

Protecting the personal in art: Australia's moral rights legislation

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Australian intellectual property law has largely developed around the protection of economic interests, rather than personal interests. However, since 1928, Australia has been obliged to protect the personal interests of authors of copyright works through the granting of "moral rights" under the Berne Convention for the Protection of Literary and Artistic Works. As of 21 December 2000, these rights were expressly recognised by the Copyright Amendment (Moral Rights) Act 2000 (Cth) which amended the Copyright Act 1968 (Cth) ("Act").

The Act emerged out of a long debate between protecting creative integrity in line with the Berne Convention, and concerns that too stringent a regime would interfere with commercial use of copyright works. Cases such as *John Bulun Bulun v R & T Textiles Pty Ltd* (1998) 3 AILR 547 and *Terry Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481, in which artworks incorporating symbols of significance to indigenous communities were used on t-shirts and in banking promotions, clearly demonstrated the need to balance the personal interests of creators against the commercial incentive not to unduly inhibit the use of copyright works. The Act can be seen as a compromise, whereby the personal interests of an author are protected, but mechanisms are in place that allow the exercise of an author's right to be dealt with quickly and cost-effectively by the user. Whilst there is some reason to doubt that the Act goes far enough in protecting personal interests, it is probably too early to tell.

What are "moral rights"?

Authors (as defined by the Act) of artistic, literary, dramatic and musical works and of films have:

- the right of attribution of authorship (section 193 and Division 2 of Part IX);
- the right not to have authorship falsely attributed (section 195AC and Division 3 of Part IX); and
- the right of integrity of authorship (section 195AI and Division 4 of Part IX).

Moral rights are distinct from other intellectual property rights in that they cannot be assigned and do not pass with ownership of copyright (section 195AN(3)).

These rights are also unusual in that they can only subsist in individuals (section 190). This is particularly significant for the

film industry where corporations often take on roles deemed by the Act to be those of "author". The Act specifically provides that, if a producer of a film is a body corporate, then the producer will not enjoy moral rights, although moral rights will subsist in the director and screenwriter (section 191).

Application and duration of moral rights

Moral rights only apply to acts or omissions occurring after 21 December 2000. The rights of attribution of authorship and integrity of authorship apply to all works in which copyright subsists, whether they were created before or after 21 December 2000, except for films and works which are included in films. The rights only exist for films created after 21 December 2000. The right against false attribution previously existed under the *Copyright Act 1968* and the effect of the amendment is to extend this right to films.

Moral rights last for the duration of copyright protection in the works, except in the case of films where the right of integrity expires on the death of the author (section 195AM).

What uses of copyright works would infringe an author's moral rights?

Performing an act in relation to a copyright work such as reproducing, publishing, performing, transmitting, copying, exhibiting, making available on-line or adapting the work, will infringe an author's right of attribution if the person performing the act:

- did not attribute the author at all;
- did not attribute the author in the manner in which he or she had made known that they wished to be identified; or
- in the absence of a specified manner of identification, did not attribute the author by a reasonable form of identification which was clear and reasonably prominent.

An author's right against false attribution may be infringed where a person:

- falsely attributes the work or a reproduction of the work to someone other than the author; or
- attributes a substantially altered work to an author as the unaltered work of the author without lawful excuse.

A person who deals with, imports, or authorises another to use, deal with or import a work, which is not appropriately attributed to the author, will also infringe the author's

right to attribution and against false attribution (as well as the author's right to integrity). The importing and dealing provisions require that a person knew, or ought reasonably to have known that, if the article had been made in Australia, it would constitute an infringing article.

Treating a work in a derogatory manner will infringe an author's right to integrity if the person:

- materially distorts the work;
- mutilates the work;
- materially alters the work; or
- for artistic works, destroys the work or exhibits the work in a certain manner or place,

where these acts are prejudicial to the author's honour or reputation.

Any other act which is prejudicial to the author's honour or reputation may also infringe the right to integrity.

Whilst acts which would infringe the rights to attribution and against false attribution seem relatively clear, what would constitute an infringement of the right of integrity is more ambiguous. The Act does not specify whether prejudice to an author's honour or reputation will be an objective test judged by community standards or a subjective test dependant upon the specific author's response. Australian case law will need to establish a clearer test to enable users of copyright works to know with some certainty, the types of treatment which are likely to constitute infringing acts.

Some examples of acts which could amount to derogatory treatment are:

- affixing red ribbons to a sculpture of flying geese located in a shopping mall at Christmas time (see the Canadian case of *Snow v The Eaton Centre* (1982) 70 CPR (2d) 105));
- moving a work of art from the place where it was specifically designed to be located without the artist's knowledge or consent;
- shortening a film;
- redeveloping a building without notifying or consulting the architect (in 2000, plans to redevelop the building housing the National Gallery of Australia were put on hold after objection by the building's original architect that he had not been consulted);
- changing the colour of drawings for a publication (although in the UK case of *Tidy v Trustees of the Natural History Museum* [1996] EIPR D-86, (1998) 39 IPR

501, it was found that a museum's alteration of black and white cartoons by reducing their size and adding coloured backgrounds was not an infringing act. Interestingly, the colouring of black and white film classics such as *Casablanca* is what initially sparked debate about moral rights in the United States' film industry.)

When would such uses not infringe an author's moral rights of attribution and integrity?

Non-infringing uses

An author's right of integrity will not be infringed if:

- the act performed was done in good faith to restore or preserve the work (section 195AT(5));
- in the case of moveable artistic works, the work is destroyed only after the author is given a reasonable opportunity to remove the work (section 195AT(1));
- in the case of moveable artistic works situated in a public place and specifically designed for that location, the work is removed or relocated only after the remover has:
 - (a) been unable to locate or identify the author or his or her representative, after having made all reasonable inquiries; or
 - (b) complied with the notice and consultation requirements as set out under the Act (section 195AT(4A)).
- in the case of buildings, or artistic works which form part of or are affixed to buildings, the work is changed, relocated, demolished or destroyed only after the owner of the building has:
 - (a) been unable to locate or identify the author or his or her representative, after having made all reasonable inquiries; or
 - (b) complied with the notice and consultation requirements as set out under the Act (section 195AT(2) and (3)).

Defences

It is a defence to an infringement of an author's moral rights if:

- the act or omission was "reasonable"; or

- the act or omission had been consented to by the author in accordance with the Act.

In determining whether an act or omission is "reasonable", the Act sets out a number of non-exclusive factors to be taken into account (sections 195AR and 195AS):

- the nature and purpose of the work;
- the manner and context in which the work is used;
- relevant industry practice or voluntary codes in the industry in which the work is used;
- whether the work was made in the course of employment or under a contract of service;
- except in the case of films, the views of any co-authors about the act or omission;
- in regard to the right of attribution, any difficulty or expense that would have been incurred as a result of identifying the author; and
- in regard to the right of integrity, whether there was a lawful excuse for the treatment.

Consent will only be valid if it is made in accordance with the Act. The Act requires that consent be (sections 195AW and 195AWA):

- in writing;
- from the individual author, or authors, or his or her representative (where there are joint authors, the consent of one does not affect the position of the other. For films, there is provision in the Act for co-authorship agreements governing the exercise of moral rights);
- given in relation to specified acts or omissions or to specified types of acts or omissions (which can have occurred before or after the consent is given); and
- given in relation to either a specified work in existence at the time of the consent or a specified work or work of a particular description which is not yet in existence.

For employees however, the Act makes the consent requirements less onerous. Consent can be given for the benefit of the employer in relation to all or any acts or omissions (whether they occur before the consent is

given or after) and in relation to all works made by the employee during the course of his or her employment. It is therefore easy for employers to side-step the moral rights of employees by simply inserting broad consents into employment contracts.

Because the defence of "reasonableness" has not been clearly defined, there seems to be a tendency emerging that when industry or government engages contractors, a requirement is imposed on those contractors to ensure that all individual authors engaged on the project have consented to a waiver of their moral rights in any work that may be created under that project. Contractual requirements of this nature, particularly if imposed in relation to works of artistic creativity, will limit the effectiveness of moral rights legislation.

How effective are moral rights in protecting the personal interests of authors?

It is difficult at this early stage to assess the efficacy of the Act in protecting the personal in art. The remedies which may be granted range from damages to injunctions and orders for public apologies. Some criticisms of the legislation are that it does not incorporate the full range of moral rights found in other jurisdictions, nor does it include suggested amendments recognising collective moral rights of indigenous communities which are of particular concern in Australia. Furthermore it provides a fairly weak enforcement regime, preferring consultation to court-enforceable rights.

The Government did however make it clear that the legislation was not intended to grant rights which would be routinely enforced through the court system, but instead would encourage good industry practice and raise awareness in an "educative way" of the need to respect the creativity of authors. Time will tell whether this approach has been successful. However, legislation which affirms the importance of an author's creative integrity and relationship to their work is at least a step in the right direction. ■

Rupert Burns: Actor, comedian and lawyer

Catherine Symons, Madgwick's Lawyers

Rupert Burns turned to the study of law on a whim. After 10 years treading the boards and about 7 years spent constructing them (Rupert was previously a carpenter and joiner), he enrolled in law at Melbourne University.

The final stages of his law studies coincided with the arrival of twins to his household. As Rupert describes it, this was a period characterised by intense sleep deprivation, at the end of which he woke, somewhat bemused, with a law degree.

Following on from this discovery, Rupert spent a number of years working with a Melbourne law firm, drawing on his extensive background and experience in film, television, theatre and comedy to provide specialised advice to local and interna-