

Report for Visual Arts Industry Guidelines Research Project: copyright and moral rights

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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.

Many of the issues raised in this report could well be the subject of detailed reports in their own right. That is not, however, the intention of this report, which aims rather to give a snapshot of issues relating to copyright and moral rights as at 15 June 2001.

To place the issues in context, we commence with a brief overview of copyright and moral rights.

Copyright and the visual arts: an overview of the existing law

Copyright is a set of rights, listed in the Copyright Act 1968 (Cth) and relevant court decisions, which exists for a certain period of time in a range of different types of material, including paintings, drawings, sculptures, craft works, photographs, engravings and other artistic works. Films, videos, sound recordings and textual material are also among the types of material which copyright protects.

The Copyright Act also sets out when people other than the copyright owner can use copyright material without permission.

The Copyright Act has been amended a number of times since 1968, to bring it up to date with evolving technology.¹

Nature and purpose of copyright

In a lecture in 1998, a respected judge and copyright commentator, noted that copyright, together with other areas of law which protect intellectual or creative endeavour, depend on “three sacred principles”:²

¹ For example, in 2000, the Act was amended by the passing of the Copyright Amendment (Digital Agenda) Act to ensure that the Act was able to be applied to dealings with copyright material using digital technologies and communication systems, including the Internet, and the Copyright Amendment (Moral Rights) Act to ensure that creators are attributed and have the “integrity” of their work respected.

² Mr Justice Laddie, Copyright: Over-strength, Over-regulated, Over-rated?, [1996] 5 *EIPR* 253.

- the principle that “Thou shalt not steal”;
- the concept that matter created by the brain may be owned; and
- the principle of reward.

Under the Australian Copyright Act, copyright is defined to be ‘personal property’. In practice, copyright law allows industries based on the creation of copyright material to develop, and gives individual creators and investors working within those industries power to find employment and to invest.

The Australian approach to copyright, and to intellectual property rights generally, is much more pragmatic and commercially-oriented than the approach adopted in Continental Europe and countries whose legislation has been modelled or influenced by European rather than British approaches to intellectual property law. As a general comment, the Continental European approach sees a creator’s intellectual property rights as falling squarely within the scope of his or her human rights, while Anglo-influenced legislation is much more concerned with balancing such rights against commercial and other public interests. The distinction is particularly noticeable in relation to the types of exceptions that are allowed under Anglo systems in comparison with exceptions under European-influenced systems.

The rights of copyright owners in visual artworks

If you own copyright in an artistic work, you are the only person entitled to:

- reproduce the work (for example by photographing, photocopying, copying by hand, filming, scanning into digital form or printing);
- publish the work (that is, to make the work public for the first time); and
- communicate the work to the public (for example via email, television or the Internet).

How you get copyright protection

Copyright is a free and automatic form of protection: the legal rights which comprise copyright come into being at the same time as the visual artwork is created. Thus drawing an illustration or fashioning a sculpture creates not only the artwork but also the copyright in that artwork.

There is no registration procedure for copyright in Australia, and while artists and other copyright owners are encouraged to put the “copyright notice” on their work (for example, “© Anne Artiste 2001”), there is no legal obligation to do so, and a work is protected equally under Australian law whether the work carries the notice or not.

International protection

Australia is a party to a number of international treaties dealing with copyright protection. These are the:

- Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) – about 133 countries;
- General Agreement on Tariffs and Trade (GATT), which includes the agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) – about 132 countries;
- Universal Copyright Convention (UCC) – about 95 countries;
- International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention) – about 57 countries;
- Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Phonograms Convention) – about 57 countries.

In addition, Australia has bilateral treaties relating to copyright with both Singapore and Indonesia.

The treaties require two important things:

- ^ minimum standards of protection; and
- protection for copyright material from all the countries which are party to the treaty (“national treatment”).

As a result of a number of international conventions, visual artworks created overseas are generally protected in Australia, and Australian visual art is generally protected overseas.³

How long copyright lasts

Generally, copyright protection begins at the time the relevant material is created, and lasts until fifty years after the end of the year in which the person who created the material dies. This general rule applies whether or not the creator owns copyright when they die, or ever owned copyright.⁴

First ownership of copyright

Generally, the creator is the first person to own copyright in what he or she has created.⁵

³ For more information, see the information sheet *Copyright protection in other countries*, available from the Australian Copyright Council's website at www.copyright.org.au for further information.

⁴ There are a number of exceptions to the “life + 50” rule: for further information, see the Australian Copyright Council's information sheet *Duration of copyright*, available from the Council's website at www.copyright.org.au for further information. See also below under the heading “Duration of copyright” concerning possible amendments in this area.

⁵ There are a number of exceptions to this rule. For further information, see the Australian Copyright Council's information sheet *Ownership of copyright* available from the Council's website at www.copyright.org.au.

Dealing with copyright

A person who owns copyright can choose to “assign” (that is, to transfer) either all or any part of his or her copyright to someone else. To be fully effective, an assignment of copyright must be in writing and must be signed by the person transferring the copyright.

A person who owns copyright can also choose to “license” either all or any part of his or her copyright to someone else.⁶ Some types of licence must be in writing to be legally effective, but it is advisable for all agreements about copyright to be in writing, so that all parties are clear as to what they may or may not do with the relevant material.

Both assignments and licences of copyright may be limited: not only may a licence or assignment grant rights in relation to part only of the copyright, but the licence or assignment may be limited by reference, for example, to where or for how long the material may be used. A licence or assignment might, for example, allow a person to reproduce an illustration only onto T shirts, for distribution within Victoria only, and for a period of five years, all other rights remaining with the copyright owner.⁷

In many cases, copyright is or may be collectively licensed on behalf of copyright owners by “collecting societies”. Collecting societies which are relevant in relation to craft workers and the visual arts are VISCOPY and Copyright Agency Limited (CAL).⁸ In brief, VISCOPY licenses works on behalf of members on a case by case, voluntary, basis, while CAL offers blanket licences to commercial organisations, document delivery services, and so on, and also administers various schemes in the Act which allow educational institutions and State, Federal and Territory governments to use copyright material.⁹

Moral rights

The Copyright Act was amended in late 2000 to give creators of copyright material, including visual artists, a more complete set of *personal* rights than they had previously had under the Act. These personal rights belong to the creator of the material, whether or not the creator owns copyright or, indeed, ever owned copyright. The rights comprise:

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- ⁶ A licence is a permission for someone else to use the copyright material in the ways allowed under the licence.
- ⁷ For further information, see the Australian Copyright Council's information sheet *Assigning and licensing rights* available from the Council's website at www.copyright.org.au. See *intra* for the sorts of considerations which may be relevant to the way copyright is assigned or licensed in particular contexts. See also the detailed discussion papers and practical guides produced by the Australian Copyright Council, including *Artists & Copyright*, *Community Arts & Copyright*, *Indigenous Arts & Copyright* and *Multimedia: Licensing Content*.
- ⁸ For further information, see the Australian Copyright Council's information sheet *Copyright Collecting Societies*, available from the Council's website at www.copyright.org.au.
- ⁹ Note that craftspeople or visual artists who prefer to can have VISCOPY collect any monies due to them from CAL on their behalf. VISCOPY also collects monies from Screenrights, a collecting society that administers the scheme in the Act under which educational institutions may copy material from television or radio without permission, provided payment is made. (This service is relevant to those artists and craftspeople whose work is used in television programmes, including movies.)

- the right to be attributed;
- the right not to have work falsely attributed; and
- the right to have the integrity of the artist's work respected (that is, not to have the work subjected to derogatory treatment).¹⁰

There are a number of situations in which these rights do not have to be respected. We discuss the defences which are specific to art and craft works later in this report. In addition, there are two general defences to an infringement of moral rights: the consent of the creator, and that the action was reasonable in all the circumstances.

Current and emerging issues in copyright and moral rights

What is “art” for copyright purposes?

To be protected by copyright, an art work 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 ...¹¹

In addition, it is generally thought that an artwork must have a human author.¹²

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.¹³ 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 19th century concepts of art.

¹⁰ For further information, see the Australian Copyright Council's information sheet *Moral Rights*, available from the Council's website at www.copyright.org.au.

¹¹ Section 10(1), Copyright Act.

¹² 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.

¹³ The current definitions of literary and dramatic works are open-ended; there is no definition of “musical work”.

The Copyright Law Review Committee, particularly in Part 2 of its report into the simplification of the Copyright Act,¹⁴ does make 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”.¹⁵ 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”,¹⁶ 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”;¹⁷
- 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;¹⁸
- 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”.¹⁹

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

¹⁴ 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.

¹⁵ *ibid* at 2.03; see also chapter 5 of the report generally.

¹⁶ *Coogi Australia Pty Ltd v Hysport International Pty Ltd* (1998) 41 IPR 593; see www.coogi.com.au for examples of the types of garments at issue in the case.

¹⁷ *ibid.*, at 597-598.

¹⁸ *Sega Enterprises Ltd v Galaxy Electronics Pty Ltd* (1997) 37 IPR 462.

¹⁹ Full Federal Court, *Powerflex Services Pty Ltd v Data Access Corporation* (1997) 37 IPR 436 at 456; an appeal was later dismissed by the High Court (reported as *Data Access Corporation v Powerflex Services Pty Ltd* (1999) 45 IPR 353).

on computer software protection, in many cases, where a computer program is used to create material it might be viewed as merely a tool of a human author.²⁰

However, in that report and again in Part 2 of its report on the simplification of the Copyright Act,²¹ the CLRC noted that at some point a court might not be so readily able to assimilate the use of a computer to the use of a tool such as a paintbrush or typewriter.

The “Random Art” web site contains the following description of how artworks on that site are generated:²²

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)?²³

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

²⁰ 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.

²¹ See particularly paras 3.40-3.44.

²² The URL is 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.

²³ 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 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).

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,²⁴ or were someone to market postcards or posters of that or other of his preserved animal works.²⁵

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”.²⁶ 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.²⁷ The scene was not a “collage” (there had been no element of sticking two or more things together);²⁸ 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 cases, 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).²⁹ In another case, a half-court tennis court was also found to be a “building” and therefore protected: it comprised

²⁴ Hirst’s work entitled *The Physical Impossibility of Death in the Mind of Someone Living* was/is part of the Sensation exhibition.

²⁵ We discuss below how copyright might apply to Damien Hirst’s unpreserved animals.

²⁶ *Creation Records Ltd v News Group Newspapers Ltd* (1997) 39 IPR 1.

²⁷ The court also held that the installation was not a “dramatic work” because it was static.

²⁸ 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.

²⁹ *Vincent v Universal Housing Co Ltd* [1928-1935] MacG Cop Cas 275, decided under the Copyright Act 1911 (UK).

a concrete slab with special markings on it, and with net-posts set into it at selected positions.³⁰

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,³¹ and therefore it may well be that, in particular cases, a court would come to a different conclusion to 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.³²

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”.³³ This is particularly likely where the performance involves some type of action or sequenced activity.³⁴ 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 either 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.³⁵

³⁰ *Half-Court Tennis Court Pty Ltd v Jeffrey H Seymour* (1980) 53 FLR 240 (SC(Qld)).

³¹ *Creation Records Ltd v News Group Newspapers Ltd* (1997) 39 IPR 1 at 5

³² 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.

³³ 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.

³⁴ 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.

³⁵ For a brief summary, see www.abc.net.au/rn/arts/atoday/stories/s146937.htm.

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.³⁶

Biological, chemical or other “natural process” art

Similar issues to those discussed above arise in the context of art projects and art works 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)³⁷ and “The Tissue Culture and Art Project” (initiated in 1996):³⁸

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 might in each case 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

³⁶ 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.

³⁷ This work is/was also part of the *Sensation* exhibition.

³⁸ See “Manifesto” available at www.tca.uwa.edu.au. See also 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.)

upon or carved by the process employed), or if two dimensional, a “drawing”, “engraving” or “work of artistic craftsmanship”.³⁹

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 re-constructing a work acted upon by a biological, chemical or other natural process had reproduced the first work and therefore infringed copyright.⁴⁰

Use of art on-line

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”.

³⁹ 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”, but 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).

⁴⁰ 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/), 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.”

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 web site 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 on-line 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.⁴¹

Legal deterrence to 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.⁴²

Licensing issues

In our view, licensing of copyright material on-line raises different issues to the issues which are relevant to licensing of art and craft items off-line (for example, onto postcards,

⁴¹ 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”.

⁴² For detailed information on the provisions see the Copyright Council’s practical guide *Websites & Copyright* (ACC, Sydney, 2001).

T-shirt or jig-saw puzzles, or in relation to other multiple reproductions), and it cannot yet be said that there are any standards emerging.⁴³

Questions which can be raised in relation to licensing copyright material for use on-line include:⁴⁴

- what term is appropriate (given the on-going development of on-line 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;⁴⁵
- 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 on-line will result in agreements which appropriately protect and remunerate artists and craft practitioners whose work is being used on-line 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”

⁴³ 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 available from the Arts Law Centre of Australia relating to the visual arts and craft sector (see www.artslaw.com.au).

⁴⁴ 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 on-line licensing.

⁴⁵ 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.

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 1999.⁴⁶

We understand that an Interdepartmental Committee continues to work on this issue, as does a reference group set up by ATSIC.⁴⁷

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”.⁴⁸ A few weeks later, the 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.⁴⁹ Senator Ridgeway’s proposed amendments were not passed. However, the Government stated 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 the Government’s response to Senator Ridgeway.

⁴⁶ 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. 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).

⁴⁷ 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 also delivered by Mr Preston Thomas, a Commissioner of the Aboriginal and Torres Strait Islander Commission.

⁴⁸ 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.

⁴⁹ See Senator Ridgeway’s speech in the senate on 7 December 2000, available via www.aph.gov.au.

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.⁵⁰

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 “copy cat” 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 both in relation to original works and items containing Indigenous material which is made under licence.⁵¹

‘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:⁵²

... 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:⁵³

⁵⁰ 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 Organisation and UNESCO see www.wipo.int/traditionalknowledge/introduction/index.html.

⁵¹ Further information is available from NIAAA’s web site at: 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.

⁵² See www.niaaa.com.au/copyright_qa_sheet.html.

⁵³ loc. cit.

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 are 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 Australian 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.⁵⁴

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

One of the controversies which accompanied the passage of the moral rights legislation through Parliament was the issue of whether creators should be able to waive their moral rights for the benefit of those who want to use their work, such as galleries, publishers or advertisers.

In its final form, the Act does not state whether creators may or may not waive their moral rights. In our view, the Act should be amended to state expressly that waiver is prohibited, as there may be arguments that the lack of such a prohibition would not stop

⁵⁴ 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 Jun 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.

an artist or craft practitioner, under general legal principles, waiving his or her moral rights.

Also, the Act allows for creators to “consent” to things done or not done that would otherwise infringe their moral rights. 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.⁵⁵

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,⁵⁶ 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.

“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.⁵⁷

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.⁵⁸

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

⁵⁵ 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.

⁵⁶ Section 195AWB.

⁵⁷ 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.

⁵⁸ 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.

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).⁵⁹

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 the place 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 may 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, stain 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.

In our view, however, from the point of view of artists and craft practitioners, where a work is to be destroyed, the legislation should be amended to give the creator an opportunity to remove the work 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

⁵⁹ 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.

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 creator⁶⁰ was, and where he or she is located.

Where the creator⁶¹ 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;⁶² 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 affixed to it.

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.

As noted above, in our view, where a building which contains art or craft items is going to be demolished, the legislation should be amended to give the artist or craft practitioner an opportunity to remove his or her work, whether or not the work is “moveable”.

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

⁶⁰ Or the creator's representative.

⁶¹ Or the creator's representative.

⁶² Section 195AT(2) and (2A).

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.⁶³

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.⁶⁴

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 operate.

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:⁶⁵

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.

⁶³ See, for example, Article L. 121-4 of the French Copyright Law.

⁶⁴ See Article 6 bis of the Berne Convention.

⁶⁵ Claude Masouyé, *A Guide to the Berne Convention* (WIPO, Geneva, 1978) at 90-91.

Countries which have a resale royalty right in their copyright law include all but four of the countries which make up the European Union.⁶⁶ 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.⁶⁷ 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 2001.⁶⁸

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.⁶⁹ 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, 70 years after the death of the artist).

In Part 2 of its *Report on the Simplification of the Copyright Act*, 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.⁷⁰

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.⁷¹ 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

⁶⁶ Austria, Ireland, the Netherlands, and the United Kingdom do not currently provide a resale royalty right.

⁶⁷ 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. 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 fifteen year exemption from the application of any Directive to harmonise droit de suite laws throughout member states of the European Community.

⁶⁸ In the countries which currently provide for the right, we understand that it is administered by artists' collecting societies similar to Australia's VISCOPY.

⁶⁹ 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.

⁷⁰ CLRC, *Simplification* report, Part 2, op. cit., para 4.53.

⁷¹ *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).

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.⁷²

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 \$100,000.⁷³ 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 that they sell.⁷⁴

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:⁷⁵

...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.

⁷² 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*, (Sydney, Australian Copyright Council, 1989: out of print, but held by a number of libraries).

⁷³ See 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.

⁷⁴ 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”.

⁷⁵ 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/I/3)., para 113.

WIPO also proposed that screen display in public should be distinguished from the public performance right. Although both share an ephemeral characteristic:⁷⁶

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:⁷⁷

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.⁷⁸

Countries which are members of the European Union grant rental rights to a wider number of copyright owners.⁷⁹ 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".⁸⁰

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.⁸¹

⁷⁶ *ibid.*, para 114.

⁷⁷ Section 3(1)(g).

⁷⁸ 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.

⁷⁹ Directive 92/100/EEC.

⁸⁰ Article 1.2, Directive 92/100/EEC.

⁸¹ 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

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.⁸²

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 for record purposes 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 than 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 fifty years, copyright in photographs taken before 1 May 1969⁸³ lasts for fifty 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 of 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 their 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.

is not paid. Rather, his or her right is a claim for remuneration against the owner of the right at the relevant time.

⁸² 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.

⁸³ The date on which the current Act came into operation.

The reason for this is that the WIPO Copyright Treaty of 1996⁸⁴ 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 view of placing Australia in a position to be able to accede to and ratify that treaty. However, before Australia can ratify and accede to the treaty, it will have to amend the current rule as to duration of copyright.

Extension of the general term of copyright to 70 years

In many countries, copyright lasts for longer than in 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 seventy years. The United States of America amended its law and generally extended the period of copyright protection to life plus 70 in 1998.⁸⁵

In Australia, the majority of the Copyright Law Review Committee, in the second part of its report *Simplification of the Copyright Act (1968)* recommended that copyright and moral rights remain fifty 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).⁸⁶

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.⁸⁷

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

⁸⁴ For information on this treaty see the Copyright Council’s information sheet *digital Agenda Amendments*, available on its website at www.copyright.org.au.

⁸⁵ 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.

⁸⁶ CLRC Simplification Part 2, para 5.104.

⁸⁷ Intellectual Property and Competition Review Committee, *Review of intellectual property legislation under the Competition Principles Agreement*, at 84.

Copyright Council's submission to the Committee of Inquiry into Folklife in Australia described the concept as follows:⁸⁸

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 twenty 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.⁸⁹ For example, in France, Law 46:2196 of 1946 set up a National Literary Fund to collect, after copyright had expired, such royalties as had been payable to authors and their heirs and successors 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.⁹⁰

First ownership of copyright

The general presumption in the Copyright Act is that the person who creates an artistic work will be the first owner of copyright. The operation of the general presumption may be altered by the agreement of the creator – for example, an artist can agree that someone who commissions him or her to create an artistic work will be the first owner of copyright in that work when it comes into being.

There are, however, a number of exceptions to the general presumption, which means that the artist will not be the first owner of copyright in what he or she creates unless *he or she* can gain the agreement of the party for whom he or she is creating the work.

One of the exceptions applies 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

⁸⁸ Committee of Inquiry into Folklife in Australia, op. cit., at 264

⁸⁹ *ibid.*, at 265.

⁹⁰ *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 both 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.

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”.⁹¹

also re portraits and engravings – in guide but should also be here

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.⁹²

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).⁹³

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:⁹⁴

- the report of the Copyright Law Review Committee on the jurisdiction of the Copyright Tribunal;⁹⁵ and

⁹¹ Intellectual Property and Competition Review Committee, *op. cit.*, at 114.

⁹² For detailed information on the societies, see Shane Simpson, *Review of Australian Collecting Societies* (AGPS, Canberra, 1995), available via www.dcita.gov.au; see also the websites of the various collecting societies.

⁹³ 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, to organisations other than government or educational institutions).

⁹⁴ The reports are inter-connected 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.

⁹⁵ *ibid.*

- the report of the Intellectual Property and Competition Review Committee, which reviews intellectual property legislation under the Competition Principles Agreement.⁹⁶

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 is either reproduced or communicated under the educational and government schemes is identified and distributed back 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.⁹⁷

In December 2000, a report by the CLRC into the jurisdiction and procedures of the Copyright Tribunal was published.⁹⁸ 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.⁹⁹

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.¹⁰⁰ 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.¹⁰¹

⁹⁶ Intellectual Property and Competition Review Committee, *op. cit.*

⁹⁷ 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/.

Recent applications determined by the Tribunal include applications such as *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).

⁹⁸ CLC, *The Jurisdiction and Procedures of the Copyright Tribunal*, *op. cit.*

⁹⁹ *ibid.*, para 10.16.

¹⁰⁰ *ibid.*, para 11.12.

¹⁰¹ *ibid.*, para 11.129.

In relation to “input arrangements” (that is, the terms and conditions of membership of collecting societies, including issues between members and the society 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.¹⁰²

Report of the Intellectual Property and Competition Review Committee, Review of intellectual property legislation under the Competition Principles Agreement

The recommendations of the Intellectual Property and Competition Review Committee in relation to the activities of collecting societies include:¹⁰³

- 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 either 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 notes that if certain changes it recommends to trade practices legislation is adopted, then collecting societies would have to seek authorisation from the ACCC for any activities which fall within the scope of certain prohibitions in the Trade Practices Act relating to lessening competition.¹⁰⁴

The relationship of VISCOPY to CAL and to Screenrights

There have been ongoing discussions between VISCOPY and CAL and between VISCOPY and Screenrights as to the collection and distribution by VISCOPY of monies relating to members works collected under the statutory schemes.¹⁰⁵

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.¹⁰⁶

¹⁰² *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.

¹⁰³ 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.

¹⁰⁴ *ibid.*, at 202 and following.

¹⁰⁵ 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 site at www.viscopy.com).

The 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).¹⁰⁷

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.¹⁰⁸

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.¹⁰⁹ 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”.¹¹⁰ A design is “industrially applied” if more than 50 articles are made from it.¹¹¹ 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.¹¹²

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

¹⁰⁶ 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 and “Changes to payment for rights owners in artistic works”, 1999) 8(3) *Off the Air* (Screenrights) 6.

¹⁰⁷ Unlike the Copyright Act, the Designs Act requires registration for protection. Once a design has been registered for an initial twelve month period, it may then be protected for three further periods only, totalling up to sixteen years.

¹⁰⁸ 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 available in the Copyright Council’s information sheet *Designs for functional articles*; see also IPAustralia’s website at www.ipaustralia.gov.au.

¹⁰⁹ 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.

¹¹⁰ Sections 74 and 77.

¹¹¹ 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.

¹¹² 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.

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, and AAA.

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).¹¹³

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.¹¹⁴

Miscellaneous weaknesses in the current legislation

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

Miscellaneous provisions concerning 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 display¹¹⁵ may be photographed, depicted in a painting or drawing, filmed or included in a television broadcast without

¹¹³ 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. Presumably, to overcome such a situation, both owners would have to agree to a work being licensed, since any use of the work might infringe the copyright and the design monopoly.

¹¹⁴ A copy is available via the IPAustralia website at www.ipaustralia.gov.au.

¹¹⁵ The display must be more than temporary.

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.

From a policy point of view, 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. In our view, the provisions should be repealed.¹¹⁶

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 sketches of artworks, or at least not doing so for commercial purposes.¹¹⁷ 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.¹¹⁸

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. Nonetheless, in our view section 67 should be repealed, to bring the rights of owners of copyright in artistic works into line with the rights of other copyright owners.

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

¹¹⁶ 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.

¹¹⁷ Australian Copyright Council, *Artists & Copyright: a practical guide*, B68v7 (ACC, Sydney, July 1997) at 21.

¹¹⁸ loc. cit.

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.¹¹⁹

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”.¹²⁰

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”.¹²¹

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 see 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 on-line market..¹²²

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 on-going 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.

¹¹⁹ CLRC, *Simplification of the Copyright Act 1968: Part 1; Exceptions to the Exclusive Rights of Copyright Owners*, (AusInfo, Canberra, 1998) at 153.

¹²⁰ 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. For more detailed information see the Copyright Council’s practical guides *Educational Institutions: Print Resources* and *Educational Institutions: Digital & AV Resources*, op. cit.

¹²¹ 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”.

¹²² Most educational sectors operate on the basis that periodically their member institutions will be sampled by CAL for what works are being, for example, 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.

In November 2000, the House of Representatives Standing Committee on Legal and Constitutional Affairs published a report on enforcement of copyright in Australia.¹²³ 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;¹²⁴
- 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, at its own expense, inquiries into any aspect of a matter; and it has the ability to provide staff to assist parties.¹²⁵

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.¹²⁶

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.¹²⁷ The Copyright Law Review Committee, in its 1988 report on parallel importation, noted as follows:¹²⁸

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.

¹²³ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Cracking down on copycats*, op. cit.

¹²⁴ *ibid.*, Recommendation 4.

¹²⁵ *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.

¹²⁶ For further information contact the Arts Law Centre of Australia (telephone: (02) 9356 2566; web: www.artslaw.com.au).

¹²⁷ 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.

¹²⁸ 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.

At the time of writing, however, a Bill was proceeding through the House of Representatives to wind back the ability of many Australian copyright owners to control the importation of items containing their material.¹²⁹

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.¹³⁰

The Senate Standing Committee on Legal and Constitutional Affairs recently tabled a report on the Bill, which was highly critical of the methodology and interpretation of statistics shown in some of the submissions to government which were most in favour of winding back the ability of Australian copyright owners to control parallel importation.¹³¹

In our view, the exclusive right to reproduce a work in Australia (as granted by the Copyright Act) is devalued if items containing the work can be imported by others without permission; other people unfairly benefit from the copyright owner's investment in the work, and the copyright owner's return from that investment is reduced. Also, the Bill would also remove the basis for trading in rights for Australia as a separate territory.

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.¹³²

Should the law be amended to give legislative approval to appropriation art generally? In our view, no. Copyright law currently protects artists and craft practitioners. It then

¹²⁹ Copyright Amendment (Parallel Importation) Bill 2001.

¹³⁰ 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.

¹³¹ 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.

¹³² There have been a number of instances and cases where sampling within 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.

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 their 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.¹³³

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.¹³⁴

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:¹³⁵

[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.

¹³³ 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.

¹³⁴ Jane Ginsburg, “Authors and Users in Copyright” (1997) 45(1) *J. Copr. Soc’y* 1.

¹³⁵ *Twentieth Century Music corp v Aiken* 422 US 151, 156.

In our view, the second approach is to be supported as consistent with the spirit and provisions of the international treaties, and as ultimately working in the interests not only of creators but the public as a whole.