Moral rights

Moral rights protect the personal relationship between a creator and their work even if the creator no longer owns the work, or the copyright in the work. Moral rights concern the creator's right to be properly attributed or credited, and the protection of their work from derogatory treatment.

Introduction

Moral rights are personal rights contained in the *Copyright Act 1968* that connect creators to their work. Moral rights exist in relation to artistic, literary, dramatic and musical works and films but not sound recordings. Some performers also have limited moral rights in certain live or recorded performances. This information sheet provides basic information on moral rights and their significance for creators and authors other than performers. For more information on performers' rights see the Arts Law information sheet, Performers' rights.

Moral rights are distinct from the economic rights included in copyright. Thus an employed artist who does not own copyright in the visual artworks created as part of his employment nevertheless has moral rights in those artworks. A musician who has sold his copyright to a record label still has moral rights in his musical compositions.

What are moral rights?

Moral rights arise automatically under the Copyright Act. There are three types of moral rights:

- **Right of attribution:** this is the right of an author to be identified and named as the author of his/her work;
- **Right against false attribution:** this is the right of an author to stop someone else being credited as the author of their work; and
- **Right of integrity:** this is the right of an author to ensure that his/her work is not subjected to derogatory treatment which is any act in relation to the work that is in any manner harmful to the author's honour or reputation.

"Derogatory treatment" in relation to an artistic work is defined in the Copyright Act as:

"(a) the doing, in relation to the work, of anything that results in a material distortion of, the destruction or mutilation of, or a material alteration to, the work that is prejudicial to the author's honour or reputation; or

(b) an exhibition in public of the work that is prejudicial to the author's honour or reputation because of the manner or place in which the exhibition occurs; or

(c) the doing of anything else in relation to the work that is prejudicial to the author's honour or reputation."

Who owns moral rights?

The creator of an artistic, literary, dramatic or musical work owns the moral rights in that work. For information on what is an artistic, literary, dramatic or musical work, see Arts Law's information sheet Copyright. The principal director, principal producer and principal screenwriter of a film each have moral rights in that film.

Only individuals can have moral rights so if the film producer is a corporation, it has no moral rights in the film. However a group of individuals may all be able to claim moral rights as co-creators.

Moral rights cannot be bought or sold or given away; however after the creator passes away, the moral rights can be exercised by the personal representative of the creator, for example, the executor or administrator of the creator's estate.

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Duration of moral rights

The duration of moral rights depends on the nature of the moral right and the nature of the creative work.

The moral right of attribution and the moral right against a false attribution all continue in force until copyright in the artistic, literary, dramatic or musical work or film expires – usually 70 years following the creator's death.

The moral right of integrity in an artistic, literary, dramatic or musical work also continues in force until copyright in the work expires; however the moral right of integrity of a cinematograph film only continues for the lifetime of the of the director, producer or screenwriter and ceases upon death.

The duration of performers' moral rights is quite different. See the Arts Law information sheet, Performers' rights.

When can moral rights be ignored?

In Australia, there is no need to "assert" your moral rights in order to enforce them. However, this is required in some other countries, including the United Kingdom and New Zealand. If your work is likely to be sold or distributed in these countries, you should include a clause in your contracts that formally states that you assert your moral rights.

In principle, any act which is contrary to an author's moral rights, for instance a failure to attribute the author or a derogatory treatment of the author's work, is considered a moral rights infringement.

There is, however, no moral rights infringement if:

- the author has consented to the action or omission that would otherwise infringe moral rights; or
- the defence of reasonableness or an exception applies.

Consent regime

A creator can consent in writing to specific actions or omissions which would, in the absence of consent, amount to an infringement of his or her moral rights. This is common in the area of literary works created within the course and scope of employment, where the employee consents not to be attributed as the author of a text (e.g. the contract of employment for an employed music teacher might state that the employee 'consents' not to be attributed as the author of compositions created for teaching purposes and to changes made by other teachers).

In some circumstances it may be necessary or appropriate for a creator to consent to certain acts or omissions which might otherwise be considered a breach of moral rights. A graphic artist may be required to consent to changes and modifications to a website design or logo he has created for a business. However it is important that this consent is not so broad that it allows a third party too much scope to change your work or not to acknowledge you. A choreographer commissioned to create a dance for a major performing company should be very concerned if the contract requires her to consent (effectively agree) that there is no obligation whatsoever to acknowledge her as the creator when the work is performed publicly.

Terms are commonly drafted into contracts with creators setting out the scope of the 'consent' which the creator is giving. Creators should always carefully consider any consent and seek advice if at all uncertain of the terms of the consent. In particular, Arts Law recommends that creators be wary of any term stating that they "waive" (give up) their moral rights entirely. Although the Copyright Act does not specifically allow for the "waiver" of moral rights, such a term may be interpreted as a wholesale consent in writing to all future infringement of their moral rights.

In relation to film and television production, there is an 'Industry Accord on provisions which by consent may be incorporated in contracts' (**Industry Accord on Moral Rights**). The Industry Accord on Moral Rights is a voluntary Australian film industry standard that is available for download from the Australian Directors Guild website and which acknowledges the moral rights

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of the creators of the film and the script, but sets out a series of acts to which they consent so that the producer has the flexibility it needs to commercialise and exploit the film. It also provides a standard process for the producer to obtain the consent of the director and scriptwriter to other material alterations to the film which the producer wishes to make.

Defence of reasonableness

A third party who does not acknowledge the creator of the work or who subjects the creator's work to derogatory treatment (such as by changing or destroying the work) will nevertheless not be held to have breached the creator's moral rights of attribution and integrity "if it was reasonable in the circumstances".

There is no defence of reasonableness to a claim of breach of the moral right against false attribution (crediting someone else as the author of your creative work).

A number of factors are used to determine whether a failure to attribute or an act amounting to derogatory treatment is reasonable in the circumstances, such as the nature of the work, its purpose, the manner and context in which it is used, any relevant industry practice, or any practice contained in a voluntary code of practice, as well as the context in which it is created. For example, it is common not to attribute the author of a text written by an employee, for example internal guidelines, sample contracts, information sheets. In such circumstances, the copyright material is attributed to the employer entity rather than to the individual or individuals who actually did the drafting. It is also reasonable not to acknowledge the composer of the soundtrack or writer of the screenplay or the director of a film in promotional trailers and advertising for the film.

Because the test of reasonableness is different in every context, and parties may argue over what is the relevant industry practice, Arts Law recommends that contracts dealing with the creation, sale or use of an artistic, literary, dramatic or musical work or film set out clearly how the creator should be acknowledged and provide for an appropriate process to manage any changes to the work that may possible be derogatory treatment of the work. Arts Law's template contracts contain clauses for this purpose.

Notification procedures for artistic works

The Copyright Act allows certain acts which would otherwise constitute an infringement of the moral right of integrity if certain notification requirements are followed.

For example, the Copyright Act states that the owner of a moveable artistic work may destroy it without infringing the creator's moral right of integrity in that artistic work if they first gave the author, or a person representing the author, a reasonable opportunity to remove the work from the place where it was situated.

In relation to artistic works that are affixed to or form part of a building, the Copyright Act provides for a process that should be followed by the owner of the building in relation to any change in, or the relocation, demolition or destruction of, such sculptures or installations. The building owner is required to make reasonable inquiries to discover the identity and location of the author and, if they locate the author, they must give the author 3 weeks within which the author can make a record of the work and consult in good faith with the owner of the building about the removal or relocation of the work. If the author cannot be located after carrying out reasonable inquiries, then the owner of the building is permitted to remove, relocate or destroy the work. This has been relied upon by property developers to destroy public artworks in sites being redeveloped.

Remedies

If a creator's moral rights are found to have been infringed, the court can order any of the following:

- a public apology;

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- a declaration of infringement;
- payment of money for the harm suffered (damages);
- the person to stop the infringement (an injunction); or
- that any false attribution be publicly corrected;
- that any derogatory treatment ceases or is reversed (as appropriate).

Amongst the few moral rights legal decisions we have so far in Australia:

- In *Meskenas v ACP Publishing* (2006), Australian Consolidated Press's *Women's Day* magazine published a photo of Crown Princess Mary of Denmark in front of a painting which it mistakenly attributed to artist Jiawei Shen instead of Vladas Meskenas. The Court found Meskenas's moral right against false attribution and his moral right of attribution had been infringed. The decision maker noted the distress Meskenas suffered during the time it took for the publication to respond to Eugene Meskenas's complaints (on behalf of his father), and the fact that the publication reversed the image (and so too Meskenas's painting) when it finally did publish its promised retraction. The court awarded $100 in general (nominal) damages for copyright infringement, $1,000 for the initial moral rights (failure to attribute and incorrect attribution), of $1,000 and additional $8,000 in aggravated damages for the failure of ACP, once made aware of the infringement, to answer calls or publish the retraction.
- In *Perez v Fernandez* (2012) the court determined that Fernandez had infringed the moral rights of recording artist Armando Perez (also known as Pitbull) in the song Bon, Bon. This was through altering the sound recording to falsely represent that Fernandez was a subject of the song. The court ultimately awarded Perez damages of $10,000 for infringement of his moral rights, and compensatory damages for copyright infringement to Perez's record labels, Mr Worldwide and Sweat It Out.
- In *Corby v Allen & Unwin* (2013) the publisher of a book was held to have infringed the moral rights of Schapelle Corby's sister, brother and mother to be attributed as the photographers of certain photos published in a book about Corby and her father. The successful action for infringement of moral rights was in addition to copyright infringement of the photographs, published without the permission of the copyright owners. The court awarded Corby compensatory damages $9,250 and additional damages of $45,000.

If you believe that your moral rights have been infringed, you should seek legal advice. Generally, the first step is a letter of demand requiring the infringer to cease the infringing conduct and, if appropriate, to pay damages. Arts Law has a low cost template letter of demand for moral rights infringement which you could use. Alternatively, Arts Law can give you a referral to a lawyer who can draft the letter for you though this usually will be at a cost to you based on the lawyer's fees.

Arts Law has a template Letter of Demand – Moral Rights Infringement. If you are not successful in negotiating a successful settlement, you can consider Alternative Dispute Resolution (ADR). Arts Law has a low cost ADR Service. For more information see Alternative Dispute Resolution Service – Guidelines.

Further information

You can find additional information about moral rights on the website of Australian Copyright Council – Moral Rights

Relevant Arts Law information sheets include:

- Copyright
- Performers' rights
- Letter of demand – moral rights
- ADR – mediation

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- ADR – binding expert determination and non-binding expert evaluation
- ADR Service – Guidelines

Arts Law publishes '*Visual Artists and the Law*' by Shane Simpson. 3rd Edition by Annabel Clemens (2013); which provides a commentary on: the basics of copyright (Ch 1); trading copyright (Ch, 2); protecting your copyright (Ch 3); moral rights (Ch 4).

Disclaimer

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (Arts Law) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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