

Chapter 10

Moral rights

10.01 During this inquiry the Committee considered whether moral rights should apply to works in which government owns copyright.

What are moral rights?

10.02 Under Part IX of the Copyright Act, the authors of works and cinematograph films have moral rights in material they create. Moral rights are personal and are distinct from the economic rights granted under the Act. They are:

- the right of attribution of authorship,¹
- the right not to have authorship falsely attributed,² and
- the right of integrity of authorship.³

10.03 There are exceptions to the right of attribution of authorship and the right of integrity, based on a standard of reasonableness. A defendant is responsible for establishing that it was reasonable in the circumstances not to identify the author or deal with the work in a derogatory manner.⁴ The author may also provide written consent to any or all acts or omissions that would otherwise constitute an infringement of his or her moral rights.⁵

10.04 Moral rights are personal rights, that is, they can only be owned by individuals.⁶ They are conferred on authors of copyright material even where the copyright is owned by another, including the government or other employer. This means, for example, that if an employee writes a report for a government department, where reasonable, authorship of the work must be attributed to the

¹ Section 194.

² Section 195AC.

³ Section 195AI.

⁴ Section 195AR and section 195AS.

⁵ Section 195AW.

⁶ Section 190.

employee and must not be falsely attributed to someone else, and the work must not be subject to derogatory treatment.

Evidence to the Committee

10.05 Most submissions favoured retaining the current moral rights regime in relation to government. Some noted that the issue of moral rights in relation to government copyright largely affected government employees as authors. The ACC stated that ‘the current regime applies appropriately to material in which copyright may be owned by a government’.⁷

10.06 AIIA was in favour of moral rights applying where works were created for and owned by governments under section 176. While acknowledging that this was often not an issue in the information and communications industry, AIIA reported that some of its members had raised concerns over government demands that they waive their moral rights as developers.⁸ Vi\$copy supported special policies in relation to visual artists and argued that the Crown should not require them to waive their moral rights.⁹ The Royal Australian Mint expressed concern that if moral rights were diminished, world-class designers might be less inclined to create works for the Mint.¹⁰ However, Chief Justice Black of the Federal Court of Australia suggested that not having moral rights in their judgments ‘would not trouble judges’.¹¹

10.07 Some government agencies expressed concern about possible constraints that the existence of moral rights might impose on government action. FACS argued that government may be hindered in its use of the material:

For example, FACS has been approached by an author who sought to prevent FACS modifying material that the author had created for and delivered to FACS (copyright was owned by FACS). As it was necessary for FACS to modify the material and disseminate [it] to the public, FACS was forced to rely on a presumption that its activities were ‘reasonable’.¹²

⁷ Submission 27, p. 7.

⁸ Submission 21.

⁹ Submission 24.

¹⁰ Submission 2.

¹¹ Submission 61, p. 2.

¹² Submission 36, pp. 2-3.

10.08 While arguing that moral rights should not apply to copyright material owned by governments for this reason, FACS acknowledged that authors should nevertheless retain the right to request the removal of their name from works if altered by government.¹³

10.09 The WA Attorney-General stated that governments should, as far as possible, comply with moral rights, but considered that government should not be bound by Part IX. His submission expressed concern that identifying and attributing authors in some circumstances is ‘difficult and possibly unreasonable.’¹⁴ The WA Department of Premier and Cabinet expressed a similar view.¹⁵ However, the Committee notes that these submissions did not elaborate on why governments were in a worse position than non-government bodies which must also comply with Part IX of the Copyright Act.

10.10 Not all governments were so concerned. The Victorian Government considered that the State should be subject to the same obligations as other employers. However, it noted that ‘moral rights are not well understood in the context of government copyright’.¹⁶ The Victorian Government supported ‘further investigation into the development of legislation or guidelines clarifying situations where the State is not obliged to attribute the rights associated within any works to the creator(s)’ and further education of government servants and agents in relation to moral rights.¹⁷ The NSW Attorney-General’s Department merely commented that until there was ‘a sustainable policy rationale for excluding government from the operation of Part IX’, there appeared to be no reason to do so.¹⁸ The Queensland Government did not comment.¹⁹

10.11 While the Copyright Act only provides for moral rights to be held by individuals, some submissions also raised the possibility of governments having moral rights or an equivalent right, linking such rights to a means of protecting the integrity of government copyright material. For example, the ALRC, while

¹³ Submission 36.

¹⁴ Submission 34, p. 2.

¹⁵ Submission 29.

¹⁶ Submission 64, p. 5.

¹⁷ *ibid.*

¹⁸ Submission 57, p. 2.

¹⁹ Submission 71.

supporting moral rights for individual creators where government owned the copyright, also suggested there should be further consideration of providing governments with rights similar to moral rights for this reason.²⁰ CAUL argued that moral rights should be held by governments rather than individual creators, on the basis that the work is produced in pursuit of their duties as servants or officers of the Crown.²¹ However, the Department of Veterans' Affairs argued:

Extending the protection of moral rights to the context of government copyright would move the concept of moral rights away from the unique personal character of [the] right being protected.²²

The UK position

10.12 Moral rights under the 1988 Act have limited application in relation to Crown copyright works (including parliamentary copyright works). The right to be identified as author or director of such material does not apply unless the author or director has been identified as such in published copies of the work.²³ Thus it has been argued that 'the Crown will effectively be able to determine whether this right can ever be asserted in relation to a work in which Crown copyright subsists'.²⁴

10.13 Similarly, the right to object to derogatory treatment of a work does not apply to anything done by the copyright owner or with the owner's authority, unless the author or director is identified at the time of the relevant act, or has previously been identified in published copies of the work.²⁵ Even where the right applies, it is not infringed if there is a sufficient disclaimer.²⁶ This provision applies equally to government and non-government copyright owners, unlike the right to be identified as author, discussed in the previous paragraph.

²⁰ Submission 3, p. 4.

²¹ Submission 7, p. 2. Presumably CAUL would not extend this reasoning to work performed by independent contractors where copyright ownership is often stipulated in a contract.

²² Submission 55.

²³ *Copyright, Designs and Patents Act 1988* (UK), para 79(7)(a).

²⁴ Skone James et al, *op cit*, 14th edition, p. 590.

²⁵ Subsection 82(2).

²⁶ Subsection 82(2).

The Committee's view

10.14 The Committee notes that in the UK the moral rights provisions have been modified in relation to government works, at least as far as the right to be identified as the author is concerned.

10.15 However, consistent with its belief that government should be treated no differently from any other employer, the Committee considers that there should be no change to the current moral rights provisions insofar as they relate to government. This view accords with most of those in submissions. In addition, the Committee considers that the factors set out in sections 195AR and 195AS to determine whether it was reasonable not to identify the author or to subject the work to what would otherwise be derogatory treatment are sufficient safeguards. They include such factors as the nature of the work,²⁷ the purpose for which the work is used²⁸ and whether the work was made in the course of the author's employment.²⁹

10.16 The Committee also considers that this is an area where government employees must be properly trained about their responsibilities, as discussed in the next chapter.

Recommendation 11: The Committee recommends that there be no change to the current moral rights provisions in Part IX of the Copyright Act insofar as they relate to government.

²⁷ Paragraphs 195 AR(2)(a) and 195AS(2)(a).

²⁸ Paragraphs 195 AR(2)(b) and 195AS(2)(b).

²⁹ Paragraphs 195 AR(2)(h) and 195AS(2)(g).

