

The new moral rights legislation

Virginia Morrison, Australian Copyright Council, 9 February 2001

New legislation came into effect on 21 December 2000, giving producers, directors and screenwriters new rights of attribution and integrity, known as “moral rights”, in their films. The new rights, which are contained in the Copyright Amendment (Moral Rights) Act 2000, also apply to authors of other works, including music and visual art, which means that filmmakers have new obligations in relation works used in their films.

The introduction of moral rights, which have existed in European countries for a long time, was preceded by many years of debate. Much of the debate centred on the film and television industry, which ultimately played a significant role in shaping the legislation.

What are the new rights?

The right of attribution

The legislation gives an “author” of a film, and the authors of works underlying films, the right to be identified as author when the film is:

- copied;
- exhibited in public; and
- communicated to the public by, for example, being streamed over the Internet or broadcast on television. **[Georgia, I assume this article will be published in the March issue, by which time the communication right will be in effect – at the moment the word used is “transmitted”, meaning broadcast and cable diffusion.]**

The author must be identified by the person doing those acts in the particular way that the author wishes to be identified, provided that:

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

If the author hasn’t stipulated a form of identification, it must simply be “reasonable”. It also needs to be “clear and reasonably prominent”.

The false attribution right

In addition to the right of attribution, authors of films and underlying works have 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 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”. Derogatory treatment means doing anything in relation to a film or work that is prejudicial to the author’s honour or reputation, including a material distortion, mutilation or material alteration. Editing or shortening of a film could, for example, amount to derogatory treatment in certain circumstances.

An author also has the right to prevent a work that has been subject to derogatory treatment being dealt with in certain ways, including by copying or exhibition in public.

Who do moral rights belong to?

Moral rights in a film belong to the director, the producer and the screenwriter, who are each described as the “author” of the film. This means that each has a right to be attributed as author and each has a right to take action if the film is subject to derogatory treatment. Only “principal” directors, producers and screenwriters get moral rights.

Companies cannot have moral rights which means that if the producer of a film is a company, only the director and screenwriter have moral rights in the film.

Unlike the economic rights comprised in copyright, moral rights cannot be transferred and remain with the author even after if he or she sells the copyright.

For the purposes of moral rights, a film is defined as “the complete and final version of a cinematograph film in which copyright subsists”. In the Government’s Revised Explanatory Memorandum to the legislation, the following examples of the “complete and final version” were given:

...the answer print or trial print from the original negative or the internegative, as accepted by the producer, and, in the case of a production on tape, the on-line master with sound restripe, as accepted by the producer.

When will a failure to observe moral rights be allowed?

Two important qualifiers of the rights are the defences of “reasonableness” and “consent”. Under the first defence, derogatory treatment or failure to appropriately attribute an author is not an infringement if was “reasonable in all the circumstances”. A number of factors are to be taken into account to assess “reasonableness”, including:

- any relevant practice or voluntary code in the industry in which the work is used;
- whether the creator was an employee or a contractor; and
- in the case of films, whether the film was made primarily for exhibition at cinemas, for television or some other purpose.

Under the consent defence, a person can protect themselves from moral rights liability by obtaining a written consent from an author in relation to the use of his

or her work. Anything covered by that consent does not infringe moral rights. A producer may, for example, be able to edit a film without infringing the director's or the screenwriter's right of integrity because of written consents covering such editing.

The consent provision for films and underlying works is very wide and consent may be given in relation to anything done before or after the consent is given.

Co-authorship agreements

One of the central features of a proposal put to the Government by the film and television industry was the concept of "co-authorship" agreements where creators agree to certain limitations on the exercise of their rights. The legislation provides that if a film or an underlying work has two or more authors, the authors may enter into a written agreement in which each 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. It is likely that these agreements will become standard in the industry.

Which films get the new rights?

The rights of attribution and integrity apply only to films, and works as included in films, made on and after 21 December 2000.

The false attribution right applies to films made before, as well as after, 21 December 2000, provided copyright in the film has not expired.

How long do the rights last?

The rights of attribution and false attribution in a film last for the same length of time as copyright in the film (generally, 50 years from first publication). However, an author's right of integrity in a film expires on the author's death. In the case of underlying works, such as music, the right of integrity does not expire until the copyright in the work expires.

What can you do about a moral rights infringement?

The vast majority of disputes about moral rights are likely to be resolved by negotiation. However, a moral rights infringement entitles the author to bring legal action. Courts can order a range of remedies including financial compensation, an injunction to prevent or stop certain conduct, an order that a defendant make a public apology for the infringement, and an order that any false attribution or derogatory treatment be removed or reversed.

More information

There is more information about moral rights in the Copyright Council's information sheet "Moral rights", available from the Council's web site (www.copyright.org.au) and from its publication "Moral Rights Bill" which can be purchased from the Council.