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The *Copyright Amendment (Moral Rights) Act* 2000 came into effect on 21 December 2000, following significant changes to the original Bill being made in the House of Representatives and the Senate during 2000. This update sets out the final content of the Act, with relevant background information.

What are moral rights?

Summary

The introduction of moral rights for authors has important implications for:

- the film and television industry
- those involved in construction and building management
- all employers utilising the creative efforts of their employees.

Moral rights are associated with an author's creativity and personality, as opposed to the 'economic' rights already protected under the *Copyright Act* 1968. Moral rights are only held by individuals as authors of their work.

Authors now enjoy the protection of the following three moral rights:

- to be identified with their works (the Right of Attribution), with the corresponding right not to have authorship falsely attributed (the Right against False Attribution)
- not to have their works subjected to derogatory treatment (the Right of Integrity) .

Moral rights prior to the amending Act

Previously, authors were given some limited moral rights protection under the *Copyright Act*, covering the false attribution of literary, dramatic, musical or artistic works. The provisions did not impose a positive obligation of attribution.

Some additional protection was provided for creators in relation to false attribution through the law of passing-off and the *Trade Practices Act*.

Significantly, protection under the *Copyright Act* did not cover cinematograph films. However the definition of a 'work', for the purposes of moral rights protection in the amended Act, encompasses films (including television programs). As some of the provisions relating to films are different from those relating to other works, we have included a section at the end of this update setting out the special exceptions for films.

Application of moral rights

Who is an author?

For the purpose of moral rights protection, as for copyright protection, the author will be the person who created the work. For example, the writer of a novel or essay, the person who takes a photograph or the composer of a piece of music will all be authors.

This means that, just as for copyright, the author and the owner of the copyright may not necessarily be the same person - the author may have assigned the copyright in the work, or it may have transferred automatically because it was made under an employment contract or a services contract. The effect is that, for example, the owner of a painting, the owner of the copyright in the painting and the holder of the moral rights in the painting could all be different people.

The three rights apply to all works which are created before and after commencement of the new legislation (21 December 2000). *The exception to this is that films, or works to the extent that they are included in films, are only protected if they were created after commencement (see below for the position in relation to films).*

How long do moral rights last?

Moral rights continue until copyright ceases to protect the work. The exception for films is set out on *page 6*.

Who can exercise moral rights?

Unlike the economic rights of a copyright owner, moral rights are not transmissible by assignment, by will or by operation of law. This confirms the personal nature of moral rights.

However:

- if the author of a work dies, the moral rights in respect of the work (except the Right of Integrity if it is a film) may be exercised and enforced by his or her legal personal representative
- if the affairs of an author are lawfully administered by another person (except through bankruptcy) , then the moral rights may be exercised and enforced by the person administering the author's affairs. As moral rights are not economic in nature, a bankrupt author retains them. This is likely to lead to disputes if a bankrupt author receives damages for an infringement.

What constitutes an infringement?

Right of Attribution

A person infringes the Right of Attribution if, after 21 December 2000, the person does an 'attributable act' in respect of the work without identifying the author. 'Attributable acts' are:

- in respect of a literary, dramatic or musical work: reproducing the work in a material form, publishing the work, performing the work in public, transmitting the work and making an adaptation of the work
- in respect of an artistic work: reproducing the work in a material form, publishing the work, exhibiting the work in public and transmitting the work
- in respect of a film: making a copy of the film, exhibiting the film in public and transmitting the film.

Right against False Attribution

A person (the attributor) infringes the Right against False Attribution in respect of a literary, dramatic or musical work if, after 21 December 2000, the attributor:

- applies any person's name to a work or its reproduction in such a way as to imply falsely that that person is the author of the work or that the work is an adaptation of the person's work
- deals with a work or reproduction to which the name has been so applied, if the attributor knows that the implication is false
- performs or transmits the work as the person's work or as an adaptation of the person's work, if the attributor knows that that is false.

Similar provisions apply, with appropriate changes, to artistic works and films.

It is an infringement of the Right against False Attribution if a person deals with an altered work as if it were an unaltered work of the author, unless the effect of the alteration is insubstantial or the alteration was required by law or necessary to avoid a breach of a law.

Right of Integrity

A person infringes the Right of Integrity if, after 21 December 2000, the person subjects the work to derogatory treatment. Derogatory treatment includes anything that is prejudicial to the honour or reputation of the author ('honour' and 'reputation' are not defined). Specific types of derogatory treatment, including material distortion, mutilation or material alteration, are listed in respect of each type of work.

Where the Right of Integrity has been infringed through material distortion, mutilation or material alteration, it will also be an infringement to present the work to the public by doing certain prohibited acts. These prohibited acts are similar to the 'attributable acts' listed above for the Right of Attribution (except that the public exhibition of an artistic work is not included).

It should be noted that even if the material distortion, mutilation or material alteration were carried out before 21 December 2000, it would still be an infringement to present the altered work to the public after that date.

What happens when there is more than one author?

If there is more than one author of a literary, dramatic, musical or artistic work, then:

- the Right of Attribution is a right of each joint author to be identified as a joint author
- an act of false attribution infringes the right of each joint author
- the Right of Integrity is a right of each joint author
- if one joint author gives a consent to an act or omission affecting his or her moral rights (see further below in relation to consents), that does not affect the moral rights of the other author or authors.

See *page 6* for the position in relation to films.

Authorisation

The Act provides that the authorisation, as well as the performance, of infringing acts will also constitute an infringement of a person's moral rights

Consent to infringement

An author or a person representing the author can consent to acts or omissions which would otherwise infringe a moral right. The consent must be in writing.

Moral rights cannot be assigned, transferred or waived. This means that whatever has happened to the copyright in a work, the moral rights will still remain with the author, and it is not safe to assume that the copyright owner is in a position to provide a consent.

The Senate amended the consent provisions to distinguish between films (and works included in films) and other types of work.

For all types of work other than films (or works included in films):

- a consent does not have any effect unless it is given in relation to specified acts or omissions, or specified classes or types of acts or omissions, whether occurring before or after the consent is given
- a consent does not have any effect unless it is given in relation to a specified work or specified works existing when the consent is given, or a specified work, or works of a particular description, which has not yet been made or completed
- a consent may be given by an employee for the benefit of his or her employer in relation to all or any acts or omissions, occurring before or after the consent, and in relation to all works made, or to be made, in the course of the employment
- a consent given for the benefit of a copyright owner is presumed, unless the consent states otherwise, to extend to the owner's licensees and successors in title and to other persons authorised to do acts comprised in the copyright.

The Senate also included a provision invalidating consents given as a result of duress or a false or misleading statement.

Exceptions to infringement

There is no infringement of the Right of Attribution if it is reasonable not to identify the author. Similarly, there is no infringement of the Right of Integrity if it is reasonable to submit the work to the derogatory treatment in question.

Factors which are to be taken into account in determining reasonableness include:

- the nature of the work
- the purpose, manner and context in which it is used
- any relevant industry practice or voluntary code of practice
- difficulty or expense in identifying the author (this applies only in relation to the Right of Attribution)
- whether the work was made in the course of the author's employment, or (a Senate addition which does not apply to films) under a services contract

- whether the treatment was required by law or was necessary to avoid a breach of any law (this applies only in relation to the Right of Integrity)
- if the work has 2 or more authors, their view of the matter (another Senate addition which does not apply to films).

It is not an infringement of the Right of Integrity to do something in good faith to restore or preserve a work.

As far as the presentation to the public of a work that has previously been altered is concerned, there is a defence of reasonableness, but there are no reasonableness factors listed as for other infringements.

What remedies are available?

There is a wide range of remedies available to an author whose moral rights have been infringed, including:

- an injunction
- damages
- a declaration by the court that the moral right has been infringed
- an order that the defendant make a public apology
- an order that a false attribution or derogatory treatment of the work be removed or reversed.

There are several factors that the court may take into account, in its discretion, in deciding on a remedy, such as whether the defendant was aware of the author's moral rights and anything done by the defendant to reduce the effects of the infringement.

Before granting an injunction, the court must consider whether the parties have attempted settlement and whether it should adjourn to give the parties an opportunity to settle.

There are special provisions limiting the ability of authors whose work is included in a film from recovering damages both in respect of the underlying work and in respect of the film. For example, if a screenwriter has already recovered damages for infringement of moral rights in a script (as a dramatic work), then the screenwriter's damages for infringement of moral rights as an author of the film will be reduced.

Special provisions for films

Who is a film's author?

The new legislation specifically sets out that the authors of a film comprise three categories:

- the principal producer
- the principal director
- the principal screenwriter.

If a film, or a work as included in a film, has more than one author, then the authors (for example the producer, director and screenwriter) may enter a written co-authorship agreement. The agreement would provide that each author would only exercise his or her Right of Integrity jointly with the other authors. This option applies only to films.

What happens when there is more than one author in each category

If there is more than one principal director, principal producer or principal screenwriter of a film, then:

- the Right of Attribution is the right of each author to be identified by their role
- an act of false attribution infringes the right of each author in that role
- the Right of Integrity is a right of each author
- if one joint author gives a consent, that does not affect the moral rights of the other author or authors in the appropriate role.

Application of moral rights

Films and works included in them must be created after commencement 21 December 2000, to gain protection.

How long do moral rights last?

The Right of Integrity in respect of a film continues only until the author dies. The other rights continue as long as the film is protected by copyright.

Who can exercise moral rights?

As the Right of Integrity in respect of a film ceases on death, an author's legal personal representative is unable to exercise this right. The two other rights can be exercised in the same way as for other works.

Consent to infringement

For films (and works included in films)

- a consent may be given in relation to all or any acts or omissions occurring before or after the consent is given
- a consent may be given in relation to specified works which exist when the consent is given, or works of a particular description which have not yet been made or completed
- a consent may be given by an employee for the benefit of his or her employer in relation to all works made, or to be made, in the course of the employment
- a consent may be given for the benefit of the copyright owner as for other types of work.

Unlike the situation for other works, this list is inclusive only, and does not affect the general principle that it is not an infringement of an author's moral rights to do or omit to do something if the act or omission is within the scope of a genuine written consent.

Exceptions to infringement

The reasonableness factors mentioned on *page 4* differ for films. Firstly, as noted on that page, two factors that apply to other works do not apply to films - "whether the work was made under a services contract and the view of the joint authors.

Secondly, there is an additional factor -whether the primary purpose for which the film was made was for exhibition at cinemas, broadcasting by television or another purpose. The classic example is that while it is likely to be considered reasonable to insert advertising breaks into a film made for television, there may be a question about whether that is reasonable for a film made for cinema release.

Special provisions for moveable artistic work

There have often been questions about whether, for example, a sculptor can insist that his or her work must remain in its original location. The Act has addressed these issues by providing that the removal or relocation of a moveable artistic work made for installation in a place accessible to the public is not an infringement of the Right of Integrity if the remover:

- after making reasonable enquiries, cannot discover the identity and location of the author or a person representing the author; or
- has given the author notice and an opportunity to consult with the remover about the removal or relocation or about having access to the work. The initial notice period is three weeks and the author must be given another three weeks to have access; and
- removes the author's identification from the work if the author so requires.

Places accessible to the public could include building foyers, parks and shopping centres, so, for example, building managers, should take care, at least six weeks before any renovations commence, to ensure that these requirements are met.

The destruction of a moveable artistic work is not an infringement of the Right of Integrity if the person who destroyed the work gave the author, or a person representing the author, a 'reasonable opportunity' to remove the work from its location. In this case, no notice period is prescribed. What is a 'reasonable opportunity'? It will depend on the particular situation and disputes are likely.

Special provisions for buildings

A change in, or the relocation, demolition or destruction of, a building is not an infringement of the Right of Integrity in a work that is affixed to or forms part of the building, or in the building itself, its plans or instructions used in building it, if the owner of the building:

- after making reasonable enquiries, cannot discover the identity and location of the author or a person representing the author; or
- has given the author notice and an opportunity to have access to the building. The initial notice period is three weeks and the author must be given another three weeks to have access.

It is contemplated that the author would use this opportunity to photograph or make other records of the work. The author can also require the owner to remove the author's identification from the work.

Construction and building management companies should consider establishing a register and compliance process to ensure that these requirements are met before demolition or alteration work is commenced, and that allowance is made for the full six week notice period.

Considerations for employers

Now that moral rights protection has commenced, employers will have to give serious consideration to including a moral rights consent in their standard employment contracts, especially for employees in creative areas. Even where an employer owns the copyright in the work, an employee will still hold the moral rights, and those moral rights will continue after the employment contract comes to an end. As mentioned above, a consent must be in writing and it will not always be safe to rely on an implication from the employment contract or the employment "reasonableness factor" (see *page 4*).

As a consent can be given to an employer for acts or omissions that have already occurred, and works that have already been made, employers should also consider reviewing existing employment contracts for key employees. Care must be exercised, however, so that an employee's consent is not invalidated by any misstatement about why the contract amendment is required or as a result of duress. It will also be challenging to prepare a consent which provides the employer with sufficient protection but which is acceptable to the employee.

Authors in areas traditionally seen as creative, such as graphic designers, copywriters or architects, are more likely to be aware of, and to be interested in protecting, their moral rights. Employers should however bear in mind that, just as for copyright, there is no requirement that a work be 'artistic', in the aesthetic sense, for moral rights to apply -the protection applies to any report, sketch, photograph, presentation or plan.

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