

AUTHORS' MORAL RIGHTS AND THE COPYRIGHT LAW REVIEW COMMITTEE'S REPORT: W(H)ITHER SUCH RIGHTS NOW?

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INTRODUCTION

In 1928, the Berne Convention on Literary and Artistic Works of 1886 was amended to include a new Article *6bis*, which provided that, independently of their copyright or economic rights, authors should enjoy rights of paternity and integrity in respect of their works: the right "to claim authorship" and the right "to object to any distortion, mutilation or other modification" of their work that would be prejudicial to their honour or reputation. These rights underpinned the concept of *droit moral* (so-called "moral right"), long recognized by a number of Continental European countries. The international recognition of these rights was widely accepted as the principal achievement of the 1928 revision of the Convention. The rights were reinforced in later revisions of the Convention, so that Article *6bis* of the 1971 Paris text, which Australia has ratified, now extends the right of integrity to "other derogatory action in relation to" copyright works and encourages countries to adopt a period of protection at least coterminous with copyright¹.

In September 1984, having been requested by the Attorney General of the Commonwealth to inquire into moral rights, the Copyright Law Review Committee published a Discussion Paper on Moral Rights. It invited interested persons to make submissions, particularly on ten issues the Committee thought were of special importance. The issues were comprehensive: Should all or any of the moral rights recognised elsewhere be protected in Australia beyond the protection currently afforded by Australian law? Should protection extend to all items covered by copyright, or only some? What should be the scope and duration of protection? Should the protection be included

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¹ The other major copyright treaty by which Australia is bound, the Universal Copyright Convention signed in Geneva in 1952, does not expressly protect moral rights. However, it has been recently argued that the U.C.C.'s requirement that states must grant "adequate and effective protection" for authors' rights may now, or at least in the very near future, require protection to be extended to authors' moral rights: since states must protect those rights recognized by "civilized countries" and since most such countries now recognize moral rights, the remainder must therefore similarly provide such protection: Dietz, "Elements of moral right protection in the Universal Copyright Convention" (1987) Vol. 21 No. 3 *Copyright Bulletin* 17, at 22-3. The theory, and hence Dietz's conclusion from it, is controversial: see Vaver, "The National Treatment Requirements of the Berne and Universal Copyright Conventions: Part Two" (1986) 17 *IIC* 715, at 729 ff.

in the *Copyright Act* 1968 (Cth.) or in separate legislation? Could the rights be waived or otherwise lost, e.g., when the work was commercialised? Should the rights prevail over heritage and town planning legislation? What remedies should be available and who should resolve moral rights questions, the courts or another tribunal?

After receiving and considering over 40 submissions, the Committee produced its *Report on Moral Rights*, dated January 1988 and released in March 1988. It was not unanimous. A majority of five of the nine members recommended that no legislation conferring moral rights on authors should be enacted. A variety of reasons were given: enactment would give rise to a number of serious practical problems; the theoretical basis for moral rights protection in a common law system "has not been identified"; there was insufficient pressure for enactment from authors themselves; few important moral rights violations occur in Australia; and the Australian community generally was unlikely to endorse moral rights laws.² In contrast to the 25-page majority report, a four-person minority produced a 69-page report, with a further 13 pages of footnotes, recommending that moral rights protection should indeed be included in the *Copyright Act* 1968 (Cth.), and indicating what form such legislation should take.³

It would be a pity if Australia's policy on moral rights were to be settled in accord with the majority's conclusion. The majority report contains simply too many contradictions and unsupportable statements to carry conviction. Tom Brown said of his tutor: "I do not love thee, Dr Fell./The reason why I cannot tell;" and this doggerel ultimately epitomises the majority's reaction to moral rights. To disprove the majority case does not, of course, prove the truth of the minority's; and, indeed, not all of the minority's reasoning supporting the legislative introduction of moral rights is sound. However, a combination of those valid reasons provided by the minority and of other considerations raised by neither report does go to establish the case for which the minority argues.

THE PURPOSE OF MORAL RIGHTS

It is obviously important to understand what purposes moral rights serve. The Committee majority indeed took the minority to task for failing to propose "a consistent theoretical base" for the doctrine, beyond a vaguely defined notion that some dealings with copyright works involved some "unfairness or impropriety".⁴ The majority may be right to some extent, although one might have thought that a demonstrated systematic "unfairness or impropriety" itself provided a ready basis for legislative action. The majority rightly pointed out that foreign jurisdictions have adopted differ-

² Copyright Law Review Committee, *Report on Moral Rights* (Australian Government Publishing Service, Canberra), January 1988. The majority's summary of recommendations appears at p.10.

³ *Id.*, at pp.35-39, where the minority's reasons for its conclusion and its recommendations are summarized.

⁴ *Id.*, at pp.19-20.

ent models for their moral rights legislation, but then goes on to suggest that moral rights doctrine is therefore so confused that, on this ground alone, Australia should refuse to have anything to do with it. This is nonsense: is it a valid reason for deciding not to compensate victims of personal injuries in Australia that there are many different models, with quite different theoretical bases even in common law countries, for compensating such victims? Moreover, if the absence of a consistent theoretical base were a reason for criticizing the introduction or continuation of legislation, much current legislation *including copyright law itself*⁵ would be in jeopardy — a logic that the Committee majority studiously avoided pursuing!

Rather than our chasing the chimera of “a consistent theoretical base”, it seems preferable to consider the point instrumentally: what purposes do moral rights serve? We should not be surprised to find that, without other supporting measures, such goals may be only imperfectly attained; but this is so of virtually any legal doctrine considered in isolation.

According to Continental jurists, moral rights are justified on the basis of the close personal link between an author or artist and his or her work. The work emanates from and is an extension of the author. Just as any interference with the author's body is an assault, so any interference with the author's work is an assault on the work's, and hence the author's, integrity. Moral rights assure the author that the work is communicated to the public in the form the author intended. Continental systems classify the rights as personal, rather than proprietary; after the author's death, however, they may in some countries be exercised by the heirs or by a governmental body dedicated to the preservation of the country's cultural heritage.⁶

This rather metaphysical conception of moral rights, with its idealist view of art and literature, may be useful as taxonomy but does not adequately explain the purpose of the rights, even in Continental systems of law. To equate mutilation of art and literature with maiming is a picturesque metaphor, but little more: chopping paintings is in fact different from chopping bodily parts and could fairly attract different social and legal responses. In fact, the growth of moral rights thinking in Europe at the end of the 18th and the beginning of the 19th centuries coincided with the growing economic independence of authors and artists, whose shackles of ecclesiastic, royal and seigneurial patronage had been loosened after the French revolution. In England, also, the snobbery that said gentle folk did not write for money began collapsing too: if a poet as dedicated to his art as Byron could, without corrupting his muse, accept substantial sums from his publisher, perhaps

⁵ See, e.g., (now Judge) Breyer, “The Uneasy Case for Copyright” (1970) 84 *Harv. L.R.* 281, who finds little justification for copyright on either economic or non-economic grounds.

⁶ See generally, Strauss, “The Moral Right of the Author” (1959), Study No. 4 prepared for the Subcommittee on Patents, Trademarks and Copyright of the U.S. Senate Committee on the Judiciary (86th Cong., 1st Sess.), 114; Strömholm, *Le Droit Moral de l'Auteur en Droit allemand, français et scandinave* (Stockholm, 1967); Karlen, “Moral Rights in California” (1982) 19 *San Diego L.Rev.* 675; Da Silva, “Droit Moral and the Amoral Copyright” (1980) 28 *Bull. Copr. Soc.* 1.

doing creative work for a living was all right for lesser mortals too.⁷ Creative people started behaving more and more like entrepreneurs: they needed to sell their works, to build up a reputation with their public, and so to increase the sales of their current and future works. For the most part, however, they did not accumulate the power and resources of entrepreneurs, but relied on middlemen publishers and, later, art dealers and film producers to commercialize their works.⁸ Standard form contracts, drawn up by the entrepreneurs to give themselves as much leeway as possible in publishing the work, eventually became the norm: only best-selling authors and artists had much power to insist on contract modifications to protect their own interests better. Sometimes creative people joined to form a union to advance their interests, but few collectives gained any significant power. In addition, a sea change has occurred in public opinion about the preservation of mankind's cultural heritage. What was considered acceptable in the early nineteenth century, the *elginisme* that resulted in the desecration of the Parthenon and which led to the modern feud between Britain and Greece concerning the fate of the marbles resting in the British Museum, has given way to international and national policies designed to keep art treasures intact.⁹

This suggests that moral rights rest on a number of bases that are more plausible than those dealing with metaphysical or idealistic notions of artists and art. The first basis is economic: moral rights are one form of truth-in-marketing legislation. The public is entitled to be told the truth about a work's authorship¹⁰ and is entitled to have the work in the form the author intended it to reach his or her public. This closely parallels the public interest function of a trade mark: people rely on marks as an assurance of a certain quality and are willing to pay more for a marked product than a generic brand.¹¹ The mark owner can prevent goods bearing its mark from being sold or

⁷ This did not mean that 19th century authors were generally able to live off the fruits of their writing. Most needed support from formal institutions (e.g., in England, the Royal Literary Fund) or informal institutions, e.g., patrons including other successful writers. In *The Common Writer: Life in Nineteenth Century Grub Street* (Cambridge U.P., 1985), Nigel Cross states of this period: "[T]he calamities of authors are the natural consequence of writing for a living. Few activities other than gambling are so risky . . . As major writers are one in a thousand, 999 people had to find ways and means of surviving as writers to enable a Dickens or a George Eliot to emerge from their ranks". (id., at 5-6)

⁸ A survey of English writers in the mid 1960s revealed that half of those writing full time earned less than the minimum pay of a bus driver. Even the "most prolific and businesslike" major writer may end up earning less than the literary agent he employs: James Hepburn, *The Author's Empty Purse and the Rise of the Literary Agent* (Oxford U.P., 1968), at 100 ff. Similar relativity may be expected in the other creative arts: e.g., the modern art dealer stands very much in the position of patron to the artists whose work he handles: E.B. Feldman, *The Artist* (Prentice-Hall, 1982), at 186 ff.

⁹ Merryman, "Thinking about the Elgin Marbles" (1985) 83 *Michigan L.R.* 1880. See also Bator, "An Essay on the International Trade in Art" (1982) 34 *Stanford L.R.* 275.

¹⁰ This does not prevent the well-known and accepted practice of anonymous and pseudonymous publication. Just like a trade mark owner or, for that matter, any corporation, the author is entitled to choose under what name he wishes to be publicly or professionally known, or whether he wants to be known at all. The public entitlement is to receive the communication credited as the author intended.

¹¹ Schechter, "The Rational Basis of Trademark Protection" (1927) 40 *Harv. L.R.* 813.

perceived with modifications not authorized by the mark owner.¹² Similarly, the choices that consumers of art, literature, music and drama exercise about what they wish to read or see depend upon whether or not they react, or have in the past reacted, favourably to a creator's work or his or her general repute: this assessment can be made fairly only if consumers have accurate information about the work and the author available to them. Thus, moral rights help to create and maintain a market in which consumer choice is more accurately channelled.

Secondly, the public interest in the functioning of the market in creative works coincides with the author's own interest in gaining the due reward the market is willing to confer on his or her product. Creative people want their name to come before the public¹³ and their works to be perceived as they intended. The more an author's fame increases, the more popular his work becomes and the more marketable become his future works.¹⁴ The converse is true if the author's work does not meet public acclaim. And so it should be. Having entered the marketplace, the author has to accept its risks. His or her works and name may become known, and the author will prosper; they may remain unknown or become known and shunned, and the author will languish. These are the economics of fame, and common law courts everywhere have recognized them in moral rights-type disputes.¹⁵

Thirdly, creative people generally are not in as strong a bargaining position as the entrepreneurs with whom they have to deal in order to gain a market for their works.¹⁶ Without moral rights, authors have nothing to

¹² *Illustrated Newspapers Ltd v. Publicity Services Ltd* [1938] Ch. 414; *A.C. Spark Plug Co. v. Canadian Spark Plug Service* [1935] 3 D.L.R. 84 (Exch. Ct.); *Associated Newspapers P.L.C. v. Insert Media Ltd* [1988] 1 W.L.R. 509, 511 (Ch. D.).

¹³ There are obvious exceptions, both ancient and modern. Thus, the Carrefour Press was founded in the early 1930s to advance the notion of complete anonymity in the arts. It claimed, in an anonymous pamphlet titled "Anonymous: The Need for Anonymity", that writing for an audience distorted the purity of art towards commercial ends. Despite its credo, the Press ironically ended up having to discard the principles it avowed through lack of author support: see Hugh Ford, *Published in Paris* (Macmillan, 1975), 290-7. For a contrary view on anonymity, see Anthony Trollope, "On Anonymous Literature" (1862) 1 *Fortnightly Review* 491: "A man should always dare to be responsible for the work which he does . . ."

¹⁴ Thus, in *Hepworth Mfg. Co. Ltd v. Ryott* [1920] 1 Ch. 1 (C.A.), a film studio unsuccessfully tried to stop one of its former stars using his stage name with a new employer. The evidence was that the new employer was paying the actor twice the £10 per week of his old employ, while his salary under a new name would be £7 until he could establish a new identity and goodwill.

¹⁵ Thus, the High Court of Australia in *Associated Newspapers Ltd v. Bancks* (1951) 83 C.L.R. 322, at 338, approvingly quoted from Goddard J. in *Tolnay v. Criterion Film Production Ltd* [1936] 2 All E.R. 1625, at 1626-7 (K.B.D.): "All persons who have to make a living by attracting the public to their works, be they artists in the sense of painters or be they literary men who write books or who perform in other branches of the arts, such as pianists and musicians, must live by getting known to the public. An unknown author we all know has a great struggle in the same way as an unknown musician or actor has a great struggle. . . . One way in which [authors] can expect remuneration and expect employment is by getting their name before the public." The High Court in *Bancks* accordingly held that a cartoonist was justified in prematurely terminating his employment contract when, in breach of an express term, his employer relegated his work from the front to an inside page of the comic section.

¹⁶ This unfavourable bargaining position is still recognized in Continental jurisdictions that have legislated standard form publishing contracts: cf. *Gouvernement du Québec, To Give Talent its Due: Improving the Socio-Economic Status of Quebec's Creative Artists* (1980),

bargain about. Even with moral rights, authors are not assured of furthering their interests: at a time when moral rights were thought not to exist in the United States, the boilerplate of standard form contracts in the movie industry included a moral rights waiver clause.¹⁷ Granting authors moral rights will perhaps not remedy such abuses, but at least the prima facie presence of such rights will engage the court's jurisdiction to monitor waiver clauses for restraint of trade, unconscionability, undue influence and the various other devices available at common law or equity to remedy abuse of bargaining power.¹⁸

Fourthly, the modern movement to secure the preservation of man's cultural heritage is furthered by moral rights legislation. People are now more and more recognizing the importance, to themselves and to future generations, of providing and maintaining a record of current cultural achievements and of trying to reconstruct those of the past. As Merryman puts it:

[M]onuments of human culture [are] an essential part of our common past. They tell us who we are and where we came from, give us cultural identity.¹⁹

Strong moral rights legislation helps to attain these goals by co-opting those persons with a strong vested interest in a work — the author and his or her heirs — to keep intermeddlers at bay. The granting of a private right of action to further policies of general public interest is hardly novel: witness section 52 of the *Trade Practices Act* 1974 (Cth.), where the desirable goal of purifying the marketplace of deceptive and misleading trade practices is furthered by providing traders with civil actions against competing miscreants. Admittedly, giving a private person the power to champion the public weal is, without more, not the most effective means of attaining a public interest goal. And, since moral rights, on one model, are merely coterminous with copyright, they become ineffective as a work gets older: the matter will then be left to contemporary public sensitivity or, less likely in an era of avowed governmental dislike of bureaucracy, a cultural commission charged with monitoring moral rights abuses as part of a mandate of heritage preservation.

at 119 ff. Moreover, before the copyright revisions in the U.S., U.K., Australia and New Zealand that occurred in the two decades after 1956, the copyright laws of those countries recognized this inferior bargaining position by provisions reverting copyright to the author or his heirs for the last part of the term. See *Chappell & Co. Ltd v. Redwood Music Co. Ltd* [1980] 2 All E.R. 817, at 824 (H.L.); Ringer, "Renewal of Copyright" in *Studies on Copyright* (Fisher memorial ed., 1960): "author-publisher contracts must frequently be made at a time when the value of the work is unknown or conjectural and the author (regardless of his business ability) is necessarily in a poor bargaining position." The provision still exists in the Canadian *Copyright Act* R.S.C. 1970, c. C-30, s.12(5) in the same form as it appeared in the *Copyright Act* 1911 (U.K.). The elimination of the reversionary provisions in these countries was not prompted by any evidence that the imbalance of bargaining power between authors and copyright acquirers had mysteriously vanished.

¹⁷ See the clause in *Harris v. Twentieth Century Fox Film Corp.* (1943) 139 F.2d 571.

¹⁸ See Vaver, "Authors' Moral Rights — Reform Proposals in Canada: Charter or Barter of Rights for Creators?" (1988) 25 *Osgoode Hall L.J.* 000 (forthcoming). Of course, a jurisdiction serious about furthering the policies of moral rights would ensure that the rights were neither assignable nor waivable, as the Australian Copyright Council indeed has pointed out: "Moral Rights", Bulletin No. 50 (1984), at 15, suggesting the mediating concept of a "reasonable" moral right.

¹⁹ *Supra* note 9, at 1895.

Thus, the realistic choice is between doing nothing and doing something, however attenuated.

THE CASE AGAINST MORAL RIGHTS

We shall now turn to the principal reasons that the Committee majority gave for refusing to recommend moral rights legislation.

(a) Australia's international obligations

The majority stated that the only basis upon which it could be persuaded to recommend moral rights legislation would be that "Australia's continuing membership of the Berne Convention so requires". It summarily concluded that the Berne Convention requires no further protection than Australia already gives.²⁰ The minority disagreed, claiming the Convention requires members to provide positive moral rights, not merely to allow authors to assert such rights. It went on to say that the patchwork of common law and statutory rules that could be enlisted in aid of moral rights was too incidental and fragmentary to amount to compliance with the Convention.²¹

The strength of the majority's position is that it is difficult to disprove. The International Court of Justice, which has jurisdiction over the Berne Convention, has never had any dispute on the Convention brought to it. The prospect of any moral rights dispute being thus authoritatively decided is bleak. In addition, despite a strong trend of academic opinion that Australia is or may be in breach of its Berne obligations,²² the Committee majority has a number of strong points on its side. First, both Britain and Australia took an active part at the 1928 Berne Conference in settling the present form of Article 6*bis*, avowedly to conform with their domestic common law, and the Rapporteur Général himself noted his opinion that the sources of moral rights protection in English law were the principles of common law and equity, as supplemented by statute law, without indicating that such protection did not meet the requirements of the new Article.²³ The U.K. government more recently has thought that moral rights legislation was necessary in order to comply with the Paris 1971 text of the Convention,²⁴ but the Whitford Copyright Committee, which recommended such changes, was not prepared to go that far.²⁵ Most recently, a report prepared for the

²⁰ Report, *supra* note 2, at 11.

²¹ *Id.*, at 62 ff.

²² The minority report sets out the writing which supports its position: *id.*, at 50 ff.

²³ Union Internationale pour la Protection des Oeuvres Littéraires et Artistiques, *Actes de la Conférence réunie à Rome du 7 mai au 2 juin 1928* (Berne 1929), at 283, n.2 (Strömholm, *supra* note 6, vol. 1, at 427, agrees in principle but is unprepared to say whether or not common law protection is adequate). The Rapporteur indeed singles out the Australian delegate, Sir William Moore, and praises his "high legal skills" in overcoming the initial textual difficulties to produce the Article in its current form: *id.*, at 201.

²⁴ S. Ricketson, *The Law of Intellectual Property* (Law Book Co., 1984), para. 15.80, who apparently agrees.

²⁵ *Report of the Committee to consider the Law on Copyright and Designs* (H.M.S.O. London, 1977), Cmnd. 6732, para. 53. The Committee did think that the U.K. was in default on the obligations to provide that moral rights be coterminous with copyright. However, Article

U.S. State Department has claimed that the U.S.'s mixture of statute and common law protects moral rights sufficiently for the U.S. to be able to adhere to the 1971 Paris text of the Berne Convention, relying on the similar position of Australia whose "adherence to Berne is unchallenged".²⁶

Without a more extensive inquiry than is possible in this paper, the fairest verdict that can be reached on the Committee majority's opinion on this point is, except in some respects,²⁷ "Not Disproven". But the Committee's terms of reference simply asked it whether or not legislative protection for moral rights was "needed".²⁸ A finding that Australia presently complies with its treaty obligations far from answers this question.

(b) Moral rights are inconsistent with a common law system

In the light of what has just been said, the Committee majority's claim that moral rights are "alien" and "foreign" to "a common law system"²⁹ is nothing short of astonishing.

First, it falsifies the assertions made by the Australian delegation to the 1928 Rome revision of the Berne Conference, that the wording of Article 6*bis* as finalized created no difficulties for its system of copyright and common law.³⁰ The Committee majority fails to point out any development since 1928 that undercuts the validity of those assertions, which moreover were shared by Britain and the other Empire delegates at the Conference³¹ and which were never repudiated at any later Berne conference.

Secondly, the majority's claim contradicts its major premise: that Australia already protects moral rights sufficiently for it to be in compliance with the Berne Convention. If this is true, such rights logically *cannot* be alien or foreign to Australia's legal system. The only valid claim that can be made, consistent with that premise, is that any *increase* in the level of existing moral rights protection would be antithetical to Australia's legal system. But this much less grandiose assertion is no more valid than its bigger brother.

Thirdly, the majority ignores the fact that *copyright itself* is historically alien to a common law system. It needed legislation to set up a copyright system, since it was settled long ago that copyright in published works did not exist at common law. The Committee majority is certainly not asserting

6*bis*(2) of the 1971 Paris text does allow exceptions from this position, and the Whitford Committee did not discuss whether the U.K. could technically take advantage of these exceptions.

²⁶ *Preliminary Report of the Ad Hoc Working Group on U.S. Adherence to Berne Convention*, December 1985 (1986) 33*Jo. Cop. Soc.* U.S.A. 183, at 214-5. The Report notes at 215 the opinion of Arpad Bogsch, the director of the World Intellectual Property Organization, which administers the Berne Convention, that statute and common law may combine to fulfill the obligation of Article 6*bis*.

²⁷ Passing off, widely touted as the principal common law action available to authors having moral rights grievances, may not always be available. Two of its prerequisites, that the plaintiff have a business and that the work have a goodwill and reputation capable of injury, will be difficult of proof for struggling authors with little repertoire to their credit.

²⁸ Report, *supra* note 2, at p.1.

²⁹ *Id.*, at p.27.

³⁰ *Supra* note 23.

³¹ *Id.*, at pp.238-9 of the Conference proceedings.

that copyright exists as a matter of natural right, for to do so would automatically admit the case for moral rights.

Fourthly, if the majority means to suggest that moral rights cannot exist in any common law system, it is simply wrong. Without being definitive, one may point out that India has had moral rights legislation since 1957,³² Israel introduced it in 1981,³³ and Canada has had it since 1931!³⁴ Even before then, the Chief Justice of Canada had, in an appeal from Ontario, a common law province, stated that moral rights were part of the common law, as much as they were part of the civil law of Quebec.³⁵ Indeed, perhaps paradoxically, the first Canadian case vindicating an artist's statutory moral rights was decided not in Quebec but in Ontario, where the judge in his discretion issued a mandatory interlocutory injunction requiring a defendant to remove material distorting a sculpture.³⁶ The most recent Copyright Bill introduced in the United Kingdom contains extensive provisions dealing with moral rights of integrity and paternity.³⁷ The current *Copyright Act* 1956 (U.K.) already contains limited provisions dealing with misattribution, an aspect of the right of paternity, upon which similar provisions in Australia and New Zealand are based.³⁸ In the United States, California and New York have passed statutes providing for moral rights for visual artists.³⁹ Moreover, a U.S. federal court of appeals in 1976 said, in a case involving a successful moral rights claim for mutilating, of all things, a "Monty Python" television programme:

American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors. Nevertheless, the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law [citations] cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent. Thus courts have long granted relief for misrepresentation of an artist's work by relying on theories outside the statutory law of copyright, such as contract law [citation] or the tort of unfair competition [citation]. Although such decisions are clothed in terms of proprietary right in one's creation, they also properly vindicate the author's personal right to prevent the presentation of his work to the public in a distorted form. [citations]⁴⁰

³² *Copyright Act* 1957, s.57 (India). See *Smt. Bhandari v. Kala Vikos Pictures Pvt. Ltd* [1987] All India Reports (Delhi) 13.

³³ *Copyright Ordinance (Amendment No. 4) Law* 5741-1981, s.3, inserting new s.4a: see [1981] *Copyright* 269.

³⁴ Now *Copyright Act* R.S.C. 1970, c. C-30, s.12(7). For discussion of the Act, see Vaver, "Authors' Moral Rights in Canada" (1983) 14 I.I.C. 329. Canada has recently expanded these provisions by the Copyright Amendment Act 1988 (Can.), S.C. 1986-87-88, c. 15.

³⁵ *Morang v. Le Sueur* (1911) 45 S.C.R. 95, at 97-98, per Fitzpatrick C.J.C.

³⁶ *Snow v. The Eaton Centre Ltd* (1982) 70 C.P.R.(2d) 105 (Ont. H.C.). For comment, see Vaver, "Snow v. The Eaton Centre: Wreaths on Sculpture Prove Accolade for Artists' Moral Rights" (1983) 8 *Can. Business Law Jo.* 81.

³⁷ Copyright, Designs and Patents Bill 1987 (H.L.), Chapter IV.

³⁸ The Australian provisions are found in the *Copyright Act* 1968, ss.190 and 191.

³⁹ For comment on the California statute, see Karlen, *supra* note 6.

⁴⁰ (1976) 192 U.S.P.Q. 1, at 8-9 (C.A., 2nd Circ.).

Thus, in the United Kingdom, Canada, India, Israel, and the United States in both state and federal jurisdiction, either courts or legislatures or both have recognised that moral rights can be, and indeed have been, successfully integrated into a common law system. And Australia, like the United Kingdom and New Zealand, already has integrated a partial right of paternity into its copyright law, without any strain on the common law system of any of these jurisdictions being perceptible.

If the majority meant to present the more limited and more overtly xenophobic claim that such rights were "alien" or "foreign" to Australia's common law system, it signally failed to present any features that differentiated the Australian common law system from those of similar federal jurisdictions, such as the United States, Canada and India, or from the fount of common law systems, England. The implicit assertion that Australians value their property rights and resent any interference with them more intensely than any other subjects in a common law system is undocumented and seems totally implausible.

In truth, in the sense that the majority seems to use the term "alien" or "foreign", moral rights are foreign to any legal system, common law or civil law, socialist or capitalist. The institution of private property is as firmly entrenched in France and Germany as it is in England or the United States; yet the two former jurisdictions have strong moral rights laws which can impinge on the unfettered enjoyment of certain kinds of private property. In Canada, private property is just as important in the civil law province of Quebec as in the common law provinces; nor is the position in Louisiana any different in this respect from other U.S. states. Socialist legal systems have moral rights firmly embedded in their laws; one might expect that individual assertions of such rights there might contradict notions that the community interest ought generally to prevail over that of the individual.

At bottom, the majority's view should be treated for what it is: little more than an echo of some idealized pre-industrial golden age of Toryism.⁴¹

(c) Australians would not accept or respect moral rights

The Committee majority claimed that Australians would neither understand nor, if understanding, accept limitations "on a person's use of his or her personal tangible property that are based upon another individual's perception of interest in that property".⁴² This claim is nowhere substantiated.

Indeed, other claims made by the report cut down the width of this claim. Thus, the majority admits that "most" Australians would, and presumably do, recognize the right of paternity, by crediting authors whose work they reproduce.⁴³ They therefore both understand and accept this right. Therefore, the Committee majority must think that legislating paternity rights

⁴¹ Consider this revealing statement from the Committee majority: "The need to keep regulation to a minimum (and to reduce existing regulation) appears to be accepted by all major political parties and by the community as a whole." Report, *supra* note 2, at p.22.

⁴² *Id.*, at p.27.

⁴³ *Id.*, at pp. 26, 28.

would cause Australians to change their habits and now perform wrongful acts. Why people would choose to act so perversely is not explained.

Moreover, the majority cited no evidence for either its broader or narrower view that Australians do not understand and would not accept legislation on moral rights or some aspect of moral rights. There was no survey indicating Australians' attitudes on these questions, nor was it suggested that moral rights principles were beyond public comprehension. The majority's view seems little more than presumption. Politicians, more expert than most in gauging the public pulse on any issue, feel lucky if they get it right half the time. How a bare majority of a copyright law committee, neither representative of the public nor expert in practical or theoretical political science, thought it accurately felt the public pulse remains a mystery. The majority dredges up picayune examples of actual or potential moral rights infringements, and imagines that the public would react against such claims.⁴⁴ But, like any *reductio ad absurdum*, this line of reasoning has its weaknesses. Thus, the majority seems to think that artists, complaining about their works being inadequately displayed, will go to court any time their demands are unmet. (Whether or not the artist has a genuine grievance does not seem to concern the majority.) But trivial complaints in moral rights cases are subject to the *de minimis* rule, with expensive consequences for complainants.⁴⁵ The direct and indirect costs of litigation are now so high everywhere that most complaints are either settled out of court or ignored; only where the perceived benefits of a successful result outweigh these costs will a case be pursued. Moreover, some people (perhaps not quite as many as the Committee majority imagines) might think that a sculptor should not be able to stop the operators of a shopping mall, which owns the sculpture, from festooning the work with Christmas wreaths⁴⁶ or any other decoration they feel like whenever they want. But would the public which pours in to see a Sidney Nolan exhibition accept with as much equanimity the sight of the artist's works decorated with jolly little red gnomes sitting among the gum-trees, because the current owner of the works thought that his over-painting would liven up the landscapes? People's reactions to the modification of art works are inextricably bound up with their appreciation of the initial work. To admit Nolan's right to prevent the owner of one of his paintings from publicly exhibiting it in a distorted form is to admit that other artists of lesser fame should have the same right.

But the Committee majority's appeal to public sentiment is really just a red herring. If individual consumers were really interested about moral rights, one would have expected them or organisations representing them to have

⁴⁴ *Id.*, at 14-15; 23-24. The Report also suggests that there are so many different sorts of cases in which moral rights claims could be made that there are insuperable difficulties in covering such areas. But this has not been the experience in any common law jurisdiction with a moral rights statute, whether drafted broadly as in Canada or in great detail as in California and (now) the U.K. 1987 bill (see *supra* note 37). Practical difficulties do and will arise in moral rights cases, but they are solved as in any other area of the law: in the vast majority of cases, negotiation, and in a tiny minority, litigation.

⁴⁵ *Crocker v. Papunya Tula Artists Pty Ltd* (1985) 61 A.L.R. 529 (Fed. Ct.).

⁴⁶ Contrary to the result in *Snow's* case, *supra* note 36.

made submissions to the committee. But not one consumer or consumer organisation did so. This parallels experience elsewhere. Most individuals care little about moral rights, because they do not see the issue as affecting them. The vast majority does not own anything that would attract a moral rights suit. Those few people who do own valuable art works will not paint gnomes on them and cannot conceive of any other rational person doing so either. Most such people are or fancy themselves connoisseurs, who know better than to tamper with such works or who suspect, quite rightly, that tampering will reduce the work's value.

The "public" about whom the majority is really talking is a quite different public, that of institutional dealers in copyright works: media entrepreneurs, museums, art galleries and dealers, and the like. Now, this "public" might indeed view with alarm any attempt to interfere with its power over creative works and might indeed try to mobilise the larger public to share its opinion. But experience elsewhere indicates that the fears of these institutions are unjustified. Commercial life goes on without substantial hindrance in strong moral rights countries as it does in countries with weak or no moral rights. All that happens in the former is that the author or artist, who has not validly waived his or her moral rights, is admitted to have some say in how a work is later exploited. The spectre of the obstinate author habitually making unreasonable demands is as much a caricature as the spectre of the habitually deforming entrepreneur. As in most spheres of social life, compromises are made and agreements are reached, because the parties recognise and respect their mutual interdependence.

(d) Miscellaneous Difficulties

A number of other points are made in the majority report, which may be considered more briefly.

The majority claimed that the creative community as a whole showed insufficient interest in moral rights and that very few justifiable cases of infringements of such rights had been demonstrated.⁴⁷ What constitutes sufficient pressure and how one finds out what moral rights grievances are occurring in a community are debatable points. Industry pressure is obviously more concentrated and organized than the pressure that authors and their organisations can bring to bear on an issue. But, the majority failed to recognize that not only Australian creators are affected. Under the Berne Convention, foreign authors are entitled to assert moral rights here, and there is no indication that they or their representative organisations were called on to make submissions. This failure of natural justice in itself is enough to vitiate the majority's assertion. In any event, some might argue that the political process has failed if it refuses to redress a justifiable grievance of even one of its citizens. The Committee majority's relegation of such grievances to the realm of education and "community protests and

⁴⁷ Report, *supra* note 2, at 20, 26.

pressures"⁴⁸ is nothing more than a cynical attempt to reduce the creative community to a fringe group in society. Authors deserve better than this.

Who should judge infringements of moral rights, the regular courts or some specialised tribunal such as the Copyright Tribunal, is not a question of central importance. The majority's claim that judges would find such cases difficult⁴⁹ is perhaps true, but Australian judges are called on to dispose of much more difficult cases than these. In cases involving art and literature, past experience indicates that they have managed to combine sensitivity with robust common sense.⁵⁰ To suggest that moral rights cases are not justiciable is demonstrably wrong, in the light of the experience in foreign jurisdictions.

Another reason the Committee majority dredges up to bolster its case against moral rights is that copyright owners have a difficult enough job in persuading the public not to infringe copyright in certain cases; how much more difficult it would be to persuade the public not to infringe moral rights!⁵¹ This argument has been partly answered already: the public that is photocopying and home-taping is not likely to be the same public whom authors would take to task over moral rights infringements;⁵² nor would the people seeking to enforce moral rights — authors and the like — necessarily be the same as the copyright owners. In any event, the Committee majority chooses to ignore the issues of comparative morality involved here. Is there no moral difference between a person buying a record and making a tape of it to avoid scratches on the disc (copyright infringement!) and one who "improves" a Nolan painting by painting gnomes on it? A report that would give the copyright owner a cause of action in the first case and Nolan no right whatsoever in the second demonstrates its own moral sterility.

CONCLUSION

Hugh Collins recently asserted that "the mental universe of Australian politics is essentially Benthamite" and that "[f]or practitioners and observers alike, the compelling proofs of a political proposal in Australia are the twin utilitarian standards of efficacy (will it work?) and plurality (have you got the numbers?)."⁵³ The Copyright Law Review Committee's majority Report on Moral Rights is an example of Collins' phenomenon in the copyright field. Issues of justice and morality become subservient to expedience and niggardly

⁴⁸ *Id.*, at 17, 29-30. Is it any wonder, then, that Leonie Kramer talks of the "air of fragility about the creative arts in Australia, evidenced partly by a certain defensiveness in artists"? Kramer, "The Media, Society, and Culture" (1985) 114 *Daedalus* 293, at 304.

⁴⁹ *Id.*, at 16-17.

⁵⁰ See, e.g., the *Bancks* case, *supra* note 15 and *A.G. v. Trustees of National Art Gallery of N.S.W.* (1945) 62 W.N.(N.S.W.) 212, for a sensitive concern to the problems of artists; cf. *Crocker*, *supra* note 45, for a robust application of *de minimis*.

⁵¹ Report, *supra* note 2, at 28.

⁵² Text *supra* following note 46.

⁵³ Collins, "Political Ideology in Australia: The Distinctiveness of a Benthamite Society" (1985) 114 *Daedalus* 147, at 148, 156.

positivism. That this attitude appears in the work of a specialised law reform committee, supposed to be far removed spiritually from the hurly-burly of political debate, is all the more amazing.

Australian policy should not be formulated on the basis of the majority Report. Experience in jurisdictions with similar legal systems to Australia has shown that moral rights can be a positive force in a country's culture, not something to be feared and distrusted. The only entities that have anything to fear from moral rights are the occasional institutions who, in dealing with creative works, believe that what is good for them is also good for Australia. They should be put in their place.

The minority Report supplies the basis of a working model for moral rights legislation. It may not be perfect. But if the government decides to adopt the policy of protecting moral rights through legislation, the contours of such legislation find a ready shape in that part of the Report.