

INTELLECTUAL PROPERTY ISSUES IN ART CRIME

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Introduction

Art crime is an important and topical issue and I congratulate the Institute on its efforts in bringing together people such a wide range of interests to consider this area of criminal activity.

However, I have taken 'art crime' in the context of intellectual property to refer broadly to the infringement of copyright in a work of art, though strictly it may mean only those acts which amount to criminal infringement. It would be too restrictive to speak here only with criminal infringements in view of the overwhelming importance of civil actions to copyright owners.

My intention is to begin with a very brief overview of basic legal and policy framework for copyright in artistic works to provide some context for the issues I wish to discuss. These issues cover two main areas - problems associated with enforcement of copyright and proposals for reforming the definition of intellectual property rights. I have chosen to deal with the issues in that order because the second topic perhaps raises the more fundamental questions.

Background to copyright in artistic works

It is pleasant to start at a most inspiring of beginnings - the creation of art. When a work of art is created, two independent property rights can come into existence. One right pertains to the property in the physical work. Theft of the work is a crime involving this right. The second right concerns the separate incorporeal property that is conferred on the artist through the grant of copyright and which exists independently of the ownership of the physical work. Persons who are not familiar with this area of the law may not be aware of the clear distinction between these rights. For example, when an artist sells a painting to a buyer that buyer does not acquire the right to make copies of it. The artist may decide to sell the copyright as well, but that is a matter for separate agreement between the parties.

Copyright is the part of intellectual property law that protects creative and inventive endeavours. It seems to me that copyright law seeks to achieve two basic objectives in relation to art:

- first, to protect the artist against economic exploitation and violation of the artist's personal integrity; and
- secondly, to allow the community reasonable access to the work and to incorporate its ideas and expression into a shared and evolving cultural heritage.

These twin objectives encapsulate the balance of personal rights and broader social interests present in copyright law. This balance seems particularly important to artistic works since art is a fundamental human activity in which individual insights and understanding become part of a common cultural inheritance. At its highest, art civilises and unifies a community.

Australian copyright law

In Australia the law of copyright is contained entirely in Commonwealth legislation - the *Copyright Act 1968*. That Act automatically grants copyright protection to an artistic work as soon as it is made in a material form - provided that certain statutory requirements are satisfied.

The first of these requirements is that the form of the work must be one recognised in the Copyright Act. The Act defines 'artistic works' as paintings, sculptures, drawings, engravings and photographs, as well as buildings, models of buildings and works of artistic craftsmanship. Artistic quality or merit is not required for a work to attract copyright, except in the case of a work of artistic craftsmanship - which relieves the courts from having to rule on the artistic value of individual works (which no doubt is a comfort for both artists and judges). The other requirements for copyright to subsist in an artistic work are that the work must be original and must have a connection with Australia or another Convention country. The requirement for originality does not mean that the work must be novel or unique, but it must result from the artist's own unaided efforts and must not have been copied from another work. The need for a connection with Australia means the artist must be an Australian citizen or resident or a citizen or resident of a country to which the Copyright Act extends - which covers parties to international copyright treaties such as the Berne Convention and members of the World Trade Organisation. There is also a connection with Australia where an artistic work is first published in Australia.

As a general rule, the artist who creates an artistic work is the first owner of the copyright in that work, but this is subject to several exceptions. These exceptions include where an artwork is made in the course of employment and if an artist is commissioned to create certain kinds of art works - being a photograph for a private or domestic purpose, a painting or drawing of a portrait or an engraving. In these cases the employer or person who commissions the photograph, portrait or engraving is the owner of the copyright although the artist may be able to limit the use of the commissioned work to a use made known to the artist at the time of the agreement. Employed and commissioned artists can, however, secure first ownership by contract with their employer or the commissioner. The exception in relation to photographs, portraits and engravings does not apply to other forms of commissioned works where the artist retains copyright unless it is assigned.

Infringement of copyright

Turning now to infringement of copyright. Under copyright law, the copyright owner has a number of exclusive rights. The owner of the copyright in an artistic work is the only person entitled to:

- reproduce the work in a material form (such as by photographing, photocopying);
- publish the work (that is to supply reproductions, whether by sale or otherwise, to the public);
- include the work in a television broadcast; and
- transmit a television program than includes the work to subscribers to a diffusion service (for example, cable TV).

Another person who in Australia does, or authorises, one of these acts without the permission of the owner of the copyright commits a 'direct infringement' of copyright - assuming the copyright has not expired or the person is not acting under some other form of legal authority (such as one of the exceptions set out in the Act). It would be a direct infringement of copyright, for example, for another person to reproduce the work of an artist in a book or as a painting or print. A reproduction need not be an exact reproduction of the original. It needs

only to reproduce a substantial part of the expression of the original. The Copyright Act, however, protects the expression of ideas as a work and not the ideas behind the work. Thus the Act does not protect styles and techniques.

In addition, there are two further very important activities that can amount to an 'indirect infringement' of copyright. These are:

- importing a copy of an artistic work into Australia for a commercial purpose without the permission of the copyright owner; and
- commercial dealings with unauthorised imports or unauthorised reproductions.

I might add in passing that the ability of a copyright owner to prohibit the importation into Australia of legitimate copies of works produced overseas (known as parallel importation) is one of the more sensitive issues in copyright law reform.

The above rights are commonly classified as 'economic rights'. They can be licensed or assigned by the copyright owner in whole or in part, or bequeathed to beneficiaries on death and can devolve by operation of law (for example, by bankruptcy law). The economic rights are also divisible so that there can be different owners in different jurisdictions or different owners for different rights in one jurisdiction.

The act also creates criminal offences for infringement of copyright. There is considerable overlap between the types of conduct that amount to criminal and civil infringements. But not every direct or indirect infringement of the economic rights of a copyright owner is a criminal offence. The criminal provisions focus on infringements (making, selling, importing and distributing) carried out for commercial purposes. Another difference is the mental element required in the case of a criminal offence which is that the offender must know or, or ought reasonably to know, the article to be an infringing copy of the work. Thus, while all criminal offences probably amount to civil infringements, many civil infringements will not be criminal offences. [The availability of alternative civil remedies is one factor police services take into account in deciding whether or not they are able to investigate complaints by copyright owners into possible criminal infringement of copyright.]

Independently of the economic rights I have mentioned, artists also have 'moral' or 'personal' rights in the work they create. Under article 6^{bis} of the Berne Convention, Australia is obliged to confer certain moral rights on artists and other authors of original works separate from the economic rights. These obligatory moral rights are the right to be identified as the creator of a work (that is, the right of attribution) and the right to object to derogatory treatment of a work which prejudices a creator's reputation (that is, the right of integrity). An example of the right of attribution would be the right of a sculptor to insist on his or her name be displayed on or near to that sculptor's statue. In relation to the right of integrity, an example may be the right of an artist to object to the cutting up of a painting and its sale as separate pieces of art.

With limited exceptions, the Copyright Act at present does not contain a provision which enables an artist to insist that he or she be given proper credit for their work. The Act does, however, provide artists with protection against 'false attribution of authorship'. This protection imposes a duty not to attribute falsely the authorship of a work, an altered work or a reproduction of an artistic work.

It would protect an artist against a person who falsely added another artist's name to a work (as in the recent example involving Margaret Olley where someone had faked David Strachan's signature to a stolen Olley painting) - assuming of course that the person perpetrating the fraud can be identified. But the Copyright Act does not protect an artist against a person who attempts to pass off a fake by that person as the artist's work. That kind of fraud is dealt with under other areas of the law, such as the common law action of passing off, as well as consumer protection law and criminal law.

I might add that some civil law countries confer considerably wider moral rights on artists than are mandatory under the Berne Convention, such as a right of disclosure and a right of recall due to change of opinion.

Issues and policy framework

This overview of issues leads me to the questions;

- could the intellectual property rights of artists be more effectively protected; and
- in what way should the economic and moral rights conferred on artists by the Copyright Act be changed?

Copyright owners and users have strong views on both these subjects. But before addressing them, it would be useful to say something about the policy framework of copyright law.

It is nearly 300 years since the first copyright statute was passed in the United Kingdom. Since then Anglo-Australian copyright law has evolved in a piecemeal and often topsy turvy fashion. There are several reasons for this. One reason - present since the invention of the printing press - has been the need for copyright law to react to progressive technological change as it allows for new forms of works to be created or enables existing works to be reproduced or communicated in new ways. A second factor is the equally long-standing need for governments to frame laws which maximise economic benefit by giving effective protection to investment in knowledge production through strong copyright protection while, at the same time, minimising anti-competitive restrictions on a free market and maintaining a larger social interest in allowing reasonable public access to works. The Anglo-Australian tradition of copyright law has been almost totally conceived in economic terms with nothing like the same consideration being given to the non-economic rights of artists. A third factor is the importance of the international copyright system particularly as developed and implemented through the work of the World Intellectual Property Organisation among Berne member states and the World Trade Organisation in relation to the TRIPS Agreement. One result of this internationalisation is that Australian copyright law must be viewed in an international context. Equally the nature and pace of domestic law reform now takes place largely in the setting of treaties that reflect often hard fought compromises between differing national legal traditions and trade imperatives. It is very significant that the TRIPS Agreement for the first time provides member states with an effective mechanism for ensuring compliance by other members with the specific standards of intellectual property rights adopted in the Agreement. The internationalisation of copyright law has significant impact on domestic law reform. On the one hand, internationalisation ensures that a national government may not reduce copyright protection below minimum recognised standards. But on the other hand there is a disincentive for states - such as Australia - which are net importers of intellectual property - to extend exclusive economic rights where this would result in an effective outflow of funds to foreign copyright owners.

I see no reason to doubt that these factors will continue to ensure that copyright reform will continue to be a measured and difficult exercise in achieving appropriate balances in relation to the nature of the economic and moral rights conferred on Australian artists and other creators, and the enforcement of those rights.

Enforcement of copyright

For any right, a critical issue is the adequacy of the remedies available to enforce that right. As already seen, the Copyright Act provides for potentially powerful civil and criminal remedies against persons who infringe copyright in an artistic work. In addition, the Act provides for border interception provisions which allow the customs seizure of imported infringing copies based on a notice of objection lodged by a copyright owner.

Speaking generally, it appears that copyright owners in Australia are reasonably effective in their use of the Copyright Act to protect their rights. The reasons for this include:

- the legal and managerial sophistication of many copyright owners in the industries most affected by illegal use;
- the availability of targeted training for copyright owners provided for example by the Australian Copyright Council; and
- the collective administration and enforcement of rights by bodies established by copyright owners.

Copyright enforcement, nevertheless, carries inherent difficulties, particularly for some artists. But this should not be unexpected. Protecting the intangible copyright in an artwork will always be more difficult than protecting the tangible works, and this problem has heightened with the advent of the digital technology and networked communications which make replication and dissemination much easier and make detection much more difficult.

There are further difficulties in enforcing copyright in artistic work. First, there is the practical difficulty of identifying an infringing article, particularly for customs enforcement. Recognising that a T-shirt, carpet or umbrella stand embodies an unlicensed copy of an art work is a fundamentally different task to detecting illicit drugs. A further practical difficulty is that many shipments of infringing copies are small scale, often less than \$1000 in value.

Some of the proposals made on behalf of artistic copyright owners to improve the effectiveness of copyright enforcement are:

- to make it easier and less expensive for owners to bring civil actions by reversing the onus of proof in favour of plaintiffs and requiring defendants to provide security for plaintiffs' costs;
- to improve the effectiveness of border controls; and
- to seek more public resources for the investigation and prosecution of criminal infringements.

These matters are currently being considered by the House of Representatives Standing Committee on Legal and Constitutional Affairs. Earlier this year the Attorney-General gave a reference to the Committee to undertake a comprehensive inquiry into copyright enforcement in Australia.

The inquiry, which is still under way, has received written submissions and oral evidence from a wide range of interested persons. I understand that the Committee intends to table its report in Parliament early next year. The Government will of course give very careful consideration to its findings.

Reform issues - nature of copyright

I now turn to the final part of my topic which is to summarise existing proposals for changing the scope of the economic and moral rights that constitute copyright in an artistic work. Perhaps I might conveniently divide these proposals into:

- immediate issues - by which I mean those issues which have been considered by government, for which solutions seem to be reasonably close at hand; and
- horizon issues - or those issues which still under examination.

Immediate issue- digital agenda bill

The first of the immediate issues I would like to address is updating copyright law for the digital environment.

The task for national legislators is especially challenging in relation to digital use of copyright because the on-line environment is still evolving. There are conflicting predictions about the future impact of the digital environment on the use of copyright.

For instance, copyright owners claim that their works will be marketed in small portions, and that accordingly the exceptions allowing for free copying of small amounts cannot be allowed to continue. On the other hand, copyright users argue that unless the same exceptions are made broader, they will effectively be obliged to pay for all uses of copyright material on-line.

Internationally, this challenge has been met by the adoption of two new treaties to complement the standards of copyright protection in the Berne Convention. A diplomatic conference in 1996 convened by the World Intellectual Property Organisation adopted the WIPO Copyright Treaty, one of the two so-called "Internet treaties". The Australian delegation participated actively and constructively in that conference, with a mandate that was based on, amongst other things, the recommendations of a 1994 report of the Copyright Convergence Group on the need for a new communication right for copyright owners.

Legislation giving effect to the principal provisions of the WIPO Copyright Treaty, the Copyright Amendment (Digital Agenda) Bill 1999, was introduced into Parliament in September this year. As far as possible, the Bill seeks to replicate the balance between the rights of owners and the larger public interest that has applied in the print environment.

The centrepiece of the legislation is a new broadly-based technology-neutral right of communication to the public. This replaces and extends the existing technology-specific broadcasting right and the limited cable diffusion right. The new right of communication to the public will improve the protection of copyright material on the Internet and cable pay TV.

The Bill also includes an important package of exceptions to the new communication right and an extension of the existing exceptions to other rights in the Copyright Act. Further, the Bill addresses the issue of piracy of copyright material in the digital environment through the implementation of new enforcement measures.

The Bill also limits and clarifies the liability of carriers and Internet Service Providers. Finally, the Bill provides for a statutory licence scheme for the payment of rights holders in underlying copyright material included in retransmitted free-to-air broadcasts.

The Digital Agenda Bill is currently before the House of Representatives Standing Committee on Legal and Constitutional Affairs. I understand that the Committee is expected to table its report on the Bill next week.

Immediate issue- moral rights

A second intermediate issue relates to moral rights.

I have already mentioned that Australia implements its obligations under the Berne Convention to protect the moral rights of artists through a combination of civil law actions and, to a limited extent, through the Copyright Act. However, there has long been an argument that these rights should be fully protected through copyright law.

Amendments to the Copyright Act to incorporate a moral rights scheme were introduced into Parliament in 1997 as part of a bill setting out range of reforms to the Act. However, the moral rights part of the Bill attracted continuing controversy. Consequently, the proposed moral rights scheme was withdrawn so that the Government could consult further.

A moral rights consultative forum was subsequently held in Sydney in August 1998 and the Government has received submissions from the interested interests on possible changes to the proposed scheme. Those submissions have been considered and legislation, with some revisions, is expected to be introduced shortly.

Horizon issues - CLRC simplification

I now turn to the horizon issues.

I understand that artists are concerned that the Copyright Act currently grants artists lesser exclusive rights than is given to the authors of original literary, dramatic or musical works. Consequently there have been calls to remove the differential treatment of artistic works for which there is no equivalent to the rights of public performance, adaptation and commercial rental that are enjoyed by the owners of copyright in other works. I am not sure whether these concerns are a matter of principle or based on real commercial considerations, as artists have parallel rights in relation to the adaptation of their works from two to three dimensional form - and vice versa - and other rights that may be relevant to performance art.

However, I have classified this issue as a 'horizon' issue because it overlaps with the recent proposals by the majority of the Copyright Law Review Committee (or CLRC) to the effect that Australian copyright legislation should be re-structured to provide for only two categories of protected matter. The factor for determining the category into which protected material falls, and hence the level of protection it is afforded, would be the efforts of the person who undertakes its creation or production.

Material would be protected at the highest level if it was the result of significant intellectual effort by the creator, while material would be protected at the lower level only if it was the result of application of time, effort and resources by the person who produced it. Under the majority proposal, any tangible form of material might be protected under either form.

The majority of the CLRC also recommended that the exclusive rights should be simplified into two exclusive economic rights, the right of reproduction and the right of dissemination, as well as the two moral rights recognised by the Berne Convention - the rights of attribution and integrity. The exclusive economic rights would apply to both the higher and lower categories of material, while the moral rights would be granted only to the higher - that is, material that was the result of significant economic effort.

The CLRC report also included a dissenting view by one member proposing a recategorisation of works - with the category of artistic works being unchanged.

This dissenting view agreed broadly with the majority as to the simplification and reclassification of the exclusive rights comprising copyright as two economic and two moral rights.

You will appreciate that proposals to make such potentially fundamental changes to Australian copyright law will require wide consultation and careful consideration.

This brings me to the final major, horizon issue which arises from proposals to enhance the protection of expressions of indigenous culture.

The recent report '*Our Future: Our Culture* commissioned by ATSIC provides a comprehensive indigenous perspective on the issues and proposals for the way ahead for government to consider.

The Australian Government recognises the deep concern of indigenous people for the protection of their cultural heritage and is considering how to address these concerns. I think all parties will recognise these are important and difficult issues involving the intersection of traditional, national and international law. It will take some considerable time, clear thinking and good will to develop workable and effective solutions. That process has already begun. An interdepartmental committee for indigenous cultural and intellectual property representing a wide range of Commonwealth agencies is currently looking at issues of indigenous art and cultural expression. The committee is taking into account the '*Our Future: Our Culture* report as well as other studies, reports and agency programs in identifying opportunities for enhancing practical and effective protection in this area. The Committee will have regard to the effectiveness of the Copyright Act and design and trade mark legislation, as well as considering broader educational and operational issues such as model contracts and licensing arrangements.

I might quickly note two related developments which illustrate the breadth of initiatives in this area. One is the launch last month by the National Indigenous Arts Advocacy Association of a label of authenticity to protect the work of indigenous artists.

The second is the 1998 decision of the Federal Court in *Bulun Bulun v R & T Textiles* which found that an Aboriginal artist as author and legal title holder of an artistic work owed fiduciary obligations to his people as equitable owners of the copyright. The Court found that

the artist had full benefit of protection under the Copyright Act so long as the exclusive rights conferred by the Act were exercised in accordance with the laws and customs of the people to which they belong. This case might be seen as demonstrating the flexibility of the common law to deal with the protection of indigenous cultural issues. Other speakers may talk in more detail about these developments.

Conclusion

In conclusion, I recall the (possibly fictitious) Chinese saying which runs something like '*May you live in interesting times*'. I understand it was reputedly a curse to be wished on enemies. In the week of the Seattle meeting of the WTO, it is easy to believe this is an interesting time for intellectual property issues. Domestically, copyright law almost approaches tax law in its heady and headlong process of reform. It is no easy matter to integrate the many different initiatives in a practical and coherent fashion. But I have every expectation this will happen.