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The Story of Moral Rights
or the Moral to the Story?

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The Australian Copyright Act (1968-1991) (herein called the Act) substantially fails to protect and recognise the “moral rights” of authors to an extent that is likely a breach of Australia’s obligations under the Berne Convention.¹ This dilatoriness is emphasised when one considers the extent of protection now granted in the United Kingdom and the United States by statute and case law. This article will argue that moral rights should be more satisfactorily protected to ensure our compliance with the Berne Convention and for utilitarian reasons.

What are Moral Rights?

It is perhaps at the heart of the controversy on this issue that “moral rights” is the term used as that is not an accurate translation of the French term “droit moral”. More correctly the term should be “personal rights”. This reflects the genesis of this doctrine in Europe (especially France) which is based on the concept that after creation of a work, and even after economic rights are no longer vested in the artist, an artist should still retain rights in regard to the use of that work. This doctrine is explained on the basis that an artist’s work is an extension of the personality of the artist and any interference with that work may reflect on the reputation of the artist.²

On a more philosophical level this concept can be seen to reflect the Kantian philosophy that any literary creation is inevitably fused with the author’s personality and the mere act of creation confers on the author a right to protect the work from interference.³

Normally moral rights are divided into four categories:⁴

1. right of publication;
2. right of withdrawal or modification;
3. right of integrity;
4. right of attribution.

Right of Publication

This reflects the right of an artist to decide when and whether his work should be released to the public and includes the right of an author to resist publication until he or she considers that the work is of a standard befitting his or her name. This right is best demonstrated by the Whistler Case, a decision of a French court. The artist Whistler had been commissioned by Lord Eden to complete a portrait of Lord Eden's wife. The Lord sought delivery of the portrait which was completed and had been publicly exhibited. The artist refused delivery on the basis that he was not satisfied with the quality of the work. The Court confirmed that the artist retained control of the painting and was entitled to refuse to deliver the painting to Lord Eden if he was not satisfied with the standard of the work. However, the artist was liable to an action for damages for breach of contract without prejudice to rights he may have over the painting itself.

Right of Withdrawal or Modification

This is the right of an author, even after transfer of exploitation rights, to retract or correct that work on the basis, for example, that the work no longer reflects the current opinion of the author. This is a right acknowledged in French law but even in France the right is subject to the need to compensate the assignee for any losses which may result from the exercise of the right. The exercise of this right could cause enormous practical problems and some commentators (including those supportive of the doctrine of moral rights) believe that it would be an unreasonable constraint upon the owner of the work. Sarraute is of the opinion that an author should protect his or her reputation by setting forth his or her more recent views in a new work rather than using the right of withdrawal.

Right of Integrity

"The right of integrity is the most important of the author's moral rights. It is designed to protect an author's work from distortion, mutilation or any derogatory action in relation to the work. For an author, the most common situation where the integrity of a work is threatened arises where a third party, for example, a publisher (who may well be the owner of the copyright and the work) seeks to alter the author's work."

This right would include restricting the placing of site specific art (such as a sculpture) in an inappropriate site or the use of music as a part of a film which portrayed a theme obnoxious to the author. There is

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6. Cass div 14 May 1900 DP 1900-1-500 Conclusion by Avocat Général Desjardis.
7. Supra, n 5, at 468.
8. Ibid, at 478.
10. Sarraute, supra, n 5, at 477.
some difference of opinion as to whether this includes the right to stop destruction of work.\textsuperscript{12}

This right would protect a work from inappropriate editing, dismemberment or performance.\textsuperscript{13}

**Right of Attribution**

This is seen as a basic moral right and has two aspects:

1. the positive right to require that the work be identified as his work, and
2. the right to prevent another falsely claiming authorship or using the author's name on a work not produced by the author.\textsuperscript{14}

**Duration of Moral Rights**

In French law the duration of moral rights are deemed to be perpetual, unlike the limited span of economic rights which is curtailed 50 years after the death of the author.\textsuperscript{15} The duration period for moral rights, limited to the same period as economic rights, is supported by many European countries and by the Berne Convention.

**Relevance of the Berne Convention**

Australia is a signatory to the Berne Convention which is the leading international copyright convention that sets minimum standards for the protection of works.\textsuperscript{16} This agreement is administered by World Intellectual Property Organisation (WIPO) an agency of the UN. The aspect of this Convention which is of relevance to this discussion is Art 6 bis which requires member countries to accord protection to particular types of moral rights in relation to a broad range of literary, musical, artistic and dramatic works. These rights are basically the right of attribution and the right of integrity but they are limited to cases where an artist's reputation has been injured. Article 6 bis states:

"Independently of the author's economic rights and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of or other derogatory action in relation to the said work, which would be prejudicial to his honour or reputation."

The article requires that these rights survive for at least the term of economic rights.

Accordingly, it appears that Australia has at a minimum an obligation to protect those two moral rights as part of its obligation as a signatory to the Berne Convention. There is a view expressed that the Convention requires a member country to ensure domestic legislation is in place


\textsuperscript{13} Ricketson, op cit, n 2, p 424.

\textsuperscript{14} Golvan, op cit, n 1, p 165 and Ricketson, op cit, n 2, p 424.

\textsuperscript{15} Sarraute, supra, n 5, p 481.

\textsuperscript{16} L L Van Zelzen, "Injecting a Dose of Duty into the Doctrine of Droit Moral" (1989) 74 Iowa Law Review 629 at 635.
to grant the positive rights encapsulated in the terms of the Convention rather than relying on any indirect protection offered by existing legislation.17

**Copyright Law Review Committee**

The question of the protection of moral rights has attracted increased interest in Australia as a result of the Copyright Law Review Committee, *Report on Moral Rights*, November 1988. In that report the majority (five as to four in minority) were of the view that:18

1. there are insurmountable practical problems in introducing such a régime;
2. the theoretical basis or moral rights has not been identified;
3. insufficient support for the introduction of moral rights in Australia;
4. insufficient evidence of violation of moral rights;
5. the Australian community will not endorse moral rights protection;
6. some moral rights are already protected by domestic law.19

**Moral Rights—Why the Need?**

The primary question is why should the Copyright Act recognise the need for protection of moral rights?

In the light of Australia’s accession to the Berne Convention, substantial comment has ensued which is critical of any further implementation of the terms of the Convention in Australian law. This view was acceded to by the majority view in the Committee of Review and has been supported by other commentators.20

Some of the basic arguments against moral rights can be summarised as follows:

1. The introduction of moral rights would mean the introduction of concepts foreign to our system of law and thereby create havoc in our literary and cultural industries.21 The illogical nature of this concept can be ascertained by reference to another argument of the majority in the Review Committee, that moral rights are already satisfactorily protected by current legislation and common law doctrines.22 Accordingly, it seems that the concept of moral rights (said to be a foreign doctrine) is already protected and necessarily therefore not a foreign concept. Perhaps the real argument here is against “further”

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19. Ibid. This was also argued in the USA Congress as a basis for not implementing Berne Convention Art 6 bis in domestic legislation.
21. Ibid.
provision, not any provision.23 These arguments are also based on concepts such as the fear that authors may begin to seek frivolous and unreasonable recovery on matters not properly the subject of concern such as Christmas decorations on a sculpture.24 No such result has occurred to any degree in other jurisdictions where moral rights are indigenous or introduced.25

Any legislation would need to be couched in terms such that an action can be brought only if unreasonable infringement is caused thereby quelling any unnecessary fears of an avalanche of unreasonable actions.

2. There is no evidence of complaint by other members of the Berne Convention as to our current law.26 Our obligations under the treaty are not dependent upon complaints and as Australia is not yet a major force in world art this is a matter not yet tested.27 However, it does appear that Australia will become increasingly isolated as other countries comply with the provisions of the Convention, (such as the United Kingdom and the United States).

3. The absence of a theoretical basis for moral rights.28 If this was a requirement for legal reform then much current legislation would never have been passed including our current Copyright Act which was based upon concepts foreign to the common law.29

However, merely discussing the failings of the arguments against the implementation of legislation incorporating moral rights does not sustain the argument for its introduction. The main arguments favouring such legislation can be summarised as follows:

1. Australia is a signatory to the Berne Convention and has an obligation to conform with its terms.30 As the discussion above suggests, this has not occurred and this is supported by a number of commentators.31 In the words of the Whitford Committee in England:

"although the Berne Convention limits our freedom of action this is the price we pay for joining in a multi-national agreement for some 60 other countries and thus giving our authors, composers, artists and film makers the enormous benefit of copyright protection in all those countries without formality, merely by virtue of their having created a work."32

It has been argued that the Convention does no more than require that no impediment exist to the establishment of moral rights. This view has not been shared by most commentators.33

25. Golvan, op cit, n 1, p 169.  
29. Vaver, supra, n 23, at 291.  
30. Crawford, supra, n 17, at 15.  
Our continuing dilatory attitude to this point cannot fail to harm our international reputation especially when our own artists and authors overseas may be protected by complying members while the reverse may not apply in Australia in relation to foreign artists.

2. Often quoted by critics is the ability of authors to contractually protect their interests without any need for legislation. This is unrealistic owing to the limited bargaining position of artists, especially when they are not well known or particularly successful. Moral rights legislation will help overcome this disparity subject to the way in which laws are drafted.

3. The basis of moral rights is "truth in advertising", that is, you see what the artist intends that you see. This is not inconsistent with the philosophies behind much current trade practices and consumer legislation and is consistent with trade mark law, that is, people relying on trade marks as an assurance of particular quality. Moral rights would assist in ensuring that process is unsullied.

4. Legislation incorporating moral rights will engender the growing movement towards heritage protection by ensuring the integrity of objects considered worth preserving.

5. The law has acknowledged the importance of protecting one's reputation and integrity with actions such as defamation. Moral rights legislation is a logical extension of that protection.

6. There would appear to be little need for argument to support a concept that ensures that artists gain due reward for their work. Artists need to have their work viewed as they intend and thereby take the risks of acceptance and otherwise. By protecting moral rights as well as economic rights the public will increase its respect and appreciation of cultural values generally, thereby raising the cultural standards of our society.

7. Technological advances and the expansion of our capability to reproduce and disseminate work result in a greater need to give artists necessary protection against distortion and the right to be known as authors of works. The use of private copying and satellite transmission allows exploitation of copyright works in a way not contemplated by current legislation. Moral rights legislation will help relieve this imbalance.

8. Public demand—the submissions to the Review Committee and other authors suggest that a substantial number of violations of moral rights is occurring and there is a demand for law reform in this area.

34. Ibid, p 34.
35. Golvan, op cit, n 1, p 169.
37. Ibid, at 289.
38. Ibid, at 288.
40. Ibid, p 58.
41. Ibid, p 60.
42. Ibid, p 55.
Protection Granted by the Act

I will discuss the level of protection of each of the four moral rights in Australia with emphasis on the two rights protected by the Berne Convention, that is, rights of integrity and attribution, and make reference to the United States and United Kingdom statute and case law.

1. Right of Attribution

This right is generally not well protected by Australian law. The majority of the Copyright Law Review Committee acknowledge this position when they stated "there is, however, no comprehensive framework establishing a right of recognition".43

Reference was made by the Committee to four elements of this right:44

(a) the right to be known to the public as author;
(b) the right to prevent another claiming authorship;
(c) the right to prevent others from wrongfully attributing to an author works that are not his or her own;
(d) the right to prevent attribution to unauthorised versions.

(a) The Committee acknowledged that category (a), apart from contractual stipulation, is not protected in Australia.45
(b) The right to prevent others claiming authorship is to some extent protected by s 190 of the Act which states that a person is under a duty not to insert a name on a work when that person is not the author of the work. The limits of this protection can be summarised as follows:

1. Section 190 does not confer a positive right to be denoted as author as required by the Berne Convention.46 It therefore will not assist an author where publishing is completed without acknowledgment as the negative duty would not therefore be infringed.47
2. The provisions of s 190 do not apply to the makers of any recordings or films as it is limited to "works" as defined in the Act.48
3. In relation to s 190 (1)(b-d) the author will have no remedy unless the publisher, seller or trader had knowledge of the false attribution.49

(c) The right to prevent others wrongfully attributing to the author works that are not his or hers is not protected and the majority refer us to the common law remedy of "passing off" and s 52 of the Trade Practices Act.50 However, as the minority point out the basis of any action

44. Ibid, pp 6-8.
46. Golvan, op cit, n 1, p 56.
47. Ibid.
49. Ibid.
under those provisions is totally irrelevant to copyright.\textsuperscript{51} To succeed with a passing off action a plaintiff would need to establish the existence of goodwill and reputation in a relevant geographical area at risk of injury\textsuperscript{52} while the \textit{Trade Practices Act} action is reliant on a limited jurisdiction in dealings in trade and commerce and is based on the need to demonstrate false and misleading behaviour and loss being suffered. The advent of \textit{Fair Trading Acts} in State jurisdictions would do little to improve this situation. These remedies are not a satisfactory solution to this right as a breach of the moral right may occur without being proved to be a breach of those provisions nor would they comply with Berne Convention requirements as it does not grant the author the positive right to claim authorship.

(d) The right to prevent attribution of an altered version. Section 191 of the Act confers a duty on a publisher not to publish, sell or let for hire a work altered by a person other than the author as the unaltered work of the author. This provision has similar defects to those in s 190 in that it is a negative duty and not a positive right to expect that no unauthorised alterations will be made. The duty is only owed to the author by a publisher or seller and the duty is only breached if it can be established that the publisher or seller had knowledge that the work had been altered. This may be difficult to prove.\textsuperscript{53}

The limits of the protection granted by this section are exemplified by three cases starting with \textit{Preston v Raphael Tuck & Sons}\textsuperscript{54} where a similar English provision was held not to have been breached unless a positive representation expressly or by implication was made that the work was unaltered. In \textit{Carlton Illustrations v Coleman & Co Ltd}\textsuperscript{55} the Court specified the necessity for a material alteration affecting the reputation of the artist for a breach of the same provision to occur. A recent Australian authority \textit{Crocker v Papunya Tula Artists Pty Ltd}\textsuperscript{56} followed the above authorities and held that the reissuing of a book with a change of title and a deleted introduction was not a breach of s 191 as no representation in breach of s 191 was made and the alteration was not material or likely to affect the reputation of the author. These authorities demonstrate the weakness of protections based on common law doctrines without particularised legislation dealing with this area of the law.\textsuperscript{57} However, some see these cases as an example of the conservative and reasonable way in which moral rights issues would be handled by the courts, should legislation be introduced, to make nought the "floodgates" arguments of some critics of the need for moral rights.\textsuperscript{58}

The limits of these provisions are demonstrated by the fact that there is no breach of s 191 if an altered work is published or sold under

\begin{itemize}
\item \textsuperscript{51} Ibid, p 66.
\item \textsuperscript{52} Golvan, op cit, n 1, p 167.
\item \textsuperscript{53} Golvan, op cit, n 1, p 34.
\item \textsuperscript{54} [1926] Ch 667.
\item \textsuperscript{55} [1911] 1 KB 771.
\item \textsuperscript{56} (1985) 51 IPR 426.
\item \textsuperscript{57} Ricketson, op cit, n 2, p 428.
\item \textsuperscript{58} S Goddard, "Artists and Copyright", (1989) 68 Australian Copyright Council Bulletin 29 at 32.
\end{itemize}
a name of a person who had attended to the alteration owing to the negative nature of the provision.59 Such an act would not be a breach of s 190(2) as that provision applies only where another person's name is affixed to an adaptation of a work of the author.60

Accordingly, it would appear that Australian law gives little comfort to authors in relation to rights of attribution. It appears that Australia will continue to become more isolated in its current position by the recent advances made in United Kingdom and United States legislation which in some circumstances acknowledge the moral right of attribution.

In the United Kingdom the law has undergone a significant change by the passing of the Copyright, Designs and Patents Act 1988. The relevant sections of this Act are ss 77-79. Section 77 provides that the author of a work and the director of a film have the right to be identified as such after that right has been asserted.61 The right conferred covers the following types of works:

1. literary and dramatic works (not lyrics)—s 77(2);
2. musical works (plus lyrics)—s 77(3);
3. artistic works—s 77(4);
4. works of architecture—s 77(5).

Section 77(6) provides that an identification of the author must be clear and reasonably prominent.

Section 77(8) states that if the author or director use a pseudonym, then that form must be used otherwise any reasonable form of identification must be used. An important requirement is the provision in s 78 requiring the paternity right to be asserted which thereby binds subsequent owners. There are a number of exceptions to s 79, such as including computer programs, fair dealing, exam questions, current events. Section 84 provides that a person has the positive right not to have work falsely attributed to him. Accordingly, these provisions would appear to provide satisfaction of the first limb of the Berne Convention.

Although these provisions have had some criticism as being "timid things, venturing little further from their common law forebears" they do demonstrate an attempt to incorporate moral rights in English law.62 An important feature of these provisions is the ability of an author to waive these rights (s 87) which is a matter of concern as often the disadvantaged bargaining position of authors will result in these rights being lost either consciously or by the authors simply not reading contracts carefully.

In the United States the Federal Government is yet to pass legislation ensuring protection of moral rights despite the fact that a Berne Convention Implementation Act was passed in 1988. The United States adopted a minimalist attitude to that legislation, that is, the Federal Copyright Act was only amended when a clear conflict between the Convention and

59. Ricketson, op cit, n 2, p 428.
60. Ibid.
61. Flint, Thorne and Williams, op cit, n 32, p 54.
the Copyright Act existed. This allowed Congress to avoid adoption of the moral rights provisions.63

American case law does not give an author a right of attribution without some contractual provision to the contrary. This is demonstrated by Suid v Newsweek Magazine64 where a court refused an action by an author who said he had been quoted without acknowledgment. The Court stated: "the plaintiff does not cite, and this court has been unable to locate, any case recognising a common-law action for failure to attribute or misappropriation without attribution."65

However, there have been a number of individual States that have enacted legislation that to some extent protects the rights of authors in regard to paternity and other rights.

Examples of State legislation are those of California and Massachusetts. The California Art Preservation Act and Massachusetts General Laws Amendment Chapter 231 protects “fine art” narrowly defined as “original paintings, sculpture or drawing or an original work of art in glass of recognised quality”. The legislation allows artists to claim authorship or to disclaim that right for good and just reasons.66

New York enacted a slightly different type of legislation that gives more limited protection to a much broader array of works. The Act emphasises the right of attribution but limits that right to works "knowingly displayed in a place accessible to the public" (New York Arts and Cultural Affairs Law, s 14.03).67 The Act does not require attribution where the work is by an artist of distinctive style if reasonably regarded as the work of the artist.

There seems to be some doubt as to whether an artist could use this legislation to stop an owner displaying an altered work even without the author’s name. That appears to be a severe limit on the effectiveness of the Act68 as is the requirement to show "damage to the artist’s reputation likely to flow from the display".69

The New York and California models are criticised for being too narrow and limited in the purview.70

Currently, the provisions of the American Federal Copyright Act do not explicitly safeguard moral rights of artists, rather, economic rights are seen as primary. Normally, as a result, reliance is placed upon common law doctrines to protect moral rights. Common law doctrines normally canvassed are:

64. 503 F Supp 146 (DDC 1980).
67. Ibid, at 386.
68. Ibid, at 387.
(a) Section 43(a) of the Lanham Act—this is an equivalent of our Trade Practices Act and has many of the same limitations. An action under that provision deals with "unfair competition" and protects against consumer confusion. That Act may on occasions assist in protecting paternity rights.71

In Smith v Montaro a film distributor credited an actor's performance to another actor and this act was held to be actionable.72 However, this does demonstrate the limit of this remedy as deception may be limited to where an artist's name is replaced by another.73 If an artist's name is missing, then no misrepresentation occurs.

(b) Other common law actions may on occasions be relevant. However, courts invariably reach a result based on the construction of the relevant contract rather than based upon any proper consideration of the moral rights of the artist.74 In Vargas v Esquire Inc an artist was not able to compel attribution in an article in a magazine as no mention of that requirement was made in the contract.75

(c) Defamation actions could be considered but an author will always need to demonstrate that the artist's reputation has been put up to ridicule, often a difficult matter.76 Moral rights seek to protect the personality of the artist while a defamation action seeks to protect the artist's exploitable reputation and economic interests.77 Many transgressions of moral rights may not in the public's eyes defame the author and can only be brought at great cost to the applicant.

Accordingly, it can be concluded that, subject to the limited rights in various State statutes, there is little protection to paternity rights in United States law. However, these protections are still much more substantial than the rights enjoyed in Australia.

2. Integrity Rights

In the Australian context there is only limited protection for integrity in s 191 of the Act. Under that section, a work altered by a person other than the author must not be published, sold or hired as the unaltered work of the author.

This provision is limited in its impact as it imposes only a negative duty in favour of the artist, not a positive right to ensure no alterations are made which will (may) affect the integrity of the work.78 The duty is also qualified as follows:

(a) the duty is only owed to the author by the publisher, seller or hirer and not by any subsequent owner;79

(b) a breach occurs only when the publisher or seller has knowledge of the alteration;80

71. Ibid, at 1455.
72. Ibid.
73. Ibid.
74. Ibid, at 1458.
75. Ibid.
76. Ibid, at 1460.
77. Ibid.
78. Golvan, op cit, n 1, p 163.
79. Ibid.
80. Ibid.
(c) there is no breach if the altered work is published or sold under the name of the person who has done the alteration\textsuperscript{81} nor would that be a breach of s 190;

(d) section 191 does not relate to works created prior to 1 May 1969 and does not secure the author.\textsuperscript{82}

Other aspects of the Act relevant to this protection are:

- section 35(5) where a commission is made for valuable consideration the author is able to restrain use of the photograph, painting, drawing or engraving works other than for the purpose specified. This is analogous to a breach of an implied contractual term and it restrains only acts comprised in copyright such as reproduction but would not stop defacement.\textsuperscript{83}
- section 55(2) compulsory licence re-recording of musical works is not available if the work is debased.

Accordingly, there appears only a limited protection for the moral right of integrity of the Copyright Act. At common law a limited protection may be available under the tort of defamation in relation to publications which can be shown to be derogatory to the reputation of the author (Archbold v Sweet; Moseley v Stanley Paul).\textsuperscript{84} Ricketson considers that this right of action may incorporate the Berne Convention requirement that domestic law avail the author of a remedy where any breach of moral rights affects the honour or reputation of the author.\textsuperscript{85} However, as acknowledged by Ricketson, defamation rights do not survive the author as required by the Berne Convention.\textsuperscript{86} Other authors are less enthusiastic as to the ability of defamation to provide adequate protection.\textsuperscript{87} Defamation laws vary between States, the tort is subject to defences such as truth and public benefit and may be ineffective in situations where mutilations may actually increase sales by creating publicity. Neither post mortem enforcement, as required by the Berne Convention, nor injunctive relief are normally available under the tort of defamation.

In the United Kingdom the recent Copyright, Designs and Patents Act 1988 accords some protection in this area. Section 80 provides that authors have the right in specific circumstances not to have the work subjected to “derogatory treatment” assuming they have not waived those rights under s 87.

“Treatment” is defined under s 80(2) to include “any addition to or deletion from or alteration to or adaptation of the work”.

“Derogatory” is defined as “distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director”.

\textsuperscript{81} Ricketson, op cit, n 2, p 428.
\textsuperscript{82} Ibid, p 427.
\textsuperscript{83} Report on Moral Rights, p 67.
\textsuperscript{84} Golvan, op cit, n 1, p 164.
\textsuperscript{86} Ibid.
\textsuperscript{87} Golvan, op cit, n 1, p 165 and Brooks, supra, n 70, at 1460.
"Infringement" occurs in relation to a literary, dramatic or musical work when a person deals with a work and either publishes a derogatory treatment of the work or performs the work in public, or issues to the public copies of a film or sound recording.

There are statutory exceptions to this in the case of computer programs or works for reporting current events.

Section 80 is not infringed if there is a sufficient disclaimer (s 82(3)) that is, there is a disclaimer noting that the work has been subject to treatment and that the author or director has not consented to such treatment.88

This summary of the main features of the provisions indicate that the rights conferred are somewhat limited as:

1. the rights are not infringed by the derogatory treatment but by its publication (s 80(3-6));89
2. the rights would not include placing the object in an inappropriate context and accordingly the placing of a sculpture in a place inhospitable to the artistic style would not be deemed a breach;90
3. total destruction would not be a breach as there is nothing to expose to the public;91
4. the rights may be waived and, in the light of the different bargaining position of the artist as against publishers or purchasers, this is a major weakness of the provisions. It would seem likely that any well-drafted agreement would contain a waiver of those rights at least against the publisher.92

The position in the United States is similar in relation to the right of attribution except that case law intercedes more often in this area.

Apart from some notable exceptions where dicta suggested otherwise, the United States courts have consistently refused to acknowledge the artist's right of integrity and have focused on the economic aspects of copyright protection and other existing common law actions. In Preminge v Columbia Pictures Corp93 the Court did not sustain the author's right to stop the editing of a film but acknowledged there was a limit to the extent that a broadcaster could edit, cut and interrupt a picture so as to disrupt the integrity of the product, perhaps based on an industry standard of acceptable editing of such works.94 This position was further demonstrated in the well-known case of Serra v United States General Service Administration.95

The owner of a work of sculpture sought to move a sculpture designed for a particular site to another site and was met by an action by the artist that included claims based on New York

88. Flint, op cit, n 32, p 71.
90. Ibid.
91. Ibid.
93. 148 USPQ 398 (NY Sup Ct); 149 USPQ 872 (App Div); 150 USPQ 829 (Ct App 1966)
95. 847 F 2d 1045 (2nd Cir 1988).
morals rights legislation, damage to his reputation and contractual rights. The Court focused on the contractual relationship and decided that the owner of the sculpture was entitled to remove the sculpture.\textsuperscript{96}

A notable example, however, where the courts were more liberal in their interpretation of moral rights is the authority of \textit{Terry Gillian v ABC} \textsuperscript{97} where the Court upheld an action for an injunction to stop the broadcast of Monty Python episodes in an adulterated form. The Court held on a construction of the contract that the degree of editing went outside that allowed. The Court also added that the action could have been successful on another basis as "an actionable mutilation" of the plaintiff's work. The Court recognised that moral rights were not a part of the United States law but stated:

"courts have long granted relief for misrepresentation of an artist's work by relying on theories outside the statutory law of copyright such as contract law or the tort of unfair competition. Although such decisions are clothed in terms of proprietary right in one's creation, they also properly indicate the author's personal right to prevent the presentation of his work to the public in a distorted form."\textsuperscript{98}

This case can be distinguished on the basis that the decision was based mainly on contractual issues; however, the Court clearly specifies that moral rights as evidenced by various common law and statutory devices can be enforced in the United States. The effect of this decision has been limited somewhat by the fact that the decision has not been widely followed by subsequent courts.\textsuperscript{99}

Reference should also be made to the various States Acts mentioned above which attempt to address the moral right of integrity. The California \textit{Art and Preservation Act} enforces artists' right of integrity by protecting artwork from intentional physical defacement, mutilation and alteration.\textsuperscript{100} As discussed above the protection is limited to fine art of "recognised quality" and would not cover matters such as literary works or films. The test of recognised quality is determined by experts in the area. This may favour the position of established artists and may mean developing artists are deemed of inferior quality if experts such as curators and art dealers approach the task from an economic basis of value.\textsuperscript{101} This legislation is defective in its lack of width of protection and in that it only prohibits acts and not omissions.\textsuperscript{102} Also, artists can waive their rights under the legislation and in an unequal bargaining interplay this will often occur.\textsuperscript{103} The rights granted are lost on the death of the artist and are accordingly not enforceable by personal representatives.\textsuperscript{104}

\textsuperscript{96} Van Zelzen, op cit, n 16, at 639, 640.
\textsuperscript{97} 538 F 2d 14 (1976).
\textsuperscript{98} Ibid, at 24.
\textsuperscript{99} Followed and extended \textit{WGN Continental Broadcasting Co v United Video} 693 F 2d 622 (7th Circuit 1982), Discussed in Brooks, supra, n 70, at 1451.
\textsuperscript{100} Brooks, supra, n 70, at 1462.
\textsuperscript{101} Ibid, at 1463.
\textsuperscript{102} Ibid.
\textsuperscript{103} Ibid, n 69, at 874.
\textsuperscript{104} Ibid, at 871.
As discussed above, the New York Act is broader in the items covered but emphasises attribution. However, s 14.03 of the Act does state that a "publicly accessible work that has been altered, defaced, mutilated or modified may not be displayed, published etc if the artist's reputation is reasonably likely to be affected from that display". This legislation is limited in its purview as it relates only to paintings, sculpture, drawings or works of graphic art (s 11.01). It also does not protect from damage, rather, it requires a duty to see that work is not publicly displayed. The New York Act does not specifically provide for waiver but the omission to prohibit waiver may mean that artists can still waive these rights contractually.

Recently in the United States an Act, the Visual Artists Rights Act of 1990 was passed. This legislation will to some extent protect integrity and paternity rights. The legislation deals with the following issues:

The works covered by the statute are defined in s 101 where "work of visual art" is defined to include paintings, drawings, prints, sculpture or still photographic images.

The right of attribution is protected by s 106A(a) which provides three basic rights:

1. to claim authorship of the work;
2. to prevent use of his or her name as author of any visual art he or she did not create;
3. to prevent use of name with distorted work.

The right of integrity is also protected by s 106A(a)(3) which allows an author to:

1. prevent distortion, mutilation or modification prejudicial to honour or reputation including grossly negligent distortion etc;
2. prevent destruction of work of a recognised stature including grossly negligent destruction.

The duration of this protection is the life of the author (s 106A(d)(i)).

This Act is significant but does have aspects that could be improved.

1. Provision should be made for the right to receive damages which flow from the breach of the terms of the Act. 107
2. One questions limitation in relation to destruction for the work to be of "recognised stature"—this has no relevance to the Berne Convention or accepted moral rights theory. 108
3. In relation to attribution the rights do not provide for anonymity or pseudonyms. 109
4. As discussed above, the Act is limited in the types of works covered and accordingly would not include literary or musical works.

105. Davis, supra, n 66, at 386.
106. Davis, supra, n 66, at 387 and Corr, supra, n 69, at 874.
108. Ibid.
109. Ibid.
The Act appears to be the first step in an incrementalist's journey to more complete protection of moral rights and, if seen in that light, then the Act is a valuable first step.

Right of Withdrawal

This right is not within the ambit of the Berne Convention but is protected in France. There is no evidence of a demand for this right. It could be argued, therefore, that it is not justifiable that such a right should exist in Australia. This right is not protected by English law as is demonstrated by the English decision of Chaplin v Lesley Frewin Ltd where a minor was unable to withdraw publication of a book on the basis that it was defamatory and would cause his own reputation to suffer. The Court looked at the commercial liabilities and determined the author's moral position to be irrelevant. The Court's economic viewpoint was exemplified by the comment "the mud may cling but the profit will be secured".

Right of Publication

In Australia s 31(1)(a)(ii) and (b)(ii) vests in the owner of a copyright the right to publish the work. This may appear to accord with the moral right to publication; however, this right will only be vested in the author when the author has not divested himself or herself of the copyright unlike the European concept of this moral right. This right can be also lost where the author is an employee whereupon the right to publish vests in the employer, or if the author has assigned the copyright. Accordingly, if these events have occurred the author no longer has the right of publication.

Damich, an American commentator, sees the right of publication as a concept partially acknowledged in the American Copyright Act 1976 and in case law and quotes s 106(2) of the American Copyright Act that protects the right of first publication.

The most significant of the rights contained in s 106(2) is the right of public distribution which, to the extent that it gives the author the right to make the first public distribution of his work, parallels the French moral right. This was borne out by the authority of Harper and Row Publishers v Nation Enterprises. In that decision the Court considered that s 106 maintains the common law right of first publication and that the Act did not affect the author's ability to choose whether, at what time and for what price to seek to publish the work. This line of thinking is also reflected in the English decision of Prince Albert v
Strange where the Court stopped publication of etchings by the Queen’s consort when they were published without his consent.\textsuperscript{119}

Accordingly, it appears that there may be some adequate common law basis to sufficiently protect this right and, as it is not a right mentioned by the Berne Convention, it appears that Australia does have sufficient protection for this right.

**Conclusion**

The above discussion should indicate that there is strong support for the implementation of moral rights legislation in Australia. Even if such legislation is conservative in its purview, then at least Australia will be seen as conforming to its international obligations under the Berne Convention and at the same time acknowledging the substantial force of more ideological arguments in support of moral rights. It seems that any protection granted by current common law doctrines and statute is only coincidental and serves only to emphasise that Australia now lags seriously behind the reforms recently introduced in the United Kingdom and the United States where moral rights are at least given some status in the law.

\textsuperscript{119} 64 ER 293.