



AUSTRALIAN INSTITUTE OF LANDSCAPE ARCHITECTS

PRACTICE NOTE 5

MORAL RIGHTS

The Commonwealth Copyright Amendment (Moral Rights) Act 2000 protects the moral rights of the author(s) of a work. It is designed to protect the author's honour and reputation.

Purpose

Despite the considerable amount of available advice there is much confusion among landscape architects as to the meaning and relevance of moral rights.

This practice note is a brief summary of the potential application of the Act. It is based on August 2004 information from the Australian Copyright Council (via its website) and on a number of Practice Notes published by the Royal Australian Institute of Architects.

What are moral rights?

The right of attribution: To be identified as the designer whenever a project you have designed is constructed, or your work is reproduced. and

The right of integrity: To be informed if a project you have designed is to be altered or demolished.

The Act also protects designers against false attribution and derogatory treatment of their work.

False attribution

It is false attribution to identify a person as the designer of a project who did not design the project.

Derogatory treatment

It is derogatory treatment if a project is altered in a way that the designer considers will or could damage their honour or reputation.

Retaining moral rights in a project that is to be altered by another landscape architect

If the new work is to be attributed, that attribution must include attribution of the original designer for the original part of the site.

What can be done if derogatory treatment occurs?

The designer can require that their name no longer be associated with the project.

Who has moral rights?

Individuals hold moral rights; a partnership or corporation cannot.

In relation to landscape architectural projects, every person who can be identified as contributing to the **design** of a project has moral rights in the project. This would include employees, partners, directors, contract staff and each specialist consultant used on the project.

Can moral rights be transferred or sold?

No, however the holder of the moral rights can consent to specified infringements of their rights. For example, not being attributed as the designer or not being notified if the site is to be altered or demolished.

Who is obliged to honour moral rights?

Anyone who reproduces the work or falsely attributes the work to another person. In the case of renovations or demolition, the client/owner.

Are moral rights affected if the copyright is transferred or sold to the client?

No, the designers retain the moral rights.

What happens if a project is sold?

The obligations in relation to the moral rights transfer to the new owner.

What is the difference between copyright and moral rights?

Copyright relates to the commercial value of a design, whereas moral rights relate to the honour and reputation of the designer.

Projects being designed by our practice are being attributed to the practice. Can we continue to do this?

Yes, however you will need to have each person working in the practice sign a consent to infringement of their rights. You must also acquire a consent from each specialist consultant, which sets out the form in which they are to be attributed.

When should the consents be signed and where should they be kept?

Consents should form part of an employment contract or agreement or workplace agreement and be signed whenever a new employee starts work for the practice. Consents from existing employees could be an amendment to existing agreements.

Why do we need consents?

Without a consent from each holder of moral rights, you or the practice could be exposed to a claim of infringement of a person's moral rights.

What about other consultants?

You should also obtain consents from all other consultants who work on a project. You would obtain the consent from the consultant's practice and they should, in turn, obtain consents from each person working in their practice, such as employees, directors etc.

The consent from employees etc should:

- Permit the work undertaken by the person giving the consent to be attributed to the practice, without necessarily naming the person.
- Permit the practice to negotiate with clients on the form that attribution of the project will take, on a project by project basis, with a condition that, as a minimum, the work will be attributed to the practice.
- Not require the practice to notify the person if the practice is notified by an owner at some time in the future that a project is to be altered or demolished.
- That the practice may give any client or subsequent owner a copy of the consent.

The consent from specialist consultants should include terms that:

- Permit the work undertaken by a consultant to be attributed in an agreed form that may or may not include the consultant by name.
- Permit the landscape architect to negotiate with its clients on the form the attribution will take on a project by project basis, with a condition that, as a minimum, the work will be attributed to the practice.
- Do not require the landscape architect to notify it if the landscape architect is notified by an owner that the project is to be altered or demolished.
- The landscape architect may give any client or subsequent owner a copy of the consent.

What should you tell your clients?

You should advise your client that you have obtained consents in relation to the moral rights for their project from your employees, directors, etc, and that you will also obtain consents from the other consultants, when they are selected or appointed. You should stress that you have done this in order to protect the client. You are then in a position to negotiate how the moral rights will be managed for their project.

How should the moral rights be managed?

This will vary from one project to another. In the case of minor, insignificant or unimportant projects you may only require attribution if the client publicises the project.

Significant projects may warrant:

- A plaque or sign listing the project team.
- A requirement that this list is used whenever the project is publicised or published.
- That the practice is notified if the project is to be altered or demolished.

The following matters should be considered when negotiating with the client:

- Is a plaque or sign fixed to the project desirable, necessary or appropriate?
- Who should be identified on a plaque or sign? (including but not limited to the practice, the principal members of the design team, specialist consultants, individual specialist designers, others).
- Should the same list be used if the project is publicised or published or is it sufficient to simply identify the practice?

What components of the design should be covered by the agreement with the client?

All elements of the design. The owner does have the right to subject the work to derogatory treatment if it was reasonable in the circumstances to do so. As the limits of 'reasonableness' have not yet been established by the courts, it would seem prudent to identify, and consent to, future client actions considered reasonable by yourself. This is important for short life-span elements of a design. For example, you may be very concerned about the potential removal of major specimen trees but consent to the client thinning/replacing shrubs in a mass planted area if necessary. Every project will require a unique agreement.

Is it desirable that the practice is notified if the owner decides to alter or demolish the project?

Generally yes, but the decision should be made at the beginning of each project and form part of the client and landscape architect agreement.

If a client asks you to sign a waiver of your moral rights you should refuse.

Firstly, you can only consent to specified infringements of your moral rights – not waive them.

Secondly, the consent only applies to the person who signs it, therefore, if the director of a practice signs a waiver on behalf of the practice, they are only consenting to infringements of their own rights.

Finally, moral rights have been granted to designers. And therefore should apply to landscape architects as designers of works. It is unconscionable for any client to seek to eliminate these rights. Seek proper legal advice if you are asked to waiver your rights.

If the client asks you to sign an indemnity against all claims arising from moral rights you should refuse.

Firstly, the risks are probably indeterminable and would not therefore be covered by your professional indemnity insurance, thus the client is unlikely to be afforded any meaningful protection.

Secondly, if you have the consents outlined above in place and the client has entered into an appropriate agreement with the practice, they will be protected and their obligations will be clearly defined and generally limited to dealing only with the practice they have chosen for their project. Any claim by someone who holds moral rights who has signed a consent with the practice would almost certainly be dismissed as the client would be seen to have acted reasonably.

Check with legal counsel if you are asked to sign indemnity clause(s) you are unhappy about. Most indemnity insurers insist they be consulted whenever you are requested to provide any form of indemnity or waiver.

What should we do if we are notified that a project of our design is to be altered or demolished?

You have the choice of doing nothing or of requesting consultations to discuss the owner's proposals, which are required to be held in 'good faith' and to make a record of the project, before the alterations or demolition take place. However, you should promptly inform the person who has notified you of your decision. (You have three weeks to respond and a further three weeks to make a record, etc.)

What should we do if we are engaged to alter or demolish an existing designed site?

Inform the client of their obligations under the legislation.

What happens if a project of ours is published in a magazine, newspaper or similar publication and we are not attributed?

Write to the publisher demanding an apology or a reprint with appropriate attribution.

Where can I find more information?

The Australian Copyright Council displays (and regularly updates) information sheets on its website.

The Royal Australian Institute of Architects Practice Advisory Notes numbered AN10.02.101, AN10.02.102, AN10.02.104, AN10.02.105, AN10.02.106, AN10.02.107, AN10.02.108, AN10.02.109 and AN10.02.868.

Consult your legal advisor (and possibly your indemnity insurer) before entering into any agreements relating to your moral rights.

FOOTNOTES

Retrospective Cover:

At the time of publishing this guide, the AILA had no advice available on the subject of retrospective claims, in particular to the following queries:

- If a practice, prior to 2000, had identified a design's attribution by using the practice's title rather than individuals, has an individual any retrospective claim of moral rights?
- 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? Does the practice, if it still exists, have to agree?
- Following from such a claim, and given that the practice's contract with the client would have only 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.
- 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?
- 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 recognized?

Your legal advisor might answer some of these questions. But, it is more likely that definite answers will not be given until the concept of 'reasonable infringement' has been formally tested.

This practice note was prepared by Paul Costigan and Michael Ryan and is issued by AILA for general guidance only. As it is essentially a summary of published material, no responsibility for its accuracy or currency is accepted by the institute, its office bearers, members or staff or by the authors.