

8.2 PARA-COPYRIGHT: MORAL RIGHTS AND RESALE ROYALTY RIGHT

• MORAL RIGHTS

- We have been a signatory to the Berne convention for a long time and Aus has been under an obligation to implement moral rights for a long time but they only came to be implemented in Aus in 2000
- **Berne Convention, Art 6^{bis}**
- (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 honor or reputation.
- Only fully implemented in Australia in the year 2000: see CB [6.3-6.5]; Part IX of the Act (we will not cover moral rights of performers, only authors).
- **DEFINITIONS PER S189**
- **work** means a literary work, a dramatic work, a musical work, an artistic work or a cinematograph film.
- **author**, in relation to a cinematograph film, means the maker of the film.
- **maker**, in relation to a cinematograph film, means the director of the film, the producer of the film and the screenwriter of the film.
- **ADDITIONAL TO OTHER RIGHTS: S192**
- (1) The moral rights of the author of a work are in addition to any other rights in relation to the work that the author or anyone else has under this Act.
- **THE ATTRIBUTION RIGHT: S193**
- The first moral right is the right of attribution
- (1) The author of a work has a right of attribution of authorship in respect of the work. (the right to be acknowledged as the author of that work)
- (2) The author's right is the right to be identified in accordance with this Division as the author of the work if any of the acts (the attributable acts) mentioned in section 194 are done in respect of the work.
 - To the right of attribution is not at large, the Act specifies in s194 a number of acts/things that need to take place and if one of those things take place, then the author has a right of attribution in relation that event
- **ACTS OF ATTRIBUTION: S194**
- (1) If the work is a literary, dramatic or musical work:
 - (a) to reproduce the work in a material form;
 - (b) to publish the work;
 - (c) to perform the work in public;
 - (d) to communicate the work to the public;
 - (e) to make an adaptation of the work.
- (2) If the work is an artistic work:
 - (a) to reproduce the work in a material form;
 - (b) to publish the work;
 - (c) to exhibit the work to the public;

- Unlike in s31 exhibit to work in public is not an exclusive right in CR but it does appear as an act of attribution
 - (d) to communicate the work to the public.
- (3) If the work is a cinematograph film:
 - (a) to make a copy of the film;
 - (b) to exhibit the film in public;
 - (c) to communicate the film to the public.
- **GIVING EFFECT TO ATTRIBUTION RIGHT**
- S195 tells us how we give an author attribution
- **S195**
- (1) Subject to subsection (2), the author of a work may be identified by any reasonable form of identification.
- (2) If:
 - (a) the author of a work has made known, either generally or to a person who is required under this Part to identify the author, that the author wishes to be identified in a particular way; and
 - (b) the identification of the author in that way is reasonable in the circumstances; the identification is to be made in that way.
- So many authors work under pseudonyms and we do not dig up their real names for the purpose of attribution
- **S195AA:** An identification of the author of a work must be clear and reasonably prominent.
- **S195AB:** When a literary, dramatic, musical or artistic work is reproduced in a **material form**, an adaptation is made of a literary, dramatic or musical work, or a copy of a cinematograph film is made, an identification of the author is taken to be reasonably prominent if it is included on each reproduction of the work or of the adaptation or on each copy of the film, as the case may be, in such a way that a person acquiring the reproduction or copy will have notice of the author's identity.
- **THE RIGHT TO NOT HAVE AUTHORSHIP FALSLEY ATTRIBUTED: S195AC**
- The next moral right is the right not to have authorship falsely attributed – that is, author has the right for their work to not be attributed to someone else
- (1) The author of a work has a right not to have authorship of the work falsely attributed.
- (2) The author's right is the right not to have a person (the attributor) do, in respect of the work, any of the acts (the acts of false attribution) mentioned in the following provisions of this Division.
- **ACTS OF FALSE ATTRIBUTION**
- See **195AD** (literary, dramatic and musical works), **195AE** (artistic works), **195AF** (films) (extracted in notes).
- The right is in favour of the author (for works) or the director/ producer/ screenwriter (for films) and the right is against the person who provides the false attribution
- This suggests there is no liability to the person who the work is falsely attributed to.

- So if you falsely attribute the artists work to someone who is not the artist then you have infringed the right not to falsely attribute the work – the person who falsely gets the credit has not infringed the right
- But if you claim to be the author of work that someone else has authored then you are the person falsely attributing authorship so you would be liable for infringing this moral right
- **MESKENAS V ACP**
- In March 2005 Princess Mary of Denmark visits Australia, and is photographed for *Woman's Day* at the Victor Chang Cardiac Research Institute in front of a portrait of the late Victor Chang.
- Meskenas was the painter who painted the portrait
- The caption to the published photo erroneously names another artist as the author of the portrait and the artist complained
- The publisher later apologises to the plaintiff artist, but does not publish it until over 1 year later, shortly before the litigation is commenced.
- Copyright in the portrait belongs to Dr Chang (and his successors), pursuant to s 35(3), as valuable consideration was provided for it (the portrait had been commissioned)
- However, moral rights do not travel with the CR ownership, they remain vested in the author
- Thus the author of the painting remained entitled to enforce their moral rights in the painting
- **Method:**
- So when you look at infringement of moral rights, having identified that the painting is a work, being one of the works to which moral rights applies you then ask whether the alleged infringer has:
- Has the publisher done an attributable act, ie something that requires attribution to the plaintiff? (at [15]) – yes the photograph in the magazine reproduced the painting in material form and this is an attributable act
- Is there a defence under s 195AR, ie was it reasonable not to attribute? Held: no (at [18]), it could easily have been done in a note under the photograph identifying the author so they ought to have done this
- Has the publisher done an act of false attribution? (at [15]). Held: yes, 'false' simply means 'incorrect' and does not require an intentional element (at [31]). They named the wrong person as the author of the work – this is false in fact and being incorrect is enough for FA – did not need to be intentionally misleading
- No other defence, eg consent, was raised.
- Plaintiff is entitled to compensatory damages for harm to reputation and injured feelings (including aggravated damages as a result of defendants conduct) (at [40-41]). Held: \$8K awarded.
- **RIGHT OF INTEGRITY**

- The next moral right is the right of integrity of authorship – this is the right not to have derogatory treatment of a work
- **S195AI:**
- (1) The author of a work has a right of integrity of authorship in respect of the work.
- (2) The author's right is the right not to have the work subjected to derogatory treatment.
 - Sections 195AJ, 195AK and 195AL set out the meaning of derogatory treatment for each type of subject matter.
 - Essence of derogatory treatment (195AJ) - there is some doing in relation to the work that is prejudicial to the author's or maker's honour or reputation.
- So the right of integrity of authorship generally involves 2 requirements for it to be infringed
 - (1) generally there needs to be some material distortion, mutilation or alteration of the work
 - (2) once this has been established the question is whether that is prejudicial to the honor or reputation of the author
 - If these 2 aspects are satisfied then you have infringement of the authors right to integrity of authorship
- **INFRINGEMENT OF MORAL RIGHTS**
- **See:**
 - **s195AO** re infringement of attribution right
 - **s195AP** re infringement of right not to have authorship falsely attributed
 - **s195AQ** re infringement of right of integrity
- Each of these rights can be infringed by someone who does something which is an infringement of these rights or who authorises the doing of such a thing
- **DURATION OF MORAL RIGHTS: S195AM**
- (1) An author's right of integrity of authorship in respect of a cinematograph film continues in force until the author dies. (shorter than the rest of them)
- (2) An author's right of integrity of authorship in respect of a work other than a cinematograph film continues in force until copyright ceases to subsist in the work.
- (3) An author's moral rights (other than the right of integrity of authorship) in respect of a work continue in force until copyright ceases to subsist in the work.
- **ENFORCEMENT OF MORAL RIGHTS: S195AN**
- After the death of the author, moral rights (other than right of integrity in relation to a film), moral rights may be 'exercised and enforced' by the author's legal personal representative after the death of the author: **s195AN(1)**
- 'Subject to this section', a moral right is not transmissible by assignment, will or operation of law: **s195AN(3)**
 - Authors will usually nominate their personal rep for the purpose of the moral right provisions after their death
 - If you become bankrupt and own CR and moral rights trustee in bankruptcy can dispose of CR to bring in debts but moral rights remain with you as they

are not alienable/transmissible – bankrupt author retains the right to enforce moral rights

- **DEFENCES IN RELATION TO MORAL RIGHTS**

- Defences are specific to particular moral rights
- **‘REASONABLENESS’ DEFENCE**
- **195AR**: There is no infringement of the right of attribution of authorship if it was reasonable not to identify the author.
- **195AS**: There is no infringement of the right of integrity of authorship if derogatory treatment or other action was reasonable.
 - **195AS(2)** sets out non-exhaustive list of factor to be taken into account when considering ‘reasonableness’ in relation to Part III works
 - **195AS(3)** likewise in relation to films.
- **DEFENCE OF ‘CONSENT’**
- After moral rights were introduced a lot of moral rights consents were sent out to clients to get their contractors and whoever prepared CR material for them to retrospectively provide moral rights consents so that their works could be used within the business in the ordinary way that employee material is used and expected to be used but which may have been impeded by the moral rights of authors
- It is not an infringement of an author’s moral rights to do (or omit to do) anything within the scope of the author’s written genuine consent (ss195AW and 195AWA).
- Consent must be in writing
- Consent can be retroactive.
- Consent can be given over works not yet made.
- So authors can not sell or dispose of their moral rights but they can provide consent for things to be done in respect of their works that might otherwise infringe their moral rights
- **s195AW** covers films and literary, dramatic, artistic and musical works included in films.
- **s195AWA** deals with works not included in film but requires GENUINE consent AND must be in relation to specified/classes/types of acts or omissions and specified works or works of a particular description.
 - So needs to be reasonably particular in describing what the author is consenting to with respect to their works
- Provisions also provide for employee consents to apply more generally – provide for employees to have given the benefit of their consents for the benefit of their employers in respect of works created in the course of their employment