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## In this issue

Current & Emerging Copyright Issues for the Visual Arts .....	32
<i>Ian McDonald</i>	
Book reviews .....	61
Copyright Law & Practice Symposium .....	66

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# Copyright Reporter

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# Current & Emerging Copyright Issues for the Visual Arts

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Ian McDonald

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## Introduction

The development of digital technology in general, and the Internet in particular, has certainly increased media attention on copyright, and has generally raised awareness of the importance of both copyright and moral rights in digital economies and communication. However, as is apparent from this report, not all issues relating to copyright and moral rights in the context of craft and the visual arts are based on technological developments.

## What is “art” for copyright purposes?

To be protected by copyright, an artwork must fit within the definition of “artistic work” set out in the Copyright Act:

**artistic work** means:

1. a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not;
2. a building or a model of a building, whether the building or model is of artistic quality or not; or
3. a work of artistic craftsmanship to which neither of the last two preceding paragraphs applies ...<sup>1</sup>

In addition, it is generally thought that an artwork must have a human author.<sup>2</sup>

Given that the category of “artistic work” applies to works whether intended to be artistic or not, it is clear that some sort of definition of “artistic work” is necessary within the Act. It may be, however, that an open-ended, inclusive list would be more appropriate than the current closed list of categories. Courts would then have the ability to take evidence and make a decision on the facts of a particular case as to whether a particular artistic practice had resulted in the creation of an “artistic work” for the purposes of copyright.<sup>3</sup> As it stands, while courts may show some flexibility in how they interpret these categories of “artistic works”, the categories themselves are based on very 19<sup>th</sup> century concepts of art.

The Copyright Law Review Committee (CLRC), particularly in Part 2 of its report into the simplification of the Copyright Act,<sup>4</sup> makes recommendations which are designed to allow copyright law to “encompass all embodiments of material within the literary and artistic domain”, and to allow copyright “to embrace both traditional and non-traditional expressions of textual, aural and visual material”.<sup>5</sup> It is not at this stage clear whether the Government will act on the recommendations.

At the moment, while people who copy pieces created by others may suffer some social or artistic opprobrium, it is not clear that the current law gives creators of certain types of material the right to exercise any copyright rights over their work.

### *Computer-generated art*

There have been a number of cases involving copyright in relation to material generated by computer. For example:

- in a case involving the colourful and reasonably well-known knitted garment manufacturer Coogi,<sup>6</sup> the first run of machine-produced fabric was held to be a work of artistic craftsmanship for the purposes of copyright, even though it had been created not through hand-knitting or weaving, but through writing a computer program and then, “using the graphs and control programs” producing runs of fabric through a “process of trial and error experimentation of a computer-controlled mechanical process”;<sup>7</sup>
- in another case, computer games were held to be protected by copyright as “cinematograph films” even though the way any particular game would develop was a consequence of the player’s actions;<sup>8</sup>
- in yet another case, a Huffman compression table within a computer program was held to be protected by copyright as a literary work, even though it had been produced through a computer program which “would perform the necessary mathematical and statistical analysis to analyse a data file and output C source code”.<sup>9</sup>

In each of these cases, the court was able to identify that someone had established parameters within which a computer or a computer program would operate, and within which material would be generated. In each case, the resulting material was found to be protected by copyright. As the Copyright Law Review Committee discussed in its report on computer software protection, in many cases where a computer program is used to create material, the program might be viewed as merely a tool of a human author.<sup>10</sup>

However, in that report and again in Part 2 of its report on the simplification of the Copyright Act,<sup>11</sup> the CLRC noted that at some point a court might not be so readily able to equate the use of a computer to the use of a tool such as a paintbrush or typewriter.

The “Random Art” website contains the following description of how artworks on that site are generated:<sup>12</sup>

Every picture in the gallery is described by a formula. The computer generates a random formula and draws the corresponding picture. That’s all! Often it is quite surprising how good a taste randomness has.

A picture represents a region of the plane, where the x and y coordinates range from -1 to 1; x = -1 is on the left and y = -1 is on the top (don’t ask why).

Colors are encoded as triples of numbers, representing the red, green and blue components, where the component values range from -1 to 1. For example, RGB[-1,-1,-1] is black, RGB[1,-1,-1] is red, and RGB[1,1,-1] is yellow. Alternatively, a shade of gray is encoded as a single number, -1 being black and 1 being white. ...

A little more interesting is the formula  $x[]$ , which gives a gray horizontal "gradient". This is so because the  $x$  coordinate ranges from -1 to 1, which corresponds to all shades of gray ... If we combine two such gradients, we get a colorful picture. The formula  $rgb[x[], y[], CONST[-1]]$  gives a picture with a red horizontal gradient and a vertical green gradient: ...

In the language of the CLRC, are these artworks created 'with the *assistance*' of a computer (and therefore likely to be protected by copyright) or 'by' the computer (and therefore probably not protected)?<sup>13</sup>

### ***Installations***

One of the works shortlisted for the Turner Prize in 1999 was an unmade bed by Tracey Emin. The particular bed was not only unmade, but dirty, and surrounded by items such as used underwear, condoms and other bedroom paraphernalia.

Copyright protects the way ideas are *expressed*, and not ideas as such. Clearly, then, at the most generalised level, one would not infringe any copyright Ms Emin might have were one to fail to make one's bed in the morning. However, would Ms Emin be able to rely upon copyright law to prevent someone else installing *another* unmade bed in a gallery? Would she be able to rely upon copyright to control whether people could photograph or film *her* particular unmade bed, or then make posters, videos or other items that include shots of the bed?

The answer would depend on whether Ms Emin could establish that her installation is indeed protected by copyright.

Similarly, it is not clear what rights Damien Hirst might have under copyright law were someone else to show a work which involved a shark floating in a glass tank of formaldehyde,<sup>14</sup> or were someone to market postcards or posters of that or other of his preserved animal works.<sup>15</sup>

While an installation will generally have a human author, it is not clear that an installation will always fit within one of the categories of "artistic work" in the Australian Copyright Act, particularly if it consists of "found" items. Even where an installation includes, for example, hand-made or sculpted items, or surfaces which have been painted, drawn upon or otherwise inscribed by the artist or a collaborator, it may be that copyright would protect only the component parts and not necessarily the installation as a whole.

In a United Kingdom case involving the rock band Oasis, the court held that the placement of objects and people around a swimming pool did not create an "artistic work".<sup>16</sup> On the facts of that case, the judge held that the resulting scene was not protected by copyright: it could not be characterised as falling within any of the definitions of "artistic work" under the United Kingdom legislation which were argued for by counsel representing the band.<sup>17</sup> The scene was not a "collage" (there had been no element of sticking two or more things together);<sup>18</sup> it was not a "work of artistic craftsmanship" (the scene was not the subject or result of the exercise of any craftsmanship, merely being an assembly of *objets trouvés*); and the scene was not a "sculpture" (no element had been carved, modelled or made in any of the other ways that sculpture is made).

There are some cases which suggest that, in some instances, installations might qualify for copyright protection as “buildings”. The word “building” under the Act is defined to include “a structure of any kind”. In one case, a sunken garden was held to be a “building”, and therefore within the definition of “artistic work” (the garden comprised combination of steps, walls, ponds and other stone structures).<sup>19</sup> In another case, a half-court tennis court was also found to be a “building” and therefore protected: it comprised a concrete slab with special markings on it, and with net-posts set into it at selected positions.<sup>20</sup>

Many installations, however, may not be able to be characterised as “buildings”. While the judge in the Oasis case noted that it was not necessary in the case before him to answer questions in relation to installation art generally,<sup>21</sup> and therefore it may well be that, in particular cases, a court would come to a different conclusion from the decision in the Oasis case, such findings are by no means inevitable. The key issue is that installations, *per se*, are not clearly protected under current law: the fact that the art world might regard some particular installation as artistic does not mean that an artist’s lawyers will be able to persuade a court that the installation is protected by copyright, or that any rights in that work have been infringed.<sup>22</sup>

### ***Performance art***

While the definition of “artistic work” does not include “performance art” as such, performance art may be protected if it can be characterised as a “dramatic work”.<sup>23</sup> This is particularly likely where the performance involves some type of action or sequenced activity.<sup>24</sup> Individual elements created for or during a performance art piece might also be protected because they fit within other categories of copyright material (for example, a video which is made of, or to accompany, the performance).

However, in other cases, where the elements of the performance or its development are determined by chance or random accident, it may be difficult to establish that the resulting piece is a dramatic work at all. Further, while an artist might be able to demonstrate that a particular performance piece (or a performance of their piece) is protected, it may in some cases be difficult to show that someone else has infringed copyright, because what has been taken might in some cases be no more than an “idea”.

Take, for example, *Shallow Grave*, performed by Mike Parr over three days at the Art Gallery of New South Wales during 2000. Parr stayed awake during the night, when he walked through the Gallery. During the day, he slept on the floor beside various Victorian paintings and sculptures that depict drowsiness or sleep.<sup>25</sup>

Given that the piece involved very little in the way of plot or character, it is not clear whether *Shallow Grave* would be protected under current law as a “dramatic work”, and therefore whether Parr would have any rights under copyright law if someone had filmed the performance without his permission, or if someone performs substantially the same piece either in the same space or elsewhere.<sup>26</sup>

### ***Biological, chemical or other “natural process” art***

Similar issues to those discussed above arise in the context of art projects and artworks which in some way involve biological, chemical or other natural processes.

By way of example, one can look at Damien Hirst's *unpreserved* animal artworks such as *A Thousand Years* (in which a cow's head slowly putrefies in a large glass case, as generations of black flies deposit eggs that turn into maggots, which turn into flies, and so on)<sup>27</sup> and "The Tissue Culture and Art Project" (initiated in 1996).<sup>28</sup>

an on-going artistic research and development project into the use of tissue technologies as a medium for artistic expression ... We have grown tissue sculptures, "semi-living" objects, by culturing cells on artificial scaffolds in bioreactors. Ultimately, the goal of this work is to culture and sustain, for long periods, tissue constructs of varying geometrical complexity and size, and by creating a new artistic palette. A unique set of issues and problems has arisen because these living-cell tissue constructs will not be transplanted into the body. Some of the problems concern the practicalities of the procedure itself, while the acquisition of living cells for artistic purposes has created concerns and has focused attention on the ethical and social implications of creating "semi-living objects". Thus our goal is to create a contestable vision of futuristic objects that are partly artificially constructed and partly grown/born. These semi-living objects consist of both synthetic materials and living biological matter from complex organisms. These entities (sculptures) blur the boundaries between what is born/manufactured, animate/inanimate and further challenge our perceptions and our relations toward our bodies and constructed environment.

There are a number of difficulties the artists in each case might face were they wanting to claim an infringement of copyright.

Firstly, the mere idea of using particular biological, chemical or other natural processes as the basis for artistic creation will not be protected by copyright.

Secondly, it is not clear whether a court would find that an item acted upon by such processes would fit within one of the categories of "artistic work" required under the Act, although arguably the work, if three dimensional, might be a "sculpture" (being worked upon or carved by the process employed), or if two dimensional, a "drawing", "engraving" or "work of artistic craftsmanship".<sup>29</sup>

Thirdly, if the court were prepared to hold that the work were within the scope of material protected by copyright, it would also (and probably simultaneously) have to be satisfied that, as with computer-generated works, the work originated with a human author, who had set out the parameters within which the process would operate, and who was using the relevant processes as a tool to create the work.

Certainly, if the artist took a photo or a video of the process, the photograph or the video would be protected. Thus artists can clearly exercise general control over third parties who want to reproduce images taken by the artist of the process. However, it may be difficult for the artist to use copyright to stop other people filming, photographing or otherwise recording or reproducing the work which the artist had set up.

Also, except where the artist might have created an object to which the process will be applied, it may be difficult to show that someone reconstructing a work acted upon by a biological, chemical or other natural process had reproduced the first work and therefore infringed copyright.<sup>30</sup>

## Use of art online

### *New rights*

Prior to the Digital Agenda Act coming into operation on 4 March 2001, owners of copyright in artistic works had the right to control the *reproduction* of their work, including into digital form (for example, by scanning). However, owners of copyright in artistic works did not generally have the right to control the *cable distribution* of their work unless their work was included in a “television programme”.

This defect, however, was remedied by the Digital Agenda amendments. This means that in the digital environment, subject to various exceptions, owners of copyright in artistic works now control, for example, uploading an image onto a server and reproduction into an email, and the transmission and “making available” to the public of images (for example, via fax or email, or by making the image available from a website or on an intranet).

### *Technological protection and electronic rights management information*

It is one thing to have legal rights; it is another to expect that in the age of Napster, copyright rights will always be respected in an online environment. Off-line, people use locks and alarms to protect their physical property, and to control who has access to premises. Copyright owners use technological protection measures in a similar way, to deter people from lifting their material or using it other than as they allow.

Methods which are being used or developed to control the use of copyright material in the digital environment include:

- anti-copy devices;
- access control and digital enveloping;
- proprietary viewer software;
- water-marking or finger-printing;
- metering systems; and
- monitoring and remunerating systems.<sup>31</sup>

Legal deterrence for people circumventing such protection and rights management measures was enacted with the Digital Agenda amendments, and people who provide devices or services to circumvent technological measures which are used to protect copyright material, or who alter or deal in certain (generally commercial) ways with copyright material which has had electronic rights management information altered may now find themselves subject to both civil action from copyright owners and criminal prosecution.<sup>32</sup>

### *Licensing issues*

Licensing of copyright material online raises different issues from the issues which are relevant to licensing of art and craft items off-line (for example, onto postcards, T-shirts or jig-saw puzzles, or

in relation to other multiple reproductions), and it cannot yet be said that there are any standards emerging.<sup>33</sup>

Questions which can be raised in relation to licensing copyright material for use online include:<sup>34</sup>

- what term is appropriate (given the ongoing development of online media, should licences be for more limited periods of time than apply off-line);
- the bases on which payment should be determined (whether flat fees or royalties are more appropriate; how the use of the material on a site – for example, as an icon or button, on the home page, as wallpaper, or as a stand-alone image deep within a site – should affect the basis of remuneration to the rightsholder);
- what technological protection measures and electronic rights management information to inhibit uncontrolled access or use of images licensors should be obliged to adopt or use if they want to be licensed to use the work;
- whether licences relating to visual images should include limitations on the pixel resolution at which the image is loaded onto or into a site, in order to inhibit commercial piracy of the image;<sup>35</sup>
- what steps are necessary to protect the artist or craft practitioner’s moral rights (for example, in relation to digital manipulation or alterations); and
- the scope of the permissions that should be granted to people browsing a site on which an image appears (for example, can they print out or download).

There are, ultimately, no right or wrong conclusions in relation to any of these issues. Rather, a well-thought through approach to licensing online will result in agreements which appropriately protect and remunerate artists and craft practitioners whose work is being used online by other people. Artists and craft practitioners should also address the last four points in the above list where they are making their own material available on their own site.

## **Visual art by Indigenous artists and from Indigenous communities**

Copyright protects work created by Indigenous artists and craft practitioners to the same extent that it protects material created by non-Indigenous people.

However, there are a number of “gaps” between the protection given to cultural material and items of cultural value or significance under either copyright or other “mainstream” forms of legal protection and the rights and obligations people have under customary Indigenous systems. For example, copyright only lasts a certain length of time, and does not protect styles or methods, while Indigenous communities generally recognise ongoing rights in relation to particular images and particular styles, including over images depicted in ancient rock art.

In 1997, a discussion paper by Ms Terri Janke, entitled *Our Culture, Our Future: Proposals for the Recognition and Protection of Indigenous Cultural and Intellectual Property*, was released. The paper sought comment on the protection of Indigenous heritage in light of shortcomings in existing laws, and contained suggestions for improving protection. The final report, also entitled *Our Culture: Our Future*, was endorsed by the Aboriginal and Torres Strait Islander Commission, and was publicly launched on 2 September 1999.<sup>36</sup>

We understand that an Interdepartmental Committee continues to work on this issue, as does a reference group set up by ATSIC.<sup>37</sup>

In November 2000, the House of Representatives Standing Committee on Legal and Constitutional Affairs included a recommendation in its report *Cracking down on copycats: enforcement of copyright in Australia*, that the Minister for Arts and/or the Attorney-General should give the Committee a reference “to inquire into the mechanisms for the protection of indigenous cultural and intellectual property”.<sup>38</sup> A few weeks later, Democrat Senator Aden Ridgeway moved amendments to the Moral Rights Bill when it was before the Senate. These amendments were intended 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.<sup>39</sup> Senator Ridgeway’s proposed amendments were not passed. However, the Government stated that 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. At the time of writing we were not aware of any further developments in relation either to the recommendation of the House of Representatives committee or to the Government’s response to Senator Ridgeway.

The issue of what protection should be given to traditional Indigenous culture and knowledge is not merely an internal Australian issue – it arises in many countries where a dominant culture has displaced surviving cultures and peoples, including New Zealand, Canada and the United States. The legal recognition of traditional culture and knowledge is also of on-going international concern.<sup>40</sup>

### ***Label of authenticity***

On 16 November 1999, a “label of authenticity” was launched by the National Indigenous Arts Advocacy Association (NIAAA). The label was developed to deter people from selling “copycat” and “rip off” Indigenous designs and products.

The label offers a national certification trade mark that can be placed on art or cultural products to denote genuine Aboriginal or Torres Strait Islander origin. It can be used in relation to original works and items containing Indigenous material which is made under licence.<sup>41</sup>

### ***Protocols***

As a result of the sensitivity of the issue, and in the absence of specific legislation, many organisations have developed protocols for dealing with certain types of material, such as material created by Indigenous people and material which includes motifs or styles which are identifiably Indigenous.

While these protocols have been developed in relation to specific sectors, many of the types of issues dealt with in them are relevant to the visual arts and to artists and craft practitioners, whether or not they are recognised as Indigenous or not. For example, NIAAA addresses Indigenous artists in the following words:<sup>42</sup>

... you should only use designs, images, dances and stories from your own Aboriginal or Torres Strait Islander community in your work. Otherwise you should get the full permission of the traditional custodians of the design to use it within your work.

You should never reproduce sacred or secret images unless you have permission to do so under Aboriginal law. For instance, the Wandjina is a very special image from the Kimberley area. Rights to reproduce this image are governed by Aboriginal laws and there may be strong penalties for unauthorised uses.

NIAAA addresses non-Aboriginal or non-Torres Strait Islander people as follows, trying to dissuade them from appropriating imagery of cultural significance:<sup>43</sup>

If you are not Aboriginal or Torres Strait Islander you should not use Aboriginal or Torres Strait Islander designs or images in your artwork.

...Images such as the rainbow serpent and specific Aboriginal designs such as the rarrk, x-ray and acrylic dots have been used by non-Aboriginal artists in their artworks. NIAAA does not endorse the use of Aboriginal and Torres Strait Islander designs and images by non-Indigenous artists ...

Further, by copying Aboriginal and Torres Strait Islander designs and images, the cultural significance of the designs and images is being weakened ... NIAAA strongly urges non-Indigenous artists to respect the cultural and religious significance of Aboriginal and Torres Strait Islander images and not use them in their artworks.

### **Issues relating to moral rights**

As noted earlier, the new rights of attribution and integrity were only introduced into the Copyright Act in December 2000. At the time of writing, we were not aware of any cases having been brought by creators under the legislation.<sup>44</sup>

Here we provide some detail on moral rights in Australia – particularly in relation to defences to infringements of moral rights in art and craft works. We also note some possible reform issues.

#### ***Consent***

The major controversial issue relating to the moral rights legislation was whether creators should be able to waive their moral rights.

The Act provides a defence to infringement where a creator has “consented” to the infringing act or omission. For freelancers and other independent creators, consents must be given in writing, and may be given in relation to:

- specified works or types of works (whether already existing or not); and
- specified acts or omissions or types of acts or omissions.<sup>45</sup>

Employers may seek much more comprehensive consents from employees. In all cases, somewhat oddly, consents may be retrospective.

It should be noted that a consent does not have to be “reasonable” or in the best interests of the artist or craft practitioner. While a consent obtained under duress or as a result of false or misleading statements will not have any effect,<sup>46</sup> the Act still allows wide scope for pressure to be applied to creators to obtain consent. Our experience, having talked both to users and creators, is that broad consents are regularly sought, often as part of the “standard” terms and conditions of commissioning agreements.

It will be interesting to see the extent to which artists and craft practitioners are able to resist such clauses, and whether broad consents continue to be used as people become more familiar (and comfortable) with moral rights obligations.

### ***Waiver***

The Act does not provide that an undertaking not to exercise a moral right – a waiver – is unenforceable. Thus it seems that if a creator did subsequently bring proceedings for infringement of moral rights, such an undertaking may give rise to a defence to infringement (eg as an estoppel), and the creator may be in breach of his or her contract.

### ***“Reasonableness”***

Under the Act, moral rights are not infringed if the person allegedly infringing the creator’s moral rights acted reasonably in all the circumstances.<sup>47</sup>

The Act sets out various factors to be taken into account in determining whether a particular treatment of a protected work is “reasonable” in the circumstances. These factors do not provide an exclusive list of the factors to be taken into account, but “any practice” and “any practice contained in a voluntary code of practice” are both listed as factors to be taken into account in determining whether something which infringes moral rights is reasonable or not. In both cases, however, it is a practice or voluntary code *in the industry in which the work is being used*, not the industry or sector from which the work originated, that is being referred to.<sup>48</sup>

The references to “industry practice” are problematic, as the effect may be to give an advantage to industries that treat creators badly. On the other hand, it might be difficult to argue, given the enactment of comprehensive moral rights, that people working within a particular industry or sector can continue to treat works in ways which infringe moral rights as if no such legislation existed.

It will be interesting to see whether and how codes of practice develop in the industries and sectors which periodically use artistic works (such as the advertising or publishing industry).<sup>49</sup>

It will also be interesting to see both how the concept of “reasonableness” develops, and whether users of visual material will take an active approach to moral rights (and contact creators either for consents or rely on the various notice procedures discussed below), or whether they will take a more passive approach by relying on the defence of reasonableness.

### ***“Moveable” artistic works***

Under the Act, an artist or craft practitioner’s right of integrity is not infringed by destroying any “moveable” artistic work if the creator or the creator’s representative has first been given a “reasonable opportunity” to remove the work from where it is situated.

The provision does not *oblige* someone wishing to destroy an art or craft work to contact the creator or his or her representative first. Rather, the provision means that the person destroying the work would have an immediate defence in the event that the creator later brought an action for infringement of moral rights, and would not have to argue either that the destruction of the work did not prejudice the artist’s honour or reputation, or that the destruction was “reasonable” in all the circumstances.

It is not clear what art or craft works are “moveable” for the purposes of the section. Clearly, paintings, works on paper, and craft items such as pots and so on – anything that can be picked up and carried around – are “moveable”. Mosaic floors and carved timber roof beams are not “moveable”. It is likely that art or craft works which are in some way bolted down or fixed (including, for

example, sculptures on walls, stained glass windows and so on), while “removable”, are not “moveable” in the sort of sense required by the section. The defence discussed in the next section may apply where non-“moveable” art and craft is destroyed.

For artists and craft practitioners, it would be better if the legislation gave the creator an opportunity to remove the work before it was destroyed, whether or not it is “moveable”.

### ***Works which are part of buildings***

People who are going to change, relocate or demolish a building which contains an art or craft work which is “affixed to or forms part of” a building can rely on a special defence to an action that they have thereby infringed the moral rights of the artist or craft practitioner if the building’s owner could not, after making reasonable inquiries, discover who the creator<sup>50</sup> was, and where he or she is.

Where the creator<sup>51</sup> and his or her location is known, people who might otherwise be liable for infringing a right of integrity by changing, relocating or demolishing a building can rely on an exception or defence if the owner of the building has complied with certain procedures:

- the owner must have given the creator (or his or her representative) notice in writing that the building was going to be changed, relocated or destroyed and that the creator has three weeks from the date of the notice to seek access to the art or craft work to make a record of it and/or to consult in good faith with the owner about the change, relocation or demolition;<sup>52</sup> and
- if the creator *does* seek access to the work, the owner must give the creator a reasonable opportunity within a further period of three weeks to access it.

If a building has been changed or relocated, the creator of an art or craft work “affixed to or forming part of” the building can ask the building’s owner to remove his or her identification from the art or craft work.

While the owner would appear to be under an obligation to consult in good faith with the artist or craft practitioner in relation to the change, relocation or demolition of the building, he or she is under no obligation to accede to any demands the creator might make in relation to his or her work which is “affixed to or forms part of” the building, whether or not those demands or requests are reasonable.

Note also that unlike the defence in relation to “moveable” art and craft items, if an art or craft work is “affixed” (for example, bolted or cemented to the floor or a wall, or screwed onto a door), the building owner can rely on the above defence without having given the creator the opportunity to take the work away, even if the artist might easily do so (for example, by undoing the bolts). This is the case whether or not it would have been reasonable to have given the artist or craft practitioner the opportunity to remove the work.

### ***Site-specific artworks***

In addition to the two exceptions discussed above, the Act contains a new defence in relation to moveable artistic works that are situated in a public place and that were made for installation in that place. The defence provides that the removal or relocation of a site specific artwork does not

infringe the right of integrity in the work, provided the person removing the work complies with certain procedures before the removal. These procedures are the same as those applying to artistic works affixed to buildings, as described above.

### ***The scope of moral rights***

In many cases, other countries grant more extensive moral rights to creators than those granted under Australian law. For example, in some countries creators have the following moral rights in addition to rights of attribution and integrity:

- the right to decide if and when a work will be made public; and
- the right to decide that a work will be withdrawn or retracted from public view or circulation.<sup>53</sup>

The moral rights protected under Australian law represent the minimum standard which Australia is required to provide in order to comply with the Berne Convention.<sup>54</sup>

### **Droit de suite (resale royalty right)**

Industries such as the computer software, recording, publishing and film industries are based on making and selling copies of copyright material (for example, discs containing software, books, CDs or videos). Copyright thus plays an important part in the way each of these industries operates.

In the visual arts, however, and particularly in relation to fine arts and crafts, the primary source of income for artists is generally the sale of physical items, rather than the licensing of copyright in those items. This is despite the growth in activities of collective licensing organisations such as VISCOPY.

To compensate for this, many countries have introduced a “droit de suite” (sometimes referred to in English as a “resale royalty right”), which entitles an artist to receive a percentage of the sale price each time his or her physical work is resold. After the artist dies, his or her heirs get the benefit of the right, which has been described as follows:<sup>55</sup>

The painter or sculptor often sells his [or her] work cheaply in order to make ends meet. The work may pass through a number of hands and, in doing so, may considerably increase in value. It becomes a source of revenue for those engaged in sales (dealers, experts, art critics etc) and is often bought as a good investment. This provision therefore allows the artist to follow the fortunes of his [or her] work and to profit from the increase in value each time it changes hands.

Droit de suite was first introduced in 1920 in France, and was included in the Berne Convention (the major international copyright treaty) in 1948. However, countries are not obliged under that Convention to grant the right. Where a country does grant the right, both artists in that country and artists from countries which have similar schemes are entitled to benefit.

Countries which have a resale royalty right in their copyright law include all but four of the countries which make up the European Union.<sup>56</sup> In 1997, the European Parliament approved a 1996 European Commission proposal for a draft Directive to introduce a harmonised resale royalty right in member countries of the European Union.<sup>57</sup> A Common Position was adopted by the European Council in

mid-2000, and the European Commission gave its opinion on the European Parliament's amendments on 24 January 2001.<sup>58</sup>

The Directive provides that all countries within the European Union will have to grant a resale royalty right in relation to pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, glass, tapestries, ceramics and photographs.<sup>59</sup> The right would operate in the event of "any resale of the work by public sale, in a commercial establishment or with the involvement of a seller or dealer", but not in relation to private sales. The royalty would be calculated as a percentage of the sale price, net of tax. The percentage payable would be lower where the sale price is higher, and sales below a certain price could be excluded. The royalty would be payable by the seller rather than the buyer, and would be payable for the period of copyright (that is, in Europe, until 70 years after the death of the artist).

In Part 2 of its *Report on the Simplification of the Copyright Act 1968*, the Copyright Law Review Committee considered *droit de suite* in connection with its consideration of the distribution right – that is, as an exception to its recommendation that a distribution right should be exhausted on first sale. The Committee recommended that the *droit de suite* not be implemented as a component of the distribution right, but noted that the introduction of *droit de suite* in Australia is a significant policy issue that may warrant further examination.<sup>60</sup>

The Australian Copyright Council produced a report on *droit de suite* in 1988 for the Australia Council and the Federal Department for the Arts, Sport, Environment and the Territories.<sup>61</sup> The conclusion in the report was that the most important development for artists at that time was the establishment of an artists' copyright collecting society to administer existing copyright rights, and that once such a society was established, the introduction of a new right such as the resale royalty right would be easier. Now that VISCOPY has been established as a collecting society for the visual arts, the situation in Australia could be reviewed. Such a review would be particularly pertinent given the European developments.

The introduction of the right would benefit artists whose work appreciates over the period of copyright, but would be especially beneficial to Indigenous artists – particularly as many now well-known Aboriginal artists were selling artworks at very low prices prior to the general recognition given to Aboriginal art.<sup>62</sup>

We understand that some agents, on behalf of their artists, have begun introducing *droit de suite* clauses into their terms or conditions when selling artworks: one agent is reported to have said that his private clients "don't have any problems" with these contracts, which he has been using for three years in relation to works by established artists, priced from \$3,000 to over \$100,000.<sup>63</sup> A contract, however, is no substitute for a right under legislation, as rights under a contract are generally not enforceable against people other than the people who are party to the agreement, and cannot be imposed retrospectively (for example, where as a younger or less aware person, an artist sold a work without such a contractual clause). Also, it may be that only established artists are in a position to impose such terms or conditions on works they sell.<sup>64</sup>

## **Right of display or exhibition**

In one of the meetings leading to the adoption in December 1996 of the WIPO Copyright Treaty, participating countries considered whether the proposed treaty should include an "[author's] exclusive right of authorising the public display of the original or a copy of his work". The term "public display" was used to describe the "static showing of the original or a copy of the work,

either directly or indirectly, that is, by means of a device, such as a film, slide or on a screen (television or other)". Thus, the display on a computer screen of digitised works would be an indirect display.

In the memorandum prepared for the meetings, WIPO observed that:<sup>65</sup>

... it could be considered that such a display is a kind of reproduction, since what appears on the screen is a copy, albeit ephemeral. It would, however, be dangerous for authors to try to rely merely on such a possible interpretation, which could be countered by the argument that there is no reproduction where the result is not a *permanent* and *tangible* copy.

WIPO also proposed that screen display in public should be distinguished from the public performance right. Although both share an ephemeral characteristic:<sup>66</sup>

The essence of the difference is that, when works are displayed on a screen their image is static (fixed) for a finite time ... while, when [the use is performance, recitation, broadcast or other communication to the public] that is not the case.

Canada's Copyright Act gives owners of copyright in certain artistic works a right:<sup>67</sup>

to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan.

An exhibition right has never been seriously discussed as a possible new right for artists in Australia.

### **Rental right for all subject matter**

Under current Australian copyright law, only owners of copyright in some types of copyright material have the exclusive right to rent articles containing their material: namely, owners of copyright in computer programs, in sound recordings, and in works contained in sound recordings.<sup>68</sup>

Countries which are members of the European Union grant rental rights to a wider number of copyright owners.<sup>69</sup> In the European Union, owners of copyright in a range of materials, including "artistic works other than buildings and works of applied art", are given an exclusive right of rental.

The right applies both to the originals and to copies of these items, and relates to dealings which give either "direct or indirect commercial advantage".<sup>70</sup>

A particularly interesting feature of the rental right within, for example, the United Kingdom and other European community countries is that various categories of creators, including people who create artistic works, retain an unwaivable right of equitable remuneration in relation to the rental of their work, even if they assign their copyright to someone else. This right may not be excluded or restricted by contract.<sup>71</sup>

In the meetings which led to the adoption of the WIPO Copyright Treaty, a proposal was put forward that the treaty include a rental right for all copyright material. However, this proposal was not eventually accepted.

## **Right of access to a work in order to be able to exploit the copyright**

Under German law, an author may require the owner of an original or a copy of an artistic work to grant the creator access to it if that is necessary in order to make reproductions or adaptations.<sup>72</sup>

The owner of the item can only oppose such access if he or she has a legitimate interest in doing so.

There is no equivalent provision under Australian law. Arguably such a provision would be of great benefit to artists and craft practitioners who, prior to parting with a work, did not have the foresight, ability or funds to take a commercial-quality transparency which might later be used either as a record or to exploit the copyright in the work.

## **Duration of copyright**

### ***Amendment of the term of copyright for photographs***

Currently, the duration of copyright in a photograph is determined by different rules from those that apply to other types of artistic material.

While the general rule for artistic works is that copyright lasts for the life of the creator plus 50 years, copyright in photographs taken before 1 May 1969<sup>73</sup> lasts for 50 years from the end of the year in which the photograph was taken. Copyright in photographs taken on or after that date will continue until fifty years after they are first published.

As a result, as of this year, all photographs taken before 1 January 1951 (including many well-known images by photographers such as Max Dupain, Olive Cotton and David Moore) are now in the public domain and may freely be used by anyone. Further, without the current rules being amended, photographers publishing work from their teens or twenties (and who have retained copyright in their photographs) will find that the copyright in their early photographs will begin to expire as they reach retirement.

It is likely that the Act will be amended within the foreseeable future to bring the rules for duration of copyright in photographs into line with the rules which apply to other artistic works.

The reason for the change is that the WIPO Copyright Treaty of 1996<sup>74</sup> contains provisions which require signatory countries to ensure that copyright in photographs lasts for the life of the photographer plus 50 years. The Digital Agenda amendments made to the Copyright Act in 2000 were made with the object of enabling Australia to accede to that treaty. However, before Australia can accede to the treaty, it will have to amend the period of protection for photographs.

### ***Extension of the general term of copyright to 70 years***

In many countries, copyright lasts for longer than in it does Australia.

Following the adoption of a directive dealing with harmonising the duration of copyright, copyright in all countries which are members of the European Union should now generally last for the life of the creator of the work plus 70 years. The United States amended its law and generally extended the period of copyright protection to life plus 70 in 1998.<sup>75</sup>

In Australia, the majority of the Copyright Law Review Committee, in Part 2 of its report *Simplification of the Copyright Act 1968* recommended that copyright and moral rights last for 50 years *post mortem* in works of “significant intellectual effort by the person who undertakes its creation” (the category of copyright subject matter proposed by the Committee which is most likely to cover the types of artistic works discussed in this report).<sup>76</sup>

A promise to extend copyright in Australia to match the position under European and United States copyright laws was contained within the Australian Labor Party’s pre-election policy in 1996. The promise has not reappeared in subsequent policy statements or pre-election policies.

The Intellectual Property and Competition Review Committee also visited the issue in its *Review of intellectual property legislation under the Competition Principles Agreement*. It recommended, however, that the duration of copyright in Australia not be extended in line with the periods of protection applying in the United States or Europe, and that no extension of the copyright term should be introduced in future without prior review of the resulting costs and benefits.<sup>77</sup>

### ***Domain publique payant***

The concept of “domain public payant” relates to the payment of royalties for the commercial use of works even after they enter into the public domain. However, rather than the copyright owner receiving the benefit, monies are paid into a central fund. The Copyright Council’s submission to the Committee of Inquiry into Folklife in Australia described the concept as follows:<sup>78</sup>

Domain public payant is based on a ‘revolving’ system which enables the revenue from the works of deceased authors to benefit living authors whose works in turn subsequently produce income for the livelihood of future generations of authors. It gives expression to the social dimension of copyright and has often been acknowledged as an effective protective mechanism for a nation’s ‘cultural heritage’.

As at the date of that submission, some 20 countries had passed legislation providing for domain public payant. The Committee of Inquiry into Folklife in Australia noted that while the introduction of a domain public payant is likely to be opposed by commercial interests, the system had been made to work overseas.<sup>79</sup> For example, in France, Law 46:2196 of 1946 set up a National Literary Fund to collect, after copyright had expired, royalties similar to those that had been payable to copyright owners while copyright subsisted. The Fund, under the authority of the Minister in Charge of Arts and Letters, was to “sustain and encourage the literary activity of French writers” by providing fellowships, grants, loans and so on to writers, their spouses and their children.

The Report of the Committee of Inquiry into Folklife in Australia noted that it was uncertain how much revenue domain public payant would generate, but nonetheless recommended that consideration be given to the introduction of a system of domain public payant in Australia to cover the work of both known creators whose copyright had lapsed, and folklife materials.<sup>80</sup>

### **First ownership of copyright**

In most cases, the person who creates an artistic work – the artist – will be the first owner of copyright. The artist may, however, assign the future copyright so that another person is the first owner. In addition, there are a number of situations in which the artist will not be the first owner of copyright unless the person for whom the work is created agrees that the artist will be the first owner of copyright.

One of these situations is when the Commonwealth or a State or Territory government is involved in the creation or first publication of copyright material: if anything is created or first published under the “direction or control” of such a government or agency, the relevant government will own copyright. This exception can operate unfairly on creators who may not be aware of it.

In its *Review of intellectual property legislation under the Competition Principles Agreement*, the Intellectual Property and Competition Review Committee stated that it did “not believe that the Crown should benefit from preferential treatment under the Copyright Act as compared with other parties”. It therefore recommended that the relevant section of the Copyright Act “be amended to leave the Crown in the same position as any other contracting party”.<sup>81</sup>

### **Collective licensing and collecting societies**

We discuss two types of collective licensing in this section: that which occurs when copyright owners voluntarily give a collecting society the right to deal in certain ways with their copyright material; and that which occurs when a collecting society administers a statutory licensing scheme under the Copyright Act.<sup>82</sup>

VISCOPY is an example of a collecting society that offers voluntary licences only (it has not been declared a collecting society to administer any of the statutory licensing schemes in the Act); Screenrights is an example of a collecting society which administers only statutory schemes (the radio and television schemes for educational institutions and for government, and a scheme for retransmission of broadcasts).<sup>83</sup>

Copyright Agency Limited (CAL) administers schemes under the Act (in relation to textual and graphic material, the reproduction and communication schemes for educational institutions and the reproduction scheme for governments). CAL also offers various voluntary licenses to commercial and non-profit organisations to reproduce and communicate textual and graphic material in which its members own copyright.

There have been two recent reports relating to collective licensing and collecting societies:<sup>84</sup>

- the report of the Copyright Law Review Committee on the jurisdiction of the Copyright Tribunal;<sup>85</sup> and
- the report of the Intellectual Property and Competition Review Committee, which reviewed intellectual property legislation under the Competition Principles Agreement.<sup>86</sup>

We briefly discuss these reports below. We also briefly note the activity of VISCOPY in ensuring that monies due to owners of copyright in art and craft works which are reproduced or communicated under the educational and government schemes are identified and distributed to its members from the schemes administered by CAL and Screenrights.

### ***CLRC report on the jurisdiction of the Copyright Tribunal***

Generally, the Copyright Tribunal has jurisdiction to determine various terms and conditions, including the amount of equitable remuneration payable, in relation to selected statutory licences under the Copyright Act. In most cases, the Tribunal’s jurisdiction is exercised where the parties fail to reach agreement.<sup>87</sup>

In December 2000, a report by the CLRC into the jurisdiction and procedures of the Copyright Tribunal was published.<sup>88</sup> The CLRC noted that the Copyright Tribunal is functioning well, and performing a role which could not effectively be carried out by any other body. However, the CLRC also noted that its function would be enhanced by the adoption of the recommendations in the report.<sup>89</sup>

Many of the recommendations in the report flow from the general recommendation that the Tribunal's jurisdiction be expanded to apply to *all* collectively administered licences (whether statutory or not) and to *all* types of copyright material and *all* copyright uses.<sup>90</sup> The adoption of such a recommendation would mean that disputes concerning the licensing practices of voluntary collecting societies such as VISCOPY would come within the jurisdiction of the Tribunal. The recommendations also have the potential to bring licensors such as image libraries and agents administering rights in relation to a number of artists within the scope of the Tribunal's jurisdiction.

The CLRC also recommended that the Tribunal have the power to *substitute* a licence scheme put forward by a party to an application, as well as its current power to vary or confirm schemes and specify charges and conditions.<sup>91</sup>

In relation to "input arrangements" (that is, the terms and conditions of membership of collecting societies, including issues between members and the societies relating to distribution), the CLRC recommended against the Tribunal being given jurisdiction, but did recommend that, for statutory licensing schemes, collecting societies have the ability to apply to the Tribunal for an order confirming, varying or substituting an existing or proposed scheme of distribution.<sup>92</sup>

### ***Report of the Intellectual Property and Competition Review Committee***

The recommendations of the Intellectual Property and Competition Review Committee, in relation to the activities of collecting societies, in its review of intellectual property legislation under the Competition Principles Agreement, included:<sup>93</sup>

- that the Copyright Tribunal be given jurisdiction over all collective licensing arrangements;
- that the Australian Competition and Consumer Commission (ACCC) be able to determine that a reference should be made to the Copyright Tribunal, based on an application by a collecting society or from an actual or potential licensee, taking account of market power, the availability of alternative dispute resolution mechanisms, and the public interest in balancing public access to copyright material with the legitimate commercial interests of copyright owners.

The Committee noted that if certain changes it recommended to trade practices legislation were adopted, then collecting societies would have to seek authorisation from the ACCC for any activities covered by certain prohibitions in the Trade Practices Act relating to lessening competition.<sup>94</sup>

### ***The relationship of VISCOPY to CAL and Screenrights***

There have been ongoing discussions between VISCOPY and CAL and between VISCOPY and Screenrights about the collection and distribution by VISCOPY of monies relating to members' works collected under the statutory schemes.<sup>95</sup>

Discussions have canvassed not only the amount of monies attributable to works in which copyright is owned by VISCOPY's members, but also the methods by which the use of its members' works under these schemes should be assessed.<sup>96</sup>

### **Overlap between copyright and design law**

The Designs Act protects "features of shape, configuration, pattern or ornamentation applicable to an article". Under the Act, design drawings and prototypes of useful or functional articles may be registered under the *Designs Act 1906* (Cth).<sup>97</sup>

A design which is registrable under the Designs Act may also be an "artistic work" for the purposes of copyright. The Copyright Act contains a number of provisions which deal with this overlap. At different stages, the Act has been amended to remove some unfair consequences of previous provisions; for example, until the Act was amended in 1990, articles with artistic works printed on them, such as fabric and T shirts, could be denied copyright protection. However, there are still some areas of legal and practical uncertainty or difficulty of which artists and craft practitioners should be aware.<sup>98</sup>

For example, the Copyright Act does not allow dual protection under the Copyright Act and the Designs Act for three-dimensional representations of artistic works.<sup>99</sup> In other words, people who create craft works, buildings, or models of buildings which are to be industrialised have to choose if they want one protection or the other for their design. This decision generally has to be made before the design has been "industrially applied".<sup>100</sup> A design is "industrially applied" if more than 50 articles are made from it.<sup>101</sup> The design itself may be two-dimensional (such as a drawing) or three-dimensional (such as a prototype).

Secondly, it is unclear whether a work which is a sculpture or an engraving may also be a work of artistic craftsmanship. This is because of an ambiguity in the way "artistic work" is defined in the Copyright Act.<sup>102</sup>

Thirdly, there is some uncertainty as to the meaning of "two-dimensional" and when a design is applied to a "surface". For example the design for a mirror, where a pattern is etched into the glass itself, is not strictly a design "applicable to a surface" since here the design is an integral part of the article itself. Similarly, a stained glass window, where the design comprises different coloured pieces of glass pieced together, is not really applied to the surface of an article but rather constitutes the article (the window) itself. In some cases, these works may be works of artistic craftsmanship.

Fourthly, the possibility of dual protection under both designs law and copyright law for two-dimensional applications of designs (such as for T-shirts) may cause some confusion about ownership since different rules apply under the two regimes. For example, in the case of a commissioned drawing, the artist would usually be the owner of the copyright. However, under the Designs Act the commissioning client (not the artist) has the right to register under the Designs Act (although permission of the copyright owner is also required).<sup>103</sup>

In August 1992, the Attorney-General referred the Designs Act to the Australian Law Reform Commission for inquiry and report. The Commission published an issues paper in April 1993, and a discussion paper in August 1994, both of which discussed the interaction between the Designs Act and the Copyright Act. The Commission released its report in June 1995. The Commission recommended several amendments to the Copyright Act regarding the design/copyright overlap.

At the time of writing, an exposure draft for discussion had been released by the Government.<sup>104</sup>

## **Some weaknesses in the current legislation**

The Copyright Act contains a number of provisions which are in various ways anomalous.

### ***Special exceptions applying to artworks***

Sections 65 to 73 of the Act contain a number of provisions which specify when copyright in various types of artistic works is not infringed.

Some of these provisions operate to disadvantage artists and craft practitioners in comparison with other types of creators.

For example, as a result of the combined effect of sections 65 and 68, a sculpture or “work of artistic craftsmanship” which is on public display<sup>105</sup> may be photographed, depicted in a painting or drawing, filmed or included in a television broadcast without permission. Further, the resulting image, film or broadcast may be commercialised, again without permission. This is *not* the case for other artworks, such as murals; the copyright owner in artistic works other than sculptures and works of artistic craftsmanship retains rights over both initial reproductions such as filming and photography and subsequent commercialisation in, for example, postcards or films.

It seems anomalous that sculptors and craft practitioners whose work is publicly displayed other than temporarily should not be able to exert the same copyright control over their work as, for example, painters and muralists.<sup>106</sup>

We have suggested elsewhere that in the meantime, galleries and public building owners could adopt the practical approach of making access to the gallery or building conditional on not taking photographs or making sketches of artworks, or at least not doing so for commercial purposes.<sup>107</sup> As we have also noted, however, this is not a satisfactory solution because artists themselves would have no rights against someone who copied their work in breach of such a promise, and works such as statues and fountains in public parks will not be given this level of protection since access cannot be restricted in the same way.<sup>108</sup>

Section 67 provides a second example of the anomalous position of owners of copyright in artistic works. Under that section, any artworks (whether on public display or not) may be reproduced into films or television broadcasts without permission if the inclusion of the artwork is incidental to the principal matters in the film or broadcast. The Act does not contain any similar provisions relating to the incidental inclusion of music, sound recordings or films or other copyright material.

In practice, at least insofar as film is concerned, we understand that clearances to include artworks, even incidentally, is routinely sought. The reason for this is that these clearances will be necessary where a film is to be released internationally, because many other countries do not have such an exception.

The Copyright Law Review Committee, in its report on the simplification of the Copyright Act, noted the Australian Copyright Council’s comments that the various miscellaneous exceptions appear to allow a considerable amount of commercial exploitation. The CLRC accordingly recommended that the provisions should be repealed, and that to resolve the “practical injustices to which the present wording” of section 65 in particular gives rise, the non-commercial activities currently covered by the provisions should be brought within the scope of an extended “fair dealing” provision in the Act.<sup>109</sup>

### ***Commercial availability of artworks in electronic form under the educational copying provisions***

The Copyright Act contains a number of schemes under which educational institutions may deal in certain ways with copyright material without permission for their “educational purposes”.<sup>110</sup>

Generally, insofar as the schemes relating to literary, dramatic, artistic and musical works are concerned, only certain amounts of material may be copied or otherwise reproduced. Whether more than these amounts may be reproduced generally depends upon whether the material is commercially available within a “reasonable time”.<sup>111</sup>

For example, an educational institution may only photocopy, scan or otherwise reproduce an artistic work on its own from a hardcopy if the artwork is not commercially available separately (for example, as a postcard, slide or poster). However, no such “commercial availability” test applies where the artwork is in electronic form (for example, where the work is on an Internet site or on a CD-ROM).

This anomaly may have resulted from a drafting oversight, but until it is amended, educational institutions will not have to check whether owners of copyright in artistic works have made them separately available in electronic form before reproducing or communicating them under the educational copying schemes administered by CAL. This means that owners of copyright in artistic works are being denied an opportunity to develop a potentially valuable online market.<sup>112</sup>

### **Enforcement**

While collecting societies and other non-profit organisations (such as the National Indigenous Arts Advocacy Association) may in some cases be prepared to act on behalf of individual copyright owners whose copyright has been infringed, one of the ongoing problems, particularly for individuals who own copyright, has been the difficulty of taking action for infringement of copyright due to the expense and complexity of legal proceedings.

In November 2000 the House of Representatives Standing Committee on Legal and Constitutional Affairs published a report on enforcement of copyright in Australia.<sup>113</sup> Its recommendations included:

- that the Federal Government conduct, in conjunction with relevant representative organisations, a public education campaign aimed at promoting awareness and understanding of copyright in the general community and in the business sector;<sup>114</sup>
- that appropriate legislation be amended to establish within the Federal Magistrates Court a small claims jurisdiction to hear copyright matters, as a small claims jurisdiction has highly simplified pleadings, the rules of evidence do not apply, it has the ability to order (t its own expense) inquiries into any aspect of a matter, and it has the ability to provide staff to assist parties.<sup>115</sup>

These recommendations, if adopted, have the potential to significantly benefit artists and craft practitioners.

Note should also be made that some organisations are able to assist in resolving disputes concerning copyright through alternative dispute resolution. For example, the Arts Law Centre of Australia offers a mediation service specifically designed to provide affordable and accessible mediation for artists and arts organisations.<sup>116</sup>

## Parallel importation

To date, copyright owners have been able to control who can import copies of their material, even if that material was legitimately made overseas.<sup>117</sup> The Copyright Law Review Committee, in its 1988 report on parallel importation, noted as follows:<sup>118</sup>

The philosophy underlying [the parallel importation provisions] is that it is just as illegal to import legitimately made copies for which there is no licence, as it is to import copies which have been made entirely without the copyright owner's authority. This is because the key to whether there has or has not been an infringement is the existence or non-existence of a licence from the Australian copyright owner authorizing the importation and subsequent commercial dealing with the copies in Australia. The importance to the Australian copyright owner of being able to prevent parallel imports, as well as unauthorized copies, arises from the fact that copyright ownership may be divided on a territorial basis.

At the time of writing, however, there is a Bill before Parliament which would remove the ability of many Australian copyright owners to control the importation of items containing their material.<sup>119</sup>

Visual artists and craft practitioners who have licensed the use of their material overseas in, for example, books, periodicals and sheet music, and who are being paid by way of royalties, would be adversely affected by the enactment of the Bill. Not only would their ability to negotiate Australian rights be removed, but they would be at risk from people importing books, periodicals and sheet music which include images of their art or craft work.<sup>120</sup>

The Senate Standing Committee on Legal and Constitutional Affairs recently tabled a report on the Bill. The report was highly critical of the methodology and interpretation of statistics in some of the submissions to government in favour of allowing parallel importation.<sup>121</sup>

## Development of "users' rights" and anti-copyright sentiment

This report would not be complete without briefly noting two further developments which may increasingly bear on future law reform relating to copyright.

The first is postmodernism and the associated growth of appropriation as a norm in art and craft theory and practice. Clearly, from a strictly legal point of view, appropriation can lead to infringement of copyright.<sup>122</sup>

Should the law be amended to give legislative approval to appropriation art generally? Copyright law currently protects artists and craft practitioners. It then obviously lies with an individual artist or craft practitioner to decide on a case by case basis whether he or she, in appropriating another person's copyright material into his or her own work, will infringe copyright if he or she sees this as appropriate and is willing to run the associated risks; to amend the Copyright Act to permit appropriation in the context of art would then change transgression into orthodoxy.<sup>123</sup>

Secondly, the development of digital reproduction and communication technologies has been accompanied by the articulation of what have been referred to as "users' rights". Indeed, one commentator on copyright has argued that end user rights now dominate copyright rhetoric because of the increased capacity end users have to receive, store and disseminate works. She also notes the influence of postmodernism on the rhetoric of "users' rights", accompanied or assisted by increasing numbers of "high-tech background" copyright lawyers who identify with users rather than copyright owners.<sup>124</sup>

Article 27(1) of the Universal Declaration on Human Rights articulates intellectual property rights as human rights:

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

The European approach to copyright law is based squarely on this “human rights” approach, as are the major international conventions relating to copyright.

However, the approach in the United States is markedly different, being governed by a highly functionalist discourse which flows from the words in the US Constitution:

The Congress shall have Power ... To promote the Progress of Science and the Useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

This view is also articulated in US Supreme Court cases:<sup>125</sup>

[copyright] must ultimately serve the cause of promoting broad public availability of literature, music and the other arts.

In Australia, the discussions and reports concerning the scope of exceptions under the Act, the winding back of copyright owner control over parallel importation, and the application of competition policy to copyright material and copyright collecting societies generally show the influence of a functionalist approach, with a keen eye on the interests of the consumer. On the other hand, particularly in relation to discussions concerning Indigenous art and crafts, there is a counter tendency of giving primacy to the rights of the creator – for appropriation to be either resisted as inappropriate, or done only with consultation.

## Endnotes

- 1 Section 10(1), Copyright Act.
- 2 See generally section 32. Note, however, the (unanswered) question posed by Finkelstein J in the recent first instance judgement of 25 May 2001, *Telstra Corporation Limited v Desktop Marketing Systems Pty Ltd* [2001] FCA 612 at para 4: "Must a copyright work have a human author"?; his Honour refers the reader to the High Court case of *Sands & McDougall Pty Ltd v Robinson* (1917) 23 CLR 49. For current purposes, it is enough to note that the presumed need for human authorship (whether correct or not) raises questions about computer-generated art and art where an artist merely presents or points to a natural item or process.
- 3 The current definitions of literary and dramatic works are open-ended; there is no definition of "musical work".
- 4 Copyright Law Review Committee, *Simplification of the Copyright Act (1968) Part 2: Categorisation of Subject Matter and Exclusive Rights, and Other Issues* (AusInfo, Canberra, 1999) at 5.28 and following.
- 5 *ibid.*, at 2.03; see also chapter 5 of the report generally.
- 6 *Coogi Australia Pty Ltd v Hysport International Pty Ltd* (1998) 41 IPR 593; see [www.coogi.com.au](http://www.coogi.com.au) for examples of the types of garments at issue in the case.
- 7 *ibid.*, at 597–598.
- 8 *Sega Enterprises Ltd v Galaxy Electronics Pty Ltd* (1997) 37 IPR 462.
- 9 Full Federal Court, *Powerflex Services Pty Ltd v Data Access Corporation* (1997) 37 IPR 436 at 456; an appeal was dismissed by the High Court (reported as *Data Access Corporation v Powerflex Services Pty Ltd* (1999) 45 IPR 353).
- 10 Copyright Law Review Committee, *Computer Software Protection: Final Report* (1995) at 13.01 and following. See also the Committee's comments in Part 2 of its report, *Simplification of the Copyright Act*, *op. cit.*, at para 5.47.
- 11 See particularly paras 3.40–3.44.
- 12 The URL is [gs2.sp.cs.cmu.edu/art/random/howto/index.html](http://gs2.sp.cs.cmu.edu/art/random/howto/index.html); for examples of art generated by the process see [gs2.sp.cs.cmu.edu/art/random/archive/index.html](http://gs2.sp.cs.cmu.edu/art/random/archive/index.html).
- 13 In Part 2 of its simplification report, *op. cit.*, the CLRC recommended that the Act be amended to create two broad categories of copyright material only, the first category being distinguished by a threshold of originality, with the higher level of protection being dependent on the passing of that innovation threshold: see para 5.47. It is worth noting that the UK legislation specifically protects computer-generated works: section 178, *Copyright, Designs and Patent Act 1988* (UK).
- 14 Hirst's work, entitled *The Physical Impossibility of Death in the Mind of Someone Living*, was/is part of the Sensation exhibition.
- 15 We discuss below how copyright might apply to Damien Hirst's unpreserved animals.
- 16 *Creation Records Ltd v News Group Newspapers Ltd* (1997) 39 IPR 1.
- 17 The court also held that the installation was not a "dramatic work" because it was static.
- 18 The Australian legislation does not contain a sub-category of "collage" in its definition of "artistic work". Under Australian copyright law it is, however, likely that a collage will generally be protected as a "work of artistic craftsmanship", or possibly, in some cases, as a "sculpture". Given dictionary definitions, an Australian court may also look to whether the relevant items have in some way been fixed to each other or to a surface.
- 19 *Vincent v Universal Housing Co Ltd* [1928–1935] MacG Cop Cas 275, decided under the *Copyright Act 1911* (UK).
- 20 *Half-Court Tennis Court Pty Ltd v Jeffrey H Seymour* (1980) 53 FLR 240 (SC(Qld)).
- 21 *Creation Records Ltd v News Group Newspapers Ltd* (1997) 39 IPR 1 at 5.
- 22 Even if a work is found to be protected, it may be that where a second artist repeats an installation a court might be persuaded that all that has been used is an idea. See, however, the decision in the House of Lords in *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] FSR 113 concerning infringement of copyright in wallpaper, where copying resulted in infringement, even where the works objectively did not look similar. In other words, derivation may be more important in finding infringement than the appearance of a defendant's work.
- 23 Note that, to be protected, the work would have to be recorded in some way, either via a script or written description, or through a video of a performance of the work.
- 24 In this regard, note that the court in *Creation Records* declined to find that the posing of the people and objects around and in the pool was a "dramatic work" on the basis that the scene was static.
- 25 For a brief summary, see [www.abc.net.au/rn/arts/atoday/stories/s146937.htm](http://www.abc.net.au/rn/arts/atoday/stories/s146937.htm).

- 26 If the work could be classified as a literary or dramatic work, note that Parr, as the performer, would have various rights if he had been filmed or sound recorded without his permission. Note, however, that performers' rights are contingent on the performer performing a musical, literary or dramatic work: see generally the Copyright Council's information sheet, *Performers' rights*, available from its website at [www.copyright.org.au](http://www.copyright.org.au).
- 27 This work is/was also part of the *Sensation* exhibition.
- 28 See "Manifesto", available at [www.tca.uwa.edu.au](http://www.tca.uwa.edu.au). See also [www.abc.net.au/science/news/stories/s22459.htm](http://www.abc.net.au/science/news/stories/s22459.htm) concerning Patsy Payne, who "used positron emission tomography or PET scans to create slice-like images which will be used to take visitors on a 'guided tour' of her innards" (at Exhibitions of Science and Art, Canberra, National Science Week, May 1999).
- 29 In *Komesaroff v Mickle* (1986) 7 IPR 295, the Court declined to hold that a person who made "moving sand pictures", consisting of two parallel panels of glass held together by aluminium channelling, and filled with amounts of selected sand, liquid and bubble-producing substance, had made a "work of artistic craftsmanship". The position of the sand varied, as the sand worked its way through the liquid and bubbles; when all the sand had trickled down to the lower part of the product, the frame could be reversed, and the process started again. While counsel for the plaintiff submitted that the product was a "work of kinetic art", the court stated that as no sand landscape within the product "is a static feature for any length of time, such landscapes cannot be taken into account as part of a "work of artistic craftsmanship" (at 303). The court also noted that, while the product had an "artistic" character, the actions of the plaintiff in making the product did not "directly bring about the spectacles which result from adjustment of the position of the product, and ... there is no 'craftsmanship' in the performance of the skilled act which she performs" (at 304).
- 30 Similar issues arise in relation to art installations that incorporate or use sounds. One work initiated during the 1999 Perth Festival (see [demos.imago.com.au/future\\_suture/future/](http://demos.imago.com.au/future_suture/future/)), was "Project Otto":  
 "PROJECT OTTO (Richard Sewell, Jeremy Hicks, Sam Landels), enables the viewer to interact with the myriad of sound waves that usually pass the earth unnoticed. The PROJECT OTTO team has created a mechanism that is able to interpret extraneous audio and to transmit this raw information along with a pre-prepared bank of video signals onto the WWW. In addition to the on-screen controls users will be able to alter an antenna and manipulate this electronic tap on the earth's auratic atmosphere."
- 31 This list is drawn from an article by Séverine Sudollier, "Electrifying the Fence: The Legal Protection of Technological Measures for Protecting Copyright" [1999] *EIPR* 285 at 285-286. See also Brude H Turnbull and Dean S Marks, "Technical Protection Measures: the Intersection of Technology, Law and Commercial Licences" (1999) 46 *J. Copr. Soc'y* 563 (also published at [2000] *EIPR* 198) and Lucinda Jones, "An Artist's Entry into Cyberspace: Intellectual Property on the Internet" [2000] *EIPR* 79, particularly at 88-90. For a sample of what particular software is currently available, consult software suppliers, software periodicals, or search the Net using terms such as "technological protection" and "electronic rights management".
- 32 For detailed information on the provisions see the Copyright Council's practical guide *Websites & Copyright* (ACC, Sydney, 2001).
- 33 For general information about licensing copyright rights, see the Copyright Council's information sheet *Licensing and assigning rights*, available from its website. See also the various checklists, guides and sample agreements relating to the visual arts and craft sector available from the Arts Law Centre of Australia (see [www.artslaw.com.au](http://www.artslaw.com.au)).
- 34 In 1997, the Copyright Council published a discussion paper entitled *Licensing Content for Multimedia* (ACC, Sydney, 1997) which included the results of a survey of emerging licensing practices in relation to copyright content. The survey concentrated on CD-ROM licensing practices, but many of the issues identified in that context are also relevant to online licensing.
- 35 A resolution of 768 by 512 pixels/72 dpi is sometimes referred to as sufficient to allow clarity on-screen, but not sufficient for commercial use by someone lifting an image from a site.
- 36 The report was commissioned by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and funded by the Aboriginal and Torres Strait Islander Commission (ATSIC). Some information is available on the web at [www.icip.lawnet.com.au/index.html](http://www.icip.lawnet.com.au/index.html). See also Ms Janke's final report, also entitled *Our Culture, Our Future* (Michael Frankel & Co, Sydney 1999) and the Australian Copyright Council discussion paper, *Protecting Indigenous Intellectual Property* (ACC, Sydney, 1998).
- 37 At the 1999 UNESCO/South Pacific Commission Symposium on the Legal Protection of the Expressions of the Pacific Indigenous Cultures in New Caledonia, the Government presented a paper outlining its approach to the protection of Indigenous intellectual property. A paper taking a different approach was delivered by Mr Preston Thomas, a Commissioner of the Aboriginal and Torres Strait Islander Commission.

- 38 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Cracking down on copycats: enforcement of copyright in Australia* (Parliament of the Commonwealth of Australia, Canberra, 2000), Recommendation 2. The report is available both in hardcopy and via [www.aph.gov.au](http://www.aph.gov.au).
- 39 See Senator Ridgeway's speech in the senate on 7 December 2000, available via [www.aph.gov.au](http://www.aph.gov.au).
- 40 See generally Australian Copyright Council, *Protecting Indigenous Intellectual Property*, op. cit.; for detailed information on recent activities relating to intellectual property, genetic resources, traditional knowledge and folklore by the World Intellectual Property Organization and UNESCO see [www.wipo.int/traditionalknowledge/introduction/index.html](http://www.wipo.int/traditionalknowledge/introduction/index.html).
- 41 Further information is available from NIAAA's website: [www.niaaa.com.au/label.html](http://www.niaaa.com.au/label.html). See also the *Indigenous Protocols Kit* and accompanying report being developed by the National Association for the Visual Arts. Some information on the kit and report is available at [www.visualarts.net.au/Web/pa/content08b.asp](http://www.visualarts.net.au/Web/pa/content08b.asp).
- 42 See [www.niaaa.com.au/copyright\\_qa\\_sheet.html](http://www.niaaa.com.au/copyright_qa_sheet.html).
- 43 loc. cit.
- 44 There have, however, been newspaper reports of possible action under the new legislation in relation to proposals to renovate and extend parts of the National Gallery building in Canberra. See, for example, "Blue murder in the art cathedral as angry architect takes on the archbishop", *Sydney Morning Herald* 2 June 2001 and "Kennedy quizzed over 'unseemly brawl'" *Sydney Morning Herald* 7 Jun 2001.
- We have also become aware that where, under some of the moral rights provisions, notice has been given to creators that their work is to be removed, altered or destroyed, some solicitors have discovered that the moral rights provisions may operate as a way of monitoring whether architectural plans might be being reproduced in a way which infringes copyright. It is unclear whether this, perhaps unforeseen, consequence of the moral rights provision might act as a disincentive to people using the notice procedures to take advantage of the various exceptions to infringement of moral rights.
- It is also unclear whether owners of copyright in other art or craft works will be able to use the moral rights provisions to the same effect: their work might not, for example, be included in working drawings or re-drafted plans where renovations or extensions are contemplated, or where drawings or photos are included. Also, the building's owner and draftspeople may be able to rely on the miscellaneous exceptions which allow publicly displayed sculptures and craft work to be photographed, drawn and otherwise reproduced; or
- the "damage" which an owner of copyright in such a work might be able to demonstrate as a result of such incidental copying might not be worth pursuing in the courts.
- 45 Section 195AWA. Note that there are slightly different types of consent which operate in relation to films and works which are included in films. For more detail see the Copyright Council's *Moral Rights Bill* (with supplement), op. cit.
- 46 Section 195AWB.
- 47 Note that there are slight differences in the listed factors, depending on whether the item is a literary, dramatic, artistic or musical work, or a film.
- 48 Sections 195AR and 195AS. In other words, whether something done in relation to a work in the advertising industry infringes a creator's moral rights will depend on practices and voluntary codes within the advertising industry, not on practices and voluntary codes in the arts.
- 49 Sectors within the advertising industry either opposed the enactment of moral rights in relation to material created for advertising, or argued for artists to be able to waive their rights generally. See, for example, the report of the Senate Legal and Constitutional Affairs Committee, *Copyright Amendment Bill 1997*, available via the Parliament House website at [www.aph.gov.au](http://www.aph.gov.au).
- 50 Or the creator's representative.
- 51 Or the creator's representative.
- 52 Section 195AT(2) and (2A).
- 53 See, for example, Article L. 121-4 of the French Copyright Law.
- 54 See Article 6 bis of the Berne Convention.
- 55 Claude Masouyé, *A Guide to the Berne Convention* (WIPO, Geneva, 1978) at 90-91.
- 56 Austria, Ireland, the Netherlands, and the United Kingdom do not currently provide a resale royalty right.
- 57 COM (2001) 47 final, which also contains a legislative history of the proposal: see [europa.eu.int/eur-lex/en/com/pdf/2001/com2001\\_0047en01.pdf](http://europa.eu.int/eur-lex/en/com/pdf/2001/com2001_0047en01.pdf). See also Gerhard Pfennig, "The resale right of artists (droit de suite)" (1997) (3) *Copyright Bulletin* 20; Simon Hughes, "Droit de Suite: A Critical Analysis of the Approved Directive" [1997] 12 *EIPR* 694. We understand that the United Kingdom has been now promised a 15 year exemption from the application of any Directive to harmonise droit de suite laws throughout member states of the European Community.

- 58 In the countries which currently provide for the right, we understand that it is administered by artists' collecting societies similar to Australia's VISCOPY.
- 59 Note that creators from countries which do not grant reciprocal rights are unlikely to benefit from changes to national legislation which result from the adoption of the treaty.
- 60 CLRC, *Simplification* report, Part 2, op. cit., para 4.53.
- 61 *Droit de Suite – the art resale royalty and its implications for Australia*; an edited version of the report was published under the title *Resale Royalty – a New Right for Artists* in 1989 (ACC, Sydney, 1989).
- 62 By way of example, in July 1998 a work by Aboriginal artist Billy Stockman, entitled "Wild Potato Dreaming", which would originally have been sold by Stockman for between \$50 and \$150, was auctioned for more than \$200 000. Other Indigenous artists whose works can sell for six-figure sums include the late Kngwarreye and the late Rover Thomas. See, generally, (1996) 60 *Copyright World* 9; [1996] 9 *EIPR* D—273; and Mary Wyburn et al, *Bulletin 69: The Art Resale Royalty*, Australian Copyright Council, Sydney, 1989: out of print, but held by a number of libraries.
- 63 See [www.theage.com.au/entertainment/20001128/A41081-2000Nov27.html](http://www.theage.com.au/entertainment/20001128/A41081-2000Nov27.html). Artists reported to be selling works on this basis include Juan Davila, Imants Tillers and Ian Abdulla.
- 64 See loc. cit. for comments from one gallery owner that a legislated droit de suite "applying to all artists would be more equitable than individual contracts".
- 65 WIPO Memorandum prepared by the International Bureau, *Committee of experts on a possible protocol to the Berne Convention for the protection of literary and artistic works*, (BCP/CE/1/3), para 113.
- 66 *ibid.*, para 114.
- 67 Section 3(1)(g).
- 68 This is the international standard set by Article 11 of the TRIPS Agreement, and in Article 7 of the WIPO Copyright Treaty and Article 9 of the WIPO Performances and Phonograms Treaty (note that these last two treaties have yet to come into operation, although many countries have already amended their own laws to comply with the obligations of either one or both of these treaties). Countries bound by the TRIPS Agreement are also obliged to grant a rental right in relation to films, but only if rental of films "has led to widespread copying of such works materially impairing the exclusive right of reproduction". The Australian Government takes the view that this is not the case in Australia.
- 69 Directive 92/100/EEC.
- 70 Article 1.2, Directive 92/100/EEC.
- 71 Article 4, Directive 92/100/EEC. For implementation of the right to remuneration in national legislation, see, for example, section 93B(5), *Copyright, Designs and Patents Act 1988* (UK). The editors of *Copinger*, op. cit., at 7-118 comment that this right to remuneration is not strictly a copyright right, as the author cannot, for example, prevent rental in the event that the remuneration is not paid. Rather, his or her right is a claim for remuneration against the owner of the right at the relevant time.
- 72 German *Copyright Law*, section 25. The provision in the German law does not, however, require the owner of the item to "surrender" the item to the creator.
- 73 The date on which the current Act came into operation.
- 74 For information on this treaty see the Copyright Council's information sheet *Digital Agenda Amendments*, available on its website at [www.copyright.org.au](http://www.copyright.org.au).
- 75 See Gail Fulton, "Mickey Mouse gets copyright reprieve" (1999) 16 *Copy Repr* 177, which contains a useful chart summarising the duration periods before and after the Act.
- 76 CLRC *Simplification* Part 2, para 5.104.
- 77 Intellectual Property and Competition Review Committee, *Review of intellectual property legislation under the Competition Principles Agreement*, at 84.
- 78 Committee of Inquiry into Folklife in Australia, op. cit., at 264.
- 79 *ibid.*, at 265.
- 80 *loc. cit.* Were such a scheme contemplated in Australia, it is likely that the use of Indigenous material in the public domain would need to be considered separately. There are good arguments for suggesting that, were a system of public domain payant enacted into Australian law, relevant Indigenous communities should play a significant role in determining whether Indigenous material which has fallen into the public domain in the copyright sense should be used at all and if so, on what terms and conditions. The application of any resulting funds should also be determined by the relevant Indigenous community.
- 81 Intellectual Property and Competition Review Committee, op. cit., at 114.
- 82 For detailed information on the societies, see Shane Simpson, *Review of Australian Collecting Societies* (AGPS, Canberra, 1995), available via [www.dcita.gov.au](http://www.dcita.gov.au); see also the websites of the various collecting societies.

- 83 Note, however, that Screenrights does also offer some voluntary services to members, but it does not offer TV and radio copying licences to organisations other than those covered under the statutory schemes (that is, organisations other than government or educational institutions).
- 84 The reports are interconnected in that the Tribunal's jurisdiction has been justified on anti-monopolistic grounds; see for example, Copyright Law Review Committee, *The Jurisdiction and Procedures of the Copyright Tribunal* (AusInfo, Canberra, 2000) at para 10.02.
- 85 *ibid.*
- 86 Intellectual Property and Competition Review Committee, *op. cit.*
- 87 Note, however, that the Tribunal's jurisdiction in relation to the "cover version" scheme for recording music does not depend on an application from the parties. See generally, *ibid.*, at 179 and following. The report is also available via the CLRC's website at [www.law.gov.au/clrc/](http://www.law.gov.au/clrc/).  
Recent applications determined by the Tribunal include *Copyright Agency Ltd v University of Adelaide* (1999) 45 IPR 383 (involving copying by educational institutions under Part VB of the Act) and *Re Application of Seven Dimensions Pty Ltd* (1996) 35 IPR 1 (relating to the use of videos by the NSW police force under the government use provisions).
- 88 CLRC, *The Jurisdiction and Procedures of the Copyright Tribunal*, *op. cit.*
- 89 *ibid.*, para 10.16.
- 90 *ibid.*, para 11.12.
- 91 *ibid.*, para 11.129.
- 92 *ibid.*, paras 12.21 and 12.22. In other recommendations, the CLRC recommended that alternative dispute resolution mechanisms be adopted by collecting societies when they have disputes either with copyright users or with members, and that the Tribunal should not only encourage parties to explore alternative dispute resolution, but have the power to compel them to do so where the Tribunal concludes that this would be appropriate: *ibid.*, paras 21.23 and 21.24.
- 93 Intellectual Property and Competition Review Committee, *op. cit.*, at 118 and following. The report canvassed a number of copyright issues apart from how competition policy should apply to the activities of collecting societies. Some of these recommendations are noted elsewhere in this report.
- 94 *ibid.*, at 202 and following.
- 95 See VISCOPY's press release of 24 October 2000, "Royalties flow to artists", relating to the distribution of monies received from Screenrights (available through VISCOPY's website at [www.viscopy.com](http://www.viscopy.com)).
- 96 See, for example, the information sheet produced by CAL entitled "Rights in artistic works, Statutory licences, and CAL", available on CAL's website at [www.copyright.com.au](http://www.copyright.com.au) and "Changes to payment for rights owners in artistic works" (1999) 8(3) *Off the Air* (Screenrights) 6.
- 97 Unlike the Copyright Act, the Designs Act requires registration for protection. Once a design has been registered for an initial 12 month period, it may then be protected for three further periods only, totalling up to 16 years.
- 98 In most cases a person who intends to make articles from a design (whether their own or somebody else's) should seek legal advice about the implications under copyright law and the Designs Act. There is more detailed information about the provisions in the Copyright Council's information sheet *Designs for functional articles*; see also IPAustralia's website at [www.ipaustralia.gov.au](http://www.ipaustralia.gov.au).
- 99 The situation is different for an artistic work registered as a design, which is for the surface of an article such as a fabric design.
- 100 Sections 74 and 77.
- 101 The circumstances in which a design is taken to be industrially applied are set out in Regulation 17 of the Copyright Regulations. The production of more than 50 articles, or one article manufactured in lengths or pieces, would result in the industrial application of a work reproduced by the article. It is open to a court to find that a design may have been industrially applied if fewer than 50 articles are made from it. The question of whether industrial application has taken place will depend largely on the nature of the article.
- 102 See section 10(1) of the Act. The safe course may be to register a sculpture or an engraving which is to be reproduced in articles.
- 103 This seems to open up the possibility of two "owners" competing over the same work. This could cause problems, especially in the commercial context, since either owner may want to grant an exclusive licence over the design to a third party, such as a manufacturer. There cannot be two "exclusive" licences in place at the same time without destroying the meaning of exclusivity. To overcome such a situation, both owners would presumably have to agree to a work being licensed, since any use of the work might infringe the copyright and the design monopoly.
- 104 A copy is available via the IPAustralia website at [www.ipaustralia.gov.au](http://www.ipaustralia.gov.au).
- 105 The display must be more than temporary.

- 106 If the sections exist to allow, for example, tourists to take photographs of public artworks, then the repeal of the provisions might be accompanied by a “fair dealing” exception which would allow, for example, private snapshots of artworks but would prevent commercial uses of copyright artworks.
- 107 Australian Copyright Council, *Artists & Copyright: a practical guide*, B68v7 (ACC, Sydney, July 1997) at 21.
- 108 loc. cit.
- 109 CLRC, *Simplification of the Copyright Act 1968: Part 1; Exceptions to the Exclusive Rights of Copyright Owners* (AusInfo, Canberra, 1998) at 153.
- 110 For an overview of these provisions, see the Copyright Council’s information sheet, *Educational institutions: introduction to copyright*, available on its website at [www.copyright.org.au](http://www.copyright.org.au). For more detailed information see the Copyright Council’s practical guides *Educational Institutions: Print Resources* and *Educational Institutions: Digital & AV Resources*.
- 111 To date, the various educational sectors have had agreements with Copyright Agency Limited (appointed by the Attorney-General to administer the schemes relating to literary, dramatic, musical and artistic works) as to what period of time will be a “reasonable time”.
- 112 Most educational sectors operate on the basis that periodically their member institutions will be sampled by CAL for what works are being photocopied, scanned or otherwise reproduced. This means that copyright owners only receive remuneration for use of their works under the various schemes when the use of the work shows up in a sample.
- 113 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Cracking down on copycats*, op. cit.
- 114 *ibid.*, Recommendation 4.
- 115 *ibid.*, Recommendation 20. The Committee recommended that the procedure in the Federal Magistrates Court should resemble that of the Small Claims court of the ACT or the Small Claims Division of the Magistrates Court of Tasmania.
- 116 For further information contact the Arts Law Centre of Australia (telephone: (02) 9356 2566; web: [www.artslaw.com.au](http://www.artslaw.com.au)).
- 117 For general information on parallel importation, see the Copyright Council’s information sheet *Importing copyright items*, available from its website at [www.copyright.org.au](http://www.copyright.org.au).
- 118 Copyright Law Review Committee, *The Importation Provisions of the Copyright Act 1968*, Australian Government Publishing Service, Canberra, 1988 at para 9; see also the final report of the Copyright Law Review Committee, *Computer Software Protection*, Commonwealth of Australia, Canberra, 1994 at para 11.18.
- 119 Copyright Amendment (Parallel Importation) Bill 2001.
- 120 For example, where those items are purchased by some third party as a remainder, or at a cheaper price than the item sells for in Australia.
- 121 Nonetheless, a majority of the Committee recommended that the Bill be enacted. Strong minority reports were delivered by members of the Committee belonging to the opposition parties, and given that minority parties, together with the Labor party, have the numbers to block legislation in the Senate, it is not clear whether the Bill will in fact be passed by Parliament.
- 122 There have been a number of instances and cases where sampling in the music industry has raised copyright issues: see, generally, Patrick Keyzer, “Protection of digital samples under Australian Intellectual Property Law” (1993) 4 *AIPJ* 127. For discussion in relation to four visual artists (Imants Tillers, Gordon Bennet, Tracey Moffat and Juan Davila), see Matthew Rimmer, “Four stories about copyright law and appropriation art” (1998) 3 *MALR* 180.
- In many cases, the methodology of appropriation is accompanied by parody. Note should, however, be made of the fact that parody does not provide an excuse or defence to a claim of copyright infringement under Australian law; this should be contrasted with laws of other countries, including European countries, and the operation in the United States of the “fair use” defence.
- 123 It may also be very difficult to quarantine the operation of any exception to the higher arts and crafts, and not have it being relied upon without aesthetic integrity for solely commercial ends – a particular problem with manufacturers of “Indigenous” tourist items such as T shirts, tea towels and beer holders.
- 124 Jane Ginsburg, “Authors and Users in Copyright” (1997) 45(1) *J. Copr. Soc’y* 1.
- 125 *Twentieth Century Music corp v Aiken* 422 US 151, 156.

## Book Reviews

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### **“Ownership of Rights in Audiovisual Productions: a Comparative Study” by Marjut Salokannel**

*Kluwer Law International. The Hague 1997*

ISBN 90-411-0415-1

The general rule that the author is the first owner of copyright is an assumption that has been challenged, in particular, by collaborative art forms such as film. Difficulties arise when a work is created through collective effort and where the lines between creativity and purely technical skill are unclear. It is these difficulties that face lawmakers addressing the issues of ownership and exploitation of rights in collaborative works, such as audiovisual productions. It is these problems that form the basis of the study undertaken by Marjut Salokannel.

Marjut Salokannel is a Researcher in the Department of Private Law at the University of Helsinki. Her book, *Ownership of Rights in Audiovisual Productions: a Comparative Study*, provides a detailed analysis of the relevant laws in civil and common law countries. The laws of the Nordic countries (Finland, Norway, Sweden, Denmark and Iceland) form the basis of the study. From this starting point, the author provides a comparison with other civil law regimes through an examination of the laws of Germany, Belgium and France, and with laws from the common law tradition through an examination of the legislation of the United Kingdom and the United States. Salokannel concludes that similar results have been reached under both traditions, despite fundamental differences in their approaches to the protection of intellectual and artistic endeavours.

The detailed structure of the book helps to clarify the comparison of the legal systems and the specific laws of different nations. As each issue is raised, the relevant details of the laws of respective countries are dealt with in turn.

The first section of the book provides an overview of the rapidly changing audiovisual environment and provides a plotted history of the ways in which legal and moral rights to filmic works have been constructed.

The second chapter provides a detailed examination of the concept of the “author” in general, and in particular, the ways in which the “author” of an audiovisual work has been determined. The author does this by addressing the ways in which “originality”, “authorship” and “audiovisual” have been defined in the different jurisdictions.

The third part of the book looks at ownership of rights in audiovisual works and the ways in which this ownership has been determined and regulated under the laws of the various countries selected for the study. The author focuses on Nordic countries and the role of the labour unions in the administration of rights and the effect this union structure has had on the development of a more expansive concept of the “author”. The rights of the performing artist are also considered in some

detail, as are moral rights. Moral rights are addressed with particular reference to the development of moral rights regimes in the UK and the US. The regulation of ownership of economic rights in audiovisual works is considered with particular focus on the ways in which rights are assigned to the producer. The practical details of assigning rights to audiovisual works in the various jurisdictions are also discussed.

Chapter 4 examines the impact of digitisation on the ownership of rights in audiovisual works. Salokannel points out that the digital environment creates new challenges for the legislators, by confusing the boundaries between the user and the creator.

Part 5 provides concluding remarks in which the author states that the traditional, individualistic notion of the “author” is no longer valid and proffers the audiovisual field as the prime example with which to illustrate this point. The author is pragmatic about the need for the producer to have the necessary rights with which to exploit an audiovisual work. That pragmatism is accompanied by an awareness of the value of ensuring that creators, particularly directors, are able to exercise their moral rights. The author sees the division of economic and moral rights in audiovisual productions as a sensible one – a differentiation that has developed under both civil and common law systems as a result of the practical demands of the audiovisual industry.

Salokannel’s book addresses the issues surrounding the rights of creators and producers of audiovisual works. The author provides a detailed account of relevant Nordic law and undertakes a thorough comparative study of the legislative regimes at work in civil and common law jurisdictions. Readers should be conscious of the fact that the book was first printed in 1997, and as such does not fully address recent developments of the laws in some countries.

*Cecilia Minogue*

## Current Issues in Film Law

*Edited by Mathew Alderson*

*Prospect Media 2001*

*ISBN: 1-86316-176-7*

“ Do you remember the first time you saw the flickering images of film? I do.”

With this, Justice Michael Kirby begins the preface to *Current Issues in Film Law*, reminding the reader that film is not merely a receptacle for legal conundrums and issues, but an art form that can affect the way we imagine and perceive the world; a part of our cultural life that is deserving of legal protection and consideration. Within the broader sphere of intellectual property, Justice Kirby considers the history of the film industry in Australia and emphasises the need for the law and lawyers to be up to date and responsive to technology.

*Current Issues in Film Law* meets that call for up-to-date analysis by delivering exactly what its title promises. Editor Mathew Alderson successfully brings together 12 contributors to discuss the law as it affects rightsholders, would-be rights holders, and users of film. While most of the articles focus on the effects of the recent Digital Agenda and moral rights amendments to the *Copyright Act 1968*, as a whole the book provides a broad examination of copyright and other areas of the law as they relate to the audiovisual industry by calling on historical, technological, philosophical and economic points of view.

In general, the contributors are Australian lawyers, specialising in various aspects of intellectual property and the arts. Other contributors complement this group with their professional experience in economics, information technology and the film industry.

The publication is a collection of articles which canvass a broad range of issues. Among these are moral rights, directors' copyright, the effects of technological advances, private copying, the use of artworks in film, rights management, and technological protection and circumvention measures.

In their respective articles, Delia Browne and Troy Gurnett discuss moral rights in light of the legislative amendments introduced by the *Copyright Amendment (Moral Rights) Act 2000*. Both writers focus on the new provisions as they relate to film and provide an analysis of the issues that the new laws may raise in practice. While Gurnett provides a succinct and practical “snapshot” of the provisions, Browne's article is a more in-depth study of the amendments and the process of reform. She traces the development of Australia's moral rights regime from the inception of moral rights in France and includes an overview of the “Film and Televisions Moral Rights Proposal” presented to the Attorney-General in March 1999. In particular, Browne looks at the contentious “waiver” issue and concludes that the new moral rights provisions, which require the consent of the author before an infringing use may be made, “represent a brave step in Australia's legislative history”, since unlike “... our common law compatriots, the UK and New Zealand, the Government did not waive the rights away by providing a large list of statutory exceptions ...”.

Two articles on the topic canvass the arguments for and against the introduction of a film directors' copyright into Australian law. The first, written by editor Mathew Alderson and graduate lawyer Troy Gurnett, examines the issues from the producer's point of view. The authors argue that it is not necessary to introduce a directors' copyright into Australian law, since Australian legislation

does not breach any international conventions by conferring copyright ownership on producers and since such a conferral of rights may be seen as inconsistent with the economic rationale that underlies Australian copyright law. The second article, by the Executive Director of the Australian Screen Directors Association, Richard Harris, provides insight into the history of the film industry in Australia and the effect the events of the past have had on ownership of copyright in films and the “authorial” role of the director. Harris emphasises the problems that arise because the director’s craft is not “written down” and because film is a collaborative work. Harris recognises that, in copyright, creativity is not enough. It must be shown that the person created the ultimate form in which that creative thought is embodied. To this end, it is argued that film directors have ultimate responsibility for the creative decisions that affect the end result and that it is their decisions that form the final product. Harris argues that directors should be granted copyright over the films they create for two reasons: symbolic and economic. Symbolically, copyright ownership would acknowledge the creative and authorial acts of film directors. Economically, such a conferral of rights would allow directors to benefit from remuneration provided by statutory schemes.

A third article, by English lawyer Duncan Poole, provides a historical overview of the changing role of the director, from the experiments of the Lumière brothers to the popular successes of directors such as Steven Spielberg and George Lucas. Poole emphasises creative vision and control as the elements that rightly place the film director in the position of author for the purposes of copyright. He discusses the authorial rights given to directors in the UK, where the producer and principal director are joint first owners of copyright in films.

Tara Gutman’s article, *Digital Roadkill: music clears the way for online film and television*, contemplates the online experience of the music industry as a platform from which to discuss the inevitable dissemination of film online. Gutman argues that the film and television industry can learn some valuable lessons from the litigious encounters of the music industry in the US. She considers new ways of distributing film and TV over the Internet and argues that copyright owners should join forces with those who control the technology, in order to maintain control over their work and avoid costly litigation.

David Brennan and Simon Lake discuss home copying of broadcasts in light of the introduction of digital television in Australia on 1 January 2001. The argument, as they see it, is not that users should be prevented from accessing works but that copyright owners should receive fair remuneration for that use. Their article discusses the approaches to private copying taken by the European Community and the US.

Peter Karcher considers the issues raised by the reproduction of artistic works in film. In discussing the potential problems brought about by an exception allowing incidental filming of artistic works, Karcher looks at the scope of the definition of “artistic work” and of the meaning of “incidental”.

Therese Cantanzariti provides a step-by-step guide to rights management in Australian films. She takes the reader through the process of production, teasing out the legal issues as they would arise in practice: from idea to title, to script, to other subject matter that may be incorporated into the film. While copyright represents a significant portion of the bundle of relevant legal issues, Cantanzariti looks at other pertinent laws, including trade practices and the *Australian Tobacco Prohibition Act 1992*.

As a legal practitioner specialising in information technology, Leif Gamertsfelder is well placed to provide a detailed analysis of things technical. In this instance, he provides an examination of the Digital Agenda amendments to the Copyright Act. In particular, he looks at the provisions that relate to technological protection measures, circumvention devices and electronic rights management

information. His article points out the anomalies created by the amendments, specifically in relation to the fair dealing exceptions.

Ross Jones is a commissioner of the Australian Competition and Consumer Commission (ACCC). First, his article looks at the role of competition law in relation to the market structure and practice of the film distribution and exhibition industries. Second, he considers the potential impact of liberalisation of current restrictions on parallel importation of copyright material. Such liberalisation represents the type of change to the Copyright Act which the ACCC strongly supports.

“Contestability and Copyright” is the title of David Brennan’s philosophical article on copyright, which discusses the general issues of property, economics, morality and politics before moving to the specifics of digitisation, fair dealing and parallel importation. Brennan concludes that copyright is a socially desirable form of property that serves to reward creative effort, which in turn promotes the vigour of a “vibrant democracy”.

The final article of *Current Issues in Film Law* is written by Adam Simpson and examines the provisions introduced by the *Copyright Amendment (Digital Agenda) Act 2000*. Specifically, Simpson considers the right of communication and the anti-piracy and anti-hacking laws as they relate to the audiovisual industry.

*Current Issues in Film Law* is an interesting collection of articles that is complemented by a table of cases and a well-organised index. It may act as a useful starting point for those researching the legal issues currently affecting the film industry and, perhaps more importantly, will make compelling reading for anyone with an interest in film and law.

*Cecilia Minogue*

## **Copyright Law & Practice Symposium: New rights, new obligations, new relationships**

### **Day 1: Thursday 22 November**

**Keynote address:**

**Copyright – Almost Perfect?**

His Honour Mr Justice Laddie  
High Court of England and Wales  
Visiting Fellow, Centre for Copyright Studies

**Session 1: Copyright and contract**

*CLRC Inquiry into Copyright and Contract*  
Professor Jim Lahore, Melbourne University  
and Mallesons Stephen Jaques,  
Chair, Copyright Law Review Committee

*Commodifying and Transacting Informational  
Property Through Contract*

Associate Professor Brian Fitzgerald,  
Head of the School of Law and Justice  
Southern Cross University

*Contracting Beyond Copyright: Some Efficiency  
Considerations*

Megan Richardson, Associate Professor  
Law Faculty, University of Melbourne

**Session 2: International treaty obligations:  
application in a new environment and future  
directions**

*Applying the three-step test in the digital  
environment*

Sam Ricketson, Barrister, Victorian Bar, and  
Professor of Law, University of Melbourne

*International developments in copyright*

Chris Creswell, Copyright Law Consultant  
Attorney-General's Department, Canberra

**Session 3: Legal and policy developments**

*A review of current legislative and policy  
developments*

Libby Baulch, Executive Officer, Australian  
Copyright Council

*A review of recent cases*

Michael Green, Barrister  
St James Hall Chambers, Sydney

**Dinner: Tattersalls Club**

Address: His Honour Justice Lindgren  
President, Copyright Tribunal

### **Day 2: Friday 23 November**

**Session 1: Authorisation liability: the new  
statutory formulation and its application to  
new forms of exploitation**

Kate Haddock, Partner, Banki Haddock Fiora

**Session 2: Technological protection measures,  
circumvention and the copyright  
implications of new technology**

*The application of copyright and defences to  
new technology*

John MacPhail, Baker & McKenzie

*Technological protection measures: a  
comparative perspective on Australian anti-  
circumvention laws*

David Lindsay, Research Fellow, Law School,  
University of Melbourne

**Session 3: Moral rights: contracting out,  
reasonableness and industry practice**

*Consents and waivers*

Warwick Rothnie, Partner, Mallesons Stephen  
Jaques

*Moral rights in practice: how is it working?*

Panel includes:

Susan Bridge, Executive Officer, Australian  
Publishers Association

Rick Barton, Legal Counsel, Royal Institute of  
Architects

Shane Simpson, Simpsons Solicitors

Susanne Larson, Acting Executive Director,  
Screen Producers Association of Australia

**Closing address**

Caroline Morgan

Vice-President, Copyright Society of Australia  
Corporate Counsel, Copyright Agency Limited

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## Inside

**McDonald**, Current and  
Emerging Copyright Issues for  
the Visual Arts

**Book Reviews**

**Copyright Symposium**