
THE MORAL RIGHTS OF AUTHORS AND PERFORMERS

An International and Comparative Analysis

ELIZABETH ADENEY



OXFORD

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PREFACE

In the United Kingdom and Australia the express provision of moral rights for authors and performers is a recent legislative development. Laws protecting authors in these countries were passed in 1988 and 2000 respectively. Only in 2006 did moral rights for performers come into force in the United Kingdom. Australia's protection of performers, already passed by Parliament, is expected to come into effect in the near future. Canada has had statutory moral rights for authors since 1931, these rights having been entirely redrafted in 1988. Legislation protecting performers in Canada is planned, and a bill that would have provided such protection was tabled in 2005. United States legislators enacted a type of moral rights protection for visual artists in 1990.

In the light of these largely recent developments, it is not difficult to justify a book on this the most personal—one might say the most intellectual—branch of intellectual 'property' law. And it is not only the topicality of moral rights issues that invites extended commentary at this time.

Despite the copyright world having considered moral rights extensively for more than two decades now, relatively little systematic commentary on the rights in English has emerged. Comparative analysis in English is rare, and comment has, naturally enough, tended to focus on immediate issues rather than the larger picture. All the major, synthesizing, texts on moral rights are European, most of them French and German. No English-language text has attempted a detailed account of the operation of the current French and German statutory provisions, even though these, and the associated cases and commentaries, are the richest source of current thinking on moral rights available to us.

This is not, of course, to ignore the excellent published commentaries on the moral rights debates of the 1928 and 1948 Berne Convention conferences. It was at these revision conferences that the then-prevailing concepts of the rights were discussed, sifted and adjusted to provide us with the current agreed text of article 6bis, the Berne moral rights provision. Nevertheless, these debates were concerned only with the protection of authors outside their own countries. They, and the resulting Convention text, do not fully reflect the variety, the nuances, even the volatility, of moral rights concepts in individual countries.

Within the copyright world there is a need for comparative examination of

the newly emerged moral rights provisions, taking into account whatever relevant cases have been decided. Since the courts of the Commonwealth countries may look to each other for persuasive judgments and since there is an increasing trend, in Australia at least, to look to US decisions in intellectual property matters, the moral rights thinking of our common law neighbours needs to be understood. While decided cases in these countries are still rare, we are arriving at a point where a moral rights jurisprudence is starting to develop.

Finally, the issue of cross-border litigation has to be addressed, for moral rights as for any other form of intellectual property. The facilitating of cross-border litigation was, after all, the primary aim of the Berne Convention. A number of the leading moral rights decisions in Europe have been concerned with just this issue. I have attempted in this book to give an account of this complex area, well aware, however, that such an account can only be a starting point in establishing the relevant legal process.

The book, in its present form, would not exist without the influence, guidance and assistance of a number of people. My thanks, above all, to Sam Ricketson for supervising the thesis on which a large part of the book (Chapters 1–7 and 10–18) is based, for making his own collection of Berne Convention documents available to me, and for creating an environment in which exploration of the intriguing byways as well as the better-trodden highways of moral rights development was possible. My thanks, further, to Ysolde Gendreau for her very generous help in the search for Canadian and French materials. My thanks to those who, at various times and in various capacities, have read portions of the work and provided invaluable comment on it: Giuseppina D'Agostino, Gerald Dworkin, Ysolde Gendreau, Jane Ginsburg, Adrian Sterling, Paul Torremans and David Vaver. My special thanks to those at the Max Planck Institute for Intellectual Property, Competition and Tax Law in Munich for enabling me, in the course of two visits to the Institute, to gain access to the considerable German literature in this area, and to those at the Institut de recherche en propriété intellectuelle Henri-Desbois (IRPI) in Paris for allowing me the use of their library and for their assistance in locating French materials. Without their help, much of this book could not have been written. My thanks also to Naty Guerrero-Diaz for her great help with Spanish translations, to the Law Schools at Deakin and Monash Universities, and to Oxford University Press for the latitude it has allowed me in pursuing my interest in this area.

It is noted here that portions of Chapters 11 and 18 have previously appeared in the *Intellectual Property Journal* (Canada) and the *Intellectual Property Quarterly* (UK) respectively and I thank these journals for their support.

Finally, a note on translations and sources is necessary. Because the moral rights of authors first developed in Europe, many of the primary materials concerned

with their early history are in languages other than English. Sometimes the source material available to the modern researcher is itself a translation of an earlier document. Where I have not had access to original documents, the earliest available translation has been used. The English translations used in this book are, unless otherwise stated, my own. The Canadian statutory materials have been quoted in French/English parallel text, reflecting the equal authority of the two languages. Likewise, the Berne Convention excerpts have been given in French/English parallel text. The use of the French text here reflects the status of French as the authoritative language of the Convention, pursuant to article 37(1)(c) of the current Convention text. The French and German statutes have been quoted in the original as well as in translation in order to allow readers to judge for themselves the nuances of the texts.

Elizabeth Adeney
Melbourne
July 2006

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