduction of objects such as tea towels, t-shirts or carpets.

The right to integrity contains two elements. The first is that there has been a material distortion of, the mutilation of or a material alteration to the work. The second is that the distortion or the doing of anything else in relation to the work is prejudicial to the author's honour or reputation. The potential impact of the right of integrity is unknown. In fact, the legislation appears to rely heavily on a number of imprecise tests. For example the question of how the courts may interpret 'derogatory treatment' and 'prejudicial to the author's honour or reputation' requires a more detailed consideration.

What is 'Derogatory Treatment?

The Act sets out various definitions of what is considered to be derogatory treatment with respect to the various forms — literary, dramatic and musical works, artistic works and cinematograph film. In each provision dealing with 'derogatory treatment',[33] the Act refers to a material distortion, mutilation and/or material alteration. It is only in relation to the derogatory treatment of artistic works that the protection does not extend beyond the physical.[34] In this particular provision, derogatory treatment also includes any exhibition in public of the work that is prejudicial to the author's honour or reputation because of the manner or place in which the exhibition occurs. This provision may prove to be particularly important for Indigenous creators.

The provision raises the question: to what extent may Indigenous creators object to any unauthorised modification of their work in a material form which does not 'touch' the physical protected? For example, the reproduction of art works on carpets or on t-towels may be considered highly offensive and derogatory to the creators and their communities, but may not be sufficiently appropriated and changed to attract the protection of these provisions. In addition, the question of what is derogatory is also subject to the defence of relevant industry practice, which can be a vague notion.[35] While the issue of what is derogatory treatment is unclear, it is the second limb of the integrity provision which requires further attention.

What is 'Prejudicial to Honour and Reputation'?

The second limb of the provisions defining 'derogatory treatment' provides for 'the doing of anything else' in relation to the work that is prejudicial to the author's honour or reputation.[36] As the Act itself does not offer definitions of

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32 T Janke (1998) *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights*, Michael Frankel and Co, p 113.

33 Section 195AJ (literary, dramatic or musical work), s 195AK (artistic work), s 195AL (cinematograph film)

34 See s 195AK.

35 ibid.

36 Section 195AJ(b).

what reputation or honour may mean in this context, one may assume that the courts would consider reflecting on the ways 'integrity' is viewed in other common law jurisdictions.

This issue arose in the Canadian case of *Snow v The Eaton Centre*.[37] In this case, a renowned sculptor created a work for the Eaton Centre shopping mall in Toronto called 'Flight-Stop'. The work consisted of 60 Canada geese flying in formation. At Christmas time, the Centre tied ribbons around the necks of the geese for decoration. The artist sued, arguing that this was prejudicial to his honour and reputation because he considered his work of art looked ridiculous with the addition of ribbons.[38] The Ontario High Court ordered that the ribbons be removed. In doing so, Justice O'Brien considered that 'prejudicial to honour and reputation' could contain some subjective element or judgment on the part of the author, as long as it was reasonable.

British courts have shown little inclination to follow the emphasis in the *Snow* case. In *Tidy v Trustees of the Natural History Museum*,[39] cartoonist Bill Tidy brought an action for breach of intregrity against the Natural History Museum after the black and white cartoons that he had given the museum to exhibit were reduced in size and altered with the addition of coloured backgrounds. Rattee J, in the High Court, refused Tidy's application for summary judgment for breach of his right of integrity. The judge suggested that, in order for the court to find whether the Gallery's treatment of his cartoons was prejudicial to Tidy's honour, it was necessary for the applicant to demonstrate how the defendant's acts were perceived by the public. In reference to *Snow*, Rattee J said that he would have to be satisfied that the view of the artist was one which was reasonably held, which 'inevitably involves the application of an objective test of reasonableness'.[40] Without further evidence, the judge said he could not this reach this conclusion. Recently in Britain there has been further discussion of this issue in a County Court, where a judge argued that, for a treatment to be derogatory, a plaintiff must establish that the treatment accorded to his work is either a distortion or a mutilation that prejudices his honour or reputation as an artist. In other words, it would not be sufficient that the author is himself aggrieved by what has occurred.[41]

Considering the difficulties in Canada and Britain, it is unclear how derogatory treatment will be construed in Australia. In particular, there seems to be uncertainty as to whether 'treatment' that may be prejudicial to the honour or reputation of an author is to be judged from an objective or

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37 *Snow v The Eaton Centre* (1982) 70 CPR (2d) 105 (Canada).

38 He compared this addition of ribbons to the addition of earrings on the Venus de Milo.

39 *Tidy v Trustees of the Natural History Museum* [1996] EIPR D-86; (1998) 39 IPR 501.

40 ibid.

41 *Pasterfield v Denham* [1999] FSR 168, 182. See the UK position discussed in greater detail in the forthcoming book by L Bentley and B Sherman, *Intellectual Property Law*, Oxford University Press.

subjective standpoint. One suggestion is that the notion of reputation may be interpreted as similar to that defined in defamation law.[42] That being the case, the question of whether a treatment of a work is considered to be prejudicial to an author's reputation would probably be judged objectively. Who is the community in cases involving Indigenous work? Is it the Indigenous community of whom the artist is an integral member? The artistic community in general? Or is it the community at large? The effect of defining the community will be an important development for Indigenous creators. While Indigenous intellectual property is collectively owned, individuals and/or groups may act as custodians for particular items or heritage. However, any action taken in relation to this must conform to the best interests of the whole community.[43]

> Under customary law, Indigenous custodians are collectively responsible for ensuring that important cultural images and themes are not reproduced inappropriately. The Indigenous creator must be careful not to distort or misuse the cultural knowledge embodied in a work. Although an author is the creator of the artwork, or song or story, he or she cannot authorise reproduction of it without ensuring the reproduction complies with Indigenous customary law.[44]

In addition to this question of 'reputation', how the courts may interpret 'honour' is still open to suggestion. If one assumes that 'honour' is how a person views themself,[45] prejudice to honour may contain stronger subjective elements. While the right of integrity is considered to be the most important moral right for Indigenous creators, it is also important to consider the impact of the right of attribution and its mirror image the right of false attribution.

The Right of Attribution

The right of attribution of authorship is defined in ss 193–94 of the Act.[46] Identification may be any reasonable form of identification, and there will not be an infringement when it is reasonable not to identify the author.[47] It is clear that these provisions fall short of considering other important issues relating to

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42 S Ricketson (1987) *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986*, at para 8.110 (explaining that these terms were preferred to the wider concept of 'moral or spiritual interest of the author').

43 A Ridgeway, Commonwealth of Australia, Parliamentary Debates, *Senate Hansard*, no 18, 7 December 2000, p 21072.

44 Janke (1998) *Our Culture, Our Future*, p 55.

45 Hence the Roman law concept of *dignitas*.

46 The acts which give rise to the right are found in s 194, such as to reproduce the work in material form, to publish the work, to perform the work in public, to transmit the work, to make an adaptation of the work, depending on the nature of the work i.e. whether it is a literary, dramatic or musical work, artistic work or cinematographic work.

47 Section 195AR.

authorship. For example, the Tasmanian Land Council has indicated that any right of attribution that merely acknowledges an individual artist would be hollow and insufficient unless prior consent for the use was obtained from the creator concerned.[48] Another clear problem is that determination of whether an infringement has occurred is a matter of discretion for the courts, which may not be familiar with customary law, and are not bound to respect it.

The Rights Against False Attribution

The Act also provides for a right against false attribution of authorship.[49] This provision provides for those instances where attribution of work is misleading and deceptive. One of the problems of a provision of this nature is in cases where non-Indigenous creators attribute their 'Indigenous' name or identity as the original creator of a work.[50] As the moral rights regime protects the individual and not a community as such, instances where an individual falsely attributes Aboriginality or membership of a community or clan to a work would not be actionable under the present regime. As the authenticity of the art which is purported to be created by Indigenous creators art is one of the major concerns in relation to false attribution, it is clearly an issue which is not addressed by the new legislative scheme. In addition to the problems identified by the rights of integrity and attribution, there are more general problems identifiable in the Act. These include the duration and the beneficiaries of the rights, the provision for the consent or waiving of the moral right and the notion of reasonableness in relation to the infringement of the moral right. They will be discussed in turn.

Duration

As mentioned briefly earlier in this paper, the right of integrity continues in force for the duration of the copyright for a work which is the life of the creator plus 50 years.[51] In the instance of a film, the right of integrity operates for the life of the filmmaker (that is, it ceases on the death of the filmmaker). The right of attribution also continues in force for the duration of copyright for the life of the creator plus 50 years for works, and 50 years from the year of release for a film. The requirement of limited duration is also a problem in copyright law, and it has been suggested by a number of authors that this does not provide adequate protection, given the 'longevity of Indigenous folkloric works'.[52] The concern for Indigenous communities is that folkloric works

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48 Janke (1998) *Our Culture, Our Future,* p 114.

49 Section 195AE.

50 For example, Elizabeth Durack aka Eddie Burrup and Leon Carmen aka Wanda Koolmatrie, cited in Janke (1998) p 39.

51 Section 195AM, Duration of moral rights.

52 J Wambugu Githaiga, 'Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge' (1998) 5 *E Law – Murdoch University Electronic Journal of Law* 3, www.murdoch.edu.au/elaw/issues/v5n2/githaiga52.html. See also UNESCO & WIPO (1985) *Model Provisions for National Laws on the*

which are currently protected could end up in the hands of non-Indigenous people once the copyright expires.[53] As a result, the rightful owners of the works under traditional customary law would become 'culturally dispossessed and impoverished', relying on others to allow them access to that which is rightfully theirs.[54] This problem is particularly likely to arise where non-Indigenous persons are concerned. They are much more likely to put Indigenous works to culturally inappropriate uses as they are not bound by Indigenous customary laws and are therefore not exposed to the sanctions consequent to a violation of such laws.

Beneficiaries

One of the clearest stumbling blocks of the Act in relation to Indigenous creators is that moral rights are only applicable to individuals. This clearly indicates how the new Act maintains an ethnocentricity which prefers individual rights, private property and economic rights. Therefore, the rights of integrity and attribution will only vest in an individual and not in a community. This issue was addressed directly by Senator Aden Ridgeway when he moved amendments to recognise moral rights in Indigenous cultural works and the ability of a custodian to assert these rights on behalf of an Indigenous cultural group.[55] The amendments were wholly rejected at the time.[56] It is interesting, given that the problems associated with co-authors, as well as directors, producers and screenwriters of films, have been overcome by allowing them to enter into co-authorship agreements to govern the exercise of the right of integrity.[57] In essence, this is what the Democrats were suggesting for the issue of communal ownership. While it is clear that customary Indigenous law

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Protection of Expressions of Folklore Against Illicit Exploitation and Other Actions, cited by Githaiga, p 5.

53 K Puri, 'Cultural Ownership and Intellectual Property Rights Post *Mabo* Putting Ideas into Action' (1995) 9 *Intellectual Property Journal* 318.

54 ibid.

55 The proposed amendments were as follows:

- *Section 190 Moral rights conferred on individuals*: Subject to s 190A, only individuals have moral rights.
- *Section 190A Moral rights in relation to Australian Indigenous cultural work*: (1) Moral rights in relation to an Australian Indigenous cultural work created by an Indigenous author, under the direction of an Indigenous cultural group, may be held and asserted by a custodian nominated by the relevant Indigenous cultural group as its representative for the purposes of this Part; (2) In this Part, for the purposes of its application to Australian Indigenous culture works, a reference to an author is to be taken as a reference to a custodian nominated under subsection (1).

56 However, the government did indicate it would give serious consideration to the central principles of these proposals and address the need for protection of Indigenous intellectual property.

57 These sorts of issues have been redrafted following intensive lobbying by the various stakeholders. For an example of this, see s 195AN(4).

considers that responsibility and ownership of artistic creations vests in traditional custodians and not necessarily an individual creator, and this in turn has been recognised by the judiciary, the legislature is reluctant to follow suit.[58] While there may be problems of substantially identifying the community, as the present regime stands there is no other way for an artist and the traditional custodians to exact any relief unless they enter into some form of co-authorship agreement. Given that s 10(1) of the *Copyright Act* 1968 (Cth) carries the onus of proof of collaboration by the joint authors in the production of the work, the limitation of this provision may exclude many communities from exacting any relief under the new Act. In addition to the beneficiary of the moral right being a clear stumbling block for many Indigenous creators, so too will those provisions outlining the consent requirements.

Consent Provisions

The issue of consent in the moral rights regime has always been controversial. One of the major points of contention of the Moral Rights Bill as proposed in 1997 was that moral rights could be waivable. One of the main justifications for this has been from the film and publishing industries, which have said that a moral rights regime would render these industries 'unworkable' without the presence of waiver provisions. At least one of the contradictions that provisions of this nature raise is that the moral rights are treated as if they are economic rather than personal rights. Creators who waive their rights may seek financial reward for doing so. This is important when considering the bargaining position of most creators, particularly those Indigenous creators from remote communities where language and access to information are less than optimal in relation to Western copyright law. This proposal is considered to be antithetical to the spirit of a moral rights regime:

> In theory we should have a neat separation of powers in the arts, in which the managers (producers, publishers, etc.) retain control of copyright and the creators retain creative control through protection under moral rights. Unfortunately what we are increasingly seeing are deals in which creators lose ownership or control of copyright *and* are asked to waive their moral rights in both existing and future works.[59]

The problems associated with the inequality of bargaining power between remote Indigenous communities and agents are now widely and frequently reported in the popular press. An example provided recently involves agents who travel to remote communities and coerce creators within communities to

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58 See Janke (1998) *Our Culture, Our Future*, p 114.

59 I Collie, 'Multimedia and Moral Rights' (1994) *Arts and Entertainment Law Review* 94 at 98.

create up to twelve paintings in one day, in order to reduce the costs of the agent travelling back and forth to remote locations.[60]

Section 195AW of the present Act allows an author to consent to the use of their work which would otherwise be an infringement of their moral right. But this provision does nothing more than change the language of what were initially the controversial waiver provisions. The inequalities of bargaining power and economic disparity which were highlighted by the former waiver provisions would continue to exist and creators who are constrained by financial pressures would probably 'consent' rather than 'waive' their moral rights in order to ensure some sort of contractual certainty. As suggested by Lake, this inequality of bargaining power will not be remedied.[61]

The Act also contains some changes to the consent provisions for works other than films, which are apparently designed to increase the protection for freelance creators.[62] In particular, a consent will only be considered a valid defence to an infringement of a moral right if it relates to the *specified* acts or omissions, or *specified* classes or types of acts or omissions included in the Act. It remains to be seen how this will affect Indigenous creators, particularly in light of the provision which outlines the case of employed creators, where the employer can rely upon this defence of a consent relating to *all acts or omissions* in connection with *all works* made or to be made by the employee in the course of his or her employment. Should an act or omission not be provided for by the consent of the artist, then the issue of whether or not the infringement is reasonable will be a defence to an infringer. The question is whether it will become industry practice to employ Indigenous creators from remote communities as employed creators for the purposes of circumventing any requirement for genuine consent.

The Notion of Reasonableness

As indicated earlier, another area of concern is the defence of reasonableness contained in the Act. Under s 195AR, an infringement will not be actionable if it is considered to be reasonable. This test of reasonableness is assessed in relation to relevant industry practices,[63] and takes into consideration any difficulty or expense which would not have been incurred but for the infringement.[64] Other factors which may impact on Indigenous creators include whether the work was made in the course of the author's employment or under a contract for the performance by the author of services for another person[65] and if the work has two or more authors, their views about the failure

60 See, for example, M Reid (2000) 'The Pirates of Provenance', *Weekend Australian*, 1–2 April, p 38.

61 S Lake, 'Moral Rights — Beware the Waiver Mongers (1997) 16 *Communications Law Bulletin* 4 at 6.

62 See discussion of this in the Copyright Council's Update 'B102v1 Moral Rights Bill Update – 2001', on its website, www.copyright.org.au.

63 For example, ss 195AR(2)(e), 195AR(3)(f), 195AS(2)(e), 195AS(3)(f).

64 Sections 195AR(2)(g), 195AR(3)(h).

65 Section 195AR(2)(h)(i) and (ii).

to identify them and/or the treatment of their work.[66] The defence of reasonableness is highly problematic in the case of Indigenous creators, given the history of exploitative behaviour by some commercial industries.[67]

Conclusion

While the introduction of moral rights has been proclaimed as a means of alleviating some of the inadequacies of the present legal regime for Indigenous creators, the risk remains that the real needs of Indigenous creators will not be met.[68] In fact, the moral rights regime is based on similar foundations to the copyright regime, which relies on a liberal Eurocentric discourse recognising private proprietary rights. In essence, the emphasis on the individual does not sit with an 'Indigenous world view which prioritises the interests of the community as a whole over those of the individual'.[69] The current moral rights regime continues to rely on a discourse which is internally inconsistent with the goals and needs of the Indigenous communities. It is the contention of this author that the proposed moral rights regime is unable to service the needs of Indigenous communities. It is proposed, therefore, that in order for this difficulty to be overcome, a new and specific regime in the form of *sui generis* legislation be enacted as a consideration based on Indigenous customary law and expectations: 'Just as the Indigenous common law has never sought to unilaterally extinguish English/Australian common law, so we expect English/Australian common law to reciprocate.'[70] While there is some indication that a common law of moral rights may be emerging,[71] until more appropriate legislation is enacted, this new legislative regime is likely to be ineffective in remedying harm caused by inappropriate or unauthorised use of Indigenous works.

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66 Section 195AR(2)(i).

67 See, for example, discussion of this in Commonwealth Government of Australia, (1996–97) *Research Paper 20: Indigenous Peoples and Intellectual Property Rights*, Department of Parliamentary Library.

68 This has been the contention of authors such as O'Brien, who considers that the introduction of a moral rights regime would not be advantageous to Aboriginal creators other than by providing protection for what she calls 'cheap and inappropriate reproductions of Aboriginal art'. She believes that the theoretical underpinnings of a moral rights regime would not be compatible with Aboriginal customary art: see C O'Brien 'Protecting Secret-Sacred Designs — Indigenous Culture and Intellectual Property Law' (1997) 2 *Media and Arts Law Review* 68.

69 J Wambugu Githaiga (1998) 'Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge', p 3.

70 C Morris, 'Indigenous Intellectual Property Rights: The Responsibilities of Maintaining the Oldest Continuing Culture in the World' (1997) 4 *Indigenous Law Bulletin* 2 at pp 9–10.

71 See, for example, the judgments of Justice von Doussa in *Milpurrurru v Indofurn Pty Ltd* (1994) 54 FCR 240, *Bulun Bulun v R & T Textiles Pty Ltd* (1997) 157 ALR 193 and French J in *Yumbulul v Reserve Bank of Australia* [1991] 21 IPR 481 at 483.