

PART III
MINORITY VIEWS

SHOULD MORAL RIGHTS OF AUTHORS AND ARTISTS IN AUSTRALIA
BE ACCORDED LEGISLATIVE PROTECTION?

(1) INTRODUCTION

1. Subject to some exceptions later to be mentioned, copyright legislation in Australia confers economic rights, but not moral rights, upon creators of intellectual works. This is done by granting them the exclusive rights to reproduce, publish, publicly perform, broadcast, transmit and adapt the works they have created. The Copyright Act 1968 ensures the copyright owner's receipt of financial rewards by virtue of ownership. These rights can be transferred so that the copyright owner will not always remain the creator. Moreover, there are some circumstances, usually brought about by contract, in which the copyright belongs to a person other than the creator from the moment the work comes into existence.

. 2. ' The works that are the subject of copyright protection have traditionally differed from other goods and services in that they are the products of a creator's mind. They have been given protection because:

'the labour of [the] mind is no less arduous and consequently no less worthy of . . . protection [than property accruing by reason of mechanical labour].1

The question is whether, because works are the product of a creator's mind, heart and soul, a degree of protection in addition to that which guarantees financial returns is warranted.²

3. In over 60 countries additional protection is extended to creators.³ This protection is achieved by the conferring of what are known as 'moral rights', a term taken from the French 'droit moral'. A more exact translation would seem, to be personal or personality rights. As the latter term indicates. moral rights include:-

'non-property attributes of an intellectual and moral character which give legal expression to the intimate bond which exists between a literary or artistic work and its author's personality; it is intended to protect his personality as well as his work.'⁴

4. The foundation for the protection of moral rights is the Berne Convention of which Australia is a member. Although this Convention deals primarily with economic rights, Article 6 bis states:

(1) 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.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorised by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification or of accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death cease to be maintained.'

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed. '5

'Work' is a reference to 'literary and artistic works' which are defined in Article 2. In broad terms the expression embraces literary, musical, artistic and dramatic works as those expressions are understood in Australia. Additionally, 'cinematographic works to which are assimilated works expressed by a process analogous to cinematography' are included.

5. The United Nations Universal Declaration of Human Rights reflects this recognition of both economic and moral or personality rights when it states in Article 27:

'everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.'6

6. Except in certain limited circumstances later to be referred to, Australian law does not provide any express statutory, protection for moral rights. The question whether Australian law should do so was last dealt with in 1959 by the Australian Copyright Law Review Committee ('The Spicer Committee').⁷ The Committee said:

'We do not consider that any further protection for artists should be provided for the artist is free to protect himself by inserting terms in his contract of sale. Also, [we] consider that the action for defamation is more appropriate than any statutory cause of action . . .'⁸

7. In formulating their report the Spicer Committee was greatly assisted by the recommendations of the United Kingdom 1951 Report of the Copyright Committee ('The Gregory Committee') which in turn had recommended against the recognition of moral rights. The Committee said:-

'We feel that in general many of the problems involved do not lend themselves to cure by legislative action, but are of a type that can best be regulated by contract between the parties concerned Authors are already protected at common law against anything amounting to defamation of character . . .'⁹

The United Kingdom position is likely to be reversed. The 1986 Department of Trade and Industry White Paper¹⁰ stated:

'As foreshadowed in the 1981 Green Paper, the Government proposes to legislate for moral rights as follows'

(a) authors will be given the right to claim authorship and to object to distortion, but not to modification of a work to which they could not reasonably refuse consent; '¹¹

8. More recently, on 31 July 1987, a Bill to reform the law relating to copyright and other intellectual property was announced in the Queen's Speech as part of the legislative program for the 1987/88 session of the United Kingdom Parliament. A Bill has been introduced into the House of Lords. It includes Chapter IV entitled, 'Moral Rights of Author'. The chapter contains sections 69 to 79 inclusive. With these provisions should be read sections 84,85 and 93. Sections 84 and 85 are to be found in Chapter V of the Bill which is entitled, 'Dealings with Rights in Copyright Works' and section 93 in Chapter VI which is entitled, 'Remedies for Infringement'. Section 69 provides that the author of a

copyright work and the director of a copyright film have the right to be identified as the author or director of a work in the circumstances mentioned in the section. The right is not infringed unless it has been asserted in accordance with section 70. Section 69 sets out the circumstances in which the author or director has the right to be identified with his or her work. Section 70 provides for the manner in which the right to be identified may be asserted. Section 72 provides that the author of a work has the right not to have his work subjected to unjustified modification. Section 84 provides that moral rights are not assignable and section 85 for the circumstances in which moral rights will be transmitted on death. Section 93 provides for remedies for infringement of moral rights.

(2) THE MINORITY'S RECOMMENDATIONS AND ITS SHORT REASONS
T H E R E F O R

9. The minority has reached the conclusion that Australia should have legislation which confers on authors the two most important moral rights, the right of attribution and the right to the integrity of their works. The minority's principal "reasons for this conclusion are:-

- (a) Such legislation is fair and equitable;
- (b) There is a demand for such legislation from a sufficiently significant section of the copyright community;
- (c) Such legislation is necessary in order to give effect to Australia's treaty obligations;

- (d) There is a world-wide trend towards the recognition of moral rights. The trend exists in common law countries as significant as the United Kingdom and Canada;
 - (e) Copyright is today an international affair. Not only Australia's treaty obligations, but also the desirability **of** there being substantial uniformity of copyright laws as between nations suggests the need for change;
 - (f) Along with Canada and the United Kingdom, Australia should embrace the concept that the law protecting the copyright of authors will not be complete unless it confers rights which protect not only the author's economic interests, but also confers rights which recognize and preserve his or her personality. Each is the necessary complement of the other. The minority believes that protecting these two interests is likely to bring about a greater perception by the community generally of the value of the work of authors thus engendering greater respect for their rights than is now the case;
 - (9) Provided the legislation is not expressed in absolute terms, is qualified in some respects and provides for some exemptions, it will not give rise to practical problems which are of such magnitude as themselves' to provide a reason why the legislation should not be introduced.
 - (h) The advent of technological change with its increasing scope for the reproduction of a creator's work is, in the minority's opinion, a major factor indicating the need for moral rights legislation.
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10. The minority's specific recommendations are:-

1. Legislation should be introduced conferring on the authors of works and the directors of films the right to have their works attributed and the right to prevent distortion of their works.
 2. The legislation should apply to works (literary, dramatic, musical and artistic) but, "with the exception of films, not to subject matter other than works (i.e. sound recordings, television and sound broadcasts and published editions of works).
 3. Computer programs, component parts **of** computers (especially chips in which programs have been fixed) and computer software (including firmware) should be omitted from the recommended protection. Although these articles may be literary or artistic works, they are more akin to subject matter other than works than to works themselves. This is the only industrial or commercial area which the minority recommends be excepted from the legislation as it applies to works. The minority considers that the dividing line would be too difficult to draw because there are so many grey areas. The flexibility which the minority recommends the legislation should have will, in its opinion, avoid most practical problems. It follows that it is the view of the minority that the legislation should apply to buildings.
 4. The legislation should require attribution only if it is reasonable in all the circumstances to require it and then only in a way which itself is reasonable.
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5. The right to integrity (the right not to have a work distorted) should be couched in language similar to that used in Article 6 bis of the Berne Convention, so that only a distortion, mutilation or other modification of, or other derogatory action in relation to, the work which is prejudicial to the author's honour or reputation will constitute an infringement of the right.

6. The remedies available for infringement of moral rights should be those of declaration of right, injunction and damages. Additionally, the Court (or appropriate Tribunal) should have power to order a user or owner of a copyright work to attribute it to the author and/or not to distort it or make any use of a distorted copy of it. It should not, however, prevent the owner of a work from destroying it completely, unless reasonableness suggests that the work should first be offered to the author.

7. The rights conferred should not be assignable but should be capable of waiver by the author or, in the event of death or mental illness, by legal personal representatives. Waiver, to be effective, should be in writing or made by conduct. It need not be supported by consideration. A waiver should be able to be made before or after use of a work, for a particular use or particular uses, or generally for all uses. It should be capable of being made for the benefit of a particular person or persons or to the world at large. It should bind the author's legal personal representatives.

8. The rights should remain in force for the same period as economic rights, that is, for the life of the author and a further period of 50 years.
9. The legislation should be introduced by amendments to the Copyright Act.

(3) THE MINORITY'S GENERAL CONSIDERATION OF THE REFERENCE

11. The minority's consideration of the Reference is divided into three main topics. These are as follows:-

- A. The Doctrine of the Moral Right
- B. The Case for Moral Rights Legislation
- c. The Case against Moral Rights Legislation and the Minority's Treatment of that Case

The minority turns to consider those matters.

A. THE DOCTRINE OF THE MORAL RIGHT

12. A detailed treatment of the European law of droit moral will not be given since provisions differ substantially from country to country and because the detailed provisions are not of immediate relevance. The difference between the German monist view and the French dualist (separation of economic and personality rights) view is more theoretical than real.¹² But in order that the nature, of what the minority proposes may be understood it is necessary to commence with an overview of the way in which moral rights are protected in civil law countries. Moral rights are a civil law concept well understood and entrenched in the legal systems of most civil law countries. There are marked differences of detail in the way that the law of various civil law countries operates, but the essential concept is the same.

13. Dietz, in his comparison of European copyright law, notes four central components of the doctrine:

1. the right of publication;
2. the right to recall because of a change of opinion;
3. the right to claim authorship;
4. the right to integrity of the work.¹³

Only the latter two components are required by the Berne Convention.

14. Sarraute agrees that these four aspects are what generally make up the moral right but he also distinguishes between the first and the latter three components. He says there are two distinct periods in a continuum of moral rights; the period while the work is being created and the second period when, having been completed, the work is unveiled, published and sold. Until the moment of disengagement the work is an expression of the artist's personality and remains strictly his own. The creator alone can determine when the work is completed and thus when it can be revealed to the public.¹⁴ This first period is protected by the creator's right of disclosure or publication. Once the work is revealed to the public, it falls into commerce and is published, exhibited, performed etc. but the artist still retains the latter three rights.¹⁵

15. Before looking at the four components in more detail, one issue needs to be addressed. There seems to be some confusion whether the moral right is concerned with the reputation of the artist. Sarraute says the right is intended to protect the artist's personality (as the work is an extension of personality) as well as the work itself. He clarifies this by stating that what is protected is the author's status under the law, not his reputation. Legal protection is granted regardless of

the artistic merit of the work, and so the work's merit and consequently the author's reputation do not enter into account.¹⁶ In contrast, Martin and Bick in their report on moral rights prepared for the Australia Council¹⁷ state that the rights protect the artist's reputation as an artist as well as his or her personality to the extent that it is embodied in the creation, and necessarily, the integrity of the creation is also preserved.¹⁸

16. Sarraute's more precise description is preferred. He does not support a moral rights stance where the reputation of a creator would be protected per se. The work is protected and as a necessary adjunct to this, the creator's personality as it exists in the work is likewise protected. The creator would not be able to launch a moral rights action without a work. If, for example, an artist tried to stop the resale of many of his or her paintings on the grounds that this would create a drop in the demand for his or her work and thereby destroy the artist's name, he or she would not succeed on moral rights grounds.¹⁹

17. What the Martin and Bick formulation does recognise is that the reputation of the artist is affected by an abuse of moral rights. The public perception of a creation is what makes a creator's reputation (whether good or bad). Article 6 bis refers to reputation when it says the author shall have the right to object to any distortion of a work which would be prejudicial to his reputation. The Italian moral rights legislation similarly states that the author's right may only be used to 'object to any alteration of the work which may injure the honour or reputation of the author'.²⁰ This formulation still places protection of the work and the author's personality therein embodied as the *raison d'être* of the moral right but limits the integrity right by requiring prejudice to the author's reputation to be shown.

18. In France the creator can object to any alteration to his or her work. In Italy the creator can only object to an alteration which is also prejudicial to his or her reputation.

(i) The Right of Disclosure

19. This right precedes the other rights. It can be seen as having two elements: the right to create a work and the first right to divulge it to the public. Only the author can determine when a work is finished and when it should be disclosed.

20. The creator cannot be forced to deliver a work so long as he or she is not satisfied with it. This is illustrated in a French case The Whistler Case²¹ where the Court of Cassation ruled that the artist Whistler did not have to deliver a work commissioned by Lord Eden even though it had been exhibited in public. The portrait had not been delivered to the person commissioning it; therefore the artist retained ownership. The artist in failing to fulfil the contract was liable only for d a m a g e s .

21. Another aspect of this right is illustrated by another French case, The Camoin Case.²² The painter Camoin had slashed and thrown away" some canvasses. When these were found, restored and auctioned, Camoin was able to have the canvasses seized and destroyed. The court said that although the person who found the pieces became the indisputable owner of them through possession, this ownership was limited to the physical quality of the fragments and did not deprive the creator of the moral right which he or she always retained over the work. Sarraute criticised this decision in that it ordered the destruction of the restored canvas. He said that the author's moral right should lie only in the deletion of the artist's signature and in the prohibition of the public exhibition of the work.²³

22. This right has been affirmed even in the face of a contrary contractual agreement.²⁴ The creator cannot be forced to create and publish a work, and if this infringes a contractual obligation, only damages can be ordered.

23. It may be observed in passing that, in relation to the right of disclosure, the law presently in force in Australia, which largely derives from common law and equitable principles, may not be significantly different from the law of Continental countries, although a detailed comparison may reveal some differences because of the current approach to the remedy of specific performance of contracts. Thus, it is possible that a case such as the Whistler Case may have been decided differently in Australia.

(ii) The Right of Withdrawal

24. This right, Sarraute tells us, was often spoken of before the French codification of moral rights in 1957, but was never applied in the courts.²⁵ Article 32 of the law of 11 March 1957 provides that an author, even after the work 'has been published and the economic rights transferred, may exercise a right of modification or withdrawal as against the assignee - although not without accepting the obligation to compensate. As Sarraute says, the usefulness of this provision is difficult to see. Once a thought is expressed and circulated how can it be erased. The author who modifies his views should have only one recourse - to set them forth in a new work.²⁶

(iii) The Right of Attribution

25. The right of attribution can be applied by the author in three ways: to be made known to the public as the creator of his or her work; to prevent others from

claiming authorship of his or her work; or to prevent others from wrongfully attributing to him or her works that are not his or hers, or that are unauthorised altered versions of his or her work.

26. Under this right in France authors can require that their name appear on all copies as well as on advertising and other publicity for a work.²⁷ As well, an author's name must be retained on a work after sale,²⁸ the name of an author must be cited following quotations from his or her works,²⁹ a work may not be published anonymously, unless expressly provided for in the contract of publication³⁰ and, where the work is one of several authors, all names must appear.³¹

27. The German copyright law grants similar protection:

'The name of the author may not be omitted from his work unless he has consented thereto, or unless he cannot in good faith raise objections to its omission (e.g. in the case of certain contributions to newspapers) . An artist's name may be affixed to his work by another person only with the artist's permission. No-one may quote from another person's work without indicating the source. '32

(iv) The Right of integrity of the Artistic Creation

28.. The author has the right to have the integrity of his or her work respected, i.e. he or she may prevent any violation of the work which could alter or distort it.

29. The principle is clear in its simplest application of pure reproduction. Perhaps the most famous case which illustrates this right is that involving the French artist Buffet who, having decorated a refrigerator, objected when the refrigerator was cut into sections to be sold separately. The Court of Cassation upheld his objection.³³ The refrigerator was seen as an indivisible artistic unit.

30. One of the classic German cases involving the right of integrity illustrates its application to musical works. In the Maske in Blau case³⁴ a theatre had purchased the right to stage the operetta 'Maske in Blau'. It staged it, but with severe deletions and additions to the musical score. The court said that, although the standard to be applied when considering the right of integrity is a variable one, the ultimate limit of alteration is that the total character of the work may not be distorted.³⁵ In this case the changes had clearly "gone beyond this limit (presumably the distorted work could not be classified as a satire or parody) and an injunction restraining further performance was granted. An Australian example of the type of activity that this right could prevent was the proposed subdivision of a Picasso linocut print as advertised by a Sydney mail order firm.³⁶

31. The right of integrity becomes a little more complicated when no actual physical deformity is involved, but there is contextual abuse. The cases vary. In an Italian decision Ente Autonomo 'La Biennale' di Venezia c De Chirico³⁷ the Italian court refused De Chirico's application to have an exhibition of his paintings prohibited on his allegation that it 'misrepresented him as an artist by including his earlier works at the expense of his later works. In contrast is the French case Soc. Le Chant de Monde c Soc. Fox Europe et Soc. Fox Americaine Twentieth Century³⁸ where a group of Russian composers sought to restrain exhibition of, to them, a politically unacceptable movie which used their music. They succeeded.

32. Feary cites further French cases which show that physical interference is not necessary. These include cases which have decided, amongst other things, that a work of art may not be used for commercial advertising

without the artist's permission and that a reproduction of a work of art on a cheese label is not permitted.³⁹ But certainly, any guidelines as to when mere contextual abuse is sufficient to allow the artist to assert his or her right of integrity are unclear to say the least.

33. Another complicating circumstance for this right is when an adaptation, as opposed to a reproduction, is involved. This is because two moral rights are involved - the right of integrity of the creator and the creative 'right of the adaptor. Courts have tried to distinguish between changes made in the work itself, and changes necessitated by the change of medium. It seems that an adaptor is required to make necessary changes in good faith and to refrain from distorting the original work with the intention of doing harm.⁴⁰ If the creator desires greater control than this, he or she must achieve it via the contract of adaptation.⁴¹

34. It is not clear whether the right of integrity in a work can prevent its total destruction. French cases vary on this point^{4.2} while the German cases indicate that an owner retains a, prerogative to destroy a work he or she has purchased.^{43.}

35. The underlying rationale for allowing an owner to destroy a work is that a work which has been destroyed completely cannot reflect adversely on the artist's personality. On the other hand, however, destruction negates the creator's right of paternity and can be seen as the ultimate form of mutilation.

36. There are three other issues that arise in relation to the application of moral rights: alienability; duration; and exercise after death of the creator.

(v) Alienability

37. Theoretically, because the rights are personal, they cannot be assigned. Article 6 of France's 1957 Statute states that the right 'is perpetual, unassignable and cannot be barred by limitations of time'.⁴⁴ It has also been said that any renunciation of the rights - for example, waiver - 'would be equivalent to moral suicide'.⁴⁵

38. As a matter of commercial reality, however, rights which cannot be waived create difficulties. For this reason the legislation of other European countries such as the Federal Republic of Germany and the Netherlands is silent on the question of waiver. In some cases a type of waiver is provided for by statute. Article 13 of the German copyright law provides for an author to determine whether the work is to bear an author's designation. Thus, the author can choose not to have his name attributed. Similarly, Article 56 of France's 1957 law provides that an author may, by express agreement, waive the right to have his or her name appear on published copies of his or her work. This could be seen as a right to remain anonymous rather than a waiver of the right of attribution but there is little practical difference.

39. The impracticality of a truly inalienable moral right is further recognised by the French courts, despite the general legislative statement to the contrary. The shifting standards by which the right of integrity is applied to adaptations or collaborative works may, for example, be explained on the basis of implied waivers.⁴⁶ One seminal example is the case of Bernstein v. Matador et Pathe Cinema where it was held that a covenant allowing all changes necessary for adapting a play to a movie was valid, notwithstanding the author's inalienable moral right.⁴⁷

40. Lest it should be thought that the French do not take the inalienability of the moral right too seriously, the case of Guille c Colmant⁴⁸ shows otherwise. A painter signed a 10 year contract to produce paintings to be signed by a pseudonym. The court held the entire contract to be void as it violated the artist's right of paternity. In this situation involving original works, the inalienability of the artist's right of paternity overruled the contract.

41. What all this illustrates is that the moral right must and does bow to the pressures of commercial practicality and must vary from situation to situation:

'in spite of the seemingly comprehensive protection offered by the statute a French lawyer advises authors who want to be certain of controlling adaptations of their works that they must bargain for those rights with the producer. '49

42. Alienability is not a requirement of the Berne Convention which is silent on the matter. Of course, the fear is that rights which the legislation allows to be waived may be largely negated. The necessary alternative to alienable rights is a statutory scheme of inalienable rights which, buttressed by practical considerations and exceptions, in practice allows a sufficient degree of alienability.

(vi) Duration

43. This is an issue which is addressed by the Berne Convention, to which reference will be made in more detail in due course.

44. Subject to an important exception, which applies in the case of Australia, it requires recognition of moral rights for a minimum period which equals the duration of the economic copyright. Some countries - Germany and the Netherlands are two - follow the Berne Convention

approach and simultaneously terminate moral rights and economic rights. The French view is that moral rights are perpetual. The dualist basis for French copyright theory allows this approach. The moral imperative behind moral rights would support perpetual moral rights: any mutilation of a creator's work is no less injurious before death than after death.

(vii) Exercise after the Death of the Creator

45. There seem' to be two approaches taken to this issue. In many countries moral rights, like other forms of property, vest, after death, in the creator's heirs. The theoretical difficulties posed by this transfer of inalienable rights is overcome, at least in France, by seeing heirs as having only a right to exercise moral rights but not the rights themselves.⁵⁰ Further problems with this approach include non-exercise of the rights when they obviously need to be exercised and potential abuses by relatives in exercising the rights. The second approach recognises society's interest in maintaining its cultural heritage by entrusting a deceased creator's moral rights to an official organisation. In Italy, for example, the Minister for Public Culture may exercise such rights if the public interest should so require even though the creator's rights vest in his or her heirs and those heirs may still be alive.⁵¹

B. THE CASE FOR **MORAL RIGHTS** LEGISLATION

46. The considerations which suggest that Australia should legislate to provide for moral rights are, when weighed together, impressive. Some of these have already been hinted at. They are now listed, and then elucidated below. There is no significance in the order in which they appear. Minds will differ on the relative importance of each. The important thing is their cumulative force when they are considered together.

- (i) Australia's obligations under the Berne Convention
- (ii) The United Kingdom and Canadian developments
- (iii) The rest of the world
- (iv) Public demand
- (v) The 'moral' argument
- (vi) Technological advances

(i) Australia's obligations under the Berne Convention

47. Australia, in its own right, has been a signatory to the Berne Convention since 14 April 1928. Article 6 **bis** was a new article inserted into the Convention at the Rome Copyright Convention held later that year. The Rome Revision came into force on 1 August 1931. The latest revision is the 1971 Paris Revision which came into force on 10 October 1974. Australia has been a signatory to that revision since 1 March 1978.⁵² Article 6 **bis** of the Convention, which has undergone revision since 1928, expressly recognises the existence of authors' moral rights and is said to place an obligation on those countries which are signatories to the Convention to provide for the protection of the moral rights which it specifies. These rights are:

'the right to claim authorship of the work; and the right 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 the author's honour or reputation. *

The Convention states that these rights shall be maintained for the duration of the copyright (at least) and shall be exercisable by others. Article 6 **bis** further provides that those countries whose legislation at the moment of their accession to the Convention does not provide for the protection after the death of the author of all the above (i.e. moral) rights may provide that some of the rights may cease upon the death of the author.

48. It has been suggested that Article 6 bis requires only that no impediment should exist to prevent an author from claiming authorship of his or her work or from objecting to the distortion, mutilation or other derogatory action in relation to his or her work. This was presumably the approach taken by the United Kingdom Gregory Committee and subsequent Australian Spicer Committee. In support of this view it is claimed that the minimum time period exception in Article 6 bis constitutes a concession to and thus acceptance of the approach of those common law countries where, to the " extent that rights in the nature of moral rights were found to exist, they did so, not because of any statutory provision, but by reason of the common law under which rights of personal action died with the plaintiff."⁵³

49. The conventional interpretation of Article 6 bis seems to be that a positive right is required to be created by member states whereby an author can require attribution of his or her work and, similarly, that a positive right be created whereby an author can protect the integrity of his or her work. This is the view of many commentators. Some examples of what has been said are as follows:-

'It would seem to follow from this that, not only are countries of the Union bound to grant such rights, but that they must be granted by statute law.'⁵⁴

'It must be concluded that Australian law provides only imperfect and, indeed, incidental protection for the moral rights of authors. In fact it does not even fully provide that degree of protection which is required by art. 6 bis of the Berne Convention.'⁵⁵

'It seems therefore that English law fulfils this part of its obligation under the Berne Convention, Article 6 bis, only by enforcing positive contracts to give the author's name. This is scarcely the real concern of the Article.'⁵⁶

'The only provisions of the Copyright Act 1968-1976 which give to an author rights in the nature of moral rights are SS.189-195 relating to false attribution of authorship, but these provisions only recognise very limited rights . . . and do not fully comply with the obligations imposed by Article 6 bis . . . the development of the Convention has been to incorporate moral rights as a component of the author's copyright and this has not been done in Australia. '57

'In the United Kingdom there is no express recognition of these rights through the law of copyright . . . It is doubtful whether, at present, the United Kingdom fulfils its obligations under the Convention. '58 .

This view is also the view now taken by the United Kingdom Government. As is stated in the 1986 White paper:

'Amendment of the law will be necessary to comply with the Paris text of the Berne Convention which requires Member States to protect some at least of the moral rights at least until the expiry of the copyright. '59

An analysis of the Berne Convention text as a whole supports this view. Article 11 bis (2) of the Berne Convention provides that an author's right to authorise broadcasting may be subject to compulsory licensing, but shall not in any circumstances be prejudicial to the moral rights of the author'. Article 6 bis itself refers to 'rights granted' not to rights merely unimpeded or protected. The Rome Convention,⁶⁰ in reference to performers, talks of performers having 'the possibility of preventing' certain acts. Article 6 bis does not use this language. The requirement that moral rights exist for as long as economic rights also does not conform with the view that no impediment' should exist. Article 6 bis must, it is thus argued, refer to the granting of enforceable legal rights.

(ii) The United Kingdom and Canadian Developments

50. As earlier mentioned, the United Kingdom is soon to legislate to provide for the two moral rights provided for in the Berne Convention. Although this is no reason

in itself for Australia to change its law - Australia must examine its own position - the persuasiveness of such a development cannot be denied. As was remarked by the Spicer Committee:

'There are great advantages in being able to rely upon legal provisions in the countries where copyright is claimed which are substantially the same in their operation.'⁶¹

51. Canada is in the process of introducing new moral rights legislation. Its Copyright Act presently contains sub-section 12(7) which is similar to the wording of Article 6 bis. This verbatim transposition, in not allowing for the idiosyncrasies of Canadian domestic laws, has resulted in only a superficial commitment to the concept of moral rights and has raised the question whether Canada has fulfilled its obligations under the Berne Convention.⁶² Proposals are presently under way to clarify and consolidate moral rights protection. In a 1984 Government White Paper on Copyright,⁶³ the Government's proposals for clarification to 'reflect . . . the Rome Text of the Berne Convention to which Canada adheres '⁶⁴ are set down. Under the new' Act, authors moral rights are to endure for the same term as their economic rights. The Canadian Bill provides in clause 12.1 that the author of a work has, where reasonable *in the circumstances*, the right to be associated with the work as its author. It also provides that, subject to clause 18.2, the author has the right to the integrity of the work. Clause 18.2 provides that the author's right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author, distorted, mutilated or otherwise modified, or used in association with a product, service, cause or institution.

(iii) The Rest of the World

52. Apart from the United Kingdom and Canada more than 60 other nations have comprehensive moral rights legislation.⁶⁵ Again this is persuasive only, but for two important reasons. Firstly, the sheer pressure of numbers. The worldwide trend is towards the recognition of moral rights. Secondly, the remark from the Spicer Committee Report quoted above is in these days of advanced technological information dissemination even more true. Notions of exclusive national sovereignty on the cultural level (especially with regard to music) are becoming increasingly irrelevant. This is not a rejection of the significance of copyright to the advancement of culture, but rather a recognition that its protection must extend well beyond national borders. The United States has so far stood out from the trend towards moral rights protection. But on 16 March 1987 there was introduced into the House of Representatives a Bill (H.R. 1623) to implement the Berne Convention. The Bill has been referred to the Committee on the Judiciary. What the fate of the Bill will be remains, so far as the minority is aware, unclear, especially as there are two other bills, S. 1301 and H.R. 2962, before Congress neither of which provides for moral rights (see Endnote 2 to the views of the majority).

53. Despite the uncertainty which exists in the United States, the point which the minority makes is that uniform legislative protection is an important factor in the continued protection of both the economic and moral rights of creators.

(iv) Public Demand

54. There would appear to be an increasing demand for moral rights protection from the creative community. Of the 33 submissions received by the Committee, 23

supported the introduction of moral rights legislation. Of the 10 submissions that did not support such legislation, only 2 were totally opposed in principle. Two more did not oppose the principle of moral rights, but contended that no legislation, nor any other form of legal intervention, was necessary. One submission neither supported nor opposed moral rights and the other 5 were concerned with very specific problems that they envisaged in their respective fields of work.

55. Lahore and Griffiths commented in 1974 that:

'a majority of complaints by authors, artists, musicians, directors and other creative artists concerning the use of their work relate to matters that come within the concept of the moral right rather than within copyright as it is presently conceived in Australia. '66

This statement is borne out more recently by the evidence collected by Martin and Bick in their report on moral rights prepared for the Australia Council in 1983,⁶⁷ and by the picture presented by the submissions to the Committee. Martin and Bick state in their report:

*The evidence which is available to us is unequivocal: artists' moral rights are abused in Australia. '68

They state that the problem may not be as apparently chronic as it really is because the majority of infringements or abuses go unreported. They illustrate the dimensions of the issue with a selection of cases of abuse in the visual arts field which they claim are typical of the types of problems that occur regularly.⁶⁹

56. The submissions to the Committee favouring moral rights legislation represent a wide cross-section of the creative community including painters, sculptors, writers, architects, photographers and craftspeople.

Almost all these submissions quote examples of moral rights abuses in their respective creative fields. The Arts Law Centre of Australia, for example, quotes a figure of 27 artists that, over a period of 18 months, consulted them with regard to moral rights abuses.⁷⁰ The Australian Writers Guild submits a solid and pressing need for moral rights legislation for the scriptwriters it represents.⁷¹

57. The need for moral rights legislation is expressed not only in terms of the close connection between economic rights, moral rights and reputation, but also in the increasing threat of unfriendly technological advances. This latter problem and others which further indicate the need for effective moral rights protection are examined separately.

(v) The Moral Argument

58. The most compelling argument for moral rights legislation is the 'moral' argument. This argument was fervently put (at least in relation to the visual arts) in a submission from Christopher Heathcote (an artist) who said:

'to put it bluntly'

it is clearly wrong for someone to deliberately mutilate a canvas
it is clearly wrong for someone to knowingly wrongfully attribute a work of art
it is clearly wrong to do either of the above even if the artist is dead.

These are self-evident moral imperatives. '72

59. The moral imperative behind moral rights is to maintain the relationship between a work and its creator which might otherwise be lost. If a human being is considered as having an individual moral value, then that

person's creation can be seen as an extension of their moral being and as such deserving a share of the respect to which a moral being is entitled. As is stated in the 1956 Report of the Swedish Royal Commission on Copyright Law:

'What we are here confronted with is a form of human activity where to a greater extent than in other connections the producer puts into his product his personality, his spiritual apprehensions and experiences, and where in consequence there often arises an emotional connection between the author and the results of 'his work which is seldom found to the same extent in any other sphere of activity. '73

60. Stromholm states that the moral right arose because supporters of copyright in the period 1880-1960 wished to live in a society with a strong respect for the inviolability and freedom of individuals and a particular respect for intellectual creativity.⁷⁴

61. In that the doctrine of moral rights serves to protect works, it is sometimes linked to the related policy of preserving a nation's cultural heritage. This principle, is evident in the preservation of anonymous works, such as Ancient Greek sculptures, or old English folk songs.⁷⁵ . . .

62. These moral principles did not come only from Continental Europe. The commentator Patterson discusses English practices relating to the Stationers Copyright of the 17th century and concludes:

'the stationers were aware of the continuing interest of the author in his works by reason of the fact that he created them. . . . Unfortunately, the stationers' recognition of the authors' creative rights did not survive the introduction of statutory copyright. '76

The sentiments that an author should always be named as the author of a work and that a work should not be violated or abused by others are strongly voiced in the submissions to the Committee. Those submissions which are against the introduction of moral rights legislation do not gainsay these principles. Rather they say that it is impractical and/or inappropriate to seek to protect moral rights by legislation. The remedy lies in persuading users of copyright material that it is important to respect the personality of the author if, for no other reason, than that is what common courtesy requires. With respect, the minority regards this view as naive.

(vi) Technological Change

63. The advent of technological advances with its increasing scope for the dissemination of a creator's work is seen as a major factor necessitating the implementation of moral rights legislation.

64. Technological" advances have resulted in widespread consumer ownership of equipment not only for the use of works, but the copying of works. Copyright laws have not yet been changed to cope with many of these uses which are 'largely private, 'not readily detectable and yet enormous in scale' .⁷⁷ Indeed, there is a substantial question concerning the nature of the amendments which need to be made to the copyright laws of most countries in order that technological change may be accommodated. The scale of the technological takeover is illustrated in a study presently being undertaken by the United States Library of Congress into the uses of optical disc technology for library collections. Such a system would store print materials, photographs and cinematographic works on optical discs allowing display and print-out via telecommunications links at remote stations throughout the world as well as on site. The discs themselves are cheaply replicated. As David Ladd concludes. the implications are staggering.⁷⁸

65. In his 1980 Geiringer Lecture at New York University, Stephen Stewart QC of the United Kingdom warned that this technological acceleration is accompanied by a widespread and growing public demand that consumers:

'should have the widest possible access to all copyright material at the lowest possible cost and, in many cases, **free**'⁷⁹

He went on to say:-

'Almost everybody in our modern society is a consumer of copyrights in several respects: as a reader of books, newspapers, or other printed copyright material, as a listener to music, as a viewer of television or as a parent of a child at school who should have his school books cheap or free, to name only the most common uses. Thus, put in electoral terms, on most copyright issues the overwhelming majority of voters are on one side and a comparatively very small number of voters, who are copyright owners, are on the other side of the argument. Furthermore, only a tiny fraction of this small number of copyright owners become millionaires, but it is those' few who are constantly in the public eye. No politician, even if he is the opposite of a popularist, could totally ignore this when taking a position on a copyright issue. The counter-argument, as you all know, is that without copyright, the liberty, of the subject, including the liberty of speech and the freedom of expression in literature and the arts, would be in danger and ultimately some of the values of western civilization would be at risk. But this counter-argument is not as obvious as the popularist argument of cheap access to copyright works by the general public. Therefore, the copyright argument needs to be put again and again in differing forms and in all countries. Once this is acknowledged, the task of constantly arguing for the maintenance and development of copyright, which may at times appear repetitive, or even tedious, becomes a necessary, even a noble pursuit, humanist in the best sense of the word'.⁸⁰

Stewart's views were adopted by Ladd.⁸¹

66. The point which the two commentators are making is that, without copyright protection, authors, and thus society itself, are at risk in the respects mentioned by them because authors will not be encouraged to create. Those views may not be found persuasive by all. But their source entitles them to substantial respect. It is probably correct to say that the remarks were made in the context of a plea to ensure that economic rights continued to be adequately protected. But much of what Stewart said is, in the opinion of the minority, as applicable to the case for the protection of moral rights as it is for the protection of economic rights.

67. The seriousness of the threats to copyright is emphasised again in a 1984 article in which Gillian Davies states that:

'the balance has now been tilted in favour of users of copyright works who are able to take advantage of the fact that the copyright owner is unable to control or require remuneration for the many uses of his work not envisaged in existing legislation, such as private copying, rental, satellite transmission.'

A concomitant strengthening of **moral** rights is seen as one of the possible solutions to the weakening of the individual economic elements of copyright.⁸³ Ladd says that the idea of the author's right must never be abandoned and that for countries standing in the European tradition where the philosophical basis of copyright includes the idea that an author's work is the extension of his or her personality, the defence of copyright will be easier.⁸⁴

68. Davies says that Governments should be contemplating new legislation to encourage the continued growth of cultural industries, using copyright legislation as a positive instrument of cultural policy to promote creativity.⁸⁵ It is conceded that moral rights legislation would not cure all the problems posed by technological advances, but they would certainly go part of the way both towards redressing the imbalance and increasing public awareness of the importance of

C. THE CASE AGAINST MORAL RIGHTS LEGISLATION AND THE
MINORITY ' S TREATMENT OF THAT CASE

69. Those who object to the idea of moral rights legislation for Australia provide counter arguments to those put in its favour. These are listed below before being dealt with in detail. . In case there should be any misunderstanding, it should be clear that not each of these arguments is supported by the majority of the Committee. The minority mentions them because they were relied upon in' submissions to the Committee. The arguments are as follows:-

1. The requirements of Article 6 **bis** of the Berne Convention are already sufficiently protected;
2. Moral rights as a concept are alien to Australia's property-based legal system;
3. Moral rights are not compatible with the Copyright Act;
4. There is no compelling demand nor need for moral rights legislation;
5. There are too many practical difficulties associated with the implementation of moral rights, particularly concerning:
 - newspapers and other media,
 - advertising,
 - employer/employee situations,
 - collective works,
 - adaptations,
 - anonymous creators,
 - art works in public places,
 - quality of performances or reproductions;
6. Moral rights would be harmful to the processes of information dissemination;
7. Moral rights would stifle criticism in the form of parody, burlesque etc.;

8. Moral rights legislation in Australia would complicate Australian dealings with other countries where there are no moral rights.

The minority deals with each of these arguments below:-

- (i) The requirements of the Berne Convention are already sufficiently protected

70. This argument is based partly on the proposition that Article 6 bis of the Berne Convention merely requires that 'no impediment' exist preventing creators from asserting and bargaining for the specified rights of attribution and integrity.⁸⁶ It is also claimed that a collection of rights derived from the common law and some statutory provisions, when considered together, confers on creators of intellectual property rights, rights which equate those contemplated by Article 6 bis. The issue then, is whether Australian law provides adequate protection for the moral interests at stake.

71. Three of the submissions received by the Committee allege that the law as it presently stands does offer adequate protection against moral rights abuses.⁸⁷ The principal remedies that they rely upon in this assertion are breach of contract, the law relating to unfair competition and defamation, and the Copyright Act itself.

72. The suggested Australian alternatives for each moral right are now examined in order to determine the extent of their protection in Australia.

(a) The Right of Attribution

73. The moral right of attribution does not exist as a specific right under Australian law. But it is claimed that equivalent protection is afforded by a mixture of the

false attribution sections of the Copyright Act, contract law, passing off, defamation and the provisions of Part V of the Trade Practices Act 1974.

74. Australian law does not recognise a positive right of attribution; thus any right to accreditation must be created by contract. But is contract an adequate substitute? Its many limitations would suggest not: in addition to the limitations presented by the privity requirement, there is the difficulty of implying protective conditions into a contract which does not provide for protection and the poor bargaining power of little known creators.

75. Contractual protection can be very effective. Artists in some fields have established standard form contracts which do protect their moral rights. Martin and Bick set out samples from standard contracts from the Designers Association and the royalty contract used by the Australian Society of Authors.⁸⁸ Certain eminent individuals are also able adequately to protect their moral rights by contract. But, as Martin and Bick conclude, and as is stated in many of the submission's to the Committee, the range of protection which contracts offer is directly related to the bargaining strength of the parties. The Australian Writers Guild, for example, claimed that it had not been able adequately to protect its members moral rights through negotiated agreements.⁸⁹

76. The doctrine of privity of contract, in providing that only persons who are original parties to a contract are bound by its terms, further decreases the efficacy of contract as an alternative to moral rights legislation.

77. It is interesting to note that in Scandinavia, not only is there legislative protection for moral rights, but there is a system of secondary protection in the form

of special rules for copyright contracts. For example, s.28 of the Swedish Copyright Law of 1960 prohibits a person acquiring the right to use a work from assigning the work to another person without the permission of the author.⁹⁰

78. Anglo/Australian cases dealing with abuses of the positive right of attribution are not common - creators realise that they cannot, apart from contract, require attribution. This is illustrated by an old English case . Preston v, Raphael⁹¹ where the purchasers of drawings plus copyright in the drawings reproduced them in changed form and without the artist's signature. The artist did not (could not) enforce attribution but she claimed that the reproductions were recognizably of her work and thus were represented as unaltered versions of her" work, which was a breach of the Fine Arts Copyright Act 1862 (UK). The Court found against the artist as there were no express representations to be implied from the mere fact that to some minds the work might suggest the name of the plaintiff.

79. There. is some indirect protection of the right of attribution in sections 41 and 44 of the Copyright Act which are concerned with fair dealing. Fair dealing for purposes of criticism or review, reporting news or educational use is not a breach of copyright if, amongst other things, a sufficient acknowledgement of the work is made. But the general rule is that, in the absence of contractual provisions to the contrary, an artist s work may be displayed or sold without the slightest reference to the creator.

80. The plagiarism aspect of the right of attribution, i.e. preventing others from claiming authorship, is protected in Australia by Part IX of the Copyright Act. This Part is headed 'False Attribution of Authorship', but it covers only the situation where the author's work

is claimed by another. It does not cover the situation where it is wrongly claimed that an author has created a work he or she did not in fact create. In contrast the United Kingdom Copyright Act protects the latter situation (section 43 Copyright Act 1956) but not the former.

81. Sub-section 190(1) of the Australian Act provides:

'A person . . . is . . . under a duty to the author of a work not to -

- (a) insert or affix another person's name in or on the work, or in or on a reproduction of the work, in such a way as to imply that the other person is the author of the work;'

Publishers, distributors and performers may also be liable if they knowingly use a work that has a person's name affixed to it contrary to sub-section 190(1) paragraph (a). The action survives the author and passes to his or her heirs along with and for as long as the copyright subsists in the work (sub-sections 190(3),(4)). A breach of the duty owed under these sections will only allow a civil action for injunction or damages to be brought (sub-sections 194(1),(2)). The provisions deal only with 'works'. They do not extend to 'subject matter other than works' such as sound recordings and cinematographic films.

82. The final aspect of the right of attribution - preventing others from wrongfully attributing to an author works that are not his or hers, or that are unauthorised altered versions of the author's work - is partly covered by the Copyright Act. Section 191 of the Act creates a duty in others not to represent an altered version of an author's work as being the author's. But the Act gives no power to creators to stop others from attributing to them works that are not theirs.

83. There is little, if any evidence before the Committee that this is a problem. To the extent that it is, section 191, despite the abovementioned omission, will cover most cases of abuse. In so far as it does not, the torts of defamation and passing off and some of the provisions of Part V of the Trade Practices Act will be available, in some circumstances, although by no means all, to provide a remedy. This aspect of the matter is, in the minority's view, on the fringe of the Reference. For that reason it is not proposed to embark on an analysis of the circumstances in which general law remedies will afford relief. It is sufficient to say that such an analysis would reveal that there could be cases of abuse for which there would be no legal remedy available to a person whose work had been wrongfully attributed to another.

84. The overall conclusion is that Australian law does not provide for a right of attribution. The applicable statutes and common law go part of the way, but fall far short of what is needed to confer the right. Furthermore, apart from the situation where a work has been plagiarised, it would appear that any legal protection the "cr'earer may receive for his or her personality right of attribution is fortuitous. If the creator is lucky, and has the necessary bargaining power, his or her moral rights may be protected by a contract. Otherwise the creator needs to establish a number of conditions that are totally irrelevant to the right of attribution; for example:

- a deceptive practice (passing-off, defamation, Trade Practices Act);
 - a reputation (passing-off, defamation) economic loss (passing-off) ;
 - involvement of a corporation (Trade Practices Act);
 - involvement of trade and commerce (passing-off, Trade Practices Act).
-

(b) The Right of Integrity of the Creation

85. Alternative legal protection for this right in Australia follows a similar pattern. An author has no substantive right to prevent others from altering his work without consent but in certain situations the author's complaint may coincide with a recognised cause of action.⁹²

86. The Copyright Act provides some incidental protection of a creator's integrity in his or her works. Sub-section 35(4) of the Act, which gives ownership of a work made in pursuance of terms of employment to the employer, provides that for other uses the author will control the copyright. However, the major usages of the work will be controlled by the employer.

87. Sub-section 35(5) applies to commissioned works and, after vesting ownership of the work in the person commissioning it, provides the author with control of the use of that work where the use is not that for which the work was commissioned. The use must have been made known by the commissioner to the author at the time the agreement was made. Further limitations include the fact that it only applies to photographs, paintings or drawings of a portrait, and engravings, but the biggest limitation, as far as the integrity right is concerned, is that only acts comprised within the copyright can be restrained. Thus, while the reproduction of the work could be prevented, defacement of the work could not.

88. Sub-section 55(2) of the Act restricts the compulsory recording licence of musical works so that recordings of an adaptation that debases the work are excluded from the compulsory recording right. But it is the owner of the copyright who must take the action, and this may not be the creator.

89. There is a reference to alteration of works in section 191 which corrects the mischief of representing an altered work as the unaltered work of a creator. But it does not prohibit the alteration itself. In fact its effect is quite the opposite. As explained by Channel J. in Carlton Illustrators v. Coleman:⁹³

'The owner of a copyright has an undoubted right, subject to the provisions of this clause, to make any alteration he pleases . . . provided that thereby he makes no false representation to the public as to the authorship of the drawing. '94

Instead of the creator of the work having a right to prevent alteration, the owner actually has a right to alter it.

90. It can be seen that the Copyright Act gives only very limited protection to the right of integrity. The general rule is that, where the copyright is assigned, the assignee can alter or amend the work as he or she pleases. The creator again must resort to contractual provisions or to attempt to mould the facts of the case into a cause of action for defamation or passing off.

91. As already discussed under attribution, contractual provisions will only, aid the creator who is the original owner of the copyright, and then only when the work is still owned by the original purchaser of it. The doctrine of privity excludes third parties. The usefulness of contract also depends on an assumption that the creator has the bargaining power to demand the inclusion of desired provisions.

92. The defamation action is available to a creator who can establish that a particular action directed towards his or her work will affect his or her reputation in that it holds the creator up to public hatred, ridicule or

contempt. This may not always be able to be demonstrated. And even where it can, the plaintiff is confronted with a myriad of potential defences each designed to protect freedom of expression but often giving rise to problems of substantial factual and legal complexity.

93. Similarly, passing-off may sometimes provide a remedy. Thus, in Hexagon Pty. Ltd. v. ABC⁹⁵ the owner of copyright in the two Alvin Purple movies successfully brought a passing-off action against the ABC when it produced a series of the same name. But as this case illustrates, a passing-off action is not necessarily concerned with violation of a work. Prevention of violation, or the recovery of damages for it, will occur only if that is a necessary, really an incidental, consequence of the restraint of the passing off or the award of damages.

94. Paul Goldstein puts forward the copyright owner's exclusive right to adapt under the Copyright Act as another means by which an author's right in the integrity of his or her work' can be effectively secured.⁹⁶ The limitations of this remedy are that it is the copyright owner, not the author, who has the exclusive right to adapt and thus to object to an unauthorised adaptation. Once again, the correction of an abuse of integrity is incidental. Not surprisingly, Goldstein says he is not suggesting that the English law on adaptation rights generally secures the equivalent of the Continental right of integrity.⁹⁷

(C) The Right of Disclosure

95. The right of disclosure is not a requirement of the Berne Convention, but for the sake of completeness this right plus the right of withdrawal will be briefly examined in terms of Australian alternatives.

96. With some limitations, Australian creators do enjoy a comparable alternative to the right of disclosure. This is partly because, apart from its moral justification, the right can be seen as a consequence of the fact that the creator with physical possession has the power of destruction and therefore of disclosure in respect of his or her work. The other factor which gives the creator power in this area is that under the Copyright Act the general rule is that the author is the first owner of the copyright (sub-section 35(2)). Thus the creator as owner can use his or her copyright to decide whether or not the work will be made public (section 31)." The general rule is subject to a number of exceptions. The major exceptions are when a creator is employed to create a work and, in some cases, where a creator is commissioned to create one.

97. The way in which moral rights legislation operates in a civil law country in a situation where physical possession is lost, is illustrated by a French authority, The Rouault Case.⁹⁸ There, the painter Rouault was under a contract to an art dealer to turn over to him the entirety of his artistic production. The artist worked on his unfinished canvasses at the dealer's gallery where the canvasses were stored. The dealer died and his heirs claimed the unfinished works belonged to them under the contract. The court found for Rouault who claimed that, because the works were unfinished, he alone could decide on their final delivery. In the course of its judgment the court said:

'Until final delivery, the painter remains master of his work, and may perfect it, modify it, or even leave it unfinished if he loses all hope of making it worthy of himself The breach of any such agreement [to the contrary] exposes the author who changes his mind only to damages. '99

Thus in France the moral right of disclosure prevails over all copyright situations where someone other than the creator is to be the owner even if the latter has the physical possession of the work. The Australian Copyright Act, in contrast, does not refer to finished or unfinished works, and so the result would seem to be that as soon as a work is first reduced to writing or to some other material form (sub-section 22(1)) - even though unfinished - the copyright in it may belong to another by virtue of the statutory exceptions already alluded to or under contractual agreement. This is certainly the case with commissioned portraits where, by virtue of sub-section 35(5), the copyright is owned by the commissioner. In the New Zealand case Art Directors v. Needham¹⁰⁰ it was held that the NZ equivalent of this section applies as much to unfinished works as it does to completed works. Thus in such situations, where "the creator loses physical possession, he' also loses his or her power of disclosure.

98. As far as concerns works not yet created - or in Australian terms, not yet reduced (at all) to some material form the common law tradition of not enforcing contracts strictly personal in nature¹⁰¹ means that the creation of a work will not be compelled. Even if an assignment of future copyright is made under sub-section 197(1) of the Copyright Act, the section only operates to compel the assignment of the copyright if and when the work comes into existence. It does not operate to compel an author to create a work.

(d) The Right of Withdrawal

99. Anglo-Australian law does not recognise a right allowing a creator to withdraw a work from circulation. This is not surprising as even in France, where it is recognised, it seems to have been ignored.¹⁰² It is generally seen as the most dispensable aspect of moral

rights and it is difficult to disagree with the sentiments of Sarraute (equally applicable to Australia) when he says:

'The right of withdrawal . . . **has, fortunately,** equivalent in United States law. '103

(e) Summary

100. Martin and Bick concluded that the alternative protection afforded by Australian law is:

'fragmented, technically and theoretically inadequate and operates with respect to moral rights, purely incidentally. '104

This was the predominant view contained in the submissions. Thus the Australian Writers Guild said:-

'The present protection afforded writers with regard to their moral rights is inadequate due not only to its fragmentary nature, but also due to the fact that the primary purpose of existing legislation is to protect the economic interests of the writer without regard to any moral right except insofar as these rights may be occasionally inter-related' .105

The Arts Law Centre of Australia states that any suggestion that moral rights are already sufficiently protected is erroneous. The centre says that its figures illustrate that the odds for protecting moral rights are firmly stacked against the artist:

'During the last 18 months the Arts Law Centre of Australia has counseled 27 artists on their moral rights and acted in at least 10 cases where moral rights had been abused. Of these, one dispute was satisfactorily settled by negotiation . . . in another the terms of the contract . . . were sufficient to resolve the dispute; and in another s.191 of the Copyr ight Act was successfully relied upon. This left 7 serious cases in which the artists were unable to obtain any remedy' and many where the artists did not attempt to do so, after learning of the difficulties involved. '106

Because moral rights are not the exclusive, or even a primary, focus of the substitute legal remedies, the conclusion of the Australian Copyright Council is that:

'A back-door approach - defamation, passing-off etc. even if effective - lacks the certainty of specific legislation and furthermore does nothing to encourage respect for authorship. '107

101. It should be noted here that, although the United States, like Australia, has no express moral rights protection, the alternative protection afforded by other doctrines is substantially wider than that afforded in Australia¹⁰⁸. The alternative remedies discussed above are supplemented in the United States by its general doctrines of unfair competition and breach of privacy. Further, section 43a of its Lanham Act¹⁰⁹, which is the US equivalent of section 52 of the Australian Trade Practices Act, is not limited by the constitutional concept of corporation. Yet the conclusion of many US commentators is still that the scope of protection in America for personal rights of creators is insufficient. 1 1 0

102. This overview of alternative Australian protection does not warrant the conclusion that moral rights are adequately protected under present Australian law. It supports the conclusion that the protection offered is piecemeal, incidental and often not conceptually designed to cope with moral rights issues. One is drawn towards the conclusion of Paul Goldstein:

'And if moral rights generally is the concern, then the better course suggested by the Whitford Committee and the Green Paper - is to adopt an explicit rule giving the author a right in the integrity of his work. '111

(ii) Moral Rights as a Concept is alien to Australia's
Property-Based Legal System

103. It is suggested in two of the submissions that the civil law notion of moral rights legislation is totally antithetical to our copyright and common law traditions.¹¹² One academic interpretation of the foundations of Anglo-Australian copyright law states:

'English copyright was founded on the premise that authors and printer's" are entitled to reap the economic rewards that flow from the publication of their original works. Although copyright law has expanded considerably from this early concern for books and printing, the law's initial orientation to publishers' rights to make copies, rather than to authors' rights in their works, continues to color its modern application. '113

Lahore thinks that the Australian lawyer might have difficulty in understanding moral rights but he also says:

'Copyright need not be conceived of in the narrow unitary terms of the common law . . . there are dicta in earlier cases suggesting a rationale of copyright that would justify much of what is now comprehended within moral rights. '114

104. The minority agrees that the ordinary perception of the rights of ownership are in conflict with many of the precepts of moral rights. The deep-seated common law notion that a property owner should be able to do as he or she pleases with his or her property is an imposing obstacle to moral rights legislation.

105. But, the obstacle is by no means insurmountable. The old adage 'an Englishman's home is his castle* is certainly no longer as true as it once was given increasing trends towards regulation. One significant precedent illustrating this is legislation restricting the rights of owners of certain buildings, for example, heritage legislation.¹¹⁵ As it was stated in one submission, on one view, moral rights legislation would merely add another dimension to the basic economic copyright, namely, that the property right would no

longer include the right to distort or mutilate the property¹¹⁶ and the minority would add, require those using or referring to it to attribute its authorship whenever it was reasonable to do so.

106. Moral rights should not be thought of as always having belonged easily to European notions of law. Before moral rights were integrated into European law they were considered totally antithetical to the 'buyers' rights are absolute' concept:

*With the printing and other commercial privileges of the 15th and the two following centuries, there begins the painful intellectual process whereby European jurists gradually learned to "construct" something so thoroughly alien to their Roman law ~~system~~ of categories as "rights to incorporeal objects". ¹¹⁷

This head of argument merges with the next. What is said concerning it is also relevant to the assertion that moral rights are foreign to Australia's underlying philosophy concerning the law of property.

(iii) Moral Rights are not compatible with the Copyright Act " .

107. The Copyright Act is said to contain provisions which are in such conflict with the concept of moral rights that the two could not be compatible. The provisions relied upon are chiefly those which provide for the assignment of copyright so that persons other than the creator become the owner of it. Additionally, reference is made to provisions of the Act which operate to vest the copyright of a work in someone other than the author from the moment of the work's creation. This occurs in some employment situations (sub-section 35(4)) and in relation to some commissioned works (sub-section 35(5)). Reference is also made to provisions of the Act relating to fair dealing (sections 40-42), works in public places (section 65) and the compulsory licensing provisions, eg. sections 53B and 55.

108. In the minority's view, these submissions raise matters which are fundamental to the questions which the Reference raises for consideration. Of course the Act in its present form is incompatible with moral rights. The whole question is whether it should be amended to give effect to them. The incompatibility arises, particularly in the minds of common lawyers used to conventional property law concepts, because the introduction of moral rights would create an uncertainty in that economic rights would belong to the copyright owner (who may not be the author) whilst moral rights would remain with the creator. The minority agrees that that situation, which is so well understood in Continental countries, not only by lawyers but also by the copyright community, will not be readily understood in Australia. But the minority cannot accept that the present incompatibility which there is between the Australian legislation and the concept of moral rights is a reason for not recommending their introduction. Whether they are introduced or not must depend upon other considerations later to be discussed. It is appropriate to say here, however, that moral rights, **if** introduced, would need to be subject to exceptions. The problem is not in essence theoretical. It is a question of balancing the competing interests and being practical about one's solution. Existing copyright law and the limitations it places upon any proposed moral rights legislation are but two of many factors. The extent and scope of moral rights, if introduced, are others.

(iv) There is no compelling demand, nor need for moral rights legislation

109. It is argued that there is neither a sufficient demand nor a sufficient need to warrant introduction of moral rights protection. One submission expanded on this theme and stated that none of the four political preconditions that would warrant legislation exist in the case of moral rights. These preconditions are:

1. a disadvantaged group;
2. that is well organised and articulate;
3. that has the will of the government behind it; ,
and
4. a demonstrated inadequacy in the current law.¹¹⁸

In the light of this submission it is necessary to examine moral rights in relation to each category of copyright work and to analyse, as far as possible, the demand/need within each.

(a) Artistic Works

110. Of the 33 submissions received 20 specifically favoured introduction of at least the rights of attribution and integrity for artistic works, compared with only three specifically against. Of these latter three, one believed that authors' moral rights were already adequately safeguarded and the other two were against only in respect of employer/employee situations. Some of the submissions in favour, like the submissions from the Office of the Minister for the Arts in New South Wales and the Victorian Ministry for the Arts, claimed to have canvassed the views of their States' major cultural institutions. In a more recent letter (1 October 1987) Mr Frank Walker, the New South Wales Minister for the Arts, said, amongst other things, that, on behalf of the New South Wales Government, he wished to express strong support in principle for any legislation or other Commonwealth action to safeguard and entrench the moral rights of authors and artists.¹¹⁹

111. There was greater unanimity about the right of attribution than the right of integrity. For example, the Royal Australian Institute of Architects and the Arts Law Centre of Australia rejected the right of integrity for built architecture,¹²⁰ the Museums and Art Galleries of the Northern Territory rejected 'placement' of work as being part of moral rights,¹²¹ and the Arts Law Centre agreed that integrity should not cover all situations.¹²² The Victorian Museum of the Arts referred to problems concerning restoration and the legal role of trustees of art generally.¹²³ The Crafts Council of Australia referred to the need for a distinction between public and private showings of art but it did not say why.¹²⁴ The Australian Vice-Chancellors Committee expressed concern that the right of integrity should cover placement and exhibition, and thought that integrity in artistic works should not prevent the development of buildings in which they were placed.¹²⁵

112. Despite these perceived areas of difficulty, the overall impression to be gained from the submissions is of qualified support for the rights of attribution and integrity. The perceived need for modifications in some cases is certainly not seen by the minority as a reason to reject the right of integrity.

113. Even if it be accepted that there is a demand, it can still be argued that there is no need for moral rights for artistic works. Art galleries, for example, as they themselves claim, follow the highest standards of attribution and integrity. The problem of lack of attribution of photographs can be overcome by contract. The problem of lack of attribution of art works on public display that are reproduced commercially could be overcome contractually and by the amendment of section 65 to make such commercial reproduction an infringement of copyright.

114. But, what of the situation where the artist has not protected him or herself by contract? What of the situation where an entrepreneur decides to cut up a famous painting and sell off the pieces?¹²⁶ What of the situation where the owner but not author of an artistic work decides to add spots to the painting so that it matches his sofa?¹²⁷ What of the situation where a public sculpture is repainted by its new owners in a new colour?

115. The submissions support many of the conclusions reached by Martin and Bick in their study, namely:

artists' moral rights are abused in Australia;
many cases are unreported because there is no procedure for complaint;
for artists, questions of integrity loom large;
the right of attribution is less often infringed, especially for painters and sculptors, but photographers and architects are constantly battling to be known as creator;
the work of visual artists is inherently more capable of defacement in a primary sense than other works of art;
there are very few cases where complaints raised concern context.¹²⁸

(b) Literary/Dramatic Works

116. The submissions present a less one-sided approach with regard to literary/dramatic works, although the majority favour moral rights. Seventeen submissions support moral rights for literary works; eight are against. Two submissions opposed moral rights outright. These were the two submissions mentioned earlier that are opposed to any form of moral rights legislation on principle.¹²⁹ One of these, the submission from the Newspaper Publishers Association of Melbourne, is opposed

only because it is of the opinion that present legal safeguards are sufficient. The Australian Book Publishers Association submission supports the principles of attribution and integrity as important aspects of publishing but thinks they are already sufficiently safeguarded. Two more submissions¹³⁰ are opposed to moral rights for those who write for newspapers; one of the submissions in favour of moral rights generally also proposes an exemption for newspapers.¹³¹ One other¹³² is similarly opposed because of the many practical problems that would be created for radio broadcasters. One submission opposes moral rights legislation for authors published works¹³³ and two others¹³⁴ expressed concern that moral rights would create practical difficulties in running administrative offices.

117. Thus, many of the issues raised by the submissions against moral rights in the context of literary works relate to practical problems - the position of newspaper proprietors, radio broadcasters, and other employers of creators. These problems will be examined later.

118. Apart from the practical problems, the main contention is that the rights are already adequately protected by the law relating to contract, passing-off and defamation. This contention is disputed by the submissions favouring moral rights for literary works. The Australian Writers Guild claims that scriptwriters have not been able adequately to protect themselves through contract nor has the Guild achieved adequate protection through negotiated agreements. The Fellowship of Australian Writers* submission highlights the need for authors to take a more business-like attitude to publication and to include moral rights as part of their negotiations. The Victorian Fellowship of Australian Writers agreed with the Australia Council approach that not only legislation but a major education campaign is needed.

119. The submissions certainly do not provide as much evidence of the demand/need for moral rights protection for literary works as they do for artistic works. It would, for example, have been interesting to have heard from the Australian Journalists Association, or some individual authors. The Australian Writers Guild submission indicates that the problem of moral rights abuses in the literary field may be greater than the submissions otherwise indicate. One of the reasons why abuses in the literary field could appear to be less frequent is that these abuses are much less obvious and often more transitory than abuses of artistic works.

(c) Musical Works

120. There were no submissions received which were specifically concerned with moral rights in musical works. There were 14 submissions which supported moral rights protection for at least artistic, literary, dramatic and musical works. There were the two submissions opposed to any legislative protection and the Federation of Australian Radio Broadcasters submission which was concerned with practical problems for radio broadcasters. The other submissions did not allude to musical works because they were concerned very specifically with other works.

121. Five areas of musical works can be examined in relation to attribution: mechanical reproduction, graphic reproduction, public performance, broadcasting and diffusion. Only the latter three areas pose any obvious problem with attribution.

122. Attribution of public performances of music varies. Sometimes there is a program. More often there is not. The major use of diffusion is for background music in public venues. There is generally no spoken voice or other interruption. Broadcasts of popular music usually do not attribute the music to its composer. If there is attribution at all, it is often of the performer - orchestra, band or singer - without mention of the name of the composer.

123. The Australasian Performing Right Association considers that attribution of title and name of composer to each musical work broadcast is unworkable. That appears to be a widely held view. The minority agrees that attribution in many of these situations could be impractical. But this does not indicate a lack of demand or need for attribution of musical works generally.

124. There is also a case for arguing that there is no need for a right of integrity for musical works. The compulsory recording right granted by section 55 incorporates its own integrity protection in sub-section 55(2) by deeming a debased recording an infringement. But, as pointed out earlier, the right to object belongs to the owner not the creator of the work and perhaps does not extend to cover such matters as the lyrics.

125. Apart from sub-section 55(2) the composer can only fall back on contract, defamation, passing-off, etc. to protect his or her moral rights. In the absence of a contractual right, a composer has little control over alterations to the work of which he or she may not approve such as cuts, additions, uses to which the music may be put, additions of or changes to, lyrics, and so on.

126. The minority's conclusion is that the evidence of demand/need for moral rights in musical works is substantially less than the evidence of demand/need for such rights in respect either of artistic or literary works. But, this does not automatically lead to the conclusion that abuses do not occur or that there is no demand/need.

(d) Sound Recordings, Broadcasts, Cinematographic Films and Published Editions

127. Apart from the two submissions against any moral rights, only two submissions specified that the above 'subject matter' or some of them should not be accorded moral rights protection. The Australian Copyright Council, in its submission, stated:

'We are not aware of claims by the makers of sound recordings, editions and broadcasts to moral rights and are sceptical as to the need for moral rights for this essentially non-creative subject matter. (152)'

128. In his submission Michael McDonald thought that sound recordings, published editions, broadcasts and cinematographic films should be excluded on the basis that moral rights for collective works cannot be justified as they lack the necessary relationship between a creator and his or her work.¹³⁶

129. Seven submissions, on the other hand, claimed that protection should extend to all forms of works and subject matter presently covered by economic copyright. The Australian Film and Television School commented that creative production and technical personnel (for example, makers of recordings and broadcasts) should share the benefit of moral rights protection.¹³⁷

130. The opposite view is impliedly expressed in the United Kingdom Whitford Committee Report which distinguishes 'works' from 'subject matter other than works' which include films, sound recordings and broadcasts. The recommendation on moral rights refers to authors and not makers. Thus the Committee did not envisage moral rights for the makers of 'other works', that is for the makers of subject matter other than works, to use the Australian terminology. Except in one respect, the proposed United Kingdom legislation will not confer protection other than on-authors in respect of works (again using the Australian terminology). The proposed legislation confers on the director of a film, both the right to be identified with the film and the right not to have his or her work subjected to unjustified modification when the work is shown in public.

131. In France a distinction is made between producers of collective works and of collaborative works. In the former, where the contributions are so fused that different authors are anonymous, the producer holds the copyright. In the latter, where the individual contributions can be easily revealed (for example, the screen credits for a film), all the authors may claim authorship and invoke their moral rights.¹³⁸

132. The minority disagrees with views which suggest that copyright material which falls within the category of subject matter other than works is necessarily non-creative in character. That may be so in some cases as indeed it is in relation to works. But it is certainly not so in relation to many sound recordings, and most, if not all, films.

(e) Performers

133. Although a performance is not a category of work which is presently protected under the Copyright Act, it was suggested in two submissions that moral rights protection should be extended to all creators including performers. 139 Both these submissions expressed the belief that performers should have copyright style protection because technology has made it possible to record and reproduce their performances.

134. The protection of performers' rights are dealt with in the Rome Convention of 1961 which states:

'Performers must have the possibility of preventing the fixation or broadcasting . . . without their consent, of their "live" performances of works. "Live" for this purpose means a performance which is not fixed, for example on a record of film. '140

135. Two members of the minority, the Chairman and Mr. Frankel, are of opinion that moral rights should not be conferred on performers. This is consistent with their view that, except in relation to unauthorised fixations of their work, performers should not be accorded a right in the nature of copyright. The reasons of these two members of the minority for this view are substantially practical ones. The remaining members of the minority, Mr. Banki and Mr. Fielding, are of a contrary view. They comprised the minority in the Performers' Protection Reference. In accordance with their approach to that Reference, they would recommend conferring on performers rights to attribution and integrity in relation to the use of fixations of their performances.

(v) The Practical Difficulties Associated with the Implementation of Moral Rights are too Great

136. The areas of difficulty previously listed are now examined in greater depth.

(a) Newspapers and Other Media

137. Newspaper proprietors and radio and television broadcasters perceive two basic practical difficulties with moral rights. Firstly, it is claimed that the right of attribution would mean that journalists, editors, sub-editors, headline writers, caption writers, etc. would have to be acknowledged and this would result, in some cases, in the attributions being longer than the article itself.¹⁴¹ Secondly, it is claimed that the right of integrity would abrogate the entire editing process which is necessarily an integral part of producing a newspaper or a radio or television program.¹⁴²

138. These perceived difficulties could be overcome by a number of means.. One solution would be to exempt newspapers" and some areas of radio and television broadcasting from moral rights obligations. The Copyright Act is full of exceptions (for example, fair dealing for reporting the news) so this type of solution is certainly a possibility.

139. Another solution, based on the recognition that no moral right can be absolute, would be to include a general provision in any legislation allowing modifications 'deemed unavoidable in the light of the nature of a work as well as the purpose and manner of exploitation' .¹⁴³ In other words, moral rights would be

subject to the requirement of reasonableness derived from such considerations as the nature of the work, the purpose and character of its proposed use, and prevailing industry practices. Such a provision would cater for problems relating to the editing of news items. It would mean, for example, that a three line article would not be expected to carry a ten line attribution or any attribution at all because this is not the practice. In passing the minority notes the almost universal practice of major Australian newspapers is now to accord by-lines to the writers of most news items and news commentaries with the exceptions of editorials.

140. A third possible solution which is really a restatement of the second, would be to qualify moral rights so that modifications should be held not to infringe moral rights provided they constitute 'changes to which the author could not in good faith [or reasonably] refuse consent' .¹⁴⁴ In interpreting this qualification courts would be required to refer to such indicators as the purpose of the publication and industry practices .

141. A fourth possible solution is related to the question of waiver. If waiver were to be a part of the legislative scheme for moral rights, then it could be used to overcome most problems.

142. Apart from the question of possible solutions, it should be noted that it is the views of the Australian Copyright Council that newspaper publication is one area where moral rights abuse does require redress and that, in any event", moral rights legislation in other countries has not impeded newspaper activity. The Council believes that exceptions to moral rights should be avoided, and that qualifications of reasonableness are sufficient to overcome the problems raised.¹⁴⁵

(b) Advertising Industry

143. The difficulties referred to in this area are similar to those perceived in the media generally, namely, that it would often be impracticable to acknowledge all the contributors to the production of an advertisement and the need of one person (an editor) to decide on the final format even if this means changes to the various contributions.

144. The solutions proposed above apply equally in this case. It should be noted that the right of attribution in France has been used to require attribution of an advertisement to its author. ¹⁴⁶

(c) Employer/Employee

145. Two submissions from City Councils raised the same concerns as those raised in relation to the media and advertising - but in the slightly different context of plans, lithographs and photographs created by employees in the course of their employment. ¹⁴⁷ The context is different, but the possible solutions are the same, the important point being that problems such as those raised by the two Councils can be overcome.

(d) Collective Works

146. Collective works raise many problems. Some are as follows:-

- (i) the problem of a component author enforcing his or her moral rights to the general disruption or paralysis of the work as a whole. In many of these cases (for example, drafting of town plans) the work will be one done in the course of employment and the solutions mentioned earlier can be used to overcome the problem;

(ii) the problem whether or not the work as an entity in itself should attract moral rights, and the question of who should be deemed the author for this purpose. This problem relates especially to films, sound recordings and sound and television broadcasts and has already been discussed. It arises again here because the issue of moral rights for co-authors. involves, not only the question of "balancing co-authors interests, but also that of considering the interests of a producer of a collective work. If it is considered that moral rights should attach to collective works and be vested in the maker or producer, then this could affect the way in which co-authors rights" are viewed;

(iii) the problems resulting from the use of an author's work as a basis for creating a work in a different medium (the adaptation problem). This problem is not necessarily a part of the problem of collective works and will be discussed separately.

147. The situations where many people rather than a single author have contributed to the creation of any one work - whether or not the final work has separate rights - vary. One can envisage a simple (even if unlikely) situation where. two artists might collaborate in painting a picture. Any subsequent moral rights problems could presumably be' corrected by either one of them - even in the face of opposition by the other who may not object to the abuse.

148. The more difficult situations are those where the collective result is not just one species of work (for example, a painting, a play, a symphony) but a collection of various works - for example, a cinematographic film or a television broadcast involving a written scenario, a musical score, a spoken text, backdrops, etc. The

potential problems are most acutely seen in the motion picture industry where 'industry paralyzing blackmail becomes a distinct possibility'.¹⁴⁸ Even if a co-author's rights are abused, this may not justify overall disruption and harm to other co-authors rights or to the interests (or possibly rights) of the producers. The fears of American motion picture and television industries of enforcement of these component rights is one of the reasons why the United States has not acceded to the Berne Convention.¹⁴⁹

149. The solutions reached in France and the Federal Republic of Germany in relation to these problems are interesting. The French solution may not be as successful as the producer's would wish. The balance appears to be in favour of the co-authors. A distinction is made between collective works and collaborative works. A collective work is distinguished from a collaborative work on the basis of the anonymity of its various authors. Property rights are vested in the producer. A collaborative work, however, is one where the participation of individual creators is easily recognised and revealed, and so the individual creators, and not a single producer, may invoke their non-assignable rights.

150. Taking the example of a motion picture, Article 14 of the law of 11' March 1957 specifies that the following contributors shall be presumed to be co-authors of motion pictures: the author of the scenario, the author of the adaptation, the author of the spoken text, the author of the music composed especially for the film, and the director. Article 16 then attempts to deal with the problem of possible opposition by one of the co-authors. This Article requires firstly, joint agreement by joint authors as a condition of completeness and secondly, that the moral rights of any author may not be exercised until the film is completed.¹⁵⁰ These two aspects of Article 16 are difficult to reconcile. Presumably they were designed to allow the film to be at least completed..

Then if one of the authors asserts his or her moral rights to oppose release, the producer would have to show that he or she did all that was necessarily implied in his or her obligation to reach joint agreement between the authors. An author cannot, therefore, prevent the use of his or her contribution in a film, but he or she could prevent the film's release. Sarraute concludes that this solution goes too far in defending the rights of co-authors, at the expense of the work as a whole.¹⁵¹

151. The German scheme for overcoming the same problem is much more simply expressed. Article 93 of the German Copyright Act 1965 provides that authors whose works are used in cinematographic products can prohibit 'only gross distortions or other gross injuries of their works or of their contributions.'¹⁵²

152. Although at first it may seem that the German scheme makes greater allowances for practical considerations, the reality seems to be that the French scheme would be interpreted in much the same way as the German, i.e. the co-author would have to show more than mere abuse of his or her rights - he or she would have to show a gross abuse. This conclusion is illustrated by two French cases. In SA les Gemeaux c Prevert et Grimault¹⁵³ where several people were involved in the production of an animated film two authors claimed abuse of their moral rights. The court held that even though the claimants had legitimate rights, it would not withdraw the film because this would obliterate the rights of the other collaborators. In Leger c Reunion des Theatres Lyriques Nationaux¹⁵⁴ the designer of stage settings for the production of an opera sought to have a scene that was withdrawn reinstated. The court agreed that Leger's moral rights had been infringed but because of the other rights involved refused to grant the order sought.

153. Despite the French practice of differentiating between 'collective' and 'collaborative' works and then giving moral rights to either the producer or the co-authors respectively there seems to be no real justification for extending this analogy into the Australian situation. The problem whether the maker of a cinematographic film should have moral rights as well as economic rights should be treated as a separate issue. Certainly it would not seem justifiable to give the maker moral rights to the statutory exclusion of co-authors. But, do the French and German solutions still leave a co-author (whether with vexatious or legitimate claims) too much ability to disrupt the collective work?

154. A law which can reconcile the incompatible interests of producers and authors in situations of conflict is probably not possible. But the comments of the Copyright Council in its submission are relevant:

'The point is, surely, that all industries manage to survive when new laws are introduced, and it can hardly be imagined that moral rights will have an impact over and above such other legislative intervention as, say, the Trade Practices Act. When we speak of moral rights, we talk of nothing more than what is due to a creator in terms of recognition of his authorship and respect for his work. 155

The Council then goes on to support a qualification of reasonableness in the sense of changes to which an author could not in good faith refuse consent.¹⁵⁶ This is getting back to the French and German practices of not allowing objections except to gross distortions. It also reflects the situation that exists in the Scandinavian countries where:

*There is no alternative to making an evaluation from case to case. ¹⁵⁷

(e) Adaptations

155. Adaptations raise the same issues as co-authors rights in collective works but in a different context. Adaptations occur when an author gives permission to another author to adapt his or her work to a different medium. The issue, as with co-authors, is again the conflict between, equally valid moral rights. As with co-authors it does not seem fair that the author who gives adaptation rights should also give up his or her moral rights. On the other hand, the adaptor necessarily needs to modify the work to fit the new mode of expression.

156. The solution to this conflict in countries where moral rights are recognised is to allow changes that are necessary for the transposition of the work to a different medium but to require that 'the intrinsic aesthetic quality of the work be preserved.'¹⁵⁸ Because of the difficulty for a court in determining whether the intrinsic aesthetic qualities of a work have been retained, Sarraute suggests that the court should ask only, "Has the adaptor executed the adaptation in good faith and refrained from distortion with the intention of doing harm?"¹⁵⁹ An author wishing control greater than this must, he says, resort to contract.

(f) Anonymous Creators

157. Users of anonymous works could theoretically be guilty of abuse of the right to attribution. But, if an author has published a work anonymously, he or she could not be heard to complain if the work were not attributed.

(g) Art Works in Public Places

158. The problems have already been referred to. They are those of potential abuse of the right to attribution when public scenes are recorded by photographers or artists, and the potential abuse of the right to integrity should publicly displayed works be removed, altered or destroyed.

159. Section 65 of the Copyright Act deems there to be no infringement of copyright when art works in public places are photographed, painted, drawn, engraved or included in a film or television broadcast. This reflects the practical consideration that it would be impossible to require every casual photographer or painter to attribute public works included in their portrayals of public scenes. In this situation it would be sensible to deem there to be no abuse of moral rights either. However, there is a question whether there should be any exemption in cases involving the portrayal of works for commercial purposes as in the case of postcard production. Obviously there could be difficulties where a panoramic view took in many sculptures and buildings. A postcard may not be large enough to take all the attributions. However, this could be overcome by limiting the right of attribution to portrayals where an artistic work forms the central point of interest.

160.. Potential abuse of the right of integrity to art works in public places raises more problems. To prevent the removal of an artistic work from its site is to impose the taste of one generation on another; to prevent the removal of a work which is widely disliked does not seem right; to prevent the alteration of a building because it may disturb art works or because of the architect's rights does not seem at all practicable. The creators themselves would probably agree with these sentiments. The submission from the Royal Australian Institute of

Architects stated that built architecture should not, in the majority of cases, be covered by the creator's right of integrity.¹⁶⁰ The Arts Law Centre in its submission recognised that there was a case for omitting from the purview of the right to integrity questions concerning alterations to or removal of works in public places.¹⁶¹

161. The problems, once again, can be solved by resort to qualifications of reasonableness based on practical considerations.

The Martin and Bick Report¹⁶² and the Arts Law Centre submission¹⁶³ both state that if a permanent work on public display needs to be removed, then it should be, but only after the artist is consulted. If a work on public display has to be destroyed because there is no alternative location for it, reasonableness would in many cases require that it be offered to the author free of charge if there were no market for it, or at market price if the work were "of any value. Alteration of a work should not be allowed under any circumstances without the artist's permission.

162. There is a good deal to be said for the proposition that those proposing to remove, re-site, or destroy a publicly displayed work of art should be required to justify their decision or be subjected to a requirement that such a decision need be reasonable in the circumstances. The minority sees that this may give rise to undue delays and other difficulties, but remains sympathetic to the claims of those who advocate a right to integrity in respect of art works in public places.

(h) Quality of Performance or Reproduction

163. There would be practical difficulties if the right of integrity were extended to cover the quality of a performance of a dramatic or musical work. Many performances are very poor although the integrity of a creator may in no other way be affected. If the intrinsic aesthetic qualities of the work are in no other way damaged, then it would seem unreasonable and impracticable to allow the author any recourse through his or her moral rights.

(i) Summary

164. Moral rights legislation unmodified by both a right to waive and exceptions based on practical considerations (whether in general or specific terms) would certainly create many serious problems. Such truly inalienable rights are not envisaged. Creators themselves do not expect such absolute rights, as the submissions indicate. Nor are moral rights in other countries enforced without regard to practical considerations. The practical difficulties raised "above do not provide a reason why moral rights legislation should not be introduced. If, as the minority believes to be the case, such legislation is right as a matter of principle, such practical difficulties as there are can be overcome by appropriate qualifications and exceptions built in to the legislation.

(vi) Moral Rights would stifle Criticism in the Form of Parody and Burlesque

165. The Australia Council in its submission expressed concern that the right of integrity should not be used to stifle satire, comment and pastiche.

166. A parody or burlesque is an imitation of another work to produce what is itself a new work recognised as an independent literary, musical or art form. The question with regard to moral rights is at what stage does the parody or burlesque lose so much of its independence or exclusive creativity as to become merely a distortion which a creator can prevent through enforcement of moral rights.

167. The approach of the courts in copyright cases (to see if the work is really a parody or merely an infringing copy) has been to compare the input of the defendant in creating a new work with the amount and quality of what the defendant has taken from the plaintiff. The courts take the view that burlesque and parody are worthy of judicial protection as independent forms of creative effort. Such a view would extend to protect creators of parodies and burlesque against the moral rights claims of the authors of the works being parodied. The creator's cause of action for infringement of both economic and personality interests would fail if the court were to view the work as a parody or burlesque and therefore as itself comprising a new creation. It follows that moral rights would no more stifle parody and burlesque than do economic rights.

(vii) Moral Rights Legislation in Australia would
Complicate Australian Dealings with Other Countries
where there is no Moral Rights Legislation

168. It was stated in one submission that, if moral rights legislation were introduced into Australia, it would produce the anomalous situation of an Australian artist having moral rights protection in Australia and not in other convention countries where there is no moral rights legislation and vice versa. The same comment can be made, but with greater justification, with regard to the present situation where an Australian author has no moral rights in Australia but has them in over 60 other countries, including most of Europe, Canada and soon the United Kingdom.

4. CONCLUSIONS

169. The most compelling argument in support of moral rights is the apparent justice of the case put forward in support of them. Australia's obligations under the Berne Convention, coupled with trends towards international uniformity of the copyright laws of all countries, are further factors which strengthen that case. A benefit which, in the opinion of the minority, would flow from the enactment of moral rights legislation would be likely to be the strengthening of the position of creators of copyright in an age when it is being generally threatened by technological advances which have led numbers of people to ignore or overlook, not only the economic interests of authors, but also their feelings. Large sections of the community treat copyright material as if it were in the public domain from the moment it is published.

170. The majority of the Committee have placed substantial reliance on the absence of a strong demand for moral rights legislation. The minority's earlier analysis has shown 'that 'there are substantial demands made for the legislation by a number of interests. Its analysis shows that there is little opposition to the concept of moral rights from the point of view of principle. Those who oppose the recognition of moral rights do not rest their case on an underlying philosophy that they are wrong in principle, but rather on the proposition that their introduction will cause substantial disruption of some existing practices and tend to upset long-held notions of the sanctity of property in the common law world. The minority's response to this is to say that, if a proposal is fair and just, as this one is, and, if it seems right in principle, as Australia's accession to the Berne

Convention suggests that it is, one would hesitate for a long time before allowing practical considerations to divert one from a course which had so much merit. Having considered the practical problems that there are, the minority is of the opinion that all can be accommodated provided the legislation is sufficiently flexible and provides for certain, qualifications and exceptions.

171. With these thoughts in mind, the minority turns to address the ten issues on which the Committee, in its discussion paper, sought special comment, and to formulate recommendations.

1. Which Rights?

172. The minority recommends the introduction of legislation providing for the moral rights of attribution and integrity.

173. The right of attribution should include the three aspects previously discussed as making up this right: to be made known to the public as the creator of a work; to prevent others from wrongfully claiming authorship of a work; and to prevent others from wrongfully attributing works to a creator. The operation of Part IX of the Copyright Act which presently protects authors from plagiarism would require coincidental consideration.

174. Recognition of a right to integrity in a work requires consideration of the question whether or not the right should be limited by requiring prejudice to the author's honour or reputation to be shown. The Berne Convention expressly allows this qualification. Given the expected difficulties the community at large may have in understanding and giving effect to these rights, the minority recommends inclusion of this qualification.

175. The minority does not recommend legislation to introduce the rights of disclosure or withdrawal. It considers that the former is adequately protected and that, so far as the latter is concerned, once a work is published it cannot realistically be withdrawn. Its effect can only be modified by the creation of a new work or perhaps some public comment about it made by the author.

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2. Which Items?

176. The minority recommends that moral rights protection should cover works (with the exception of computer programs, computer components and software) as presently defined in the Copyright Act and films. Except in the case of films it does not recommend that moral rights protection should be extended to subject matter other than works.

177. The two members of the Committee with particular knowledge of the film industry are of opinion that there is greater" potential 'for abuse, particularly in relation to the integrity of films, than in any other copyright area. Where an exhibitor or broadcaster interferes with the completed work in such a way as to change the nature, effect and style of the work which is exhibited or broadcast, for example, by cutting a film to fit in with time limitations imposed by broadcast scheduling, or making insensitive program' breaks for the interposition of advertisements, and where such interference changes the nature and style of a work, there is a case for conferring on the creator of the film, i.e. the director, a right entitling him or her to ensure that the work is shown as intended without changes or interruptions which will have the effect of distorting it. However, the director should not have such a right,

otherwise than by contract, against the producer or film distributor with respect to the film. His or her right should be maintainable only against the person who exhibits or broadcasts the film to the public. It would be commercially and industrially unacceptable for a director to be able to enforce a moral right against the producer or distributor. Such a right, if it were to be conferred, would be likely to interfere with the commercial and contractual freedom the producer and distributor must have in order to be able to market the film satisfactorily. In essence, the rights conferred on directors of films should be enforceable only against third parties with whom the director has no contractual relationship. These will usually be exhibitors or broadcasters. To accord moral rights in this limited way in respect of films is in accordance with the intention of Article 6 bis of the Berne Convention; see the provisions of Article 2 earlier referred to.

178. The minority recognises that articles falling within the general description, subject matter other than works, often reflect much creativity on the part of their makers and that those who combine to make many such articles contribute as much originality and skill as do authors, composers, artists and sculptors when they create conventional works. Nevertheless the minority has reached the conclusion that, except in the case of films, moral rights should not be conferred in respect of subject matter other than works. This will exclude from the ambit of the minority's recommendations sound recordings, published editions of works and television and sound broadcasts.

179. The Committee's reasons for recommending the omission of copyright articles relating to computers stem from practical considerations. The minority's fear, although the Committee has no submissions about the matter, is that computer associated products, often being products of the work of a number of persons, would present problems akin to those which arise in relation to subject matter other than works. In reaching its conclusion the minority has recognized that Article 6 bis of the Convention can be read as requiring the conferring of the right of attribution and the right to integrity in relation to all works, but the extension of the concept of copyright to computer programs is artificial and the minority does not think that failure to afford them production would involve "Australia in non-compliance with its obligations "under the Convention.

3. The Scope of Moral Rights Protection

180. The minority recommends that moral rights protection be granted so as to cover generally all works which presently receive economic protection. Other than as mentioned it does not recommend that specific exceptions should be listed within the legislation, but rather that general considerations of reasonableness and whether any alteration to a work is prejudicial to the honour or reputation of its creator should be the guidelines for determining whether a work should be excepted from the operation of the law or the provisions of the law qualified or modified in relation to it.

181. The minority does not think that moral rights protection should be granted in respect of some types of works and not others. It believes that all works (except those relating to computers) should be encompassed within the protection granted. The minority recognises that in

practice other considerations must often prevail over and above moral rights. Many of these instances have been examined by the minority, but it does not think that specific exceptions should be made. It would prefer a legislative scheme which would allow every case of conflict to be examined upon its merits. An approach which allows modifications deemed unavoidable in the light of the nature of the work as well as the purpose and manner of particular exploitations (this is the Japanese approach) is the one which the minority prefers. Through this system the courts would decide, by taking into account considerations of reasonableness and evidence of industry practices and requirements, the extent to which there should be limitations placed upon the right of attribution in various situations.

182. The" minority considers this to be preferable to its attempting to formulate an exhaustive list of exceptions which may, on the one hand, omit an area which should have been included, or, on the other hand, exclude too much. "Such a general modifying provision may create some initial uncertainty as to the extent of and limits to moral rights but it is the opinion of the minority that this is the case with any new legislation and is unavoidable. In the case of the right to integrity, it will be for courts to decide whether a particular modification is one which is likely to prejudice the honour and reputation of the author. Only if it will, may the proposed use be stopped or modified. There is a wealth of experience in cases decided in civil law countries which will be available to provide initial guidance to Australian courts on this question.

183. More specifically, the minority is aware of the problems that the contextual aspect of the right to integrity potentially creates, but it feels that no specific limitations need be expressed. The mechanisms for compromise which the minority recommends are sufficient to overcome any conflicts or problems. These mechanisms are firstly, the prejudicial to honour or reputation limitation (rarely will contextual abuse be considered 'sufficient to damage honour or reputation), secondly, the general modifying provision enunciated above, and thirdly, the availability of waiver. The minority thus envisages that a creator would not be able to use his or her moral rights to control placement of works in a gallery, but that he or she would be able to prohibit the use of his or her work for advertising purposes. The minority notes, in this context, that the Canadian Government intends to introduce legislation for a new moral right which will give creators the right to authorise the use of their works to endorse particular products, services, causes or institutions. Excluded from "this right will be any works for which a blanket licence has been granted by a collective society of copyright owners. This is so as not to oblige users to obtain a second authorisation for works that have been assigned to such societies.

184. Similarly, the minority is of the opinion that employees, who by virtue of their employment do not own first copyright in the work, should nevertheless retain moral rights. It considers that the mechanisms for compromise already mentioned, particularly that of waiver, are adequate to overcome any conflict that may arise between an employee and an employer, while at the same time recognizing the creator's bond with the work and allowing him or her some control in cases of gross abuse.

185. Rather than leave the working out of questions concerning exemption or modification to courts of ordinary jurisdiction in actions brought for the purpose of enforcing rights which the legislation confers, the minority is of opinion that there is a strong case for vesting jurisdiction to deal with applications for exemption and for the enforcement of moral rights in an administrative tribunal, perhaps the Copyright Tribunal. It occurs to the minority that there may be many situations in which decisions will need to be made quickly. A more widely based Tribunal than is now the case with the availability of members to inspect sites where works are placed may lead to a situation in which the legislation can work in a much more streamlined way, and in a much more practical way, than might at first sight be thought. If jurisdiction is to be conferred upon an administrative tribunal, care will have to be taken to see that it is not invested with judicial power.

4. The Copyright Act or Separate Legislation?

186. The minority recommends that moral rights legislation be included' in the present Copyright Act.

5. Alienability

187. The minority recommends that moral rights should not be capable of assignment to another person but that they should be capable of waiver provided the waiver is in writing or the author engages in conduct by which an intention to waive the rights is evinced.

188. In situations of disparity of bargaining power, the power of an author to waive his or her moral rights, may mean that they will invariably be waived. If waiver occurs in substantial numbers of cases, the rights will be valueless and the legal position of the author will remain much as it now is. But practical considerations require the legislation to include power to waive. The minority believes that the important thing is to recognise the rights as part of the law of the land. In this way it is likely to lead to an increased perception by the general community of the value of copyright work. At the moment it appears to the minority that there are large sections of the community which do not perceive its value and show it scant respect.

189. Furthermore, the mere existence of moral rights legislation will mean that moral rights issues will have to be considered by contracting parties. Creators will no longer be in the position of having to bargain to have something added to the contract, but rather the parties with whom they are contracting will be in the position of bargaining to have a legal right relinquished. This change will be of benefit to creators, although, the minority admits, only in an economic sense. A further factor is that the absence of a right to waive could be seen as paternalistic and the minority believe's that the creator's freedom to waive may, indeed, be more desirable than a constraint aimed at preventing potential abuse of moral rights" by users of copyright works.

190. The availability of waiver would offer a further solution as far as the practical difficulties associated with moral rights are concerned. Employers, for example, would not have to rely only on a general modifying clause, but would also be able to bargain with contributing creators to waive their rights. The

minority believes that a general modifying clause plus the ability of a creator to waive his or her rights would result in an acceptable compromise between creators and the practical needs of the users of copyright works. A waiver should not be revocable and should bind an author's legal personal representatives. It should be capable of being made before or after use of a work, for a particular use or particular uses, or generally for all uses. It should also be capable of being made in favour of a particular person or persons or generally to the world at large.

6. Duration

191. The minority recommends that the moral rights of attribution and integrity should, like economic rights, survive until the expiration of 50 years after the expiration of the "calendar year in which the author of the work dies.

192. The minority is not persuaded that moral rights should be perpetual but it does not recommend that they should cease to exist on death. The memory of a creator will live on in the community for a period. Minds will differ on what that period will be and, of course, the period will, in any event, vary from author to author. The decision has to be an arbitrary one and the minority considers that, for that reason, the rights should enure for the same period as an author's economic rights, that is to say, for the period of 50 years after death.

7. Commercialisation

193. The minority recommends that commercialisation of an artistic work should not itself lead to the loss of moral rights.

194. Any practical difficulties which could arise regarding the commercial exploitation in any form - even as a design - of an artistic work could be sufficiently overcome by the mechanisms recommended above, namely, the modifying clause and the ability to waive the rights. If the copyright owner of an artistic work permits reproduction of that work when applied to an article, i.e. permits the work to be used as a corresponding design, there is no reason why the creator (who may not be the owner) should not retain the right to have the work/design attributed to him or herself - where practicable of course - and the right to prevent distortion of the work, for example, the use of different colours, the use of only a part of the work if part only is a distortion of the whole, and so on.

195. The creator cannot object where the owner of a creation allows the work to be applied as a corresponding design - in the absence of any agreement to the contrary, this is the economic right of the owner. But the creator should retain some control over the manner in which it is reproduced. Waiver would protect the copyright owner who wishes to apply a work to a design without the inhibitions which the creator's moral rights may place upon such use.

8. Remedies

196. The minority Recommends that remedies by way of orders for injunctions to prevent infringements of moral rights and for damages to compensate a creator, where infringement has occurred and the damage can be quantified, should be available. It is also thought that the declaration of right may be a useful remedy in this area. In some cases a creator **may wish no more than a judgment of a court which vindicates his contention that his or her moral rights have 'been infringed.**

9. Other Legislation

197. The minority is not aware of any other legislation with which the proposed moral rights legislation might conflict. No such legislation has been brought to the Committee's attention in any of the submissions it has received.

10. Resolution of Moral Rights Issues

198. The minority recommends that moral rights issues be resolved according to the same procedures that apply to the resolution of other copyright issues. This is subject to what has been said earlier concerning the conferring of some jurisdiction on the Copyright Tribunal.

NOTE: The members of the Committee who comprise the minority wish to acknowledge the assistance obtained from a research paper prepared by Miss Jane Forster, Research Assistant to the Chairman of the Committee, from which much of the text of what the minority has written was taken.