

# The new moral rights legislation

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## Introduction

After many years of debate, inquiries and draft Bills, Australia finally has legislation giving creators “moral rights” protection. The Copyright Amendment (Moral Rights) Act 2000 was passed by Parliament on 7 December 2000 and came into effect on 21 December 2000.<sup>1</sup>

The Moral Rights Act has repealed Part IX of the Copyright Act 1968 (Cth), which dealt with false attribution of authorship, and substituted a new Part called “Moral rights of authors of literary, dramatic, musical or artistic works and cinematograph films”. The new Part provides for the following moral rights:

- the right of attribution of authorship;
- the right not to have authorship of a work falsely attributed; and
- the right of integrity of authorship.

These rights belong to “authors” of literary, dramatic, musical and artistic works and of cinematograph films.<sup>2</sup> The “author” of a film is defined to mean the director, the producer and the screenwriter.<sup>3</sup> Unlike the economic rights comprised in copyright, moral rights cannot be transferred, and remain with the author even after assignment of copyright.

Like other common law countries, Australia has been slow to introduce comprehensive moral rights protection. Moral rights have been part of the Berne Convention since 1928, and Australia has been bound to protect them since 1935. The Government’s longstanding view was that it could meet its obligations through other laws, including defamation and passing off.<sup>4</sup> However, in his Second Reading Speech, the Attorney-General noted that the objective of the Moral Rights Bill was to provide comprehensive implementation of Australia’s international obligations, as the current implementation was “fragmentary and incomplete”.<sup>5</sup> The Attorney-General also acknowledged 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”.

Moral rights provisions were originally included in the Copyright Amendment Bill 1996, an exposure draft released in February 1996 by the Keating government but never introduced. The following year saw the introduction by the Howard government of the Copyright Amendment Bill 1997 which contained moral rights provisions based largely on those in the 1996 Bill. The 1997 Bill passed the House of Representatives. In the Senate, the Bill was referred to the Legal and Constitutional Legislation Committee for review. The Committee made several recommendations for amendment of the Bill, including in relation to the controversial waiver provision.

Following the Senate Committee's report, the Government removed the moral rights provisions from the Bill, citing a need to undertake further consultations, particularly in relation to the issue of waiver. The Government held a consultation forum in August 1998 at which the issue of waiver emerged as the principal area of disagreement between creator groups and user/producer groups, particularly in the context of the film and television industry.

In March 1999, organisations representing creators, producers, distributors and broadcasters in the film and television industry reached a compromise agreement. The agreement provided that the ability to waive moral rights would be unnecessary if there were a mechanism for recognition of "co-authorship agreements" under which creators could agree to certain limits on the exercise of their rights.

The Bill introduced into the House of Representatives in December 1999 reflected aspects of the film and television industry proposal. The fact that certain limitations on the rights agreed on by the film and television industry had been applied in the Bill across the board to all works caused some disquiet in the creative community. As a result, when the Bill was finally debated in December 2000, many of the amendments made in the House of Representatives and the Senate involved confining limitations on the rights, including limitations on duration and application, to films and other works only as far as they are included in films.

Australian Democrat Senator Aden Ridgeway moved amendments which were intended to recognise moral rights in indigenous cultural works and to give a custodian of those works the ability to assert moral rights on behalf of an indigenous cultural group. These amendments were not passed. However, the Government indicated it would give "serious consideration to the principles underlying Senator Ridgeway's proposals" in the context of its development of legislative amendments and other measures to address the issue of protection for indigenous intellectual property.

In the following paragraphs, an overview of the principal provisions of the legislation is provided.

### **The right of attribution**

The legislation gives an author the right to be identified as author of his or her work when an "attributable act" is done to the work.<sup>6</sup>

The acts which give rise to an obligation to attribute the author generally correspond with acts that involve an exercise of the economic rights in a work. In the case of literary, dramatic and musical works, "attributable acts" are:<sup>7</sup>

- reproduction of the work in material form;
- publication of the work;
- performance of the work in public;
- transmission of the work;<sup>8</sup> and
- the making of an adaptation of the work.

In the case of artistic works, attributable acts do not include performance or adaptation but do include exhibition to the public.<sup>9</sup> In the case of films, the attributable acts are:<sup>10</sup>

- making a copy of the film;
- exhibition of the film in public; and
- transmission<sup>11</sup> of the film.

The legislation provides that the author must be identified in the particular way that the author wishes to be identified, provided that:<sup>12</sup>

- the author has made that known (either generally or to the person required to attribute the author); and
- the form of attribution was reasonable in the circumstances.

Otherwise, the author may be identified by any “reasonable form of identification”.<sup>13</sup>

The identification of the author must be “clear and reasonably prominent”.<sup>14</sup> In the case of a reproduction of a work, a copy of a film or an adaptation of a literary, dramatic or musical work, the identification will be reasonably prominent if it is included on each reproduction, copy or adaptation (as the case may be) in such a way that a person acquiring the item will have notice of the author’s identity.<sup>15</sup>

### **The false attribution right**

The provisions regarding false attribution of authorship are based on the provisions in the previous Part IX, repealed by the Moral Rights Act.<sup>16</sup>

Authors have two rights in relation to false attribution of authorship: the right not to have the authorship of a work falsely attributed, and the right not to have the authorship of an altered work falsely attributed. The legislation proscribes specific acts of false attribution.

Unlike the previous false attribution provisions, the new provisions apply to films.

### **The right of integrity**

The right of integrity of authorship is the right of an author not to have his or her work subjected to “derogatory treatment”.<sup>17</sup> Derogatory treatment means:

- “doing anything” in relation to a work that results in the work being materially distorted, mutilated or materially altered where that is prejudicial to the author’s honour or reputation;<sup>18</sup> or
- doing anything else in relation to a work that is prejudicial to the author’s honour or reputation.<sup>19</sup>

An additional form of derogatory treatment in the case of artistic works is the exhibition of a work in public that is prejudicial to the author’s honour or reputation because of the manner or place in which the exhibition occurs.<sup>20</sup>

It is an infringement of the right both to subject a work to derogatory treatment, and to deal with a work that has been subject to derogatory treatment in ways broadly corresponding to the exercise of economic rights in a work.<sup>21</sup>

## Defences to infringement

One of the Government's stated aims in enacting moral rights legislation was to achieve a "workable" scheme that was not unduly "restrictive" for users of copyright material, particularly in industries such as the film, television and advertising industries. There are two main features in the Act designed to achieve this aim. The first is the "reasonableness" defence, which allows for a failure to respect moral rights where that failure is reasonable in the circumstances. The second feature is the "consent" provision, which provides a defence to infringement of moral rights if a work is dealt with in a way that is within the scope of a written consent given by the author.

There are also several additional defences in relation to infringement of the right of integrity.

### *Reasonableness*

It is a defence to infringement of the rights of attribution and integrity that the failure to respect the rights was "reasonable in all the circumstances".<sup>22</sup> The legislation lists matters to be taken into account in determining whether it was reasonable in particular circumstances not to identify an author or to subject a work to derogatory treatment. The matters to be taken into account differ slightly depending on the right in question and whether the work is a literary, dramatic, musical or artistic work on the one hand, or a film, on the other, although the lists are inclusive. Matters common to both rights and all works include:

- the nature of the work;
- the purpose for which the work is used;
- the manner in which the work is used;
- the context in which the work is used;
- any practice, in the industry in which the work is used, that is relevant to the work or the use of the work;
- 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; and
- whether the work was made in the course of the author's employment.<sup>23</sup>

### *Consent*

If an act or omission in respect of a work is within the scope of a written consent given by the author, it does not infringe any of the moral rights.<sup>24</sup>

This defence has been one of the most controversial aspects of the legislation. The extent to which users of copyright material could opt out of moral rights obligations was the subject of vigorous debate and held up the passage of the legislation. In the original Bill, introduced in 1997, there was provision for complete waiver of moral rights, alongside a consent defence. The strong opposition

to the waiver provision led to the Government's removal of the moral rights provisions from the 1997 Bill so that further consultations could be held in relation to this issue. The consultations centred upon the film and television industry, which reached an agreed position that involved the removal of the waiver provision in exchange for certain limitations on moral rights, including expiry of the right of integrity on the death of the creator.

The revised Bill, introduced into Parliament in December 1999, omitted all references to waiver, but debate turned to the consent provision, which was criticised by creators for its breadth and was described as "waiver by another name". As a result of these concerns, significant changes were made to the provision in the Senate. Most notably, separate provisions for films (and works included in films) and other works were introduced. Also, protection for freelance creators of works other than films was strengthened.<sup>25</sup>

In the case of films (and works "as included" in films), the consent provision lists some of the forms a consent may take, but these are not intended to be exhaustive or to limit the scope of the defence.<sup>26</sup> The legislation provides that a consent may be given in relation to *all or any* acts or omissions occurring before or after the consent is given. A consent may be given in relation to:

- a specified work or works existing when the consent is given; or
- a work or works of a particular description, the making of which has not begun, or that is in the course of being made.

In addition, the provision specifies that a consent may be given by an employee for the benefit of his or her employer in relation to *all* works made or to be made by the employee in the course of employment.<sup>27</sup>

In the case of works other than films, the consent provision is worded differently in order to more carefully prescribe the types of consent that may be relied upon.<sup>28</sup> A consent from a freelance creator will only be a valid defence to infringement of moral rights if it relates to *specified* acts or omissions, or *specified* classes or types of acts or omissions (whether occurring before or after the consent is given) in relation to either of the following:

- a specified work or specified works existing when the consent is given; or
- a specified work, or works of a particular description, the making of which has not begun or that is in the course of being made.<sup>29</sup>

In the case of employed creators, however, an employer can rely upon the defence of a consent which relates to *all or any acts or omissions* (whether occurring before or after the consent is given) in relation to *all works* made or to be made by the employee in the course of his or her employment.<sup>30</sup>

A consent given for the benefit of the owner or prospective owner of copyright in a work to which it relates is presumed to extend to licensees and successors in title and other authorised persons, unless the contrary intention appears from the consent document.<sup>31</sup> A consent is invalid if it can be shown to have been induced by duress or false and misleading statements.<sup>32</sup>

### ***Additional defences***

There are some specific defences to infringement of the right of integrity in respect of certain artistic works. It is not an infringement of the right to:

- destroy a moveable artistic work, if the creator, or the creator's representative, is given a reasonable opportunity to remove the work;<sup>33</sup>
- change, relocate, demolish or destroy a building,<sup>34</sup> or a building of which an artistic work forms part, or to which it is affixed,<sup>35</sup> provided certain conditions (including the giving of notice and provision of access) are met; or
- remove or relocate site specific artworks, provided certain conditions (including the giving of notice and provision of access) are met.<sup>36</sup>

In addition, anything done in good faith to restore or preserve a work is not an infringement of the right of integrity.<sup>37</sup>

### Liability for authorising an infringement

Under the Copyright Act, it is an infringement of the economic rights of the copyright owner to "authorise" the doing of an infringing act. The 1999 Bill did not provide for moral rights infringement by way of authorisation, but this oversight was rectified by amendments introduced in the House and further amendments made in the Senate.

Under the legislation, a person will infringe moral rights by:

- authorising certain acts of false attribution;<sup>38</sup>
- authorising the doing of an attributable act in respect of a work without identification of the author;<sup>39</sup>
- authorising a work to be subjected to derogatory treatment.<sup>40</sup>

A new provision which lists the matters to be taken into account in determining whether a person has authorised the doing of an infringing act was included by amendment in the Senate. These matters are:<sup>41</sup>

- the extent (if any) of the person's power to prevent the doing of the act concerned;
- the nature of any relationship existing between the person and the person who did the act concerned;
- whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

A person (including a carrier or carriage service provider) who provides facilities for making communications is not taken to have authorised the doing of an infringing act merely because someone has used their facilities to infringe moral rights.<sup>42</sup>

These latter provisions reflect similar provisions applying to infringement of copyright introduced into the Copyright Act by the Copyright Amendment (Digital Agenda) Act 2000, passed by Parliament in September 2000 and effective from 4 March 2001.

## Infringement by commercial dealings and importation

There are provisions relating to secondary infringement of moral rights by dealing commercially with infringing works and importing for commercial purposes works that would have infringed moral rights if they had been made in Australia.<sup>43</sup>

## Application of the rights

There were several twists and turns in Government policy on the application of the rights. The Government's original proposal was that both the right of attribution and the right of integrity would apply to works created before and existing at the date the legislation commenced.<sup>44</sup> However, in its report on the 1997 Bill, the Senate Legal and Constitutional Legislation Committee recommended, in response to submissions from the film and advertising industries, that moral rights should not apply to films made before the commencement of the legislation or to other works whose authors had died before commencement. The Committee said that "... to attach moral rights to works that were in existence would be inconsistent with the economic rights of those people who have already entered into contractual agreements regarding the works".<sup>45</sup>

The 1999 Bill provided that the right of integrity would only apply to works made on or after the commencement of the legislation, the right of attribution would apply to all works except films made before commencement, and the false attribution right would apply to all works made before or after that date.<sup>46</sup>

In response to representations made by creators outside the film and television industry, an amendment was made to the Bill in the House of Representatives extending the right of integrity to works (other than films and works as included in films) which were made before the commencement of the legislation and whose authors were living at the date of commencement.

A further amendment was made in the Senate, removing the qualification that an author still be living at the commencement of the legislation.

The following table sets out the position regarding application of the rights under the legislation as enacted.<sup>47</sup>

	<u>Literary, dramatic, musical &amp; artistic works</u>		<u>Films &amp; works as included in films</u>	
	<i>Made before commencement</i> <sup>43</sup>	<i>Made after commencement</i>	<i>Made before commencement</i>	<i>Made after commencement</i>
Attribution	Yes	Yes	No	Yes
False attribution	Yes	Yes	Yes	Yes
Integrity	Yes	Yes	No	Yes

## Duration of the rights

The duration of the right of integrity was another controversial issue which was subject to changes of policy. The Government's original proposal was that all moral rights in a work would last for the same length of time as the copyright in the work, and this was reflected in the early Bills.<sup>49</sup>

During its consideration of the 1997 Bill, the Senate Legal and Constitutional Legislation Committee received a submission from the Screen Producers Association of Australia (SPAA) that the right of integrity should only apply during the lifetime of the author, on the basis that this would be consistent with the law of defamation, which is also concerned with honour and reputation. This submission was rejected by the Committee, which considered that the duration provided for in the Bill was appropriate and consistent with Australia's obligations under the Berne Convention.<sup>50</sup>

However, the Government acted on the submissions and the 1999 Bill provided that the right of integrity in all works would expire on the death of the creator. Following the introduction of the Bill, creator groups argued that this limitation on the right of integrity, which had been negotiated by creators and users in the film and television industry, should not apply to them. In response, the Government moved an amendment in the House of Representatives extending the duration period of the right of integrity for all works, except films, to match the period of copyright protection.<sup>51</sup>

The rights of attribution and false attribution in respect of a work (including a film) last for the same length of time as the copyright in the work.<sup>52</sup>

## Exercise of the rights

### *Exercise after death or administration*

Although moral rights cannot generally be transferred, the legislation provides for the exercise of the relevant rights by an author's legal personal representative after his or her death.<sup>53</sup> There is also provision for the rights to be exercised by a person administering an author's affairs, except in the case of bankruptcy.<sup>54</sup>

### *Co-authorship agreements in relation to the right of integrity in films*

As discussed above, one of the central features of the film and television industry proposal was the concept of "co-authorship" agreements, whereby creators would agree to certain limitations on the exercise of their rights. The Government implemented this proposal by including a provision in the Act expressly recognising co-authorship agreements. The legislation provides that if a film, or a literary, dramatic, musical or artistic work as included in a film, has two or more authors, the authors may enter into a written co-authorship agreement by which each of them agrees not to exercise his or her right of integrity of authorship in respect of the film or work except jointly with the other author.<sup>55</sup>

It seems likely that co-authorship agreements will become standard in the film and television industry.

## Remedies for infringement

Unlike certain forms of copyright infringement, infringement of moral rights is not an offence ; it gives rise only to the right to bring civil action.<sup>56</sup>

In addition to the usual remedies of damages and injunction, a court has the power to order, inter alia, that the defendant make a public apology for the infringement and an order that any false attribution or derogatory treatment be removed or reversed.<sup>57</sup> In deciding whether or not to grant an injunction, a court must consider whether the parties have made any attempt to negotiate a

settlement of the action and whether it should adjourn the hearing for the purpose of giving the parties an opportunity to reach a settlement.<sup>58</sup>

The legislation includes a list of factors that a court may take into account in deciding on the appropriate form of relief. These include the following:

- whether the defendant was aware, or ought reasonably to have been aware, of the author's moral rights;
- the number, and categories, of people who have seen or heard the work; and
- any cost or difficulty associated with identifying the author or reversing any false attribution or derogatory treatment.<sup>59</sup>

### **Moral rights in practice**

The introduction of moral rights legislation is a welcome development for creators. The right of attribution has the potential to raise the profile of creators by ensuring that they are acknowledged in connection with their works. The right of integrity may give creators the opportunity for greater control over how their works are presented to the public.

In his Second Reading Speech the Attorney-General said:

We believe that the main impact of the new legislation will be to build upon existing good industry practice and, where necessary, to raise awareness in an educative way of the need to respect the creativity of authors and artists.<sup>60</sup>

Moral rights will be particularly important for creators who do not own copyright in their works, or who no longer own the physical items in which their copyright works are embodied, and who therefore do not have an opportunity to contract with users for the protection of those rights.

One of the weaknesses of the legislation, from the creator's standpoint, is the consent defence, which allows a user of copyright material considerable latitude in seeking to avoid moral rights obligations, particularly in the case of employees and creators in the film and television industry.

For those working with others' copyright material, the moral rights legislation creates new obligations to attribute creators appropriately and to ensure that works are not subject to derogatory treatment in the course of their use. The impact of the legislation may vary from industry to industry, depending on existing practices and standards. It seems likely that consents from creators will become an important feature of moral rights compliance. In many cases, consents may need to be obtained in addition to copyright clearances.

Overall, the legislation appears to be a reasonable compromise between the interests of creators and of users of copyright material. However, in these early days it remains to be seen how effective and workable moral rights will be in practice.

## Endnotes

- 1 There is a consolidated version of the Copyright Act as amended by the Moral Rights Act available on the Attorney-General's SCALEPlus website (<http://scaleplus.law.gov.au>). Speeches, explanatory memoranda and related documents are available from the Australian Parliament's website ([www.aph.gov.au](http://www.aph.gov.au)).
- 2 "Cinematograph film" is defined in section 189 as "the complete and final version of a cinematograph film in which copyright subsists". Note that, although a cinematograph film comes within the category of "subject matter other than works" in the Copyright Act, for the purposes of the moral rights provisions, a cinematograph film is a "work".
- 3 See the definition of "author" and the definition of "maker" in section 189. See also section 191, which provides that a reference to a director, producer or screenwriter is a reference to the "principal", not "subsidiary" directors, producers or screenwriters. See also sections 195AZJ, 195AZK and 195AZL in relation to films that have more than one principal director, producer or screenwriter. Note that only individuals have moral rights (section 190), so where the producer of a film is a body corporate, only the director and screenwriter will have moral rights in the film.
- 4 Ricketson, S., *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* (Centre for Commercial Law Studies, Queen Mary College, London, 1987) at 458–463.
- 5 House of Representatives 1999, Second Reading Speech by the Hon Daryl Williams AM QC MP Attorney-General, *Copyright Amendment (Moral Rights) Bill 1999*.
- 6 Subsections 193(1) and (2).
- 7 Subsection 194(1).
- 8 "Transmit" is defined in section 189 as: "to broadcast or transmit by cable to subscribers to a diffusion service", which is the definition used in relation to the current economic rights for literary, dramatic and musical works. Schedule 2 of the Act contains consequential amendments substituting references to "transmit" with references to "communicate to the public", the new right which will be introduced by the Copyright Amendment (Digital Agenda) Act 2000. These amendments will come into effect once the Digital Agenda Act commences on 4 March 2001.
- 9 Subsection 194(2). This is not one of the economic rights in artistic works.
- 10 Subsection 194(3).
- 11 This will be "communication to the public" once the Digital Agenda amendments come into force.
- 12 Section 195.
- 13 Section 195(1).
- 14 Section 195AA.
- 15 Section 195AB.
- 16 Division 3. The previous provisions continue to apply to acts done before the commencement of the legislation in relation to literary, dramatic, musical and artistic works (see Table A, Application, Saving or Transitional Provisions).
- 17 Section 195AI.
- 18 Section 195AJ in relation to literary, dramatic and musical works, section 195AK in relation to artistic works, and section 195AL in relation to films.
- 19 Section 195AJ, in relation to literary, dramatic and musical works, section 195AK in relation to artistic works, and section 195AL in relation to films.
- 20 Subsection 195AK(b).
- 21 See subsections 195AQ(2), (3), (4) and (5).
- 22 Section 195AR in relation to the right of attribution and section 195AS in relation to the right of integrity. This defence does not apply to the right of false attribution.
- 23 See subsections 195AR(2) and (3) and subsections 195AS(2) and (3).
- 24 Section 195AW (in respect of films and works included in films) and section 195AWA (in respect of other works).
- 25 It should be noted, however, that the legislation does not expressly exclude waiver, therefore the possibility of non-statutory waiver may be left open.
- 26 Subsection 195AW(6).
- 27 Subsection 195AW(4).
- 28 Subsection 195AWA.
- 29 Subsection 195AWA(3).
- 30 Subsection 195AWA(4).
- 31 Subsection 195AW(5) in relation to films and subsection 195AWA(5) in relation to other works.
- 32 Section 195AWB. This provision was introduced in the Senate.
- 33 Subsection 195AT(1).
- 34 Subsection 195AT(3).
- 35 Subsection 195AT(2). This provision and subsection 195AT(3) in relation to buildings were amended in the House of Representatives to provide that the creator must be given notice of any change, relocation, demolition or destruction of the building, and must be given access to the affected work. In the Senate the provisions were further amended to specify the purposes for which a creator may have access to a work, and to give the creator the right to have his or her name removed from a work.

- 36 Subsection 195AT(4A). This provision was not in the 1999 Bill, but was inserted in the House of Representatives. The provision was amended in the Senate to specify the purposes for which a creator may have access to a work, and to give the creator the right to have his or her name removed from a work.
- 37 Subsection 195AT(5). This provision applies to all works (including films).
- 38 Sections 195AD, 195AE and 195AF.
- 39 Section 195AO.
- 40 Section 195AQ.
- 41 Section 195AVA. This is an inclusive list.
- 42 Section 195AVB. This provision was also inserted in the Senate.
- 43 Sections 195AU and 195AV.
- 44 Discussion Paper, *Proposed Moral Rights Legislation for Copyright Creators*, Commonwealth of Australia, 1994, at para 3.72.
- 45 Senate 1999, *Consideration of Legislation Referred to the Committee – Copyright Amendment Bill 1997*, October 1997, Canberra, at 2.96.
- 46 Subclause 195AZM(2).
- 47 See sections 195AZM, 195AZN and 195AZO.
- 48 That is, made before the commencement of the legislation and existing at that date, provided copyright in the work has not expired.
- 49 Discussion paper at para 3.71.
- 50 Senate Committee Report at 2.99.
- 51 Subsection 195AM(2).
- 52 Subsection 195AM(3).
- 53 Subsection 195AN(1).
- 54 Subsection 195AN(2). This provision may apply, for example, where an author is mentally incapacitated and a guardian is appointed to look after his or her affairs.
- 55 Subsections 195AN(4) and (5). This provision originally applied to all works but was amended in the Senate in response to representations made by creators outside the film industry. See Delia Browne, "Moral Rights: Just a little respect..." (2000) 43 IPF 30.
- 56 Section 195AZ. An author can only take action in relation to an act or omission occurring after the commencement of the legislation.
- 57 Subsections 195AZA(1)(d) and (e).
- 58 Subsection 195AZA(3). The origin of this provision lies in the film and television industry proposal. Under that proposal, an injunction could not be granted until mediation had taken place.
- 59 Subsection 195AZA(2).
- 60 House of Representatives 1999, Second Reading Speech by the Hon Daryl Williams AM QC MP Attorney-General, *Copyright Amendment (Moral Rights) Bill 1999*.