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## **Abstract**

This paper investigates copyright law and public architecture in the context of cultural institutions of Australia. Part 1 examines the case of the Sydney Opera House to illustrate the past position of architects in respect of copyright law. It goes on to consider the framework laid down by the Copyright Amendment (Moral Rights) Act 2000 (Cth) to resolve copyright disputes over moral rights and architecture. Part 2 considers the argument over the proposed renovations to the National Gallery of Australia between Dr Brian Kennedy and the original architect Colin Madigan. Part 3 finally deals with the allegations that Ashton Raggatt McDougall, the architects of the National Museum of Australia, plagiarised the designs of Daniel Libeskind for the Jewish Berlin Museum.

## **Keywords**

copyright law, public architecture, Copyright Amendment (Moral Rights) Act 2000 (Cth)

## **Cover Page Footnote**

The author is grateful to Dr Kathy Bowrey of the University of New South Wales, and the audience at the Faculty Seminar at the Australian National University on 31st October 2001 for comments on this paper. I would like to acknowledge the research assistance of Elsa Gilchrist.

# CRYSTAL PALACES: COPYRIGHT LAW AND PUBLIC ARCHITECTURE

*By Matthew Rimmer\**

*This paper investigates copyright law and public architecture in the context of cultural institutions of Australia. Part 1 examines the case of the Sydney Opera House to illustrate the past position of architects in respect of copyright law. It goes on to consider the framework laid down by the Copyright Amendment (Moral Rights) Act 2000 (Cth) to resolve copyright disputes over moral rights and architecture. Part 2 considers the argument over the proposed renovations to the National Gallery of Australia between Dr Brian Kennedy and the original architect Colin Madigan. Part 3 finally deals with the allegations that Ashton Raggatt McDougall, the architects of the National Museum of Australia, plagiarised the designs of Daniel Libeskind for the Jewish Berlin Museum.*

It is a puzzle that architecture should endure a marginal place under copyright law, even though it enjoys a rich and established cultural tradition.

Historically, architecture has long been considered a form of art, ever since ancient times, when it was viewed as the product of divine inspiration.<sup>1</sup> However, buildings did not immediately gain as much copyright protection because of their functional and utilitarian nature. Architectural works only came to be included within the list of literary and artistic works protected at the international level after the revision of the *Berne Convention* in 1908.<sup>2</sup> The *Copyright Act 1911* (UK) offered protection to 'architectural works of art' insofar as the work related to the 'artistic character of design' and not the 'processes or methods of construction'. The *Copyright Act 1968* (Cth) provided protection for buildings and models of buildings - whether or not the architecture was of artistic quality.<sup>3</sup> Furthermore, there was

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1 A Hauser, *The Social History of Art, Volume One* (1951); and D Watkin, *A History Of Western Architecture* (3rd ed, 2000).

2 S Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (1987), 253-257.

3 S 10 (1) of the *Copyright Act 1968* (Cth).

separate protection of the architect's plans, designs, and drawings.<sup>4</sup> The *Architectural Works Copyright Protection Act* 1990 (US) was implemented to protect architectural works in compliance with the Berne Convention.<sup>5</sup> Prior to this legislation, copyright protection was afforded only to architectural drawings and specifications.

Such concerns with the status of architecture have been revisited in recent policy discussions. The Copyright Law Review Committee Simplification report assumes that architecture should be treated just the same as other creations - such as literary, dramatic, musical and artistic works.<sup>6</sup> It maintains that architects should enjoy the same array of economic and moral rights as other creators. By contrast, the *Copyright Amendment (Moral Rights) Act* 2000 (Cth) insists that architecture deserves special treatment because of its functional and utilitarian character. Thus the moral rights of architects are limited to consultation in respect of changes to buildings. However, the *Copyright Amendment (Moral Rights) Act* 2000 (Cth) does not diminish the copyright protection that may subsist in drawings. So paradoxically, architects enjoy full moral rights in respect of architectural plans - but not buildings. The legislation displays an ambivalence whether architecture should be treated the same as other artistic works, or singled out for special attention. The old debate about whether architecture should be classified as art continues to haunt the current discussions.

The *Copyright Act* 1968 (Cth) does not draw an explicit distinction between 'private' and 'public' architecture in the framework of the legislation. However, the courts make an implicit separation between the two categories in judicial decisions. There have been a series of cases in Australia dealing with copyright law and private architecture - mainly in relation to floor plans for project homes and kit homes.<sup>7</sup> Such matters involve quite prosaic deliberations about copyright infringement. More striking have been a number of controversies in Australia concerning copyright law and publicly funded architecture - such as galleries, museums, and other cultural institutions. Barbara Hoffman comments upon the general character of such disputes:

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4 S 21 (3) of the *Copyright Act 1968* (Cth).

5 M Mathis, 'Function, Nonfunction, and Monumental Works of Architecture: An Interpretive Lens in Copyright Law' (2001) 22 (2) *Cardozo Law Review* 595; and R Newsam, 'Architecture and Copyright - Separating the Poetic from the Prosaic' (1997) 71 (4) *Tulane Law Review* 1073-1131.

6 Copyright Law Review Committee, *Simplification of The Copyright Act 1968: Part 2. Rights and Subject Matter* (1999).

7 There have been a series of cases in Australia dealing with copyright law and private architecture - mainly in relation to floor plans for project homes and kit homes: *Darwin Fibreglass Pty Ltd v Kruhse Enterprises Pty Ltd* (1998) 41 IPR 649; *Led Builders Pty Ltd v Eagle Homes Pty Ltd* (1999) 44 IPR 24; *Eagle Homes Pty Ltd v Austec Homes Pty Ltd* (1999) 44 IPR 535; and *JS Hill & Associates Ltd and others v Dawn and others* (2000) 50 IPR 425.

At issue in all of these disputes is the conflict between the rights of the artist who creates the work, the rights and responsibilities of the government authority who commissions and/ or funds the work, and the rights of the public for whose benefit it is presumably created. What limitations, if any, are imposed on government as an owner of property when that property is art? Does artistic freedom limit government property rights, or are such rights of artistic expression properly limited in the public context?<sup>8</sup>

Such controversies involve a consideration of the use of public space and the relationship between the architect, the government, and the public. They also invite debate about the role of copyright law, the protection of cultural heritage, the renewal of architectural relics, and urban planning. Such matters of symbolism are not necessarily apparent in the cases dealing with architectural plans of private residences.

There have been a number of international cases involving disputes over public architecture. In the United Kingdom, there has been disquiet about renovations to heritage buildings. The heir to the British throne and the sometime architectural critic Prince Charles said of a 1984 proposal for an extension to the National Gallery, London: 'A monstrous carbuncle on the face of a much-loved and elegant friend'. Daniel Libeskind's Spiral Gallery for the Victoria and Albert Museum has also attracted controversy. The architecture historian David Watkin likens the building to a 'pile of falling cardboard boxes'.<sup>9</sup> In Europe, too, there has been concern about cultural institutions. There has been a debate over the completion of Antoni Gaudi's La Sagrada Familia church in Barcelona.<sup>10</sup> Defenders of the project say that one should think of it as a medieval cathedral, begun by some hands and finished by others. Critics complain that the constant revisions are a progressive distortion of the work. The Pompidou cultural centre in Paris attracted six failed lawsuits to halt the project, and a decade of press criticism.<sup>11</sup> In the United States, there has also been criticism of dysfunctional architecture. Notably, the Guggenheim Museum in New York, which was designed by Frank Lloyd Wright, has been damned as nothing more than 'scientific kitsch'.<sup>12</sup> Such controversies show that the questions raised by this study of copyright law and public architecture are universal in their resonance.

This paper investigates copyright law and public architecture in the context of cultural institutions of Australia. It considers such issues as the tension between

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8 B Hoffman, 'Law for Art's Sake', in W Mitchell (ed), *Art and The Public Sphere* (1992) 121.

9 J Glancey, 'All The Angles', *The Guardian* (London), 18 June 2001.

10 R Hughes, *Barcelona* (1992), 538-539.

11 G Jahn, 'Letter To The Editor from the National President of the Royal Australian Institute of Architects', *The Sydney Morning Herald*, 3 May 2001.

12 D Watkin, *A History Of Western Architecture* (3rd ed., 2000), 648.

form and function, the nature of collaboration, and the difference between influence and appropriation. Part 1 examines the case of the Sydney Opera House to illustrate the past position of architects in respect of copyright law. It goes on to consider the framework laid down by the *Copyright Amendment (Moral Rights) Act 2000* (Cth) to resolve copyright disputes over moral rights and architecture. Part 2 considers the argument over the proposed renovations to the National Gallery of Australia between Dr Brian Kennedy and the original architect Colin Madigan. It examines the role played by the Royal Australian Institute of Architects (RAIA). Part 3 finally deals with the allegations that Ashton Raggatt McDougall, the architects of the National Museum of Australia, plagiarised the designs of Daniel Libeskind for the Jewish Berlin Museum. Of course this sample of cultural institutions is not comprehensive. Similar discussions have attended the renovations to the Museum of Contemporary Art in Sydney,<sup>13</sup> the Federation Square project in Melbourne,<sup>14</sup> and the National Gallery of Victoria.<sup>15</sup>

### Red Sails In The Sunset: The Sydney Opera House

Ironically enough, some of the first forums about the introduction of a system of moral rights were held in the Sydney Opera House.<sup>16</sup>

The Sydney Opera House was a classic case of moral rights violations. The Danish architect Jorn Utzon won an international competition to design a performing arts complex. Construction of the building began in 1959 and proceeded in slow stages over the next fourteen years. The project was subject to many delays and cost over-runs and Utzon was often blamed for these. The New South Wales state Government withheld fee payments to Jorn Utzon and refused to agree to his design ideas and proposed construction methods.

The architect presented a list of nine demands to the Minister Sir Davis Hughes.<sup>17</sup> Hughes rejected terms 3, 4, and 5, which would have given Utzon final approval of all details, overall control of the surroundings of the site, though not necessarily of the work itself, and an instruction directing consultants that the architect was in charge and the client agreed not to by-pass him by communicating directly with them and the contractor. These were standard conditions which applied to all architects and their clients. Minister Hughes rejected the RAIA's standard conditions of engagement, in particular 4 (j), not to deviate from the original

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13 E Farrelly, 'Behold! A Crystal Palace Never To Be Built', *The Sydney Morning Herald* (Sydney), 2 May 2001; and J Crosling, 'Museum Of Contemporary Art' (2001) 76 *Architectural Review* 92-97.

14 <<http://www.federationsquare.com.au/>>.

15 <<http://www.ngv.vic.gov.au/redevelopment/index.html>>.

16 Australia Council, Australia Council National Symposium on Moral Rights: Report of Proceedings, 29-30 November 1979.

17 P Drew, *The Masterpiece. Jorn Utzon: A Secret Life* (1999), 352.

design, and (m), that the employment of firms of consultants should be at the architect's discretion. Hughes also demurred at Utzon's request for the Technical Advisory Panel to exercise final authority on all programme and technical matters through the Executive Committee. As a result, the architect was forced to resign in February 1966 as Stage II was nearing completion.

A team of Australian architects - Peter Hall, Lionel Todd, David Littlemore - took charge of the project. They came up with a number of revisions to the original design - such as eliminating the opera facilities in the Major Hall, and making it a single-purpose concert hall. The author Philip Drew laments the changes:

The outcome was a travesty of the original plan. After years of criticising Utzon for not satisfying the conditions of the competition brief, Hughes now completely abandoned a major requirement of the building programme. Hughes faced an unwelcome prospect, for Peter Hall advised him that the acoustical requirements could not be met by a multi-use hall. In a stroke, Hughes robbed the roof design of any validity. His Opera House is a perversion. Having been conceived with the intention of broadening, not narrowing, the scope of musical performances which could be offered to audiences, it now betrayed Eugene Goossen's original vision. To make matters worse, it was unnecessary.<sup>18</sup>

Jorn Utzon had no legal recourse to prevent such alterations to his original design. There was no system of moral rights in place in Australia, as in Continental Europe. The artistic concerns of the architect could not challenge the interests the owner of the building.

This situation might have been different under a comprehensive scheme of moral rights. Jorn Utzon would have been able to complain that such alterations to the design of the building were in contempt of his moral rights to preserve the integrity of the artistic work. The State Government of New South Wales would have been forced to consult about the proposed revisions to the building. There could have been doubt and uncertainty about whether the building constituted an 'artistic work' given that it had not yet been fully completed and finished. However, Jorn Utzon would nonetheless retain separate copyright protection in respect of the architectural plans and drawings. He could have maintained that the reproduction and alteration of the plans amounted to an infringement of the integrity of the artistic work.

### **Moral Rights**

In the wake of such controversies, professional organisations - such as the RAI - lobbied for the protection of the moral rights of artists. After much procrastination, the Federal Government agreed upon the need to introduce a

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18 Ibid 387.

system of moral rights. However, there was much industry complaint. Whereas the film industry engaged in a very public battle over the moral rights scheme,<sup>19</sup> the building industry restrained themselves to behind-the-scenes lobbying. Since the release of a Discussion Paper, the Federal Government vacillated in respect of the moral rights of architects.<sup>20</sup> It started out with the presumption that architects should enjoy a moral right of integrity - subject to a test of reasonableness. This position was reflected in the *Copyright Amendment Bill 1997* (Cth). The Federal Government withdrew the moral right of integrity in respect of buildings after protest from the Property Council of Australia. This decision was encoded in the *Copyright Amendment (Moral Rights) Bill 1999* (Cth). The Federal Government finally reached a compromise that architects should have a right of consultation in respect of any changes that are made to their building. This consensus was enshrined in the *Copyright Amendment (Moral Rights) Act 2000* (Cth). However, the Federal Government did not make any changes in respect of moral rights that might subsist in architectural plans and drawings.

### **Copyright Amendment Bill 1997 (Cth)**

In the *Copyright Amendment Bill 1997* (Cth), the Federal Government provided that certain treatment of artistic work was not to constitute an infringement of the author's right of integrity of authorship. Hence s 195AS (1) provided that the destruction of a moveable artistic work, or a change in a structure containing an artistic work, did not constitute an infringement of the right of integrity if the author was given a reasonable opportunity to remove the work first.

The Federal Government obviously had in mind the United States case regarding the public sculpture, the *Tilted Arc*.<sup>21</sup> In 1979, Richard Serra was commissioned to create a site-specific sculpture on the Federal Plaza in lower Manhattan. Ten years later, it was removed to storage after a panel of experts failed to find a suitable site for relocation. Richard Serra alleged that the decision to remove his sculpture infringed his rights under the free speech clause of the First Amendment, the Due Process clause of the Fifth Amendment, federal trademark and copyright laws, and state moral rights law. At first instance, Justice Pollack rejected all of the arguments of Richard Serra. The New York law on moral rights did not apply to the *Tilted Arc* case because of its location on federal property. On appeal, the three-judge panel of the Second Circuit affirmed the granting of a summary judgment and held that Richard Serra's First Amendment rights were

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19 M Cooper, 'Moral Rights And The Australian Film And Television Industries' (1997) 15 (4) *Copyright Reporter* 166.

20 Attorney-General's Department, *Proposed Moral Rights Legislation for Copyright Creators: Discussion Paper* (1994).

21 *Richard Serra v United States General Services Administration* (1988) 847 F 2d 1045; and R Serra, 'The Tilted Arc Controversy' (2001) 19 *Cardozo Arts and Entertainment Law Journal* 39.

not infringed. The case was impetus for Congress to pass the *Visual Artists Rights Act 1990* (US) which extends to visual artists certain rights governing the display and resale of their work.

However, the Federal Government made no stipulation under the *Copyright Amendment Bill 1997* (Cth) that the destruction or modification of a building itself would not constitute an infringement of the author's right of integrity of authorship. It therefore presumed that architects should enjoy the same moral rights as other creators - such as writers, artists, and so on.

Thus, under this model, architects would enjoy the moral rights of attribution and integrity. This would be subject to a test of reasonableness - which would take into account factors such as the nature of the work, the context of work, industry practice, and the employment context. Furthermore, architects would be able to waive their moral rights or give consent to particular acts or omissions - a matter of some concern to the RAIA.<sup>22</sup>

### **Copyright Amendment (Moral Rights) Bill 1999 (Cth)**

The Property Council of Australia lobbied the Federal Government to ensure that architects could not exercise moral rights in respect of their buildings.<sup>23</sup> They argued that this was a common sense alternative. The president of the RAIA, Ed Haysen, charted the background to the debate on Radio National:

The original legislation - which went to the second reading stage - had a clause in it which required owners of buildings to consult with architects and get their consent before buildings were demolished or altered. There was a reasonableness clause in that legislation - so that architects could not withhold that consent unreasonably. The Property Council got very alarmed by that clause. They lobbied Senator McGauran to have all references to buildings and architecture removed from that legislation.... The Property Council felt that this was going to tie up the owners of buildings, and architects would act unreasonably to refuse changes being made to the buildings. But there was this reasonableness clause in it.<sup>24</sup>

This legislation was modelled on s 80 (5) of the British act of parliament, *Copyright, Designs and Patents Act 1988* (UK), which provided that the moral right of integrity does not apply to a work of architecture in the form of a building.

In the second reading speech of the *Copyright Amendment (Moral Rights) Bill 1999* (Cth), Daryl Williams observes:

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22 Royal Australian Institute of Architects, 'Press Release' (10 June 1998).

23 Property Council of Australia, 'Press Release: Bill Protects Owners Rights' (14 December 1999).

24 M Cathcart, 'Moral Rights In Architecture', *Radio National, ABC* (12 April 2001).

This bill clarifies one of those exceptions—that alteration to or demolition of a building will not infringe the right of integrity in the architect’s design or in any work, such as a mural, that forms part of the building. This was always the government’s policy intention, but there was some concern expressed that the drafting of the original legislation was ambiguous. Of course, where a building is altered without consulting the architect, the owner might have to remove any public sign—such as a wall plaque—giving the false impression that the architect designed the building as altered, if the architect so desires.<sup>25</sup>

However, this seems like a post-facto rationalisation of the intentions of the original bill.

RAIA claimed that the *Copyright Amendment (Moral Rights) Bill 1999 (Cth)*, before the House, specifically excluded the moral rights of integrity for architects and enabled clients to put considerable economic pressure on architects to sign away their right to attribution.<sup>26</sup> Michael Peck was particularly concerned about s 195 AT, which stipulated that certain treatment of works - including the modification and demolition of a building - would not constitute an infringement of the author’s right of integrity. He complained that the clause unjustly discriminates against architects and subverts the intent of moral rights legislation. Furthermore he believed that the introduction of ‘comprehensive consent’ in the Bill will also have the practical effect in the marketplace of making the legislation ineffective in respect of architects’ moral rights.

#### **Copyright Amendment (Moral Rights) Act 2000 (Cth)**

After much procrastination, the Federal Government finally introduced the *Copyright Amendment (Moral Rights) Act 2000 (Cth)*. It provided for a moral right of attribution - the right to be identified as the author of a work. It also allowed for a moral right of integrity - the right to protect a work against derogatory treatment.

The Federal Government recognised the compromise that had been reached between the RAIA and the Property Council over the moral rights of architects. Ed Haysen explained:

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25 Hansard. ‘Copyright Amendment (Moral Rights) Bill 1999 (Cth)’, *House of Representatives* (8 December 1999).

26 Royal Australian Institute of Architects, ‘Submission to Hon Peter McGauran MP’ (3 December 1999); Royal Australian Institute of Architects, ‘Architects Claim Moral Rights Legislation Flawed’, Press Release (9 March 2000); and Royal Australian Institute of Architects, ‘Morally Unsound Legislation’, Press Release (11 May 2000).

We found out by accident that these provisions had been taken out. So we lobbied very heavily Senator McGauran. A compromise was reached out of those negotiations. It was watered down a bit. Basically, it says that when an artistic work or a building is going to be changed, or altered or demolished, the building's architect has to be given reasonable notice if the building is going to be changed. If the author asks, he or she is allowed access to the building to make a photographic record of it.<sup>27</sup>

So, essentially, architects have a right to consultation and negotiation under the legislation. However, they do not have the power to prevent the destruction or a modification of a building, so long as there has been adequate consultation.

S 195AT provides that certain treatment of works does not constitute an infringement of the author's right of integrity of authorship. A convoluted set of provisions seeks to express the compromise that had been reached between the Federal Government, the Property Council of Australia, and the Royal Institute of Architects.

S 195AT (2A) provides that the owner of a building who changes, relocates, demolishes or destroys a building will not infringe a moral right of integrity of the author in respect of a building, so long as a certain set of procedures is satisfied. First, the owner must serve the author with a written notice stating the owner's intention to carry out the change, relocation, demolition or destruction. Second, the notice must provide the author with access to the building for the purpose of making a record of the artistic work. Third, the owner must also consult with the author in good faith about the change, relocation, demolition or destruction. Fourth, the owner must give the author a reasonable opportunity within a further 3 weeks to have such access. Finally, the author may require the removal from the building of the author's identification as the author of the artistic work - if there are changes.

S 195AT (3) provides that the owner of building will not infringe a moral right of integrity in such circumstances if they cannot discover the identity and location of the author or a person representing the author. S 195AT (3A) specifies what efforts the owner of a building must first make before relying upon this section.

S 195 AT (1) deals with the destruction of a moveable art work. S 195 AT (2) considers a change, relocation, demolition or destruction of a building in which an artistic work is affixed. S 195AT (4A) and (4B) deal with the removal or relocation of a moveable art work. S 195AT (5) provides that 'anything done in good faith to restore or preserve a work is not, by that act alone, an infringement of the author's right of integrity of authorship in respect of a work'.

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<sup>27</sup> M Cathcart, 'Moral Rights In Architecture', *Radio National, ABC* (12 April 2001).

Such provisions serve to undermine the project of the Copyright Law Review Committee to simplify the *Copyright Act* 1968 (Cth) in both formal and substantive ways.<sup>28</sup> First, the legislation is long-winded and convoluted. It hardly seems to fulfil the need to explain copyright law in terms of Plain English. Second, the legislation discriminates between the moral rights accorded to authors and other creators, and the limited moral rights provided for architects. Such substantive differences go against the push to treat creators in a similar fashion - whatever artistic field they happen to be in. There is a tension here between the simplification project of the Copyright Law Review Committee, which holds that all artistic media should be treated alike, and the long tradition of special pleading by particular industries affected by copyright law.

The architectural critic Elizabeth Farrelly questions whether the compromise produced meaningful amendments: 'The act, as amended last year, requires architects to be consulted 'in good faith' before their buildings are substantially altered. This is so vague as to be profitless for all except the legal fraternity and, if given teeth by the courts, may yet to be an own-goal for the profession by providing a real disincentive to employ an architect, or buy her product, in the first place'.<sup>29</sup>

### **Blue Murder In The Art Cathedral: The National Gallery of Australia**

In 2001, the National Gallery of Australia announced a multi-million dollar refurbishment in which the southern, left-hand corner of the Canberra Gallery would be enclosed in a large glass box.

Tonkin Zulaikha Greer, Managing Architects, have released their designs for the enhancement of the National Gallery of Australia. It involved three main areas. First, the main part of the work is a new 'front door' for the building, providing public facilities appropriate to a national institution. A new sustainable forecourt water garden, with major new sculpture opportunities, will lead visitors from the car park or the street direct to the new ground-level entrance. Peter Tonkin declares:

The project will allow the NGA to face Canberra's cultural 'main street' - King Edward Terrace, instead of turning its back to the public. The new 'front door' takes the form of a tall, naturally-lit great hall, linking all of the main levels of this complex building, uniting and rationalising the required access and

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28 Copyright Law Review Committee, *Simplification Of The Copyright Act 1968: Part 2. Rights And Subject Matter* (1999).

29 E Farrelly, 'The Art World's Great Custody Case', *The Sydney Morning Herald*, 4 July 2001, 16.

service functions for the building as a whole. A unique, low energy solution will control air temperature and daylight in the external glass walls.<sup>30</sup>

Second, the designs provide for new facilities for all of the main functions of the Gallery, including new gallery space, public education facilities and art storage and unpacking. Third, the project seeks to address shortcomings in the building's disabled access, fire safety and air conditioning, while improving all of the operations of the Gallery. Selected public spaces in the original building will be restored as a fundamental part of the proposal.

The need for a new entrance is well documented. The original design intent was that the building will be entered either via a raised walkway connecting to the High Court to the west, and in turn to the never built National Place. Otherwise, there was a grand stair leading down towards the lake. Instead the majority of visitors enter the building from the so-called temporary carpark to the south, past the loading dock and up on a narrow ramp.

The building's architect, Madigan, was furious: he says that he has not been consulted about this radical addition- and that changes show 'unreasonable contempt' for his building. Sydney architectural critic Elizabeth Farrelly conceives of the current dispute in respect of the National Gallery of Australia in terms of a custody battle in family law:

The current National Gallery debate is little more or less than a classic custody tussle. Architecture is always mixed progeny, with at least two - client and architect - and probably more assisting not only at birth but at conception. Grrrruesome. Even thereafter, architects occasionally get all anal, hanging around to select every little thing down to carpet, cupboard handles, furniture, paintings.

Normally, though, and quite rightly, the architect moves on once the birth pictures are taken, leaving the infant edifice in full care and control of the client, loving or otherwise.

But later, much later? The question exercising many a professional mind is this: what rights, if any, should the original architect have when, years or even decades later, the now mature building needs amendment. Whose building is it anyway?<sup>31</sup>

The dispute over the National Gallery of Australia has provided the first real test of the *Copyright Amendment (Moral Rights) Act 2000* (Cth) laid down by Parliament.

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30 <<http://www.nga.gov.au>>.

31 E Farrelly, 'The Art World's Great Custody Case', *The Sydney Morning Herald*, 4 July 2001, 16.

## Consultation

The original architect Madigan was displeased that he was not consulted about the plans for the renovation of the National Gallery. He only found out about the proposed changes to the building accidentally. A United States landscape design company sent its plans to the original landscape architect, unaware that he had died. His daughter passed them on to a surprised Madigan. The architect was upset at the lack of consultation:

It is a public building funded by taxpayers. Why should we allow an itinerant custodian who is here for a limited term of office and the gallery council keep this thing embargoed? Nobody is allowed to see it as it is. They say that it is still not ready to be shown. It was only by accident that I was shown the proposals. Thank goodness, I was able to bring it into public debate.<sup>32</sup>

Eventually Madigan was allowed to see the plans in early June. But even then the National Gallery of Australia instructed him to destroy the copy. Such secrecy may have been necessary to secure government funding - but it led to widespread mistrust among architects and controversy in the media.

There was criticism of the lack of consultation with the architect Madigan. There was an interesting exchange between Senator Schacht and Dr Kennedy in the Senate Estimates Committee:

Senator Schacht: Because of the moral rights legislation, obviously Mr Madigan has some rights legally to preserve the integrity of his artistic work.

Dr Kennedy: No, Senator. The moral rights legislation is quite specific in what it says and the obligations that it makes upon the gallery. There is a key issue here: some architects believe that the moral rights legislation should have gone further than it does; that it should have a provision that the change or amendment of a building should not take place without the approval of the original architect; and that the level of consultation is in the second dictionary meaning, as opposed to the first, of informing, and the second of seeking approval. This is contentious; it is not the law at the current moment. What is important and essential in an artistic institution is that discussions in such matters would be in good faith and would be regarded as genuine and meaningful.<sup>33</sup>

Senator Schacht highlighted how the trustees of the Sydney Opera House had consulted with Jorn Utzon and his son about future renovations of the building.<sup>34</sup>

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32 M Cathcart, 'Moral Rights In Architecture', *Radio National, ABC* (12 April 2001).

33 Hansard, 'Senate Committee for the Environment, Communication, Information Technology and the Arts' (6 June 2001) 206.

34 Sydney Opera House, 'Press Release: Utzon Appointment 'Reunites The Man And His Masterpiece' - Trust Chairman' (11 August 1999).

He suggested to Dr Kennedy that it would be wise management practice to follow this example: 'I suspect that may be an example from which the management of the gallery could see that this can be effectively done without an unseemly artistic brawl occurring that does nobody any good'.<sup>35</sup> However, Dr Kennedy resented the comparisons: 'In the particular case of Mr Utzon, he left in some disagreement, whereas Mr Madigan has been highly praised for his building from the profession and by the community'.<sup>36</sup>

Following requests by the RAlA, the National Gallery of Australia agreed to put current design proposals for additions to the gallery on hold, to enable a process of private and public consultation to occur.<sup>37</sup>

The Gallery agreed to participate in a consultation meeting with the original architect Madigan and the new architects, Tonkin Zulaikha Greer. A meeting was held at the RAlA state headquarters in Sydney chaired by the RAlA National President, Graham Jahn. A second meeting also took place involving the Gallery's Director Dr Brian Kennedy and the National Capital Authority Director General Annabelle Pegrum. Graham Jahn said: 'The RAlA is pleased that the NGA and the new architects have taken up its strong recommendation to embark on a more open and consultative process'.<sup>38</sup> The National Capital Authority refused to forward the project design to the Minister for Regional Services, Territories and Local Government, Senator Ian Macdonald until the Gallery has completed its obligations under the *Copyright Amendment (Moral Rights) Act 2000* (Cth) through consultation with the original architect. In addition, the Gallery reversed its previous decision not to make the new design proposals public prior to their approval by Parliament.

### **Authorship and Integrity**

*The Sydney Morning Herald* suggested that the director of the National Gallery might be in breach of the moral rights legislation. Lauren Martin comments: 'Dr Brian Kennedy, the Irish director of the National Gallery of Australia, likes to refer to art galleries as cathedrals and himself as the secular archbishop. Now he may become the first person accused in Australian courts of committing a moral sin against an artist'.<sup>39</sup> Madigan obtained preliminary legal advice that there was a case for using the new moral rights legislation to fight plans to alter his award-

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35 Hansard, 'Senate Committee for the Environment, Communication, Information Technology and the Arts' (6 June 2001) 206.

36 Ibid.

37 Royal Australian Institute of Architects. 'Press Release: National Gallery Designs On Hold' (19 June 2001).

38 Ibid.

39 L Martin, 'Blue Murder in the Art Cathedral as Angry Architect Takes on the Archbishop', *The Sydney Morning Herald*, 2 June 2001, 1 and 6.

winning building. However, such a suggestion seems rather mischievous given the limited moral rights available to an architect.

The architect behind the National Gallery was ambivalent about the question of authorship in relation to architecture. On the one hand, Madigan was at pains to refute the idea that he was the sole author of the National Gallery. He emphasized that the architecture was the product of a collaborative team of architects, designers, and artists:

I mean that one of the things that I have to say is that they keep saying, 'It's my building'. It is entirely wrong. That building was produced over a fifteen year period. We had a great team of wonderful architects in our office. We had a great time of engineers, mechanical engineers, and builders. We had wonderful committees and counsels vetting every moment of design. It has the imprint of many, many minds... All these people have put an imprint into the essence of that building's character. Why should that be defaced?<sup>40</sup>

On the other hand, Madigan was quite possessive about his creation. He noted: 'Well, if they keep on saying that it is my building, then I am going to take it back'.<sup>41</sup> It is worth noting that the *Copyright Amendment (Moral Rights) Act 2000* (Cth) only makes special provision for collaborative arrangements in respect of film. Otherwise the normal principles of joint authorship would apply. The presumption would be that the principal architect would be considered to be the author of the work.

Madigan professed himself comfortable with change in principle, and has lectured on 'design as a creative evolutionary process'. But this particular proposal he likened to the destruction of the Afghani Buddhas. Madigan emphasized that the National Gallery of Australia was a work of art. He believed that the cultural heritage of the building would be violated by the proposal:

When the gallery was finished, the curator of Australian art, Daniel Thomas, and the director James Mollison, declared it to be a work of art. They said that it should be included on the inventory of art in their collection. They were the ones who nominated it as a work of art. And as such it deserves a great deal of respect and courtesy for any additions that are made to it. I take issue with the introduction that you put to the audience - with new architects calling it a 'brutalist' style of architecture. If it is, then I think it should be part of our heritage.<sup>42</sup>

Madigan conceded that galleries would require additions as they grew in stature, and developed in history. However, he maintained that those additions should be done in a respectful and dignified way.

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40 M Cathcart, 'Moral Rights In Architecture', *Radio National, ABC* (12 April 2001).

41 Ibid.

42 Ibid.

The RAlA took up the cause of Madigan. This was part of a wider agenda. The RAlA sought to use the high profile controversy over the National Gallery to highlight the inadequacies of the current moral rights system. They emphasized that the legislation discriminated against architects. They also questioned whether the current consent provisions are open to abuse. The RAlA also campaigned for design competitions to recognise the moral rights of architects. In particular, they complained that the Department for Immigration and Multicultural Affairs failed to include the moral rights of architects in tenders for designs of detention centres.<sup>43</sup> RAlA pushed for stronger rights for architects. Ideally, they would like a strong legal regime that protects the cultural heritage of buildings.

A group of Australia's leading architects signed a statement of principles which calls for work on the entry to stop while a comprehensive plan of management is prepared for the gallery-High Court precinct.<sup>44</sup> Among the signatories were John Andrews, Robin Gibson, Daryl Jackson, Richard Leplastrier, Neville Quarry, Peter McIntyre and Madigan, all winners of architecture's highest award, the Gold Medal. Other signatories include James Grose, Richard Goodwin, Ken Maher, Rod Simpson, and Ken Wolley. The signatories declared that both the gallery and court were conceived of as an entity and should be protected in the Register of the National Estate as a heritage precinct.

However, Tonkin defended the renovations proposed to the National Gallery of Australia against the accusations of Madigan and his supporters. He argued that the firm had, with care and creativity, proposed a new life for the National Gallery, honouring its original genius and responding to the demands of a new century:

Tonkin Zulaikha Greer won the selection stage on the basis of our sensitive treatment of the existing building, a demonstrated understanding of its failures and our design's respect for Madigan's highly personal architecture. The firm's track record of successful reworking of heritage buildings for contemporary cultural use underlies our approach to the NGA project. Changed values from 1969 to 2001 mean that our conclusion about what is now appropriate for the building differs significantly from his. Unlike a painting, no work of architecture can be considered fixed in time, divorced from its function.<sup>45</sup>

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43 (Perhaps this shows a skewed sense of priorities - thinking that the moral rights of architects are more important than, say, the human rights of refugees).

44 G O'Brien, 'Exhibit A', *The Sydney Morning Herald*, 7 April 2001.

45 <<http://www.nga.gov.au>>.

Tonkin observed that over the past 21 years insensitive changes had been made to the interior of the building.<sup>46</sup> Among these were doors cut through walls, skylights being blocked off and mezzanines installed in double storey galleries. Tonkin said: 'Beautiful bush-hammered concrete walls were covered up with plasterboard and key architectural features were compromised'.<sup>47</sup> Thus it is possible that the architectural firm could seek protection under s 195AT (5). This legislation provides that 'anything done in good faith to restore or preserve a work is not, by that act alone, an infringement of the author's right of integrity of authorship in respect of the work'. However, it is uncertain whether this provision would cover the extension itself.

The architect Andrew Nimmo challenged the notion that the cultural institution was a work of art above and beyond functional considerations:

Tonkin Zulaikha Greer are not art vandals and the National Gallery of Australia is not an artwork. It is a building that must function and perform. It requires major modifications and this is acknowledged by all the informed players in this current drama, including Madigan.<sup>48</sup>

The architectural critic Elizabeth Farrelly agreed that there was a strong case that the changes to the National Gallery were reasonable in the circumstances: 'Answer, a gallery needs a front door - considerably more than a fish needs a bike'.<sup>49</sup> Philip Cox concurred the proposed new entry was a benign piece of architecture.<sup>50</sup> However, all had reservations about the glass box in the south-west corner of the building, because it would not be reversible. It would become a permanent feature of the building regardless of whether it is seen to have been a success in fifty years time or not.

Madigan and his supporters seemed to believe that moral rights could preserve the cultural heritage of a building in its youth. However, there is an important disjuncture between the regimes. As Elizabeth Farrelly comments:

With the architect still alive and posterity yet in the wings, this is not really a heritage question, although the protagonists - including Madigan - do at times paint it that way. It's more about copyright, now known as intellectual

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46 R Bolton, "'Utzon Solution' May Put Wind In NGA Sails', *The Australian Financial Review* (Sydney), 23-24 June 2001, 5.

47 Ibid.

48 A Nimmo, 'Controversy: Plans For The National Gallery of Australia' (2001) 90 (5) *Architecture Australia* 26-29.

49 E Farrelly, 'The Art World's Great Custody Case', *The Sydney Morning Herald*, 4 July 2001, 16.

50 P Cox, 'Finding A Mix For Art and Design', *The Canberra Times*, 6 July 2001, 11.

property, or even moral rights, as the latest Copyright Amendment Act is parenthetically tagged and colloquially known.<sup>51</sup>

There are differences between moral rights and cultural heritage laws. Copyright lasts for the life of the author plus fifty years - whereas heritage laws intervene later in the life of the building. Moral rights are concerned with the reputation of the author, but cultural heritage laws are interested in questions of conservation and preservation.<sup>52</sup>

### Revisions

The National Gallery of Australia has been forced to abandon its controversial plans to glass in its front door.<sup>53</sup>

After challenges from supporters of the building's designer, Madigan, the gallery's director, Dr Brian Kennedy, made 'fundamental' changes to the \$43 million renovation. The gallery is now planning to put a new entrance near its loading area.<sup>54</sup> Dr Kennedy said Tonkin's new entrance would 'adjoin or abut or integrate with the existing building' on the southern side at the loading bay area, depending on the ultimate solution. It will be 'effectively under another building'. Instead of the original proposal for a multi-storey glass atrium entrance on the south-west corner, the entrance, on the south side of the gallery, will be framed by a series of parallel zinc walls, with glass infills. To allow for the new entrance, facing the southern car park, the gallery's James O Fairfax Theatre will have to be demolished and rebuilt when, as expected, work begins at the beginning of 2003. The partner Brian Zulaikha said that the new entrance would be 'comfortable and appropriate to the form of the building'.<sup>55</sup> The architect of the 1982 building, Col Madigan, said that he knew nothing of the new entrance design. 'I thought it was abandoned'.<sup>56</sup>

The outcome achieved under the process of consultation and negotiation is quite surprising, given the limitations to the moral rights of the architect under the legislation. The president of the RAlA, Mr Graham Jahn, called the precedent setting outcome 'surprising...amazing...and absolutely successful'. Madigan was

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51 E Farrelly, 'The Art World's Great Custody Case', *The Sydney Morning Herald*, 4 July 2001, 16.

52 M Stitt, 'Plastic Trees And Plastic Houses: The Formulation Of Environmental Law And Policy To Address Imitation Of Cultural Heritage' (1994) 11 (2) *Environmental And Planning Law Journal* 155.

53 L Martin, 'Gallery's Glass Design In Shards', *The Sydney Morning Herald*, 30 August 2001.

54 V Lawson, 'Surprise As Gallery Approves Entrance Plans', *The Sydney Morning Herald*, 31 December 2001.

55 Ibid.

56 Ibid.

able to augment his limited right of negotiation with other forms of power. He was successful at publicising the dispute by bringing in the Royal Institute of Architects, and a petition of fellow architects. Madigan also enlisted the support of a politician in the form of Chris Schacht. This brought about scrutiny of the proposals for a work of public architecture in Parliament. Madigan was also able to bring public pressure to bear upon Dr Brian Kennedy through the strategic use of the mass media.

Is this settlement a vindication of the moral rights scheme? Dr Kennedy said the NGA was 'at the forefront of what [moral rights] might mean, as a public building and one that is the focus of considerable attention'.<sup>57</sup> The Federal Government would see the case a validation of its legislation. It imagined that most cases would be resolved by alternative dispute resolution. Only the exceptional few instances would need adjudication. It is a shame that the dispute did not reach the courts. It would have been a sweet irony for the High Court to rule upon the artistic integrity of the architect who designed their building - as well as the National Gallery of Australia.

### **A Tangled Vision: The National Museum of Australia**

The proposed renovations to the National Gallery of Australia were perhaps the product of institutional envy and jealousy. They were an attempt to compete for attention with the spectacular new National Museum of Australia across the lake.

Museum architects Ashton Raggatt McDougall, in association with Robert Peck von Hartel Trethowan and landscape architects Room 4.1.3, submitted and developed an innovative and colourful design for the new museum on Acton peninsula using cultural references from many sources. They were inspired by Walter Burley Griffin's land and water axes for Canberra and incorporated their own 'Uluru line', leading notionally to the centre of the continent.

They conceived of the main building as a three-dimensional knot shaping the extravagant bulges of wall and roof. The bold curved shapes of the huge windows in the main hall are strongly reminiscent of the roofline of the Sydney Opera House. The elegant zigzag shape that houses the museum's Gallery of First Australians imitates the outline of a part of Daniel Libeskind's Jewish Museum, which opened in Berlin in 1999.

The Jewish Museum is a remarkable work of architecture - with its forbidding black zinc exterior, internal voids and dead ends, and underground links to the Berlin Museum. The architect, Daniel Libeskind, describes the design of the building:

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<sup>57</sup> L Martin, 'Gallery's Glass Design In Shards', *The Sydney Morning Herald*, 30 August 2001.

To put it simply, the museum is a zigzag with a structural rib, which is the Void of the Jewish Museum running across it. And this Void is something which every participant in the museum will experience as his or her own absent presence. That's basically a summary of how the building works. It's not a collage or a collision or a simple dialectic, but a new type of organization which is organized around a center which is not, around what is not visible. And what is not visible is the richness of the Jewish heritage in Berlin, which is today reduced to archival and archaeological material, since physically it has disappeared.<sup>58</sup>

There are a number of influences and references contained within this building. First, Libeskind referred to the emblem of the Yellow Star of David in the zig-zag design of the building. Second, the architect - who was trained as a musician - responded to the music of Arnold Schonberg. The strange shape of the building is designed to echo and distort sounds. Third, Libeskind was interested in the names of those people who were deported from Berlin during the Holocaust. Fourth, the architect was inspired by Walter Benjamin's *One Way Street*. This aspect is incorporated into the continuous sequence of sixty sections along the zig-zag of the building.

There have been allegations that the National Museum of Australia is a copy of the Berlin Museum. The controversy raises interesting questions about the operation of the economic and moral rights of architects in relation to copyright law. This case study develops and extends the analysis of moral rights, which has been undertaken in the paper. Whereas the battle over the National Gallery of Australia concerns the physical alteration of the building, the dispute over the National Museum of Australia deals with changing and transforming the context of a work. It involves a situation where the context of the Berlin Museum was altered from what the architect intended or found artistically acceptable. Furthermore, the controversy over the National Museum concerns the legitimacy of creating a new work using the fragments of earlier art works and images. It is related to the debate concerning the restrictions that the moral rights regime places upon appropriation art.<sup>59</sup> The contrast between the National Gallery of Australia and the National Museum of Australia is instructive and enlightening. It reveals that, although architects have limited moral rights in respect of the physical alteration of the building, they have extensive moral rights in relation to the contextual use of architectural designs. Arguably, this will mean that architects will have a greater scope for legal action against their peers - than their paymasters.

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58 D Libeskind, *Radix-Matrix: Architecture And Writings* (1997), 34.

59 E Wang, '(Re)productive Rights: Copyright And The Postmodern Artist' (1990) 14 *Columbia - VLA Journal Of Law And The Arts* 261.

### Economic Rights

The dispute raises fundamental questions about copyright infringement of economic rights, and the possible defences to such claims. It also acts as an important reminder that the moral rights regime will not act in isolation. The dispute highlights that it is possible for parties to bring simultaneous actions for breach of economic rights and moral rights. It will be left to the courts to facilitate the co-existence of these regimes.

*The Bulletin* first raised the allegations that the National Museum of Australia plagiarised the Jewish Museum on the 13 June 2000. The journalist Anne Susskind revealed the story in the breathless tones of a scoop:

It's an open secret in architectural circles, but hasn't gone much beyond that: the 'footprint' of the Gallery of Aboriginal Australians, designed to represent the history of Aboriginal Australians, designed to represent the history of Aboriginal people and one of the most important parts of the National Museum of Australia, traces that of the new Jewish museum in Berlin, designed to represent the history of the Jews in Berlin.<sup>60</sup>

In response, Daniel Libeskind told *The Bulletin*: 'We've looked at the web site and at some plans. It is extremely difficult to make a judgment based on these, but it seems there is a very shocking similarity, and we will investigate it further'.<sup>61</sup>

The story was picked up by the media in Germany. Interestingly, the usually dignified Frankfurter *Allgemeine Zeitung* chose to headline its story: 'Stroke of inspiration from the Antipodes; We'll copy you; Architectural kleptomania; How the Jewish Museum in Berlin became the National Museum of Australia in Canberra'. Libeskind told the newspaper: 'At first, I thought it was a joke. Not a proportion, not an angle of the Jewish Museum has been changed'.<sup>62</sup> Daniel Libeskind repeated his claims on the Bayerischer Rundfunk radio station in Germany that Howard Raggatt has copied his design for the Jewish Museum in Berlin, a controversial landmark building.<sup>63</sup> He said that his structure, in central Berlin, with sloping floors and other innovations designed to be metaphors for the disorientation Jews have suffered throughout history, had been copied exactly in the National Museum. The allegation focused on the Gallery of First Australians, a centre for Aboriginal Australia. There were questions about whether it was appropriate to attempt to compare the genocide of Jews with the experiences of Australian Aborigines.

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60 A Susskind, 'Footprints In The Quicksand', *The Bulletin*, 13 June 2000, 108.

61 Ibid.

62 P Heinrichs, 'Museum a Copy, Claims Architect', *The Age* (Melbourne), 8 April 2001.

63 Ibid.

In response, Howard Raggatt rejected the allegations of plagiarism, which had been aired in the press. He told *Arts Today* on Radio National:

I think that the press is having a lot of fun with those allegations. More seriously, it is unfortunate that the debate has been couched in this terminology. Plagiarism involves unacknowledged work - the purpose of passing that work off as your own. This is what we have not tried to do. I guess that our scheme is a purposeful translation of Daniel Libeskind's building in quite dramatic terms, which would be unrecognisable by the unscholarly viewer. Nevertheless, we have taken the icon of the zigzag - not because we are particularly inspired by the building, or even interested in it, in a way. It is a highly recognisable iconic form.<sup>64</sup>

Howard Raggatt was concerned that Daniel Libeskind is reported to have said that he thought that it was architectural plagiarism. There was a need to resolve the inter-personal ethics of the situation. Howard Raggatt hoped to contact Daniel Libeskind and resolve the dispute through mediation. He noted: 'It is a very awkward thing to have a conversation via the media'.<sup>65</sup>

However, it might be difficult to establish that there is a substantial similarity between the National Museum and the Berlin Jewish Museum. Even the journalist Anne Susskind admits that there are big differences from the Libeskind-designed building.<sup>66</sup> First, the wall surfaces will be different - they are exposed black pre-cast concrete as opposed to the shiny zinc cladding of the Berlin building. Second, they are not vertical like those of the Berlin building, but skewed, sloping in different directions. Thirdly, the roof was not flat like the Berlin building. Fourthly, the Canberra façade is even more aggressive, more severe and hermetic, with less relief in terms of windows (the windows are looking into a courtyard garden, the Garden of Australian Dreams). This makes it even more bunker-like - possibly due to budgetary constraints, but perhaps reinforcing a political statement the architects are making. Finally, a visitor approaching the museum might also not perceive the Libeskind zig-zag, because a section has been built in, obscuring it somewhat. But in some of the architects' aerial images of the gallery, the pattern is unmistakable.

Furthermore, it is interesting that journalists should pick up the references to the Libeskind building, and ignore the many other quotations embedded in the work. In a book on the building, Anne Susskind comments: 'No one, really, should be surprised that the National Museum of Australia has several allusions to other buildings'.<sup>67</sup> First, the central organising concept of the scheme is the idea of a

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64 M Cathcart, 'National Museum of Australia: Plagiarism?', *Arts Today*, *Radio National*, *ABC*, (30 April 2001).

65 *Ibid.*

66 A Susskind, 'Footprints In The Quicksand', *The Bulletin*, 13 June 2000, 108.

67 A Susskind, *Building History: The National Museum of Australia* (2001), 19.

'tangled vision', engaging the axes of Burley Griffin's city plan. It evokes such disparate inspirations as Bea Maddock's 'Philosophy Tape', Jackson Pollock's 'Blue Poles', boolean string, a knot, ariadne's thread, and the Aboriginal Dream-Time story of the Rainbow serpent making the land. The building implies that the story of Australia is not one story, but many stories tangled together. Furthermore, the National Museum of Australia refers to a Burley-Griffin designed cloister at Newman College in Melbourne. It quotes the Sydney Opera House - both the parts designed by Jorn Utzon, and sections designed by the other architects. It suggests the shell curves of Felix Candela. The Hall is evocative of Eero Saarinen's terminals at the J F Kennedy Airport in New York. The arc is like a piece of work by Richard Serra. The Garden of Australian Dreams evokes a range of different cartographies. And the walls also use selected fragments of the word Eternity - evoking the story of a man who for thirty years chalked this single word on the pavements of Sydney.

So it would be wrong to take the reference to the work of Daniel Libeskind out of context. It is but one of a multitude of quotations embedded in the building. As Charles Jencks notes that no one reference is clear: 'it suggests all of these things without naming them, and this ambiguity gives the building great power'.<sup>68</sup> It is striking that questions about copyright should be raised in relation to the work of Daniel Libeskind, but not in respect of say the buildings of Jorn Utzon or Eero Saarinen. However, Charles Jencks also justifies the building in terms of transformative use: 'Transformation liberates architects from slavish imitation while allowing them to combine prototypes'.<sup>69</sup> So perhaps a case could be made that the copying is protected by the defence of fair dealing - for the purposes of criticism and review.

It is striking that the RAlA was silent over the controversy over the National Museum of Australia, given that it was so vocal and active in the dispute over the National Gallery of Australia. There were a number of extenuating factors which militated against such an involvement. The conflict over the Museum pitted an Australian architect against an international architect - whereas the battle over the Gallery was a clear-cut conflict between an architect and the owner of a building. Furthermore, the Museum raised complex questions of inspiration and appropriation in relation to a post-modern building.<sup>70</sup> By contrast, the Gallery involved matters of heritage and renovation in regard to a modern building. Such circumstances could have dissuaded the RAlA from playing a direct role in the conflict.

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68 C Jencks, 'The Meaning of Australia' (2001) 837 *Domus* 96.

69 *Ibid.*

70 LJ Wood, 'Copyright Law And Postmodern Artistic Practice: Paradox And Difference' (1996) 1 *Media And Arts Law Review* 72.

## Moral Rights

The dispute also highlights the limitations of the moral rights regime in dealing with collective and collaborative art. As Patricia Loughlan notes:

Moral rights does not have within its ideology any idea which recognises or accommodates the collective, continuing nature of all creativity, either the inevitable fact that 'the very act of authorship in any medium is more akin to translation and recombination than it is to creating, or the fact that whole networks of people, including the cognoscenti of the 'art worlds', are in fact required to work together to produce and disseminate art.<sup>71</sup>

It is a quirk that architects will enjoy full moral rights in respect of copying of their designs - but limited protection in respect of physical alterations to their buildings.

The noted architecture critic Charles Jencks poses the fraught question of attribution: 'Is it right, or reasonable, in a pluralistic democracy to quote other architecture and, if so, should the quotes be overt, understated or cryptic?'<sup>72</sup> Charles Jencks claims that the building cites - rather than copies - the Jewish Museum:

One of the problems of Modern architecture is that its pretensions to originality often obscured covert plagiarism. Here quotation marks are out in the open, thus disarming charges of theft. For instance the zigzag motif is lifted explicitly from Daniel Libeskind's Jewish Museum in Berlin and it has several justifications. The most obvious is the parallel between two different genocides, but there is also the way the shape gives a figural direction to the Gallery of the First Australians (as it is also known) and connotes the angst of the lightning bolt. There is a world of difference as any scholar or lawyer knows between honest and open citation and covert copying. Everywhere the architects Ashton, Raggatt and McDougall are citing authorities they find relevant, or functional, or amusing, or instructive.<sup>73</sup>

The Canberra museum seeks to appeal to a wide range of audiences through incorporating explicit references to the major subcultures of Australia. The justification for making some quotes explicit is to ensure that various people feel that they are getting a small slice of the national pie; or at least recognition.

*The Bulletin* suggested that there were serious copyright and ethical and moral issues at stake. An architect who preferred to remain anonymous questioned

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71 P Loughlan, 'Moral Rights (A View From The Town Square)' (2000) 5 (1) *Media And Arts Law Review* 1 at 8.

72 C Jencks, 'The Meaning of Australia' (2001) 837 *Domus* 96.

73 *Ibid*, 112.

whether sufficient respect was shown for the integrity of the Jewish Berlin Museum:

It's a little like theme-park architecture. By removing the uniqueness of a symbol, you downgrade it to some degree. I couldn't do something like that, that replicates something. You take a magazine, do some scanning or whatever; you can do it, you can distort images, steal original images, you can mirror it do whatever you want.

Anyone who follows works of architecture internationally would pick it up. Where do you draw the line and what are the ethics? Can one equate a symbol of the Holocaust with genocide in Australia? How deep does the ownership of that symbol in Berlin, where the Holocaust was conceived or generated, go? The project should be open to such scrutiny.

Most architecture is concerned with beauty - this has a wider ambition. It is not politically neutral. I personally like that subversive aspect of it. What I don't support is how he generated it. [ARM] have elevated this theory of replica to high art. They say it is generated by certain cultural connections. But it's like kleptomania in architecture.<sup>74</sup>

There is a dissonance between the interior and the exterior of the building. There has long been a concern about museums appropriating cultural property from Indigenous people. Dawn Casey has spoken out against this practice herself.<sup>75</sup> Furthermore there are exhibits within the museum which discuss the history of artistic appropriation of Indigenous designs. In such a context, it might be considered inappropriate for a copy of the Berlin Museum to be used to represent the Gallery of First Australians.

However, Professor Michael Keniger, a member of the Acton Peninsula Project Design Integrity Panel, denied any political intent: 'The map, the plan, the footprint, is very specific, so I think those who are aware of Libeskind's design will be aware of the parallels being drawn. That is as far as it goes. It's an inference drawn by others, rather than a specific political statement. They have woven into the collage this symbol and it sits there'.<sup>76</sup> A Canberra architect Andrew Metcalfe was supportive of the design: 'In terms of postmodern culture, it's probably permissible'.<sup>77</sup> Another architect said it could be seen as a 'homage' to the Libeskind building.

The director of the National Museum, Dawn Casey, sought to defend the architecture of the National Museum from criticisms that it was a case of

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74 A Susskind, 'Footprints In The Quicksand', *The Bulletin*, 13 June 2000, 108.

75 D Casey, 'Indigenous Ownership of Digital Material: Is Organised Crime Getting Out Of Hand', *Incite: ALIA Magazine*, June 2001.

76 A Susskind, 'Footprints In The Quicksand', *The Bulletin*, 13 June 2000, 108.

77 Ibid.

appropriation.<sup>78</sup> First, she attempted to deflect attention away from the debate about the exterior of the Museum to the interior of the Gallery of First Australians:

Why are we talking about the building's envelope when so many rich stories lie within? We are especially proud of the imaginative and significant exploration of Aboriginal and Torres Strait Islander cultures and histories that it contains.<sup>79</sup>

Second, Dawn Casey provided a defence of the artistic practices of the architects of the National Museum of Australia. She argued that the building was the product of artistic criticism and review, rather than cultural cringe: 'Ashton Raggatt McDougall's architecture has, in fact, critiqued that process of architectural quotation for many years'.<sup>80</sup> Finally, Dawn Casey takes the populist line that the building has been validated by the response of the public: 'People love it and are coming to see it in enormous numbers, 100,000 in less than a month. They seem to agree with us about the building's cheeky Australianness, originality and sense of place'.<sup>81</sup> Such arguments could be evidence that the conduct of the architects was reasonable in all of the circumstances.

It is worth considering whether the National Museum of Australia can be said to have authorised any infringement of moral rights by the architecture firm. S 195AO of the *Copyright Amendment (Moral Rights) Act 2000* (Cth) notes that a person can authorise the infringement of the right of attribution. S 195AQ (2) stresses that a 'person infringes an author's right of integrity of authorship in respect of a work if the person subjects the work, or authorises the work to be subjected to, derogatory treatment'. The museum's director and council had approval of the building designs at all stages and liked what they saw. The director of the National Museum of Australia, Dawn Casey, denied any prior knowledge of the quotation of the Libeskind building:

We were not aware of the reference to the Libeskind plan (which is a Jewish history museum, incidentally, not a Holocaust museum) among the numerous cultural references inherent in the design. We endorsed the plans as a whole for their imaginative and creative solution to the task at hand. Hindsight is a fine thing and, had we known, we may well have asked for that particular reference not to be included, simply because of its potential to distract attention from our exclusively Australian story.<sup>82</sup>

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78 D Casey, 'Vision For Museum Not Based In Mimicry', *The Australian* (Sydney), 23 April 2001.

79 Ibid.

80 Ibid.

81 Ibid.

82 Ibid.

It is difficult to divine what circumstances of authorisation are envisaged by the legislation. If a person commissioned an architect to copy another building in a derogatory fashion, perhaps they would fall foul of these provisions.

The conflict over the National Museum of Australia highlights a fundamental clash between the individualistic focus of the moral rights regime, and the collective nature of architecture and other cultural forms. As Patricia Loughlan observes:

The legal concept of moral rights reflects acceptance of a theory of art which is author and artefact-centred and which embodies romantic, individualistic and canonical conceptions of artistic creativity. Alternative visions of art as discourse and as reflective of communitarian values and collective practices do not fit easily within a moral rights conceptual or legislative framework. Those arts practices (like appropriation, montage and parody) which most directly challenge ideas of authorial control and private ownership of artistic images and products are in fact also those most directly and negatively affected by moral rights regimes.<sup>83</sup>

It would be a shame if the moral rights regime might be used to censor playful and eclectic works of art, such as the architecture of Ashton Raggatt McDougall. There is a need for the courts and the legislature to show greater latitude in respect of artistic practices and cultural forms, which involve pastiche, montage, and parody.

## Conclusion

There is a profound anxiety as to whether architecture should be treated the same as the other arts, or treated in a special fashion. The director of the National Gallery, Dr Brian Kennedy, posed the question: 'Will architects insist on being like the other arts or will they be greater than the other arts, as they've always been? It's a great art form but it requires you to let go'.<sup>84</sup> As Peter Greenaway observed in his film *The Belly Of An Architect*:

You can hide paintings, you can avoid literature, you can - if you're ingenious - avoid listening to music, but you cannot avoid architecture. Architecture is the least perishable of the arts and the most public. Architects (perhaps like film-makers) are supposed to be accountable to art, to finance, to the specialist critic, to the man in the street and perhaps to posterity.

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83 P Loughlan, 'Moral Rights (A View From The Town Square)' (2000) 5 (1) *Media And Arts Law Review* 1 at 8.

84 L Martin, 'Blue Murder in the Art Cathedral as Angry Architect Takes on the Archbishop', *The Sydney Morning Herald*, 2 June 2001, 6.

There is certainly a case to be made that architecture is different from other forms of art in terms of its longevity and its public profile. However, such differences are not compelling enough to force architects to relinquish their economic and moral rights.

It is unfair that architects should be denied the full complement of moral rights given that public architecture has long held a secure place in high art. It is unjust for the profession to be accountable to all - but have no one answerable to them. They should not have to endure such public responsibilities without any privileges in return. A strong case can be made that architects deserve to be treated as other creators. The test of reasonableness, industry standards, and consent provisions, should be sufficient to resolve any disputes over moral rights. Architects should not have to wistfully rely upon a limited right of negotiation. The legislation needs to mediate between the artistic concerns of architects, the property investment of the proprietors of buildings, and the public interest in the urban environment.

There are signs that the debate over copyright law and architecture will shift from cultural institutions like galleries and museums to private homes and residences, which are designed by architects. Geraldine O'Brien observes that 'inner-city house architects are increasingly concerned about what they see as ruinous changes to their original works'.<sup>85</sup> There is a push to extend moral rights protection from iconic buildings to significant heritage or award-winning houses. The national president of the RAIA, Graham Jahn, emphasized that the law made no distinction between the one-off architectural gem and a run-of-the-mill project home: 'It's a new law and the way it applies is not fully resolved'.<sup>86</sup> Such claims could lead to hysteria among property owners that private residences will be unable to be renovated and reconstructed for fear of infringing the moral rights legislation.

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85 G O'Brien, 'Architect's Anger Over Blankety Wall', *The Sydney Morning Herald*, 13 December 2001, 1.

86 Ibid.