

PART II

MAJORITY VIEWS

(1) THE PRESENT AUSTRALIAN LEGAL POSITION

9. Australian law provides some protection in relation to the moral rights set out above. In most cases, however, the present law requires the author to look after his or her own rights. This is often not easy for an author to do because of what is perceived as an unequal bargaining position with the purchaser of a work or an employer. The actions also present some technical difficulties in terms of proof.

(i) The Right to Recognition

Part IX of the Copyright Act (see Appendix III) contains provisions dealing with false attribution of authorship. There is however, no comprehensive framework establishing a right of recognition which consists of four separate elements:

- (a) The right to be made known to the public as the author of the work: There is no law expressly requiring recognition of authorship. However, contractual arrangements between an author and the user of the author's work can make provision for such recognition;
 - (b) the right to prevent others claiming authorship: This right is protected by section 190 of the Copyright Act and the protection continues to apply after the death of the author. Section 192 also prohibits knowingly dealing in unauthorised reproductions **of** an artistic work;
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- (c) the right to prevent others from wrongfully attributing to an author works that are not his or hers. An action in tort called 'passing off' can be brought if a misrepresentation is made by a trader in the course of trade to prospective customers which is calculated to injure the business or goodwill of another trader and which causes damage to that other trader or is likely to do so.

Section 52 of the Trade Practices Act 1974 provides that 'a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'.

Actions may be able to be brought under one or other of these heads to prevent wrongful attribution. An author may have some difficulty establishing that he or she is a 'trader' for the purposes of a passing off action but the courts have stressed that the action, is not to be narrowly confined. Problems would, however, arise if the representation was not being made for commercial gain, eg. the wrongful attribution of a statue, painting or tapestry on public display as being the work of a named artist. Section 52 of the Trade Practices Act is similarly limited to conduct in the course of trade. Also, actions under the section can also only be brought against corporations. A misrepresentation by an individual is not covered.

Another possible cause of action would be for defamation if the author could show that his or her reputation was sullied by the wrongful attribution.

- (d) The right to prevent others from wrongfully attributing to an author works that are unauthorised altered versions of a work: Commercial dealings in altered works where the dealer is 'aware that the work has been altered is prohibited by section 191 of the Copyright Act. Passing-off, Trade Practices Act and defamation actions may also be available to an author in such a case subject to the matters referred to in paragraph (c) above.

The protection afforded to authors under the Copyright Act referred to in paragraphs (a) and (d) above applies only in relation to literary, dramatic, musical and artistic works. The Copyright Act does not extend this protection to sound recordings, cinematography films, or broadcasts. (Nor do the provisions of Article 6 bis of the Berne Convention).

(ii) The Right to Integrity

This right is not generally recognised by the Copyright Act. However, sub-section 35(5) provides some protection for the right of integrity in respect of commissioned photographs, paintings or drawings of portraits and engravings. In circumstances where the author is aware of the purpose for which the work is commissioned he or she may prevent the commissioner from exercising any of the rights within the copyright of the work for a different purpose. Also section 41 which deals with fair dealing for the purpose of criticism or review, sub-section 44(1) which concerns the use of extracts of

works included in collections for use by places of education and section 45 regarding reading or recitation in public or for a broadcast, all give some recognition to the right to attribution. These provisions require sufficient acknowledgement of the work to be made. Making an adaptation without the consent of the copyright owner is proscribed under the Copyright Act and this may provide some control over the form of the work where the author is also the copyright owner. Limited recognition of the right to integrity is further provided by sub-section 55(2)" which provides that the compulsory licence under section 55, for the recording of musical works, does not apply in relation to an adaptation of a musical work if it debases the work. In other cases if an author's work were altered in such a way as to discredit his or her reputation, an action for defamation might lie.. It is also a matter which could be dealt with by contract, at least between the author and the original purchaser of the authors work.

(iii) The Right to Divulge

This right is not recognised by Australia law. However, the unauthorised disclosure of a non-commissioned work would often involve its wrongful acquisition and actions in detinue and conversion would be available to protect the author. An action for breach of confidence may also be relevant in some circumstances. The revelation of commissioned works would in general be governed by the contractual relationship between the parties.

(iv) The Right of Retraction

This right is not recognised by Australian law. It would, however, be possible (if unlikely) that the parties might enter into contractual relations allowing an author so to act.

10. The foregoing summary indicates that there is some protection available under Australian law for the moral rights of authors and artists. Indeed, as is mentioned further below, this protection is apparently sufficient to satisfy Australia's obligations under the Berne Convention. However, the European countries have for many years specifically protected moral rights, and the United Kingdom and Canada have recently indicated an intention to adopt legislation to like effect. The Committee notes this legislation and the reasons for its adoption. Nonetheless, a majority remains unconvinced that Australia should follow suit at least at this time.

(2) SUMMARY OF REASONS FOR RECOMMENDATIONS

11. The view of the majority, that it is inappropriate to introduce legislation to protect moral rights at this time, is based on the following matters:

- (i) The practical problems associated with the introduction of protection of moral rights are not satisfactorily dealt with by those supporting adoption of such rights.
 - (ii) The theoretical basis for moral rights protection in a common law based system has not been identified.
 - (iii) There is insufficient indication of support for the introduction of moral rights of authors of copyright works.
 - (iv) It does not appear that violations of moral rights occur with such frequency or in such number as to warrant legislative intervention.
 - (v) The Australian community is unlikely to endorse laws providing for moral rights protection.
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12. The only basis on which the majority could be persuaded that legislation for the protection of moral rights should be enacted would be that Australia's continuing membership of the Berne Convention so requires. The majority, however, is not aware of any criticism at the international level of Australia's present position.² Although opinions vary, the preferable view appears to be that our Berne membership does not require any additional protection in the area of moral rights.

13. The majority also notes that there was little support for the protection of the right of disclosure or the right of withdrawal. The minority does not favour the adoption of such rights. The majority agrees with this approach and will not pursue the issue further. The comments hereunder are directed to the rights of integrity and attribution.

(3) PRACTICAL CONSIDERATIONS

14. In the majority's view there are a number of serious practical problems that are likely to flow from the recognition of moral rights. Proponents of moral rights protection see the solution to these problems as lying in resort to one, or a combination, of contractual relationships, industry practice, or a broad concept of reasonableness. It is convenient to consider these issues insofar as they apply to attribution and integrity separately.

(a) Attribution

15. The view has been put (and this is reflected in the minority report) that certain items should be excluded from the proposed requirement for attribution. Newspapers, magazines, cinematography films and sound

recordings have been mentioned. Problems with reproductions of public works of art and buildings are acknowledged, particularly with regard to postcards. It is noted that the position in relation to collective works continues to cause problems in the civil law countries. No solution other than 'reasonableness' is offered to overcome these acknowledged difficulties. However, there seems to be no consensus among those who propound this solution as to whether there should be a general right of attribution subject only to an overriding concept of 'reasonableness' or whether alternatively or in addition there should be a number of excluded categories. In any event there would seem to be a recognition that not all categories of authors deserve attribution or can, in practical terms, be provided with that right. This invites consideration of what sort of instances of non-attribution are said to require protection. (Misattribution it should be recalled is largely covered by actions for passing off, defamation or false attribution under the present provisions of the copyright Act.)

16. Of the few instances of non-attribution brought to the attention of the Committee, most related to the reproduction of photographs or of other artistic works in another form. In many of the instances cited, actions for infringement could have been brought. The exceptions seemed to be those cases where the author had disposed of his or her copyright along with the work or where the work was displayed in a public place.

17. It seems to the majority that some of the pleas for protection indicate that the attribution right is being sought either to overcome a contract that was entered into without reference to the question of attribution or because of lack of bargaining power. Authors need to be aware of attribution questions when contracting in

relation to their works. As is discussed in paragraph 56 the majority considers that this is a matter better dealt with by education than legislation. In any event the granting of a right to contract out of the right to attribution (which is envisaged by the minority) may mean that this matter would not be treated any differently under the proposed 'moral rights' regime.

18. The other main complaint flows from the operation of section's 65-67 of the Copyright Act which allows limited rights of reproduction of works displayed in public. The policy underlying these sections would be markedly affected by an attribution requirement. " Again, it seems to the majority that the instances alluded to in submissions to the Committee indicate a dissatisfaction with the policy of sections 65-67 and see attribution as a way of overcoming it. The majority does not endorse this approach.

19. Submissions to the Committee referred to those circumstances where an author does not have copyright in the work. that is produced - notably employer-employee relations and commissioned works under section 35(5) of the Copyright Act. The point is made that the author has no control through existing copyright law over the works produced in these circumstances and therefore cannot demand their attribution. However, neither situation can arise except through contract. If the author wishes attribution he or she can include a requirement in the contract which will be effective except where non-infringing actions by third parties are involved. It seems to the majority that at least some submissions on this matter were seeking change as much to strengthen the author's bargaining position as to recognise the moral right. This view is reinforced once it is accepted that contracting out of the right is permissible. It could be expected that many employers or commissioners of works

would require waiver of attribution as a term of the contract with the author. An additional payment may, however, be sought by the author for this.

20. The foregoing remarks are also applicable generally to the 'industry practices' which it is claimed will be a factor that will limit claims to attribution. Industry practice will largely be regulated by contract. It does not require a statutory right to enable it to be dealt with in this way, and in any case, the waiver provision will result in contracts covering the right. The majority again raises the question whether it is a disguised economic right that is being claimed (at least in the terms contemplated by the minority).³

21. The question of reasonableness as a check on excessive attribution claims is returned to in paragraph 44.

(b) Integrity

22. Examples of actions brought in overseas jurisdictions indicate the matters that have been considered by authors and artists to be an invasion of moral rights - the placing of Christmas decorations on a sculpture of flying geese; the sale separately of the panels of a refrigerator which had been decorated; the resiting of a statue from a public place; the satirizing and 'modernizing' of musical and dramatic works. Not all these applications have been successful but they indicate the type of claims to which the integrity right can give rise. The examples cited in major submissions to the Committee are of a like kind. Actions that it was said the right of integrity should be adopted to prevent included the inadequate lighting of a work of art; furniture being placed in front of a work of art; the failure to hang a commissioned work; and the addition of

a neon sign to a building. Instances of this kind may make it difficult to persuade the public that moral rights should be protected. This issue is returned to in paragraph 50. But the examples are also worth considering in the context of an author not being permitted to object to reasonable actions relating to work.

23. The reasonableness approach is at the centre of the rejection by supporters of moral rights of the practical problems that can be expected to flow from the enactment of legislation. The formula used in the United Kingdom Bill that a modification of a work is permissible 'if it is reasonable in the circumstances and does not prejudice the honour or reputation of the author' is cited as sufficient answer to such problems.⁴ However, the majority is of the view that moral rights legislation which is dependent upon such an approach should not be enacted because of the costs, delays, uncertainty and the invasion of other rights to which its application in this context will be calculated to give rise.

24'. It is not clear to the majority how the notion of reasonableness 'is to be applied in the light of what will be a totally new concept in the Australian common law system. Historically there is no community standard against which to judge whether any particular action is reasonable or whether it prejudices an author's honour or reputation. What is to determine whether a sculpture " should "be moved from a particular position in a public square - traffic control, public demand, aesthetic considerations, the author's wishes, redevelopment issues? All may be relevant. Each may be 'reasonable' depending 'upon viewpoint and yet inconsistent. Even in the cases cited by the proponents of moral rights that attract most sympathy, it can be asked, whose viewpoint is to determine, for example, the reasonableness of overpainting a picture - the artist's or the owner's? Both can make out a *reasonable' case.

25. It is said by the advocates of moral rights legislation that few problems have arisen in those countries that have moral rights legislation. This does not persuade the majority that Australia should legislate on the topic. Many of the countries with moral rights legislation have a long tradition of legal recognition of personality rights. There is an established jurisprudence against which the issues can be determined and there is also a public awareness of the form of protection. Neither of these circumstances exists in this country. The Australian Copyright Council's submission asserts that any new law causes disruption to an industry; the submission cites as an example the enactment of Trade Practices legislation. The majority acknowledges that the broad statement is correct, but it is a matter of weighing the overall public good and whether the problem is of such a dimension as to warrant the disruption caused. In relation to the example cited, it is worth observing that the Trade Practices Act 1974 was designed to deal with practices that were seen as inimical to the community at large and were recognised as such by the community. The legislation contemplated here is for the benefit of a very small section of the community and involves propositions on which there will be many different opinions in the community.

26. An additional issue concerns the question of who should determine whether there has been a breach of the right of attribution or integrity. Without detracting from the expertise of the judiciary and while acknowledging the not infrequent need for them to tread in areas of public standards, it may not be unfair to query whether judges would necessarily be in the best position to make such decisions in relation to copyright works. Even leaving aside the cost factor, placing a judge in this position creates difficulties for the judiciary itself. The criteria and standards to be applied would be both uncertain and difficult to apply in practice.

27. It may be that a different kind of Tribunal with acknowledged lay experts from the relevant field (eg. artists, newspaper industry, etc.) as well as community representatives would have more expertise in making judgments of the kind required. But this again raises the question of cost.

28. Perhaps more fundamentally it should be asked whether, unless the abuses are very widespread, it might not be better left to the kind of community protests and pressures which are at present occasionally brought to bear, especially with the aid of the media. They can be a powerful weapon. Such protests do not of course provide a right of legal redress, but they can be effective in leading to a change of heart on the part of an owner of a copyright work. (It is also worth noting that the existence of legal rights in this field could lead to such community pressures being discounted by owners on the basis that a legal right to challenge proposed action would lie. This is a reaction that has occurred in other areas of copyright law).

29. "Furthermore, the criterion of reasonableness 'as the restraining mechanism for unjustifiable assertions of moral rights claims is one that turns in upon itself. It can only operate if those who can set the legal processes in motion themselves act reasonably. The majority remains to be convinced that this will necessarily occur. It is not sufficient to claim that the threat of damnation in costs will prevent frivolous actions being brought or that it will be possible to strike out such claims. An author's perception of what is an undue interference with a work, or insufficient attribution is likely to be subjectively genuine even where objectively indefensible as, in the majority's view, has been demonstrated in some of the examples referred to in paragraph 22 that were submitted to the Committee as

justification for enacting the legislation. It would be difficult without a full hearing for a judge to strike out a claim by an author on the ground that it was frivolous, vexatious or an abuse of process, if the matter turns on an indeterminate concept of reasonableness. It needs to be recognised that the enactment of moral rights legislation will inevitably lead to litigation - as the examples of overseas applications cited in paragraph 22 indicate. The reasonableness criterion could encourage litigation because, as is noted by the minority, each case will have to be viewed on its particular merits.

30. In this context it is worth observing that while certain claims for integrity protection may seem extravagant and unlikely to succeed, the publicity attracted by an action may well make it worthwhile. This is particularly applicable to persons wishing to make a political statement. The costs involved would not necessarily be a deterrent.

31. Finally, it is worth considering the impact of legislation' intended to preserve the nation's heritage. Certain artistic works, in particular buildings and sculptures, are prevented from being altered under such legislation. This affords a protection in the nature of integrity for works that it is considered should be preserved in the national interest. It is arguable that this criterion of national interest is to be preferred to the personal interests of an individual artist.

(4) THEORETICAL BASIS FOR **MORAL** RIGHTS

32. The various theoretical bases for moral rights protection are discussed in the minority report and there is no need for them to be repeated here. As is indicated by the minority, there has been considerable debate in the civil law countries, which have recognised and protected moral rights, over the basis on which such

protection is afforded. Is the protection directed to the work or the author? Is the protection founded in personality or property? The resolution of this issue has practical implications for such matters as -

- (i) the duration of protection - in France it is perpetual; in the proposed United Kingdom legislation it is to expire with the economic rights;⁵
- (ii) the person who can enforce the right - if it is a personal right should it not cease on the death of the author (of defamation actions)?;
- (iii) the alienability of protection - if personal presumably it should be inalienable (if property based can it be sold together with the economic rights?);⁶
- (iv) the right to object to alterations to a work - in France and Canada an author can object to any alterations but in Italy and in the United Kingdom Bill an author can only object to those that affect honour or reputation;⁷ and
- (v) the right to destroy a work - this ultimate sanction to the property presumably is not prevented under a system that protects personality only.

33. The majority does not consider that proponents of moral rights have enunciated a scheme for the protection of moral rights that adopts a consistent theoretical base. For example, the minority proposes that invasion of moral rights will only be able to be challenged if prejudicial to the author's honour or reputation.⁸ This would seem to suggest that it is the personality of the author that is being protected rather than the

property in the work. But the minority contemplate that the protection proposed to be afforded extends for as long as the economic rights in the work which appears to tie the protection to the work. The protection afforded is to be waivable which suggests that it is the personality of the author that is in question, but after death, an author's heirs may exercise this right for as long as economic copyright exists in the work.

34. These matters indicate to the majority that there is no clearly defined theoretical basis for the protection proposed. Rather the proponents of moral rights protection, at heart, indicate that in their view certain actions are 'unfair' to authors or, in some way, constitute improper dealings with copyright works and that legislation should be enacted to prevent such unfairness or impropriety occurring. The scheme proposed by the minority takes account of a number of pragmatic considerations to try to overcome perceived problems without creating consequences that are unacceptable to the community. This is of course an entirely proper approach to legislating on this issue. But what is not adequately 'addressed is whether the perceived problem warrants a legislative solution and whether what is proposed is workable.

(5) SUPPORT FOR INTRODUCTION OF MORAL RIGHTS

35. The majority acknowledges that there have been few expressions of concern raised in opposition to the proposal to protect moral rights. This is not surprising as the concept is unusual and, those likely to be affected are diffuse and are unlikely to understand or take the issues seriously until they encounter actual legislation or litigation. More significant in the majority's view is the relative lack of interest on the part of authors and indeed the outright opposition by some.

36. Support for the proposed legislation has been pressed most strongly by a small number of representatives of authors (most particularly artists). Authors of literary works have not been prominent in their support, even in relation to attribution. Composers of music have expressed no interest, indeed recognizing that attribution could limit the opportunity to have their music played: it does not appear that integrity is an issue of major concern to them.

37. The Australia Council organised a series of public seminars on moral rights *in* a number of centres. The attendance at the seminars were generally lower than expected by the Council and were not indicative of a major concern on the part of persons affected. One member of the majority was at the seminar in Melbourne, In his opinion the discussion showed a lack of understanding of the issues, a confusion with economic rights and a belief that the enactment of moral rights legislation would be a means of increasing the monetary rewards of authors. As was acknowledged by the Australian Council in its submission to the Committee, the seminars did not provide an overwhelming endorsement of the need for moral rights legislation, in particular, the right to integrity. Rather the view was that there was a need for a greater education of both public and authors relating to those matters with which moral rights are concerned. This is returned to in paragraph 57. Legislation was thought to be something that should be viewed as not of pressing concern. It is the majority's understanding that seminars in other centres followed a broadly similar line.

38. In the majority's view, the pressure for enactment of moral rights legislation by the persons supposedly directly benefitted by it has not been such as to indicate that it is a matter of major concern to them.

(6) INFRACTIONS OF MORAL RIGHTS

39. The majority approaches arguments for any change in the law, particularly one that imposes greater regulation upon members of the public and which will involve public expenditure through actions before courts or tribunals, as placing an onus on the proponents for change to make out a case. Legislation is itself costly to produce, requires valuable parliamentary time and inevitably involves public resources in its administration. It is not to be lightly invoked and should be seen as a mechanism of last resort.

40. The issue concerning the increase in regulation which would result from moral rights legislation is a major one, deserving some elaboration. The need to keep new regulation to a minimum (and to reduce existing regulation) appears to be accepted by all major political parties and by the community as a whole. The effect of the grant of rights of attribution and integrity would constitute major inhibitions, at least potentially, on both industry and the wider community. Subject to any areas "exempted from compliance, it could affect all areas which make use of copyright material, but especially the media.

41. Its effect would be felt in three significant ways. First, because of the concept of 'reasonableness' which would apply, there would, as indicated above, be 'uncertainty. In many cases this uncertainty, combined with potential controversy, could be sufficient to provide a disincentive for action which would otherwise be taken.

42. Secondly, in some cases, no doubt after lengthy trial or test cases, industry and community standards or rules would be developed, which would constitute, in

effect, new more specific requirements for conduct in these areas. These rules would be no more and no less than additional regulation concerning the manner **of** use of private property. They would almost certainly continue to operate with a degree of uncertainty and ongoing difficulties because of their 'case by case' nature. However, they would be sufficiently general in nature to have an operation beyond the specific facts in question.

43. Thirdly, - and this point is closely related to the first two - the process of complying with industry regulation (including the likely 'buying out' of creators' moral rights in at least some cases) as well as the cost of negotiation and often litigation would be a direct and very likely major new cost. This cost would ultimately be borne by the community as a whole.

44. It is worthwhile illustrating the potential width and effect of the imposition of moral rights of attribution and integrity by a few examples of the kind of test case which particular industries or areas of the community might face. (It needs to be acknowledged that some of these might not be applicable if the exceptions recommended by the minority were to be adopted). The examples, by no means comprehensive, are:

- . whether newspapers should be required to name all or major contributors, including editorial writers, sub-editors and photographers;

 - . whether a composer can restrain the use of his or her music as background music for a film where the composer does not approve of the subject matter of the film but the filmmaker has the permission of the copyright owner in the music to use that music;
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- . whether an author can prevent a particular class of persons, eg. schoolchildren, from performing a play even though the approval of the copyright owner has been obtained;
 - . whether the showing of certain advertisements or the timing of advertisements would breach the moral rights of the director of a film.
 - . whether a utilitarian item that obtains copyright protection because it is based on a two-dimensional artistic work attracts integrity protection;
 - . whether attribution of software and other 'technological material' such as integrated circuits, would be required;
 - . whether local Councils have the right to determine the siting of particular works (sculptures, paintings) in a way which does not please the original creator;
 - . whether particular uses of literary, dramatic, musical or artistic works constitute acceptable parody or humour, or whether they infringe the right of integrity;
 - . whether a public servant who prepares a paper for presentation by a senior officer or a Minister is "entitled to attribution - and if so how;
 - . whether employees of public companies (perhaps in practice only ex-employees) are entitled to similar rights of attribution; and
 - . whether buildings can be altered or demolished or used in a particular way.
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45. It is unrealistic to say of such instances that a ruling would be made which would resolve all related matters finally or that a particular industry would sort out the matter in accordance with acceptable industry practice, without resort to litigation. It would require only one creator who considered that he or she had been mistreated to assert a claim to certain moral rights and various major undertakings would be put to considerable trouble and cost. Furthermore, some of these examples represent precisely what has been sought in actual cases which have been the subject of complaint. Even if the eventual outcome is satisfactory from the point of view of a particular owner of copyright the delay could have very significant impacts, particularly where it has been necessary to preserve the status quo, e.g. not to release a new publication or not to demolish a building, while a dispute was resolved.

46. At paragraph 16 of the Report on Performers' Protection the Committee indicated that it had received submissions supporting the adoption of moral rights protection for performers. It noted that it would take up this issue in its reference on moral rights. A majority of the Committee recommended that performers not be given general copyright protection. This would seem to carry with it the implication that moral rights also ought not to be applicable to performances. However, should that not be thought to be the case or should the recommendation rejecting performers' right not be accepted, the majority is of the view that performers should not be granted a moral right in their performance. Many of the reasons given above for not granting moral rights to authors seem to be equally applicable to performers. In particular, attribution is commonly provided for the principal performers, but if it were obliged to be given also to back-up musicians, members of the chorus, persons in crowd scenes, etc., it

would be unworkable. Likewise, in relation to integrity, it seems to the majority that the judgment of whether or not a performance has been distorted could lead to many difficulties particularly in relation to such issues as cuing in, voice over or fading out.

47. Submissions to the Committee refer to there having been many cases of alleged moral rights breaches but the only full particularisation is provided in the Martin and Bick report. Fourteen instances are listed there. While it is indicated that they are a selection, they presumably represent what those writing the report thought were instances that most strongly supported their case. Some of them have been noted previously as being indicative of over-sensitivity or indeed unreasonableness on the part of the authors concerned. Some of the instances were resolved after discussion. The instances cited by Martin and Bick when taken with other individual claims referred to in other submissions do not convince the majority that there is anything that begins to approximate frequent invasions of authors' integrity. Legislation is being sought to deal with at most a handful of cases each year - and it could well be that the number of justified grievances is less than this.

48. The non-attribution instances are more obvious if one looks to newspapers and journals - yet at least some of the minority consider that these should be exempted from the requirements of the legislation. As has been noted previously, contractual arrangements can deal with most instances of non-attribution as well, industry practices appear to be developing, without legislation, to name the writer for an increasing number of items in newspaper. It is only third party non-attribution that cannot be so covered. Again, the instances of alleged wrongs brought to the Committee's attention were very small in number. Some of those seemed as if they were

cases where the author was reluctant to bring an infringement action which was available. Others were really objections to the fact that the operation of sections **65-67** of the Copyright Act allows copying of works in public places.

49. The majority remains unconvinced that a valid case for legislative action has been made out. When the difficulties that are likely to flow from legislation of the kind mooted are" also taken into account, the . majority's view is that a stronger case can be made out against legislative action being taken.

(7) AUSTRALIAN COMMUNITY'S PERCEPTION OF MORAL RIGHTS

50. The impact of any moral rights legislation would be wideranging. It would not only impinge on those sectors of the business community familiar with copyright concepts or with those that regularly deal with authors. Its effects would be felt by any person who owned an artistic work or copied a literary work. The general public would have to be persuaded that this was legislation with which they should comply. In the present state of public understanding it is the view of the majority that it would be difficult to persuade very many members of the public that their purchase of a work should not give them the right to do with it as they wish. The majority considers that proponents have underestimated the 'foreignness' of the moral rights concept to those used to a common law system. While members of the public may reluctantly accept that there are limitations on their use of land, they can see that these constraints have an overall public interest foundation relating to health, safety or general quality of life. Laws which impose limitations on a person's use of his or her personal tangible property that are based upon another individual's perception of interest in that property are alien to our legal system.

51. The majority believes. that if the examples of perceived infringements of moral rights which are cited at paragraph 22 were to be widely publicised, the general public response would be rejection of the proposal for legislation. The claim that only unreasonable action on the part of the owner of a work would warrant court intervention would not be acceptable especially when at least some of the examples referred to are endorsed in submissions to the Committee as being cases where court intervention was or would be justified.

52. Copyright owners can testify to the problems that they have encountered in convincing members of the public that reproduction of a work is an infringing act. It is difficult enough to maintain this line in relation to photocopying and audio and video copying and the public performance of literary and musical works. Prescription of such infringement does not involve limitations on the actual property of the owner of an article. It seems to the majority that the "task of convincing members of the public that they cannot do as they wish with something they have bought may be insuperable.

53. It may not be so difficult to persuade them that if they reproduce something, the author's name must be added to it. Most would do this anyway. The majority accepts that this is an appropriate practice, but this is not the same as accepting that it should be required by legislation. The task of policing such a requirement is so great that it will quickly be known that it is virtually unenforceable. The majority does accept, however, that one exception might relate to statutory licensing where it would not seem an unreasonable condition of use that, where practical, there should be attribution. This exception could be justified because where a statutory licence applies, it is not possible to control the use of the work by refusal to allow reproduction or through contractual arrangements.

54. It does not seem to the majority that the likely public reaction to a proposed alteration to the law should be ingnored. A law that is likely to be breached frequently and is likely to be viewed by the public as lacking an acceptable theoretical and social basis should not be recommended.

55. In the majority's view the potential damage of enacting moral rights legislation goes beyond the likely public reaction to the specific provisions themselves. As noted above, difficulties already exist with the lack of acceptance and enforceability of copyright law. It is important for copyright owners that, as far as possible, there be wide community understanding of the essential role of copyright, both in a cultural sense and as an important underpinning of major industries. The task of achieving this in the community is likely to be significantly adversely affected by "moral rights" legislation which would be neither understood nor accepted.

(8) ACTION BY AUTHORS

56. The majority is of the view that the appropriate course of action to be taken by authors and their representatives is not to press for legislation. It should be emphasized that this view does not reflect, on the moral justice of the authors' and artists' position. The majority can envisage circumstances where it may be appropriate for alteration of an author's work to occur. It also accepts that certain alterations or destruction of works are inappropriate. The philosophical difference between the majority and the minority relates to the question whether legislation should confer additional legal rights of action in relation to these matters.

57. One way of improving the position of authors and artists would be to mount an education campaign that informs members of the public of the concerns of authors. Attention should be paid to contracts so that persons who undertake commissioned works in particular, can stipulate the use to be made of their work. They may well have to accept that they will lose commissions if they are over-demanding or may have to accept a lower fee. This approach would meet the issues involved directly. It would also avoid the introduction of legislation that could be expected to produce many more serious new problems than the few situations in which it may confer a socially desirable remedy.

58. It may be that if the public and authors are sufficiently educated, some areas where there is a proper cause for concern will become identified and a specific type of legislative intervention that is appropriate to deal with them will also be able to be determined. Until that time and until a case for alteration of the present law can be properly made out, the majority recommends against legislation to confer moral rights protection on authors and, artists.
