

Australian Copyright Council

3/245 Chalmers Street Redfern NSW 2016 Australia
ACN 001 228 780 Tel: +61 2 9318 1788 Fax: +61 2 9698 3536

<http://www.copyright.org.au>
email: info@copyright.org.au

Submission on Copyright Amendment (Moral Rights) Bill 1999

9 March 2000

Introduction

We strongly support amendments to the Copyright Act to grant comprehensive moral rights to authors. We have made a number of previous submissions in relation to moral rights.¹

We have some major concerns about some aspects of the Bill:

- a) the defence of “consent” in cl 195AW;
- b) the reference to “industry practice” when determining whether a person’s actions were reasonable (cls 195AR and 195AS);
- c) the specific exemptions for buildings and moveable art (cl 195AT); and
- d) exclusion of existing works (for the right of integrity) and existing films (cl 195AZM).

A number of the organisations affiliated with the Copyright Council have made separate submissions. Some affiliated organisations do not support all aspects of this submission.

Objectives of the Bill not met

We note, and support, the objectives for the Bill set out in the Attorney-General’s Second Reading Speech:

- to provide comprehensive implementation of Australia’s international obligations, as the current implementation is “fragmentary and incomplete”; and
- to acknowledge the “great importance of respect for the integrity of creative endeavour” and “the importance to Australian culture of literary, artistic, musical and dramatic works, and of those who create them”.

The Government’s objectives are not met in relation to our four areas of concern.

1. “Consent”: cl 195AW

We object to the current drafting of cl 195AW for the following reasons:

No provision that purported waiver has no effect

- there is no provision that a purported waiver has no effect.² This means:

¹ These include: submission dated 3 August 1997 to the Senate Legal and Constitutional Legislation Committee on the Copyright Amendment Bill 1997, submission dated 7 June 1996 on the draft Copyright Amendment Bill 1996 and submission dated 21 September 1994 in response to the Government’s discussion paper “Proposed Moral Rights Legislation for Copyright Creators”. These are available from our web site www.copyright.org.au.

² An author may waive his or her rights (for example as part of a contract) even though there is no express provision to this effect in the legislation.

- a defendant may raise a waiver as a defence to an action for breach of moral rights, and
- a defendant may take action against an author for breach of contract if the author brings an action for infringement of moral rights;
- a prohibition of waiver would assist to clarify the meaning of consent;³

Provision would effectively allow waiver

- a “comprehensive consent” is effectively a waiver;⁴
- a “consent” given to past acts (referred to in cl 195AW(2)) is effectively a waiver;

Provision does not give effect to joint film industry proposal

- cl 195AW does not give effect to the joint film industry proposal of 18 March 1999;
- in any event, a vast range of other authors are not party to this proposal;

Provision does not give effect to Government’s policy

- the Attorney-General, in his Second Reading Speech said:

Understandably, creators saw the provision for waiver in the original legislation as a means by which economically powerful users of their works could force them to agree to give up those new rights completely. In response to these concerns, the concept of waiver has been dropped from this Bill.
- the “concept” of waiver has not been dropped, however, but retained as “comprehensive consent” and consent for past acts.

In our earlier submissions, we submitted that a court should have discretion to declare that an undertaking by an author not to take action for infringement of his or her moral rights has no effect, if the undertaking is prejudicial to the author’s interests.

³ That is, consent to particular acts or omissions, rather than an undertaking not to exercise moral rights generally.

⁴ The Explanatory Memorandum says that cl 195AW allows a “comprehensive consent”.

In previous submissions, we opposed the inclusion of a provision allowing waiver of the rights because:

- it will become standard practice in some industries to require creators to give up the rights that Parliament has given them, thus defeating the purpose of the legislation. Creators are generally in an inferior bargaining position, and would thus be unable to resist the adoption of such standard practices;
- in the majority of countries which have moral rights legislation, waiver of the rights is not allowed;
- a provision allowing waiver is not necessary when it is not an infringement of moral rights:
 - to do something which is reasonable, or
 - to do something to which the author consented.

Provision only relevant where person acts unreasonably

- a person who acts reasonably would have a defence under cl 195AR or 195AS – cl 195AW would only be relevant where a person acts *unreasonably*;
- the purpose of the consent provision should be to identify specific acts and omissions which an author regards as acceptable.

Suggested changes to drafting

We submit that cl 195AW should be amended along the following lines:

195AW Author's consent to act or omission

- (1) Subject to subsection (2) and s 195AN(5), an express or implied undertaking by an author, in an agreement or in a provision of an agreement or otherwise, to waive a moral right has no effect.
- (2) It is not an infringement of a moral right of an author in respect of a work to do, or omit to do, something if:
 - (a) the author had given consent in writing to the act or omission; and
 - (b) the consent related to a specified work or specified works existing when the consent was given.
- (3) A consent given for the benefit of the owner or prospective owner of copyright in the work or works to which it relates is presumed, unless the contrary intention appears in the consent instrument, to extend to his or her licensees and successors in title, and to any persons who are authorised by the owner or prospective owner, or by such a licensee or successor in title, to do acts comprised in the copyright.
- (4) In this section:

author includes a person who is:

 - (a) a legal personal representative of the author; or
 - (b) administering the author's affairs.

2. Industry practice: cl 195AR, cl 195AS

We submit that the current drafting of the references to "industry practice"⁵ are problematic, as the effect may be to give an advantage to industries which treat creators badly.

We submit that:

- the references to "any practice, in the industry in which the work is used, that is relevant to the work or the use of the work" be omitted; and

⁵ "Industry practice" is referred to in the factors to be taken into account when determining whether a person's actions were reasonable in cl 195AR and 195AS.

- the references to “any practice contained in a voluntary code of practice, in the industry in which the work is used, that is relevant to the work or the use of the work” be replaced with “any practice contained in a voluntary code of practice **to which the author is party**, in the industry in which the work is used, that is relevant to the work or the use of the work”.

3. Specific exemptions for artistic works: cl 195AT

Buildings

We strongly oppose cl 195AT(3) because:

- it is not consistent with Australia’s obligations under Article 6bis of the Berne Convention;
- it is also inconsistent with the Government’s policy that a fair application of the moral rights provisions is best achieved by reference to whether a person’s actions were reasonable in all the circumstances, and not by exceptions applying to particular types of works or acts or omissions;
- the Government’s claim that cl 195AT(3) implements a long-standing policy is not supported by the wording of the Copyright Amendment Bill 1997, the Explanatory Memorandum to that Bill, the report of the Senate Legal and Constitutional Legislation Committee, or the public forum hosted by the Attorney-General in August 1998;⁶
- the clause in fact represents a change in policy, about which there was no consultation with the authors affected.⁷

⁶ In his Second Reading Speech, the Attorney-General said:

As under the original legislation, some specific actions have been expressly exempted from infringement of the right of integrity.

This Bill clarifies one of those exemptions – that alteration to or demolition of a building will not infringe the right of integrity in the architect’s design or in any work, such as a mural, that forms part of the building.

That was always the Government’s policy intention, but there was some concern expressed that the drafting of the original legislation was ambiguous.

Cl 195AS(2) of the Copyright Amendment Bill 1997 said:

A change in a structure containing an artistic work is not an infringement of the author’s right of integrity of authorship in respect of the work.

As “building” is defined in section 10(1) of the Copyright Act to *include* a structure of any kind, cl 195AS(2) clearly could not have been interpreted in the way the Government now says it intended.

⁷ We understand the change in policy resulted from representations to the Government from the Property Council in late 1999.

Moveable artistic works

We submit that subclauses 195AT(1), (2), (4) and (5) should also be removed. Such specific exemptions are not necessary when there is a defence to infringement of moral rights if a person acts reasonably. On the other hand, these “blanket” defences make no reference to reasonableness, and thus may operate unfairly.

4. Application of the rights: cl 195AZM

We submit that compliance with the Berne Convention requires the application of both the right of attribution and the right of integrity to existing works and films, and thus we oppose cl 195AZM.

The Attorney-General, in his Second Reading Speech, suggested that cl 195AZM would implement the recommendation of the Senate Committee on Legal and Constitutional Legislation, and the joint film industry proposal. Neither proposal is consistent with the Berne Convention, and in any event cl 195AZM excludes a much wider class of works than recommended by the Senate Committee. The Senate Committee recommended the exclusion of works whose author had died before the commencement of the provisions, but the Bill would deny the right of integrity to all works created before the commencement of the provisions.

Libby Baulch
Executive Officer
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