

Moral rights in landscape projects

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abstract

An artist can expect that their artwork remains intact regardless of its owner. Also, an owner of artwork is expected to attribute creation of that work to the rightful artist. Recent Moral Rights legislation in Australia allows designers of anything having 'artistic craftsmanship', including buildings, to have the same rights of attribution as artists and to expect integrity in the constructed project resulting from the design. Two particular aspects of this legislation have ramifications for landscape architects claiming moral rights over their projects—the identity of rightful authors and the time component of landscape projects.

moral rights

copyright law

designer's rights

attribution

integrity



Introduction

A dispute in 2003 about proposed changes to the newly-constructed Garden of Australian Dreams (GOAD) at the National Museum of Australia (NMA) raised the issue of a designer's right to protect the integrity of their landscape design.¹ Existing copyright law in Australia was modified in 2000 to include moral rights. The legislation, the *Copyright Amendment (Moral Rights) Act 2000*, (the Act) allows the designers of 'artwork', including constructions like buildings and landscapes, to own two specific rights over this work—the right to attribution as the designer, including the right against false attribution, and the right of integrity against derogatory treatment of the work that impacts on the honour or reputation of the designer. The workability of the legislation in protecting these two rights for landscape projects is the subject of this paper.

Without moral rights protection, every landscape project risks substantial change in response to political, cultural or any other external pressure. The proposed changes to GOAD demonstrate the desirability for designers to have some rights over the integrity of their designs. In 1998, Room 4.1.3 was the landscape architectural component of the consortium that was awarded the design for the NMA which included GOAD following an international design competition. Richard Weller, a director of Room 4.1.3, explained the vision for the garden as:

'The Garden of Australian Dreams is not a verdant garden nor is it a set design of a 'dreamscape'. It is a map of Australia upon which the public can walk and read complex layers of information. It is a concrete surface, the size of a small sports oval which is made to look like a crumpled paper map or a map printed on fabric. ... The two main maps used to form the ground pattern of this garden are a standard English language map of Australia and Horton's map of the linguistic boundaries of indigenous Australia.'²

This vision is demonstrated in Figure 1.



Figure 1. The Garden of Australian Dreams at the National Museum of Australia, Canberra. The concrete ground plane, reminiscent of a crumpled paper plan, with the overlay of the standard English language map of Australia and Horton's map of the linguistic boundaries of indigenous Australia. Photo courtesy of Room 4.1.3



The 2003 Carroll Report recommended extensive changes to GOAD in response to a review of NMA's exhibitions requested by the NMA's chairman. In part, these recommendations were to: 'Add a number of large rocks... Add planting of vegetation typical of Australia's past and present... A sundial might be added... Explanations of the tilt of the earth's axis and its effect on Australia's seasonal climate... Well-produced representations of Aboriginal rock art... Adding more lawn, so that people could comfortably sit in this area, and lowering, or possibly removing, the hill in the middle would enhance comfort and safety.'³

There is no doubt that these changes would have substantially changed the design vision. The dispute was not resolved and the NMA has not implemented changes to the original design. Room 4.1.3 threatened legal action using the moral rights legislation. The Australian Institute of Landscape Architects (AILA) backed the stance taken by Room 4.1.3 and issued a press release supporting the need to ensure that changes to significant landscape projects, such as GOAD, not be considered without appropriate consultation with landscape architects with the relevant design expertise.⁴

Background to the legislation

Moral rights form part of copyright law, which is one of the legal areas collectively referred to as 'intellectual property'. Intellectual property rights are those rights legally claimable over the products resulting from a person's intellect. These rights have legislated limits to ensure that one person's rights do not infringe on the rights of others. Legislation covers a range of intellectual property rights:

- Ü Original design, where that design is applicable to an article of manufacture and does not include a method or principle of construction;⁵
- Ü Registration of a trademark to indicate the origin of goods;⁶
- Ü Patent law covers inventions and is restricted to articles or substances or manufacturing processes which are new, not obvious or naturally occurring, and which are industrially useful;⁷ and
- Ü Any documented work, or work of art prepared by an individual or a business is protected under copyright law. It not only includes the original documents, drawings, sketches and the like, but also includes music, films, sound recordings, broadcasts, models, displays, photographs, sculptures, buildings, constructions and other designed original products.⁸

Historically, the legislation for intellectual property rights has evolved in response to inventions and changes in artistic form to include such endeavours as plant breeders' rights over newly created plant cultivars,⁹ and copyright on computerised digital applications.¹⁰ Rarely, if ever, has legislation for intellectual property pre-empted the invention or the new type of artistic work for which property rights are later legislated. Similarly, a right assumed to be present is only established once the law recognises the owner and extent of that right, usually after a legal challenge to the existence of the property right. One such example of changing an assumed right to a claimable right is the recent change to copyright law to include moral rights for designers. Until this change, an architect could have, incorrectly, assumed that the owner of a building they had designed had the responsibility to maintain the integrity of that design in the same way that the owner of an artwork was responsible for maintaining that artwork in its original condition. Before the introduction of moral rights, copyright law established the difference between the rights of an artist over one of their paintings and the rights of an architect over one of their buildings. The difference was that



the artist directly produced the copyright product (the painting or sculpture), but the architect who directly produced the design and construction documents for the building, did not directly produce the building itself. Copyright then only covered the architect's documents.

In general terms, copyright law provides designers with the economic protection against unauthorised copying of their 'artistic work'. This protection is given for tangible finite things, not ideas. It is the artistic drawing, sculpture, painting, written work or computer graphic that is protected by copyright law. The law disallows the copying or amending of the work by the purchaser except to the extent that is contractually agreed between the designer of the artistic work and the purchaser. There are exceptions to this basic rule, for example in Australia, the 'Crown' claims copyright over designs and documents produced for government projects, presumably to restrict the potential for the work to be accessed by another government.¹¹

In 2000, Australia followed other signatory countries¹² by introducing legislation to extend copyright law to also include moral rights. These rights allow designers to protect their ownership of the design of their artistic work, whether or not the work is protected by other copyright law. These rights apply to the designer of a product and give that designer the right to the honour and reputation of being associated with that product. Legislation allows designers to claim two moral rights:

1. The right to ATTRIBUTION of authorship, and not to have authorship falsely attributed to others, and
2. The right of INTEGRITY of authorship—to not have the work subjected to 'derogatory treatment'.¹³

The Act was introduced to respect the designers' visions and to involve the relevant industries (and professions) in the moral rights process. In describing the intent of the legislation as part of his Second Reading Speech, the Attorney-General, Daryl Williams, explained that the legislation was to respect the creativity of authors and artists and to build upon existing industry practice to achieve this.¹⁴ He implied that, to make moral rights work, the industries to which it applies need to develop practices for its implementation and management. In 2004, AILA issued a Practice Note to its members explaining moral rights for landscape works.¹⁵ The Practice Note generally follows the directives given by the Royal Australian Institute of Architects to its members. For landscape architectural works that consist primarily of architectural or built form, moral rights claims are comparable with those of architectural works. However, where works include the design of elements that are expected to evolve over time, particularly rehabilitation projects, but also projects relying on maintenance, time and the effects of natural influences, the question as to the appropriateness and extent of moral rights claims needs to be examined.

Moral rights—Attribution

The Australian moral rights legislation allowed for the following rights, prior to changes to these rights by the Free Trade Agreement (FTA) between Australia and the United States of America (USA):¹⁶

- Ü Moral rights are for each finished project, which includes any drawing, report, model, as well as the constructed project;
- Ü Moral rights are owned by individuals, not corporations, and the rights are held as non-exclusive rights by everyone identified as 'contributing to the design of the project';¹⁷ and

Ü Responsibility for ensuring compliance with moral rights lies with the owner of the project, and an obligation to correctly attribute the work lies with each individual who legitimately reproduces, discusses, displays, or publicises the work. The responsibility on owners of the project requires current and future owners and managers of landscape projects to notify and conduct negotiations in good faith with the owners of the moral rights before 'derogatory treatment' is carried out on the project. Derogatory treatment is anything that is detrimental to the honour or reputation of the designer, except for things that are 'reasonable in all the circumstances'.¹⁸

These rights have remained since the introduction of the FTA but other intellectual property law in Australia has changed to bring it more into line with the law in the USA. As well as changing the law for photographic work to make it the same as for literary, dramatic, musical and artistic work, it has increased the time for copyright protection from 50 to 70 years after the death of the author.¹⁹ The FTA has also changed performers' rights over the intellectual property of their performances.

The USA has been moving towards the European Union practice of allowing performers to contractually obtain higher levels of intellectual property rights over their work.²⁰ Already the USA, and now Australia, allows performers to own the copyright and moral rights in the sound recordings of their live performances.²¹ This right is comparable to the right of all types of performance artists to claim moral rights to their artistic endeavours. The law determines that the act of performing artistic work is protectable if it is not determined by chance or random accident.²² This allows artists to own the rights to certain types of artistry where the art is a performance and not a tangible object.²³

If the performance of artisans is claimable under moral rights law, there is nothing to prevent contractors also claiming moral rights over their performances but only if those performances can be correctly described as 'contributing to the design of the project'. This possibility requires examination in two regards. Firstly, the term 'contributing to the design of the project' needs to be defined, and then the issue of whether or not a contractor's performance fits within the definition can be considered.

The author or designer of a project is clear for artworks where one person is the designer—it is the artist, but for projects resulting from input by teams of individuals, the extent of authors or designers 'contributing to the design of the project' is less clear. An example of team members contributing to the design of a project is listed in the guide to the legislation issued by the federal government Department of Communications, Information Technology and the Arts (DCITA) (the department responsible for administering the legislation). It lists the team members who are eligible to be the beneficiaries of moral rights for a film as:

'...visual artists, architects, illustrators, photographers, writers of all kinds, screenwriters, set designers, film makers and map makers. 'Film maker' includes the writer of the script for a film or television program, the producer and the director.'²⁴

Although there are differences in the legislation about the moral rights of film makers and the moral rights for designers of other artistic works, there are more restrictions on who can claim moral rights for films than for other artistic works.²⁵ A contractor can therefore prove to legitimately be a member of the design team when the construction contract is performance based. In other words, if a construction contract, or a 'design and build' contract, describes the product of the contractor's work by functional and/or performance criteria rather than describing



the construction materials and processes, the contractor can claim that their work substantially contributes to the design process, and therefore moral rights are claimable. Moral rights are not claimable by contractors when their work consists of complying with instructions in working drawings and construction specifications, in the same way that actors cannot claim moral rights when they follow a script and instructions from a director, even though the contractors and the actors are necessary substantial contributors to the finished product and use artistic skills to achieve it.

It is unlikely that suppliers could claim moral rights simply by supplying materials or fittings for a project. However, it could also be argued that suppliers could claim moral rights if they contribute to the design of the project by designing and supplying site specific or specially designed products for a project in the same way that sculptors own the moral rights for sculptures forming part of a building.²⁶ The possible argument about products provided by a material supplier not having artistic merit is countered in the legislation that states that the definition of 'artistic work' includes any work '...whether the work is of artistic quality or not'.²⁷

Since moral rights are non-exclusive rights owned by individuals, not corporations, the list of legitimate individuals claiming moral rights may be extensive, and there are no legislated limits on the number of possible moral rights owners, except that they must have had a 'contribution to the design'. The Act requires each moral rights owner to have had involvement in 'a whole or substantial part of the work'.²⁸ In context this seems to mean 'all, or a large or important section of the project' rather than 'all of the design or most of the design of the project'. Also, every owner is an equal joint owner, and in the absence of a co-ownership agreement which sets out the rights and responsibilities of each co-owner, every owner has the right to expect individual respect for their ownership.²⁹ This means that each moral rights claimant has the right for individual protection of their own moral rights to a project. Moral rights claimants include the design practice's employees, specialist consultants and their employees, and may also include individuals working for the construction contractors and specialist suppliers. Also, the client could legitimately claim moral rights as the individual making decisions about inclusions in the brief, selecting appropriate options from those recommended by consultants, establishing quality requirements, and other acts reasonably definable as 'contributing to the design process'.

An employee can voluntarily have their moral rights infringed as a condition of an employment contract. However, the particular infringements must be stated in writing and agreed to without duress or misrepresentation as to what the employee is consenting to.³⁰ The procedure recommended by AILA³¹ is to obtain from each employee approval to infringe their moral rights claims for all projects and to allow the practice to be recognised as the designer. AILA also recommends that each specialist consultant's practice obtain similar consents from their employees as a condition of contracting to provide specialist advice for each project. The list of main and specialist design practices would then be the list of moral rights owners. Negotiations with the client as, or on behalf of the project owner, would then establish and contractually agree to, the mutually acceptable methods of ensuring that the moral rights owners are attributed to the project. Difficulties arise with the procedure recommended by AILA if an employee's circumstances change. For example, if the employee leaves a design practice and is no longer prepared to allow that practice to be recognised as the collective owner of moral rights for work prepared by employees of the practice, that employee may be able to resume their ownership of moral rights for projects worked on while being an employee. Since infringement of the author's

moral rights to allow another to be recognised as the designer are purely voluntary, the author may rescind that infringement, subject to compliance with any other employer / employee contractual agreement, which cannot include the assignment of the employee's moral rights.³² This means that an employer / employee contract cannot state or imply that the employer owns the moral rights for projects designed by its employees, but can merely allow the employer to act on behalf of the employees in negotiations about moral rights.

There is a different interpretation of who may be defined as the 'author' of work. The Australian Copyright Council³³ states that, since moral rights are not owned by corporations, individuals employed by those corporations are also not able to own moral rights for projects designed under contract by the corporation.³⁴ Moral rights are therefore only claimable by individuals and employees of unincorporated businesses. The Act specifically states that this applies to moral rights for films but does not indicate if this also applies to artistic works other than films. If this interpretation does apply, it substantially undermines the majority of commentary about the application of the legislation and landscape architects involved in unresolved disputes to date are likely to not have legal standing to argue their case. Note in particular the dispute discussed above about changes to the GOAD resulting from the Carroll Report and challenged by Associate Professor Richard Weller, one of the designers and a director of the landscape architectural practice responsible for the design, Room 4.1.3 Pty Ltd, a corporation.

At the time of writing this paper, the moral rights legislation has not been tested in court and the legal meaning of 'author' and 'contributing to the design of the project' requires a court to determine. In the meantime, the meaning and application of these terms is uncertain.

The responsibility of attributing design to a precise list of moral rights owners for each project lies with the project owner. Since moral rights are owned equally by each individual, a project owner who leaves out one of the moral rights owners from any publicity or publication about the project could be exposed to a claim of breach of the moral rights of that individual, whether or not the project owner is aware of that individual's role in the project. If this is the case, the project owner could legitimately blame their consultants for failing to provide adequate professional advice about this exposure. The project owner's defence against a claim of breach is that the Act only requires the project owner to make reasonable enquiries about the names of the moral rights owners.³⁵ Further description about the extent that reasonableness applies to project owners is contained below in Moral Rights—Integrity.

The Act also states that the project owner has the responsibility to not have wrong attribution given to individuals who do not have moral rights in a project.³⁶ This increases the responsibility on the project owner to accurately and fully attribute work and to:

- U include every moral rights owner;
- U not include individuals who do not have moral rights; and
- U include the parties to whom individuals' moral rights is attributable due to employee or sub-contract arrangements, or through co-authorship agreements.

There is a clear need for a professional code of practice for project attribution that includes the consultants, contractors, sub-contractors and suppliers when these parties have legitimate moral rights, and that provides an effective method for project owners to manage their obligations under the Act.



Moral rights—Integrity

Moral rights legislation aims at protecting the integrity of work produced by designers. For painters and sculptors, this work is their finished art work. For architects, this work is the drawings documenting the design and the finished building. For landscape architects, the work covered by the legislation may not be all the landscape architects' work, since the products of many designs include environmental processes that develop and change the site over time. These processes are not tangible physical things, thereby excluding them from intellectual rights protection and, being natural processes, they are specifically excluded from copyright and moral rights protection.³⁷

For design professionals' work to be covered by the legislation, it must comply with the definition of 'artistic work' in the Act. This definition is:

- (a) 'a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not;
- (b) a building or a model of a building, whether the building or model is of artistic quality or not; or
- (c) a work of artistic craftsmanship whether or not mentioned in paragraph (a) or (b).³⁸

A 'building', in item (b), is further defined as 'a structure of any kind'.³⁹ This means that landscape projects are included in the definition of a building when they are structures. Constructed 'hard'⁴⁰ landscape projects are definitely included in item (b) or (c) but it is not clear if 'soft'⁴¹ landscape projects can be defined as buildings or work of artistic craftsmanship under the Act. Case law provides limited help. One case determined that a sunken garden was defined as a building (it consisted of 'steps, walls, ponds and other stone structures')⁴² and a half-court tennis court was also defined as a building (it was 'a concrete slab with special markings on it, and with net-posts set into it').⁴³ Both of these examples consist of 'hard' landscape elements. For landscape projects consisting of 'soft' elements, the definition under (c) could include these projects. It depends whether these projects can be accurately described as 'work of artistic craftsmanship'. Presumably the majority of professional landscape architects' work can be described this way, but when the work entails a response to environmental criteria only, as is the case for ecological restoration and rehabilitation projects, it is less likely that they will be covered by the Act. Nevertheless, most landscape projects that include soft elements are likely to be included within the definition since most projects consist of design using a combination of hard and soft elements. It is the inclusion of these soft elements that change over time that need careful consideration in regard to moral rights claims.

The law is consistent by not allowing anyone to own intellectual property rights over random artistic endeavours or naturally occurring things or processes. However artists occasionally blur the distinction between artwork and natural objects. If an artist selects, arranges and attaches found objects into a finished work of art, it is likely to be included in the Act's definition of an 'artistic work'.⁴⁴ However, if an artwork is merely something that was a pre-existing object or naturally-occurring process, it is not protectable.⁴⁵ Therefore for landscape projects, except perhaps for ecologically-based projects, it could be argued that the soft elements have been selected, arranged and attached into the completed project and therefore are included in the definition.

However, it is likely that moral rights are not claimable for those landscape projects or facets of projects that include elements that encourage naturally occurring processes to take place. The issue is that, since moral rights are owned for 70 years after the death of the author, ownership

of intellectual property for long-term changes to a site need to be proven to be designed changes and not naturally occurring or random changes. For moral rights to be claimable, the landscape architect must prove that a project that includes any of the following elements is better described as a 'work of artistic craftsmanship' than as an environmental protection, restoration or rehabilitation project. The questionable elements for claiming moral rights include:

- U Introduction of plants that grow, develop, mature, seed, and regenerate, since these changes require site management and maintenance input which is usually not within the control of the designing landscape architect;
- U Changes to the ecology of a site, and adjoining sites, by designed or incidental changes to subterranean and surface water and soil structure, especially if these elements change in response to changes in other design elements—plants, stormwater, increase or decrease in the absorption of chemicals, etc; and
- U Increase in fauna habitat, and subsequent resultant changes to plants, water, soil and chemical balance.

For landscape architects to successfully claim moral rights over a design that includes soft landscape elements, there must be evidence of a clear intent to foresee changes to the constructed project over time and for these to be accommodated as part of the professional service offered by landscape architects.

The Act protects the integrity of designed projects against 'derogatory treatment'. This is defined as 'the doing ... of anything that results in a material distortion of, the destruction or mutilation of, or a material alteration to, the work that is prejudicial to the author's honour or reputation ...'.⁴⁶ Many tasks performed, or not performed, on landscape projects as part of their long-term management materially change the work and can therefore be accurately described as derogatory treatment—pruning or not pruning, replanting, failing to adequately water, failing to remove graffiti and acts of vandalism, and others. However, the Act states that 'derogatory treatment' requires the 'doing' of something by the project owner or someone on their behalf. Therefore failing to rectify problems that occur on projects excludes those tasks from the definition. Therefore, in theory, a project owner who fails to maintain the soft elements of the project has not breached the integrity of the project, even though the project as designed is likely to substantially change and therefore be prejudicial to the author's honour or reputation.

If 'derogatory treatment' is contemplated, the Act requires the owner to follow a specified procedure involving giving notice to the author(s) of intention and to negotiate in good faith about proposed changes.⁴⁷ The Act is unclear as to what constitutes negotiation in good faith.⁴⁸ Informal bargaining is likely to be all that an owner needs to do to remove the risk of breaching the moral rights of the designer. Even if negotiation is fruitless, 'reasonableness' is an adequate defence for infringing the rights of attribution and integrity. The matters to be considered when determining 'reasonableness' are defined in the Act as including:

- U the nature of the work;
- U the purpose, the manner, and the context in which the work is used;
- U any practice, in the industry in which the work is used, that is relevant to the work or the use of the work;
- U whether the work was made in the course of the author's employment or under a contract for the performances of services for another person; or
- U any practice contained in a voluntary code of practice for the industry in which the work is used, that is relevant to the work or the use of the work.⁴⁹



Since all site management of soft landscape elements can easily be described as part of the 'nature of the work' and required to suit the changing 'purpose, manner and context of the work', a claim for breach of integrity is likely to be easily defended if the breach relates to soft landscape elements.

Landscape architects are expected to consider the long-term environmental ramifications of their work and to advise their clients accordingly.⁵⁰ This duty to provide appropriate advice has increased since the introduction of moral rights, since the duty to comply with these rights lies with the project's owners who principally rely on the advice of their consultants. Landscape and environmental evolution of the project could substantially impact on the long-term duties of owners, managers and maintainers of landscape projects designed by landscape architects, if the moral rights of the designers are observed. Since project owners have no incentive to comply with the legislation, but have disincentive by the convoluted and uncertain nature of the legislative requirements for compliance, landscape architects should provide the necessary incentive to project owners. This incentive could be in the form of providing advice as part of the standard consultation service to facilitate compliance, and advice about the long-term management of the project. For landscape architects to successfully claim moral rights over a project, there must be evidence of a clear intent to foresee changes to the constructed project over time, for these to be accommodated as part of the professional service offered by landscape architects, and for the intellectual property rights of construction parties to not be in doubt as a result of the construction contractual arrangements.

What remedies are there for non attribution, wrong attribution or breach of integrity? If a person infringes the moral rights of another, it is not legally seen as an offence.⁵¹ The moral rights owner is able to mount a civil claim, which allows for the infringed party to claim limited legal relief only.⁵² When disputes concern a breach of honour or reputation, as is the case with moral rights claims, the party being sued may make a counter-claim for the risk to their honour and reputation by being sued for a breach of honour or reputation. The legislation specifically stated that a counter-claim is possible for moral rights disputes.⁵³ For these reasons moral rights may only be worth fighting for in extreme circumstances. The designer who sues for lack of attribution or for not being consulted before derogatory treatment occurs to a project they designed, risks developing a litigious reputation, which may have an effect on the designer's business irrespective of the outcome of the dispute.

Difficulties with the legislation

Since the Act applies retrospectively for artistic work, other than films, the implication and workability of retrospectivity makes enforcement of moral rights claims difficult for projects completed prior to the introduction of the legislation in 2000. AILA has listed five unanswered questions in regard to retrospectivity in its Practice Note on the subject:

- U If a practice prior to 2000, had identified a designer's attribution by using the practice's title rather than individuals, has an individual any retrospective claim for moral rights?
- U If the practice's name has been used in the attribution of a design that pre-dates the Act, does the individual therefore need to make claim against the former practice in order that the individual designer's / landscape architect's moral rights may now be recognised / attributed?
- U Following from such a claim, and given that the practice's contract with the client would have identified the practice (and maybe other partners and consultants), even if the practice agrees to the change, how can the change be effectively communicated and agreed to by the client—



given the contract / project is now completed / historic and that the client may or may not exist or may have altered its legal status or may have been amalgamated, etc—or the client may not have sufficient legal means available to agree to the claim.

- U Given that the [Moral Rights] Act was not in place till 2000, how can such cases be settled given that many practices no longer exist in the form when the design was completed?
- U If the evidence of the individual's role and contribution cannot be 100% verified for any number of circumstances and reasons, is it most likely that the individual's claim to Moral Rights and therefore attribution cannot be formally recognised?⁵⁴

These are valid questions demonstrating the difficulty of implementing moral rights retrospectively.

Moral rights remain in operation for 70 years after the death of the last attributable designer of a project.⁵⁵ For landscape works, this requires the project owner and manager to negotiate with each moral rights owner before derogatory treatment is performed on the project for a period that may considerably exceed 100 years (assuming that at least one moral rights owner lives for 30 years after completion of the project). There are a number of difficulties with this. Most, if not all landscape projects are not expected to remain as designed without substantial alteration for 100 years. Secondly, moral rights are not able to be bequeathed in a will,⁵⁶ so legal enforcement of moral rights relies on a personal legal representative of the deceased moral rights owner making decisions on their behalf. This person, acting on behalf of the estate, needs to make judgement on whether or not a failure to correctly attribute, false attribution, or proposed derogatory changes to a project will be detrimental to the honour and reputation of the perhaps long-deceased designer. It is questionable that this person has the required insight into the designer's thinking to make sound decisions about the designer's honour and reputation in regard to moral rights claims.

As well as the problems associated with retrospectivity, there are many facets of moral rights that remain undefined in the Act. The extent of possible owners of moral rights is unclear, especially since the inclusion or non-inclusion of employees of incorporated businesses as joint owners of moral rights is not stated in the legislation. As well as consultants engaged as designers for a project, contractors, suppliers, and the client may have claims to moral rights in certain circumstances.

The extent to which projects that include 'soft' landscape elements are covered under the Act's definition of 'artistic work' is another unclear aspect of the legislation. In particular, natural processes forming part of designed landscapes are unlikely to be included in the definition since natural processes are specifically excluded. The fact that time changes landscapes and that these changes are only partly predictable and largely dependant on the knowledge, skill and incentive of others to direct and manage those changes, further blurs the extent to which landscape architects can claim moral rights over their projects.

Conclusion

The landscape architectural profession needs to develop practices for the implementation and management of moral rights, if moral rights are seen by the profession as worth having. In the absence of definitive cases, the profession should document what it sees as the correct interpretation for those elements not clearly explained in the Act. The profession should also consider the extent to which landscape projects that include ecological restoration or site rehabilitation should be included within the jurisdiction of moral rights law. A professional code of practice should be the final outcome of this clarification and implementation process.



As well as the code of practice, landscape architects' standard engagement structure should be a four stage process. The existing three stages of Project Design, Project Documentation and Project Implementation (Contract Management) stages should have an additional standard stage to provide advice on the long term management of the implemented work. This should document how project owners are expected to manage moral rights as part of the advice on the expected evolution of the site over time.

Prior to a code of practice or a change to the standard landscape architect's engagement structure being contemplated, the profession needs to consider if it wants to have enforceable moral rights. What's in it for the profession or for individuals working in the profession? It is unlikely that there are economic benefits to retain projects in their constructed state since the profession relies on change to create work. In fact, derogatory treatment of projects can create more work opportunities for the profession. Also, a project need not remain as constructed for attribution to occur. For example, the design of constructed projects is still attributable to the designers after the project has been destroyed.

The way forward is to decide as a profession if the ability to enforce moral rights is wanted. If it isn't, let the current legislation be challenged and resolved by courts responding to individuals seeking moral rights. Then use those answers to resolve the desirability and workability of moral rights claims. Alternatively, if the ability to enforce moral rights is wanted, the profession needs to develop the means to maximise its workability, especially since the legislation was introduced to build upon existing industry practice. Practice now needs to build upon the legislation by the preparation of a comprehensive code of practice which is acceptable to the landscape architecture profession and is developed in consultation with project owner representatives and other professions. Consideration must also be given to introducing advice about on-going project management as a standard landscape architectural service. °

Endnotes

- 1 A full description of this dispute is contained in: Rimmer, M. 2005, *The Garden of Australian Dreams: The Moral Rights of Landscape Architects*, available as a downloadable paper from the Social Science Research network at <http://papers.ssrn.com>
- 2 Weller, R. 'The Garden of Australian Dreams', in <http://room4.1.3.com.au/Museum/GOAD/Garden.html>, in Rimmer, op.cit. p.15
- 3 Carroll, J. and other panel members, 2003, *Review of the National Museum of Australia, its Exhibitions and Public Programs, a report to the Council of the National Museum of Australia*, Commonwealth of Australia, Canberra, in Rimmer, op.cit. p.18
- 4 Corkery, N. 18 July 2003, *Press Release: The Australian Institute of Landscape Architects calls on the National Museum of Australia to reject suggested changes to the Garden of Australian dreams*, AILA, Canberra
- 5 *Designs Act 2003* (Cth)
- 6 *Trade Marks Act 1995* (Cth)
- 7 *Patents Act 1990* (Cth)
- 8 *Copyright Act 1968* (Cth) as amended, s.10
- 9 *Plant Breeders Rights Act 1994* (Cth)
- 10 *Copyright Amendment (Digital Agenda) Act 2000* (Cth)
- 11 s.176 of the Act. Refer also to McKeough, J. and Stewart, A. 1997, *Intellectual Property in Australia*, (2nd ed.), Butterworths, Sydney, p.176 & 189; and a recommendation that this part of the Act should be

- dropped is contained in: Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation Under the Competition Principles Agreement*, at 114, as cited in McDonald, I. 2001, *Report for Visual Arts Industry Guidelines Research Project: Copyright and Moral Rights*, Australian Copyright Council, p.27.
- 12 The need for universal standardisation of copyright resulted in the Berne Convention, a document adopted in Berne, Switzerland on 9th September 1886. The document has been revised many times since then. Article 6bis provides moral rights protection for authors of artistic works and was introduced into the Convention in 1928. Australia is one of around 133 current signatory countries.
 - 13 Department of Communications, Information Technology and the Arts (DCITA), *Guide to the Copyright Amendment (Moral Rights) Act 2000—Fact Sheet*, on line at <http://dcita.gov.au/ip>
 - 14 House of Representative 1999, Second Reading Speech by the Hon Daryl Williams AM QC MP Attorney-General, *Copyright Amendment (Moral Rights) Bill*, 1999, as quoted in Morrison, I. 2001, *Report for Visual Arts Industry Guidelines Research Project: Copyright and Moral Rights*, Australian Copyright Council, p.178
 - 15 AILA, *Practice Note 5—Moral Rights*, October 2004.
 - 16 *Australia—United States Free Trade Agreement* 2004 (Cth)
 - 17 AILA, op.cit. p.2
 - 18 s.195AK of the Act
 - 19 Lim, C. 2005, *Intellectual Property Update—Autumn 2005 (Free Trade Focus: Australia's Changing Intellectual Property Landscape)*, Malleson Stephen Jacques, on-line at http://.mallesons.com/publications/Intellectual_Property/7850774w.htm
 - 20 Authors' Rights Expert Group of the EFJ, June 2000, submitted to 'Authors' Rights for All' summit, International Federation of Journalists, on-line at <http://www.ifj.org/>
 - 21 Lim, op.cit.
 - 22 McDonald, op.cit. p.5
 - 23 Ibid, p.9, and Part XIA of the Act
 - 24 DCITA, op.cit. p.1
 - 25 s.191 of the Act restricts the 'maker' of films to the 'director, producer and screen writer'. s.195AZF(1) refers to the general authorship of copyright law (s.127) being applicable for moral right authorship for works other than films, while s.195AZF(2) refers to the limited application for films. s.127 includes the possibility of joint authorship without restricting the types of possible authors.
 - 26 s.32(3)(b) of the Act
 - 27 s.10(1) of the Act
 - 28 s.195AZH of the Act.
 - 29 DCITA, op.cit. p.2
 - 30 s.195AWA(4) & s.195AWB of the Act allow for an employee to voluntarily and without duress allow their employer to be known as the designer, and therefore the owner of moral rights for a project.
 - 31 AILA, op.cit. p.2–3
 - 32 s.195AN(3) of the Act
 - 33 The Australian Copyright Council is an independent not-for-profit organisation that provides information, advice and training about copyright in Australia. The ACC is assisted by the Commonwealth Government through the Australia Council, its arts funding and advisory body. Refer to its website at <http://www.copyright.org.au/>.
 - 34 Morrison, V. 2000, 'The New Moral Rights Legislation', *Copyright Reporter*, Vol. 18, No. 4, p.170 & 179 (endnote 3), & s.191(3) of the Act.



- 35 s.195AR(2) of the Act
- 36 s.189 of the Act includes in the definition of a 'moral right': (b) a right not to have authorship falsely attributed...
- 37 Authors' Rights Expert Group of the EFJ, op.cit.
- 38 s.10(1) of the Act
- 39 ibid
- 40 Consists of concrete, stone, brick, steel or other building construction materials
- 41 Consists of soil, plants, grass or other materials that grow, change and respond to climatic influences, and that require on-going maintenance
- 42 *Vincent v Universal Housing Co Ltd* [1928–1935] MacG Cop Cas 275, (decided under the *Copyright Act* 1911 (UK), in McDonald, op.cit. p.8
- 43 *Half-Court Tennis Court Pty Ltd v Jeffrey H Seymour* (1980) 53 FLR 240 (SC(QLD)), in McDonald, op.cit. p.9
- 44 McDonald, op.cit. p.8
- 45 ibid. p.10
- 46 s.195AK(a) of the Act
- 47 s.195AT of the Act
- 48 Rimmer, op.cit. p.14
- 49 s.195AS of the Act
- 50 AILA has 21 Environmental Policies available on line at <http://www.aila.org.au/information/documents/AILA%20Policies.pdf> and members of AILA are encouraged but not required to comply with them in the AILA Code of Conduct. See AILA, May 2000, *Code of Professional Conduct*, on line at http://www.aila.org.au/information/documents/code-of-conduct_000.pdf
- 51 s.195AZ of the Act
- 52 s.195AZA of the Act lists possible relief as an injunction, damages for loss resulting from the infringement, a declaration that a moral right has been infringed, an order for a public apology, and/or an order that false attribution or derogatory treatment be removed or reversed.
- 53 s.195AY of the Act
- 54 AILA, op.cit. p.5 (footnote)
- 55 s.33, 51, 80 & 195AM of the Act
- 56 s.195AN of the Act & DCITA, op.cit. p.2

