

**REVIEW OF MORAL RIGHTS AND THEIR APPLICATION IN AUSTRALIA**

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**Maree Sainsbury**

***Moral Rights and their Application in Australia***

**Federation Press, Sydney, 2003**

210 pages

ISBN: 1862874743

[259] As Australian moral rights legislation approaches its fourth birthday it would seem time that the subject was addressed in its own authoritative text. Maree Sainsbury's *Moral Rights and their Application in Australia* seeks to fill this gap.

Sainsbury's book can be broadly divided into two parts. The first part (chapters one to four) is general in nature dealing with the history of moral rights, their emergence in Australia, and their general application. It is always useful to get an understanding of how particular law has developed and Sainsbury's discussion of the history and philosophical foundation of moral rights is enlightening. Unsurprisingly, it was that incubator of social change, the French revolution, which gave birth to the concept of *droit morale*. The legal change reflected social change, in particular the way society saw the artist and art itself. The emergence of the view that an artist invests something of his or her personality into the work gave rise to the idea that this personal investment deserved protection.

A similar shift in the appreciation of the artist is evident in the development of moral rights in Australia. Sainsbury traces the evolution of moral rights in this country from their earliest discussion in the Spicer report of the late 1950s until the ultimate passing of the *Copyright Amendment (Moral Rights) Act 2000* (Cth) (Moral Rights Act). The momentum of change and the growing vigour of support for moral rights towards the end of last century are perhaps an indication that artists had gained a more respected place in Australian society. It is sobering to reflect, however, that it took almost 50 years for this greater respect to be expressed in material form. It is a reminder to

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advocates for artists' rights such as the Resale Royalty that the pace of change can be slow and that tenacity and persistence have as much value as a good argument.

[260] In what I am referring to as the second part of the book (chapters five to eleven) Sainsbury addresses the application of moral rights within particular creative areas. A large proportion of part two is devoted to discussion of moral rights in relation to Indigenous authors. This is understandable as the issues in relation to the personal nature of moral rights and Indigenous concepts of communal ownership are significant. While dealing with this subject in some detail, and considering the relevant case law, it is unfortunate that Sainsbury does not discuss the development of Indigenous Communal Moral Rights (ICMR) legislation. Although the Government did not release an exposure draft of legislation until late last year<sup>2</sup> ICMR were included in the Government's *Arts for All* policy at the 2001 election and it announced its intention to introduce legislation in June of last year.<sup>3</sup>

The Indigenous chapter also contains an oversight in Sainsbury's references to the National Indigenous Arts Advocacy Association (NIAAA). NIAAA, as Sainsbury points out, did valuable work developing a label of authenticity for Indigenous artworks. Sadly, NIAAA's funding ceased in 2002 and they were forced to close. As a result the label of authenticity has fallen into disuse. The discussion of NIAAA and the label is useful but Sainsbury should have made the point that both are no longer current.

On the whole the second part of the book seems unbalanced with the bulk of it being devoted to Indigenous authors and digital works. This gives the impression that Sainsbury is more interested in some subjects than others. It would have been interesting and helpful to see more expansive discussion of moral rights as they relate to film, architects, visual arts and performers. For example, the film chapter does not discuss moral rights in relation to underlying works in films in any detail. Arguably, this issue presents more potential difficulties than moral rights in the film itself. The film industry has taken steps to address these difficulties. Key stakeholder

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<sup>2</sup> Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 (Cth).

<sup>3</sup> Attorney-General's Department, e-News on Copyright, Issue 29, June 2003.

organisations have worked together to develop minimum agreed moral rights consent provisions for film agreements. Sainsbury, however, does not address this.

In the chapter on architects, Sainsbury does discuss industry guidelines about the inclusion of buildings in advertisements that were agreed between the Advertising Federation of Australia and the Royal Australian Institute of Architects. Again, I feel that the chapter could have gone further. For example, a more detailed discussion of the facts surrounding the National Gallery dispute would have been useful. The lack of Australian case law makes consideration of these kinds of disputes and their resolution helpful in developing a greater appreciation of how moral rights operate in Australia.

Sainsbury also takes a brief look at moral rights as they apply to visual artists and performers. There is not, however, any discussion of the moral rights of writers or musicians. While the discussion of moral rights for performers is worthy, performers do not currently enjoy moral rights in their performances. Therefore, it is difficult to see why this issue is considered and the application of moral rights for writers and musicians is not.

Writers have significant moral rights issues. Their reputations rest on the quality of their copy and equally on the fact that they are recognised as the author of a piece. Integrity and attribution are essential. Most journalists, for example, will encounter moral rights issues at some point in their career whether it is a failure to be attributed for a story or an editor taking liberties in altering an article. It seems remiss that moral rights and their application to this significant group of authors are not included.

Musicians are similarly conspicuous by their absence. Often musical works will be dealt with under licensing agreements. However, this does not alter the fact that moral rights subsist in these works. A musician's moral rights may, for example, be infringed by another person making a remix or altered version of their musical work. This situation was actually discussed by the Federal Court in the *Schott Music* case.<sup>4</sup> There the Court considered whether a techno version of the 'O Fortuna' chorus from

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<sup>4</sup> *Schott Musik International GMBH & Co v Colossal Records of Australia Pty Ltd* [1997] 531 FCA (19 June 1997).

Carl Orf's *Carmina Burana* 'debased' the original work. Although the decision predates the Moral Rights Act it [261] is still a useful insight into how the courts may approach the issue of integrity in a work. Unfortunately, like musicians, the case is not discussed in Sainsbury's text.

As a general comment I feel it would have been interesting to see more discussion of industry practices and guidelines. Sainsbury does give some examples of these. However, as they are an important consideration for the Courts when deciding if an infringing act was reasonable, they have the potential to be of great significance. More detailed discussion of how particular industries are managing moral rights particularly in relation to consent provisions in contracts would be of great value.

This leads to a final point, which goes to the intention of Sainsbury's book. The book is 'intended for legal practitioners, those who possess moral rights, and those who work with material to which moral rights apply'. This is admirable, however it is always difficult to please everyone. In my view, the book would have been of greater value if aimed at the last two groups. I say this because it is these groups who are most affected by the application of moral rights and also currently have the least awareness of them. Sainsbury does provide much excellent practical information but I feel this could have been further enhanced by the use of more detailed case studies and a consideration of where moral rights law in Australia may be headed. Arguably, it is inappropriate for a legal text to look at what 'might' happen. However, the nascent nature of Australian moral rights and dearth of local case law would make some degree of extrapolation both useful and interesting.

As with any legal text, this book suffers from the march of time. Proposed legislation is likely to extend moral rights to Indigenous communities<sup>5</sup> and performers<sup>6</sup> by early next year. Still, Maree Sainsbury's book is a useful contribution to the understanding of moral rights in Australia. The value of this contribution, however, is undermined by the limited (and in the case of writers and musicians complete lack of) discussion and practical guidance on the application of moral rights within particular industries. The ways moral rights are being managed in practice and how this relates to the

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<sup>5</sup> Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 (Cth).

<sup>6</sup> US Free Trade Agreement Implementation Bill 2004 (Cth).

legislation and case law would have provided valuable insight into the application of moral rights in Australia.