IS AUSTRALIA IN BREACH OF ITS INTERNATIONAL OBLIGATIONS WITH RESPECT TO THE PROTECTION OF MORAL RIGHTS?

BY SAM RICKETSON*

[*In this article, the author considers the content and extent of Australia's obligations to protect the moral rights of foreign authors under article* 6bis *of the* Berne Convention for the Protection of Literary and Artistic Works. *These are the rights for an author to claim authorship or attribution in relation to his or her work and to protect the integrity of that work from unauthorized changes, mutilations or dealings. After a review of the protection presently available for these rights under Australian law, the author concludes that Australia does not comply with its obligation under article* 6bis. *He then considers whether there are any justifications for non-compliance, and reaches the view that none exists. He concludes with an examination of the legal consequences of non-compliance and the mechanisms that exist to ensure this, both under the Convention and in international law generally.*]

I *INTRODUCTION*

In January 1988, an expert committee appointed by the Commonwealth Government recommended, by a bare majority, that Australia should not enact specific legislation for the protection of moral rights.[1] Underlying this recommendation was the view that, although Australia was required to protect such rights because of its membership of the *Berne Convention for the Protection of Literary and Artistic Works*, the protection that was presently available under its municipal law was sufficient for this purpose and that Australia was therefore not infringing international law in this regard.

The purpose of this article is to examine the correctness of this view and to analyse the international obligations that Australia has with respect to the recognition and protection of moral rights. There will then follow a brief discussion of the extent to which current Australian law fulfils these obligations. It will be argued that, in fact, Australian law falls short of what is required by the Convention and consideration will then be given to the mechanisms that exist to bring about compliance. It is not intended to discuss the theoretical and policy arguments for and against moral rights — this has been done well elsewhere.[2] Rather, the intention is to examine the international background against which any Australian debate about moral rights must take place.

* B.A. (Hons) (Melb.), LL.B. (Hons) (Melb.), LL.M. (Lond.), Reader in Law, University of Melbourne. This article is derived from a paper entitled 'International Conditions and Australian Obligations' which was presented at a seminar on 'Moral and Pecuniary Rights' held by the Institute for Cultural Policy Studies at Griffith University, 9 December 1989. A shorter version of that paper was published in the Journal of Entertainment Law (U.K.) in June 1990.

[1] Copyright Law Review Committee, *Report on Moral Rights*, Australian Government Publishing Service, Canberra (January 1988).

[2] See here, *e.g.* the excellent article by Professor Vaver: Vaver, D., 'Authors' Moral Rights and the Copyright Law Review Committee's Report: W(h)ither Such Rights Now?' (1988) 14 *Monash University Law Review* 284.

II *WHAT ARE MORAL RIGHTS?*

The expression 'moral rights' is taken directly from the French 'droit moral'. However, as there is nothing necessarily 'moral' as opposed to 'immoral' in these rights, the adjective 'moral' may lead to some initial confusion. The essential character of these rights is that they are personal to the author of a copyright work and protect his or her personal connection to, and interest in, that work. There are two principal rights which are generally recognised as forming the basic corpus of moral rights: the right to be identified as the author of a work (the right of attribution or 'paternity') and the right to prevent unauthorized changes to, or modifications or mutilations of the work. A third right is sometimes added to these rights: the right to control the disclosure or publication of a work to the public. As will be seen below, the ways in which these rights may be protected vary widely as does the extent of such protection. However, there is one basic distinction that should be borne in mind: moral rights are separate from the economic rights that subsist in a work and can be retained by the author even after these economic rights have been assigned or taken by another person.

III *SOURCES OF AUSTRALIA'S INTERNATIONAL OBLIGATIONS WITH RESPECT TO MORAL RIGHTS*

Australia is bound by two international conventions that deal with copyright. The first, the *Berne Convention for the Protection of Literary and Artistic Works*, has existed for over a century[3] and Australia has been bound by its provisions from its inception.[4] The second is the *Universal Copyright Convention 1952*, to which Australia acceded in 1969. This second convention provides for a lower level of obligations than the Berne Convention and says nothing directly about the protection of moral rights. Accordingly, the treatment that follows will deal only with the obligations contained in the Berne Convention.

IV *THE BERNE CONVENTION*

General background

It may be helpful to say something briefly about the Berne Convention in general, so as to set the scene for the more detailed discussion that follows of its provisions on moral rights. As stated above, the Convention is over a century old. In its original form, it represented a very basic agreement between a number of important literary and artistic nations (excluding the United States, Austria-Hungary and the Russian Empire) that was directed at obtaining protection for

[3] The Convention was signed by 9 nations (mostly European) in 1886 and came into force in 1887.

[4] First, as a collection of separate colonies to which the Convention was applied by the metropolitan power, Great Britain, and then in our right from 1928. See further, Ricketson, S., 'Australia and International Copyright Protection' in Ellinghaus, M. P., Bradbrook A. J. and Duggan, A. J. (eds), *The Emergence of Australian Law* (1989) 144.

the authors of each country in each of the other countries.[5] This was achieved through the simple but effective device of national treatment, under which each contracting state agreed to accord to authors and works from other contracting states the same level of protection that was accorded to native authors. The level of protection available in each country might differ, but the important thing was that authors and works claiming under the Convention would receive exactly the same protection available to the works and authors of the country where protection was claimed. This was a considerable achievement, as hitherto international copyright relations had only taken the form of bilateral agreements.[6] While these often dealt in considerable detail with the protection to be accorded to the works and authors of the signatory countries, their coverage was obviously limited to those countries only. Furthermore, the arrangements between particular countries varied greatly or were non-existent, with the result that the international protection of literary and artistic works was a piecemeal and uncertain affair.

The Berne Convention was the first real multilateral agreement dealing with copyright and was a significant achievement in international co-operation, mirroring other multilateral agreements that were being negotiated at the same time with respect to such diverse subject matter as weights and measures, posts and telegraphs, patents and trade marks, and the International Red Cross. Like these other agreements, it was seen as a starting point only: it was anticipated that the Convention would be improved and elaborated upon at successive revision conferences.

This, indeed, is what subsequently occurred. Over the next 100 years, the Convention was revised at a series of international meetings: in Paris in 1896, Berlin in 1908, Rome in 1928, Brussels in 1948, Stockholm in 1967 and Paris again in 1971.[7] Each of these revisions has added to the obligations imposed on signatory countries with respect to the substantive protection to be accorded to works and authors claiming protection under the Convention (in addition to the basic requirement of national treatment). By steady increments, the text of the Convention has come to contain a solid corpus of basic authors' rights that must be accorded to authors of works claiming protection under the Convention, irrespective of the treatment otherwise available to national authors. Thus, the Paris revision of 1896 extended the protection to be given to translation rights and adaptations. Following this, the Berlin Conference recognised mechanical and cinematographic reproduction rights, abolished the need for compliance with formalities as a precondition for protection, and introduced the term of 50 years *post mortem auctoris* as the general period of protection required for Convention works. In 1928, the Rome Conference protected broadcasting and performance rights, and further refinements to these and other rights were introduced at Brussels in 1948. Finally, the two Conferences of Stockholm and Paris, in 1967

[5] These countries were: France, Italy, Spain, Germany, Belgium, Switzerland, the United Kingdom, Haiti and Tunisia.

[6] For further details as to these agreements, see Ricketson, S., *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, (1987), chapter 1.

[7] For general background on these different conferences, see Ricketson, S., *ibid.* chapter 3.

and 1971 respectively, gave protection to the fundamental right of reproduction which hitherto had not been expressly mentioned in the Convention. As for moral rights, these were first included in the Convention in 1928.

The kinds of obligations contained in the Berne Convention

There are significant variations in the kinds of obligations imposed under the Berne Convention. Some are quite specific in their content, such as article 9(1) which requires the protection of the right of reproduction 'in any manner or form'. Another is article 7(1) which deals in unqualified language with the question of duration: this must be for the life of the author plus 50 years after his death. Some obligations, however, are less specific and give considerable discretion to countries as to how they are to be carried out. Subject to certain parameters or guidelines, the discharge of these obligations is often left to each signatory state as a matter for 'national legislation'. This is true, for example, in the case of the exclusive broadcasting right which is dealt with under article 11*bis* (1): under para. (2), it is left as a 'matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph shall be exercised', although this liberty is made subject to several limitations.[8] Finally, there are provisions of the Convention which are permissive only: contracting countries may provide for such matters at their discretion. A good example is article 2(2) which allows member countries to decide whether or not fixation in some material form is to be a precondition for protection of works claiming under the Convention. In some instances, these permissive provisions may be made subject to a condition of reciprocity if the country in question desires to do so.[9]

So far as moral rights are concerned, the Convention deals with these in a way that straddles the first and second kinds of conventional obligation described above. On the one hand, article 6*bis* prescribes the content and extent of the moral rights that are to be accorded by contracting states to works pursuant to the Convention.[10] On the other hand, and this is most important from Australia's point of view, it leaves countries considerable latitude as to how they protect these rights.

History of moral rights under the Berne Convention

Article 6*bis* has been in the Berne Convention for over 60 years, since the Rome Revision of 1928. However, the concept of moral rights had been firmly established in the laws and jurisprudence of a number of leading Berne Union members for some period of time prior to this. The first country to accord such

[8] Namely the requirements that neither the moral rights of the author nor the latter's right to equitable remuneration are not thereby prejudiced.

[9] This is the case with respect to the protection of works of applied art under 2(7) and the *droit de suite* under article 14*ter*.

[10] The conclusion that the recognition of the rights mentioned in article 6*bis* is mandatory is shared by Professor James Crawford in an opinion on moral rights that was prepared for the Australian Copyright Council in September 1988: reproduced in (1989) 7 *Copyright Reporter* 8 (referred to hereafter as the *Crawford Opinion*).

protection in a practical way was France, where, as early as 1814, it came to be recognized by the courts that an author retained some control over the use of his work, even after he had transferred all of his economic rights in that work to another party. By the late nineteenth century, as one eminent Swedish scholar notes, the 'legal institute which we know as "*droit moral*" had emerged. But it was an institute without a generally accepted name and without coherent principles'.[11]

By contrast, in Germany a more comprehensive conception of moral rights that drew on the ideas of the philosopher Kant had been developed by legal scholars, but there was little, if any, legislative or judicial support to be found for it. There was disagreement between writers as to the juridical basis for these rights — whether they were simply another aspect of the author's economic rights, something distinct, or part of a curious 'mixed right' — but there was general agreement on the need for such protection. This doctrinal consensus led to the grant of limited legislative protection under the German Laws of 1870 and 1876[12] and of 1901 and 1907.[13] Following these developments, French writers began to draw on German theory, and to formulate a juridical basis for their own moral rights protection. However, such protection in France was left essentially to the courts and did not take legislative form until much later.[14] It also seems that it was not until the early part of this century that the French courts began to talk specifically of a *droit moral* or moral right.

Nonetheless, the French and German developments had considerable influence in a number of other Berne Union countries, which began to adopt moral rights protection from the early 1920's on.[15] The extent of protection under these national laws varied, but the main rights recognized were those of integrity, paternity and disclosure.[16] These rights were generally treated as inalienable, remaining exercisable by authors after they had parted with their economic rights, but there were marked national differences as to their duration and exercise after death. Of the various legislative proposals adopted at this time, those in the Italian Law of 7 November 1925 were typical. Article 16 of this Law provided:

> Independently of the [patrimonial rights] recognized by virtue of the preceding articles, the author has, at all times, the right to bring an action to prevent the paternity of his work from being unrecognized, or the work being modified or mutilated in such a way as to cause serious and unjust prejudice to his moral rights.

[11] Strömholm, S., 'Droit Moral — The International and Comparative Scene from a Scandinavian Viewpoint' (1983) 14 *International Review of Industrial Property and Copyright* 1, 11. For a more detailed exegesis on the subject, see Stromholm's massive work entitled *Le droit moral de l'auteur en droit allemand, francais et scandinave* (1967-1973), in particular Part I.

[12] For details of these provisions, see Strömholm, S., *ibid.* 228 ff.

[13] Law of 10 June 1901, article 9, Law of 9 January, article 13.

[14] This was not done until Law No 57-298 on Literary and Artistic Property of 11 March 1957.

[15] *E.g.* Rumania (1923), Bulgaria (1922), Switzerland (1922), Poland (1926), Finland (1927), Italy (1925) and Czechoslovakia (1926).

[16] At the same time, the French courts, ever innovative in this area, began to explore the possibility of according authors additional rights, such as the right to withdraw their works from circulation (in the event of a change of opinion or attitude) and, more controversially, the right to prevent excessive criticism. See generally, Da Silva, R. J., 'Droit Moral and the Amoral Copyright' (1981) 28 *Bulletin of the Copyright Society of the USA* 1, 23-6, 32.

Other provisions of the same Law gave authors the right to determine when their works would be disclosed to the public or withdrawn from circulation.[17]

Throughout this period there was no direct protection for moral rights in those members of the Berne Union with common law systems, as the concept of moral rights was quite alien to the functional view of authors' rights that was taken in those countries. This is not to say that authors' moral interests were entirely without protection in these countries. For example, in the UK, as long ago as 1862 the Fine Arts Copyright Act of that year had placed restrictions on unauthorized changes and alterations to artistic works,[18] and the common law actions for defamation and passing off also provided some protection for the rights of integrity and paternity.[19] Nevertheless, these forms of protection were piecemeal in their operation and their protection of authors' moral rights was incidental and quite distinct from the protection accorded to authors under the general copyright laws of these countries. The real problem was that the conception of moral rights was completely foreign to common law systems where authors' rights had been viewed historically in purely economic terms and, indeed, as rights that essentially belonged to the publishers and promoters of works, rather than authors.[20]

Because it was not until the 1920's that a clear notion of moral rights protection emerged in the continental European member countries of the Berne Union, it was only at the Revision Conference of 1928 that proposals for the protection of such rights under the Convention were put on the 'Berne agenda'. By this time, however, there were clear models available in national laws and the matter had been the subject of study and discussion by various national and international bodies of experts.[21] Although the initial programme of the Italian Government for the Rome Conference did not contain any proposal relating to moral rights, resolutions and proposals to this effect were presented by the French and Polish delegates.[22] Following this, the Italian Government presented a more detailed proposal for the recognition of inalienable rights of paternity, integrity and disclosure and circulated a supporting memorandum which argued that the time was now ripe for the protection of such rights under the Convention.[23] This proposal formed the basis for lengthy and spirited discussions in the

[17] Italian Law of 7 November 1925, articles 14 and 15.

[18] Under section 7. See further, *Preston v. Raphael Tuck & Sons Limited* [1926] Ch. 667; *Carlton Illustrators and Another v. Coleman & Company Limited* [1911] 1 K.B. 771.

[19] For examples of successful defamation actions, see *Archbold, Esq. v. Sweet* (1832) 5 Car & P 219, 172 E.R. 947; *Lee v. Gibbings* (1892) 67 *LTR* 263; *Ridge v. The English Illustrated Magazine Ltd* [1911-1916] *MacGillivray's Copyright Cases* 91; *Moseley v. Stanley Paul & Co.* [1917-1923] *MacGillivray's Copyright Cases* 341; *Shostakovich v. Twentieth Century-Fox Film Corporation* (1948) 80 NYS 2*d* 575, affd 87 NYS 2d 430. For examples of passing off cases, see *Lord Byron v. Johnston* (1816) 2 Mer 29, 35 E.R. 851; *Hexagon Pty Ltd v. Australian Broadcasting Corporation* (1975) 7 ALR 233.

[20] See further, Holdsworth, W., *A History of English Law* (2nd ed. 1937, reprinted 1966), Vol. VI, 360-79; Kaplan, B., *An Unhurried View of Copyright* (1967), Chapter 1.

[21] For example, the International Literary and Artistic Association ('ALAI') had produced reports in favour of such protection at its congresses in Warsaw in 1926 and Lugano in 1927: [1926] *Droit d'auteur* 119 ff and [1927] *Droit d'auteur* 72-73.

[22] *Actes de la Conférence réunie à Rome du 7 mai au 2 juin 1928*, International Office, Berne (1929), 103 and 119.

[23] *Ibid.* 173.

general commission of the Conference, as well as in a special sub-committee.[24] From these debates, it became clear that there was a general consensus on the desirability of protecting moral rights. However, there was a problem with respect to the delegates from the common law countries (United Kingdom, Australia, New Zealand, the Irish Free State, Canada and South Africa) who clearly found the concept of moral rights both puzzling and unfamiliar.[25] At the same time, these countries did not wish to be obstructive and the fact that their laws already provided some limited protection for moral rights provided the basis for a compromise draft that subsequently became article 6*bis* of the text adopted at Rome:

> (1) Independently of the author's copyright, and even after the transfer of the said copyright, the author shall have the right to claim authorship of the work, as well as the right to object to any distortion, mutilation or other modification of the said work which would be prejudicial to his honour or reputation.
> (2) The determination of the conditions under which these rights shall be exercised is reserved for the national legislation of the countries of the Union. The means of redress for safeguarding these rights shall be regulated by the legislation of the country where protection claimed.

This was coupled with a non-binding resolution which proposed to member states the desirability of protecting these rights after the death of the author.

This new provision embodied a clear conventional recognition of moral rights. In doing so, however, it met the principal objections of the common law countries. In this regard, it is noteworthy that the Australian delegate, Sir Harrison Moore, the former Dean of the Melbourne Law School, played a crucial role in bringing about the compromise text in conjunction with the Italian and British delegates.[26] Thus, the words 'moral interests' which had been proposed in the original Italian proposal were replaced by the words 'honour or reputation' because the Australian and British delegates found the former expression too vague and incapable of conveying any clear meaning in British law. On the other hand, it was felt that 'honour' and 'reputation' bore a close resemblance to the kinds of personal interests protected by the common law actions of defamation and passing off. There was also no requirement that the rights of paternity and integrity be protected as a matter of copyright law: this represented a clear acknowledgement by the non-common law countries that it was sufficient for these rights to be protected under legal categories other than copyright. In fact, it appears that this acknowledgement went further and recognized that the protection presently offered at common law and equity by the common law countries of the Berne Union was adequate for the purposes of the new provision. As Moore said in his later Report to the Commonwealth Parliament:

[24] *Ibid.* 237-8.

[25] In the words of the Australian delegate, Harrison Moore: 'There was no subject in the Conference which brought out so clearly the differences between Continental, particularly the Latin, legal thought and that of the common law countries'; *International Copyright Conference, Rome, May and June 1928, Report of the Australian Delegate (Sir W. Harrison Moore)*, Commonwealth Parliament, No. 255, 31 August 1928, 6.

[26] Comment of the British Delegates in their Report to the Board of Trade, 5 September 1928: Public Records Office, FO371/13444, 16 ff.

> Indeed, one of the arguments addressed to us was that it was hard that we [the common law countries], whose laws, gathered under various heads and found in various branches of our systems were together deemed to provide a satisfactory protection for the interests in view, should stand in the way of the establishment of an international obligation to put laws in other countries on what was deemed as proper footing.[27]

The influence of the common law countries was further apparent in the omission from article 6*bis* of any obligation to protect moral rights after the death of the author. Accordingly, the provision required no specific change in the laws of the common law countries and the only one of these that passed legislative measures to protect moral rights in the period following the Rome Conference was Canada.[28] So far as Australia and the United Kingdom were concerned, it is clear from the reports of their respective conference delegates that there was relief that no action was required to give effect to this strange new obligation that was now embodied in the Convention. There was a corresponding sense of relief on the part of other Union members that the concessions made to the common law countries had allowed the principle of moral rights to be enshrined in the Convention. Nonetheless, it was only a beginning and further changes to article 6*bis* would be required if it were to embody the same level of protection as was found in some national laws.

Following the Rome Conference, however, consensus on the future development of moral rights protection under the Berne Convention was not readily obtained. A major point of difference concerned the changes and alterations that might be made to works after authors had parted with their economic rights. Should the latter be able to regulate all changes whatsoever that were made to their works or should the more objective test requiring prejudice to honour or reputation be retained? This was of particular importance to the burgeoning film industry and sharply conflicting views on this subject were to be found in the discussions of important international non-governmental organizations such as ALAI[29] during the 1930's. A second point of difference concerned the duration of these rights after the death of the author: were these tied to the economic rights, subsisting for the same period, or did they continue indefinitely? This debate reflected a more fundamental doctrinal debate as to the juridical nature of moral rights. On the one hand, it was argued by adherents of the 'monist' school that moral and economic rights were inextricably linked and interdependent. This

[27] Parliament of Australia, *International Copyright Conference, Rome, May and June 1928, Report of the Australian Delegate (Sir W. Harrison Moore)* No. 255, 31 August 1928, 6 ff. It should be noted that Professor Crawford takes a different view of the 'agreement' manifested by these comments of Moore. In Crawford's view, they do not establish that there was any agreement at Rome that common law protection was in truth sufficient to meet the requirements of the new article, but 'merely that a range of distinct protections of the interests involved could, if adequate, satisfy those requirements'. See *Crawford Opinion*, 8, 12. The present writer does not agree with Professor Crawford's assessment of the proceedings at Rome, as the proponents of moral rights were eager to obtain recognition of these rights at the cost of almost any concession to the common law countries.

[28] *Copyright Act* RSC 1970, C-30, s. 12(7). See further, Vaver, D., 'Authors' Moral Rights in Canada' (1983) 14 *IIC* 329.

[29] *L'association litteraire et artistique internationale* or the International Literary and Artistic Association. This had been founded in 1878 under the auspices of Victor Hugo and other leading literary luminaries of the time and had played (and continues to do so) a great role in the promotion of learned discussion of international copyright matters. See further, Ricketson, S., *op. cit.* Chapter 2.

led to the conclusion that the duration of both should be the same and was the view generally adopted in German and Austrian law.[30] On the other hand, the 'dualist' school (led by France) argued that both sets of rights were distinct and separate, with the consequence that, while economic rights might be limited in time, moral rights could be protected in perpetuity.[31]

Despite these juridical differences, there was still agreement among *droit moral* members of the Berne Union that article 6*bis* needed strengthening and a number of proposals intended to achieve this were put forward at the Brussels Revision Conference in 1948. These included a wider formulation of the right of integrity, *post mortem auctoris* protection for at least the duration of the economic rights, and a more far-reaching proposal to accord a 'right of respect' to works that had fallen into the public domain, in particular 'important works generally admired'.[32] Nonetheless, the debates in the Conference soon revealed that a number of delegations, in particular those from the common law countries, were opposed to these proposed changes. The initial British position was that it would only accept article 6*bis* in its present form, and that any changes should be embodied in a separate protocol which could be separately signed.[33] After considerable discussion, a special sub-committee was appointed to consider the question. This sub-committee adopted a cautious approach, deeming it necessary:

> . . . to deviate as little as possible from the text of the Convention in force . . . in giving satisfaction to the desire expressed by the French delegation and several others to permit national legislation to develop the protection accorded to the interests of authors in the domain of moral rights.[34]

Accordingly, the changes recommended by the sub-committee were considerably less radical than those proposed in the Conference programme. Protection of the right of integrity was extended to include 'any other action in relation to the work prejudicial to the honour or reputation of the author'. It was also made clear that moral rights were to be protected for at least the lifetime of the author, and protection after this time for the duration of the economic rights was made desirable but not mandatory. It is quite clear that these changes were made in order to accommodate the position of the common law countries and it was understood, at least implicitly, that those countries did not need to alter the level of protection they already accorded through non-copyright laws to moral rights.

Further attempts to strengthen the requirements of article 6*bis* were made at the Stockholm Revision Conference in 1967. In particular, it was proposed that the *post mortem auctoris* protection for moral rights should be made compulsory.[35] While there were differences between those delegates who favoured that this protection be perpetual and those who thought it should only last for the duration of the economic rights,[36] there was opposition to both proposals from

30 See further, Dietz, A., *Copyright Law in the European Community* (1978) 66-9.

31 *Ibid.*

32 *International Office of the Berne Union, Documents of the Brussels Conference, 5 to 26 June 1948* (1951) 185 ff. (programme for the Brussels Conference) (in French).

33 *Ibid.* 195.

34 *Ibid.* 126.

35 Intellectual Property Organisation, *Records for the Intellectual Property Conference at Stockholm, June 11 to July 14, 1967* (2 Vols) (1971) 104.

36 *E.g.*, Bulgaria and Greece were in favour of perpetual protection: *ibid.* 692, 700 and 710; *cf.* the Federal Republic of Germany and Demark which were against this: *ibid.* 894.

the common law countries, who argued that *post mortem* protection of any kind would require changes to their laws, such as defamation.[37] Another objection was that any requirement to protect moral rights after death would provide a further barrier to accession to the Convention by the United States, an event which was strongly desired by delegates.[38] The proposal for perpetual protection was finally voted down by 14 votes to 11 with 5 abstentions,[39] and attempts were made to devise a compromise formulation that would accommodate the position of the common law countries. In this regard, the British delegate, William Wallace, thought that the most his Government might do would be to extend the right to claim authorship for a *post mortem auctoris* period of 50 years.[40] After further negotiations, the formulation finally arrived at required the maintenance of moral rights for at least the term of the economic rights, but subject to the following qualification: those countries whose laws, at the time of their accession or ratification of the new Act, did not provide for *post mortem auctoris* protection of all the rights required to be protected by article 6*bis* (*viz*, the rights of paternity and integrity), might provide that some of these rights might cease to be maintained after the author's death. This provided a clear escape clause for the common law countries and was duly incorporated as article 6*bis*(2) of the text adopted at Stockholm (and confirmed by the later Paris Conference in 1971).

The present requirements with respect to moral rights under the Berne Convention

Australia is bound by the Paris text of the Berne Convention, article 6*bis* of which is the same as the text adopted at Stockholm in 1967. This provides as follows:

> (1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.
> (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorised by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.
> (3) The means of redress for safeguarding the rights granted by this article shall be governed by the legislation of the country where protection is claimed.

What is required under this article can be stated as follows.

1 *Independence of moral rights:* It is clear that the moral rights enumerated in para. (1) are independent of the author's economic rights. That is, their exercise cannot be tied to, or made dependent upon, the ownership or exercise of economic rights. This notion of independence is, of course, basic to the whole conception of moral rights. The corollary to this is that moral

37 *Ibid.* 893-4 (comments of the British and Irish delegates).
38 *Ibid.* 893 (comments of the British delegate and the US observer).
39 *Ibid.* 506. Indeed, even a veto by one member state such as the United Kingdom or Australia would have sufficed, as there is a rule of unanimity for changes to the Convention under article 27(3).
40 *Ibid.* 919.

rights may be exercised even after the author has parted with his economic rights by way of licence or assignment. However, para. (1) does not go so far as requiring that moral rights protected under the Convention should themselves be inalienable, that is, incapable of assignment by the author. This is indeed the position in a number of countries with strong moral rights protection, such as France.[41] However, under the Convention there is nothing to prevent national laws from allowing authors to assign their moral rights either temporarily or permanently, in the same way as they may assign their economic rights.[42]

2 *The rights required to be protected:* Only two moral rights require protection: those of paternity and integrity. Proposals to protect rights of disclosure were made and rejected at the time of the Rome Conference in 1928[43] and, in any event, are largely covered by the rights of first publication and distribution which are recognized as part of authors' economic rights in many countries.[44] As for the rights of paternity and integrity, the following comments can be made:

(a) The right to claim authorship (paternity): In essence, this means that an author has the right to have his or her authorship of works recognised in a clear and unambiguous fashion. Para. (1) does not specify how this recognition is to be achieved, but, in the case of copies of works, common sense suggests that the easiest way is for each copy to carry the author's name in an obvious place, such as the title page or head of a work in the case of a written work or at the bottom or on the back, in the case of an artistic work. In the case of works that are performed, broadcast or otherwise disseminated in a non-material form, the attribution would need to be spoken or recorded in some fashion. These requirements seem quite unambiguous in terms of the language used in para. (1), and there is no reference to any qualification of 'reasonableness' or practicability with respect to the circumstances in which attribution must be given.

Further analysis suggests that there are three main factual situations where the right of attribution provided for under para. (1) will be relevant:

(1) Where a licensee, assignee or other party does not make any reference at all to the author on copies of the author's work or with respect to any performance, broadcast, *etc.*, thereof.

(2) Where the name of another person is attached to copies or associated with a performance, broadcast, *etc.*, so as to imply that person is the author of the work.

(3) Where the name of the true author appears on copies or in credits for a performance, broadcast, *etc.*, but is too small or too fleeting to be noticed.

41 French Law of 1957, article 6.

42 It should be noted, however, that in the report of the *rapporteur* of the Rome Conference, P. Casselli, it is clearly stated that it was understood that the rights under article 6*bis* should not be transferable or capable of relinquishment. See the report of Casselli in World Intellectual Property Organization, *1886 Berne Convention Centenary* (1986) 171.

43 See generally, Ricketson, S., *op. cit.* 460-1.

44 *E.g.* in Australia, first publication rights are protected under sub-paras. 31(1)(a)(ii) and (b)(ii) of the Copyright Act 1968.

It seems a reasonable conclusion that para (1) requires positive attribution to be given in each of these instances. However, it is not clear whether this extends to the negative right of preventing others from wrongly attributing to an author works that are not his or hers. In common law jurisdictions, protection against this kind of activity may be secured through the action of passing off,[45] and in other jurisdictions under the more general rubric of unfair competition. However, as the right in para (1) is described in positive terms as 'the right to claim authorship', it is unclear whether this implicitly includes the right to deny a false attribution of authorship in relation to a work that is not that of the author (the typical passing off situation). It is to be noted that both these positive and negative aspects were considered to fall within the scope of the right of attribution by the Copyright Law Review Committee in its 1988 *Report on Moral Rights*.[46] However, it is not clear that this broader meaning has ever been adopted in the context of the Berne Convention. Certainly, there is nothing to this effect to be found in any of the *rapporteurs'* reports for the Rome, Brussels or Stockholm Conferences which lends support to this interpretation.[47]

(b) The right to protect the integrity of the work: This is covered by the 'right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his [the author's] honour or reputation.' The scope of this obligation is wide, covering, on the one hand, changes to the actual work ('distortion, mutilation or other modification') and, on the other hand, the ways in which the work is presented to the world ('other derogatory action'). Thus, it would embrace inappropriate adaptations or 'rewrites' of a work as well as such actions as publishing a book in an offensive cover, producing a serious play in a manner which derides the author or his views, and the reproduction of an artistic work in juxtaposition with pornographic material.[48] A question which arises is whether the 'action' in question has to be carried out as part of the actions that fall within the author's economic rights, that is, should the derogatory conduct occur in the course of a reproduction, performance, *etc.* of the work in question? Or does the term 'action' extend to any derogatory action in relation to the author's work? This may be of particular importance to visual artists. Few countries grant artists a right of exhibition of their works and there is no requirement in this regard under the Berne Convention. However, artists often

45 Subject to the plaintiff establishing (i) his reputation and (ii) damage or likely damage to that reputation as a result of the defendant's deceptive conduct: see generally, Ricketson, S., *The Law of Intellectual Property* (1984) chapter 24-8.

46 Copyright Law Review Committee, *Report on Moral Rights*, January 1988, 6-8 (majority views), 43-4 (minority views).

47 It may well be permissible to have regard to such reports as extrinisc aids to interpretation under the customary rules of international law relating to treaty interpretation, as embodied in the *Vienna Convention on the Law of Treaties*, 1969, article 32.

48 In the programme for the Brussels Conference, the following examples were given: '. . . a literary work . . . published in conjunction with numerous advertisements; an artistic work reproduced in conjunction with articles not enjoying a good reputation; a musical composition, profoundly serious and religious in tone, adopted as part of a filmed operetta': *Documents of the Brussels Conference*, *op. cit.* 185.

are concerned about the way in which their works are displayed in public, as was evidenced by the public controversy some years ago in Melbourne over the removal of a sculpture by Ron Robertson-Swan from the City Square to a less central location. As the rights referred to in article 6*bis*(1) are expressed to be 'independent of the author's economic rights', it is submitted that this kind of derogatory action would come within the right of integrity recognized in para. (1).

On the other hand, it seems that the destruction of a work does not fall within the scope of the actions covered by para. (1). This is a matter of inference from the proceedings of the Brussels Conference where an express proposal was made to include destruction in the list of acts prejudicial to an author's honour or reputation.[49] This was not adopted, as some delegates were of the view that this did not relate to authors' moral interests.[50] It was further referred to in a *voeu* adopted at the end of the Conference, in which delegates acknowledged that article 6*bis*(1) did not expressly cover the destruction of works, but urged member countries to take measures to prohibit this kind of conduct.[51] In consequence, it can be said that there is no explicit requirement for member countries under para. (1) to cover destruction in their moral rights protection, but they are free, and even encouraged, so to do.

A final matter concerns the standard by which distortions, mutilations, modifications and other derogatory actions are to be judged. The requirement under para. (1) is only to prohibit those which are 'prejudicial to the honour and reputation of the author'; it does not extend to the prohibition of any alteration or other derogatory action whatsoever. This is a matter of fundamental importance, and one that marked the differences between the common law and civil law countries at the Rome, Brussels and Stockholm Conferences. The words 'honour' and 'reputation' embody relatively objective concepts that are akin to the kind of personal interests that are protected in common law jurisdictions by the action of defamation. However, attempts at successive revision conferences to introduce such terms as 'prejudicial to the author's moral or spiritual interests' were strongly resisted by the common law countries (and some others) as embodying too subjective a criterion that would leave the author almost complete latitude to decide whether or not his or her right of integrity had been breached.[52] On the other hand, it seems clear that the reference to 'honour and reputation' in para. (1) means the general honour and reputation of the author as a man or a woman, and does not bear the more limited meaning of the 'honour and reputation of the author in his or her capacity as an author.'[53] A further point that has excited debate among the commentators is whether the prejudice that must be caused relates to all of the

49 *Ibid.* 188 (proposed by the Hungarian delegation).
50 *Ibid.* 197.
51 *Ibid.* 427.
52 See generally, Ricketson, S., *The Berne Convention, op. cit.* 461-6.
53 This point was raised by several delegates at the Brussels Conference and an interpretation to this effect was included in the report of the *rapporteur general*, Marcel Plaisant: *Documents of the Brussels Conference, op. cit.* 97-8.

actions listed in para. (1), namely 'any distortion, mutilation or other modification, or other derogatory action', or whether it simply applies to the last-mentioned only, that is, to 'other derogatory action'.[54] The better view seems to be that the first of these interpretations is correct and that the requirement of prejudice applies to all the acts listed in para. (1).[55] As article 6*bis* embodies only a minimum statement of the protection required under the Convention for moral rights, it is, of course, open to any member nation to modify or even delete the requirement of prejudice altogether. On the other hand, there will be no violation of para. (1) if a Union country requires prejudice to be shown before any violation of the right of integrity accorded under that paragraph is established.

3 *Duration of protection:* The basic principle established under para. (2) of article 6*bis* is that the period of protection should be at least for the duration of the author's economic rights. Accordingly, the Convention adopts a neutral stance on the juridical nature of moral rights, that is, the monist and dualist theories referred to above. It also gives member countries flexibility in the way in which they protect these rights after the death of the author: national laws may stipulate the persons or institutions who are to exercise these rights in that country. This may well be the heirs of the author, but it would be equally open to a member country to entrust the exercise of these rights *post mortem auctoris* to a government or public agency charged with the promotion of national culture or to some other analogous body. The latter course of action would be particularly appropriate where moral rights were protected after the expiry of the economic rights as any heirs of the author would by then be far removed from him or her.

As noted above, para. (2) contains a carefully constructed escape clause for common law Berne members. Thus, a country whose laws, at the time of its accession to, or ratification of, the Paris Act of the Convention, do not provide *post mortem auctoris* protection for 'all the rights set out in the preceding paragraph [para. (1)] may provide that some of these rights may, after his death, cease to be maintained.' The references to 'all' and 'some' in this paragraph really need to be read as 'both' and 'one', as para. (1) only requires the protection of two specific moral rights, namely those of paternity and integrity. Nonetheless, para. (2) was a significant advance on the position under the Rome and Brussels Acts, as it still required common law countries such as Australia to provide protection after the author's death for at least one of the rights referred to in para. (1). For such countries, this clearly required some changes to their national laws.

4 *Mode of protection of moral rights:* Although article 6*bis* contains no specific reference to this, it has been accepted from the start that Union countries are not obliged to protect moral rights as part of their copyright laws. This was the historic compromise which enabled the inclusion of moral rights in the first

[54] An advocate of the second interpretation was Van Isacker, F., 'Letter from Belgium' [1967] *Droit d'auteur* 135.

[55] For a review of the arguments, see Ricketson, S., *The Berne Convention*, *op. cit.* 473.

place at Rome in 1928, and was confirmed at the time of the Stockholm Conference in the general report of Main Committee I.[56] Countries are therefore free to adopt other means of protection for the rights specified in para. (1). Para. (3) further makes it clear that the 'means of redress for the safeguarding of these rights' is a matter for the laws of the country where protection is claimed. This is the same as for the economic rights protected by the Convention,[57] and means that the remedies available in each Berne country may vary considerably.

Summary

The specific requirements with respect to moral rights under article 6*bis* of the Berne Convention can be summarised as follows:

(1) The exercise of these rights is independent of the author's economic rights, in the sense that it is necessary that these rights can be exercised by authors after they have parted with their economic rights.
(2) The rights to be protected are:
    (i) the right to claim authorship; this appears to be limited to the positive right to claim attribution, but not the negative right to prevent one's name being associated with a work of which one is not the author.
    (ii) the right to prevent distortions, mutilations and other modifications of, and other derogatory actions, in relation to one's work. This is widely drawn, but is subject to the condition that the act complained of causes prejudice to the author's honour or reputation.
(3) The above rights should be protected for the life of the author; following this, the protection of at least one should be continued until the expiry of the author's economic rights.
(4) This protection may be achieved by whatever legal means a member country wishes to adopt.

It will be seen from this summary that the Convention contains no obligations with respect to other moral rights, such as those of disclosure or withdrawal, nor does it place any limitations on the possible alienation, transfer or waiver of moral rights. On the other hand, the exercise of the rights that are protected is not made subject to any limitation of reasonableness or practicability, although a requirement of prejudice is specified in the case of the right of integrity.

V *DOES AUSTRALIA GIVE EFFECT TO ITS BERNE OBLIGATIONS WITH RESPECT TO MORAL RIGHTS?*

Preliminary observations

The preceding section has sought to outline the specific requirements with respect to the protection of moral rights that are contained in article 6*bis* of the Paris Act of the Berne Convention, the latest text by which Australia is bound.

[56] *Records of the Intellectual Property Conference at Stockholm*, *op. cit.* 726.
[57] See article 5(2).

The next question is, does Australia give effect to the obligations contained in this provision? The view of the majority of the Copyright Law Review Committee (5 members) was that the present level of protection under Australian law was sufficient to satisfy the requirements of article 6*bis*. By contrast, the minority of that Committee (4 members, including the Chairman) was strongly of the view that this was not the case and that specific legislation was required in order to fill the gap. Without entering into the general philosophical and policy arguments for and against moral rights,[58] the opinion of the present author is that the minority view is correct and that Australian law does not at present meet the requirements of article 6*bis*. Before examining the correctness of this view in more detail, a number of preliminary observations are in order.

(1) It is important to reiterate the obligatory nature of Australia's obligation to protect the two moral rights mentioned in article 6*bis*(1). As a matter of treaty interpretation, there can be little doubt about this. The first task in treaty interpretation is to do so 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and its purpose'.[59] In this regard, the language of article 6*bis*(1) is clear and unambiguous: the rights mentioned in that paragraph must be protected by each member country of the Berne Union.[60] Furthermore, although article 6*bis*(3) states that the means of safeguarding these rights are 'governed by the legislation of the country where protection is claimed', this does not affect the binding nature of the obligation to protect moral rights under para (1) as it only deals with the remedies to be granted for any violation.[61] Additional confirmation of the binding character of the obligations in article 6*bis*(1) is to be found in article 11*bis*(2) which provides that the conditions of exercise of the exclusive broadcasting right conferred under para (1) is to be without prejudice 'in any circumstances' to the moral rights of the author. Although there is no express reference here to article 6*bis*, it is logical to infer that these are the moral rights mentioned in that article, which clearly points to the obligatory character of those rights.[62]

(2) The obligations under article 6*bis* only exist with respect to foreign authors and works claiming protection in Australia pursuant to the provisions of the Convention. There is nothing in the article which concerns the protection to be given to Australian authors and works. On the other hand, as a matter of practical politics, it is difficult to conceive of a situation where the Australian Parliament would wish to treat foreign authors more favourably than Australian authors. For the purposes of our present discussion, however, the only

58 See Vaver, D., *op. cit.*

59 *Vienna Convention on the Law of Treaties* (1967) article 31(1). Australia is a party to this Convention, although strictly it does not apply to the Paris text of the Berne Convention which was concluded before the Vienna Convention came into force. Nevertheless, the correct view is that article 31(1) simply embodies a general rule of customary international law with respect to the interpretation of treaties. See generally, Sinclair, I., *The Vienna Convention on Treaties*, (2nd ed. 1984) Chapter 5; *Crawford Opinion*, 10.

60 To the same effect, see *Crawford Opinion*, 10-1.

61 See Ricketson, S., *op. cit.* 475; *Crawford Opinion*, 11.

62 *Crawford Opinion*, 11.

question is, does Australia provide the protection required for moral rights under the Convention in respect of foreign authors? If the answer to this is 'no', then quite irrespective of the condition of native authors, Australia will be in breach of its conventional obligations.

(3) Australia is not a country where treaty obligations are directly implemented into municipal law, so that they can be directly invoked in our courts by foreign claimants. Specific legislative measures must be taken in order to give effect to treaty obligations; alternatively, it must be possible to point to existing laws that secure the performance of such obligations.[63] In the case of copyright, this is usually an easy process, as all that needs to be done is to compare the specific provision of the Australian Copyright Act with the relevant provision of the Convention. In the case of moral rights, however, this task is rather more difficult as the applicable provisions of municipal law may be found under a number of different headings, including both statute and common law, and Commonwealth and State law. Nonetheless, even in this case, it should be possible to reach a view as to whether the level of protection presently available under Australian law is sufficient to comply with the requirements of article 6*bis*.

(4) In the event that Australia fails to accord the protection required under article 6*bis*, it stands in breach of its obligation under article 36(1) of the Convention 'to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention.' This then raises the question of what, if anything, can be done to ensure compliance with the Convention by an errant member state.

The question of compliance

Protection under current Australian law for the rights of authorship and integrity is to be found across a wide range of statutory, common law and equitable provisions. These matters have been dealt with elsewhere by other authors in more detail;[64] what follows here is a brief outline only.

(1) *The right to claim authorship:* Under statute, this is dealt with partially by the false attribution of authorship provisions of Part IX of the Copyright Act 1968. These impose a number of duties on persons not to make false claims of authorship of works or of altered versions of works: that is, A should not claim falsely that C is the author of B's work, nor should A falsely claim that B is the author of an altered version of his (B's) work that has not been made with his (B's) permission.[65] These provisions provide the obverse protection to that provided by the common law action of passing off which is directed at

[63] See generally, O'Connell, D. P. and Crawford, J., 'The Evolution of Australia's International Legal Personality'; Sawer, G., 'Australia's Constitutional Law in Relation to International Relations and International Law' in Ryan, K., *International Law in Australia* (2nd ed. 1984).

[64] See, for example, Australia Council, *National Symposium on Moral Rights* (1979); Copyright Law Review Committee, *Report on Moral Rights*, (1988) 6-9; Ricketson, S., *The Law of Intellectual Property* (1984) 425-32.

[65] A further duty exists under section 192 not to attribute falsely authorship in the case of reproductions of artistic works that have not been made by the artist.

false claims by A that B is the author of his (A's) work. Section 52 of the Trade Practices Act 1974 also provides an analogous form of protection to passing off, while the action of defamation may provide some relief against a false attribution of authorship that is damaging to an author's reputation. However, all of these forms of protection embody essentially negative rights and none requires positive attribution of authorship.[66] In so far as they are negative in character, it is not clear that they are according protection to the right of authorship that is specifically required by article 6*bis*(1) (see above). In so far as they accord no positive right to claim attribution, they do not give effect to the obligation imposed under that paragraph. It should also be noted that of these forms of protection, only statutory actions arising with respect to false attribution of authorship of works survive the author and may be exercised by his or her estate.[67]

Positive attribution, however, is required under several other provisions of the Copyright Act. These relate essentially to unremunerated uses of works that are permitted in specific circumstances, such as for the purpose of criticism or review[68] or for news reporting.[69] These provisions, nevertheless, only cover a limited range of situations where an author might require attribution of his or her authorship.

Finally, it must be noted that authors have the power to require positive attribution in any contractual arrangements they make for the exploitation of their works, whether by way of assignment or licence. In the case of licences, their position will be potentially stronger. However, where assignment takes place, the author's rights will only extend to actions by the original assignee and not by subsequent assignees.

(2) *The right of integrity:* This is protected only in small measure under the Copyright Act, in two provisions that have limited application and have never been the subject of judicial consideration. The first is subsection 35(5), which gives the authors of certain commissioned artistic works a veto over uses for a purpose other than that originally contemplated at the time of the commissioning of the work. The second is subsection 55(2) which provides that the compulsory licence under that section in respect of the recording of musical works does not apply in relation to an adaptation of a musical work that debases the work. Apart from these provisions, the protection of the right of integrity in Australia is left to contractual arrangements where possible or the common law action of defamation. There are, indeed, cases where authors have succeeded in defamation proceedings where their works have been presented with minor errors that have had the effect of changing the entire meaning of an academic treatise,[70] or where works have been

66 Although the possibility of an order for corrective advertising may have some potential in the context of a trade practices claim: Trade Practices Act 1974 (Cth) section 80A.

67 Copyright Act 1968 (Cth) sub-s. 190(3).

68 Copyright Act 1968 (Cth) s. 41. 'Sufficient acknowledgement' is required, meaning identification of the title of the work and the name of the author: see further sub-s. 10(1).

69 Sub-s. 42(1).

70 *E.g. Archbold v. Sweet* (1832) 172 E.R. 947 and *Lee v. Gibbings* (1892) 67 L.T.R. 263.

presented in such a way as to indicate that the author possessed a particular point of view which was untrue.[71] Such actions will only be successful if the author can establish a reputation that has been lowered as a result of the defendant's alterations or conduct and if there is no defence available in respect of such conduct. Nonetheless, it should be borne in mind that the obligation to protect the integrity of works under article 6*bis*(1) is subject to the proviso that the conduct impeached is prejudicial to the honour or reputation of the author. It will be recalled, in this regard, that successive Revision Conferences saw this requirement of prejudice as being analogous to what had to be shown in a common law defamation action. Accordingly, it is hard to say that the availability of this action does not meet the requirements of article 6*bis*(1). On the other hand, rights of defamation do not survive the person defamed and, *prima facie*, there is a breach of the obligation to provide for *post mortem auctoris* protection of this right under para (2).

In the light of the above, it may be concluded that Australian law probably provides sufficient protection for the right of integrity referred to in article 6*bis*(1), but only very partial protection for the right to claim authorship. In so far as these protections only survive the author in very limited circumstances, there is a clear breach of para (2). These matters point then to the need for specific legislative action in order to achieve compliance with article 6*bis*.

Reasons or justifications for non-compliance

Are there any defences or justifications for non-compliance that can be advanced? As a matter of international law, there are several, although on closer analysis these are unsustainable.

(1) *Subsequent practice of treaty parties:* It could be argued that the subsequent practice of Berne Union countries establishes that there is agreement between them that the protection presently accorded under Australian law complies with the requirements of article 6*bis*. Under the rules of treaty interpretation, it is possible to take account of any subsequent practice 'in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.[72] In this instance, the argument would be that the practice of Berne Union countries clearly establishes that the present forms of protection available for moral rights in common law countries such as Australia suffices for the purposes of article 6*bis*. However, to establish such a practice, it is necessary to point to some positive agreement or understanding between the parties to the treaty in question: it is not possible to infer such an agreement from the mere absence of complaint.[73] In the case of article 6*bis*, it is impossible to establish such a positive agreement. In the

[71] *E.g. Mosley v. Stanley Paul & Co.* [1917-1923] *MacGillivray's Copyright Cases* 341 (publication of a serious work with a lurid cover).
[72] *Vienna Convention on the Law of Treaties*, article 31(3)(a).
[73] *Crawford Opinion*, 12.

first place, even if such an agreement could be inferred following the Rome Conference, it would now be negatived by the subsequent amendments to article 6*bis* which occurred at Brussels and Stockholm: these have strengthened, rather than modified, the rights originally recognised at Rome. Furthermore, there is no consensus on this issue to be found, even among the common law members of the Berne Union. Thus, Canada enacted specific moral rights protection as early as 1931. Furthermore, the United Kingdom, after many years of maintaining that its laws satisfied the requirements of article 6*bis*, has now changed its mind and adopted specific moral rights legislation in its new copyright legislation.[74] On the other hand, when the United States finally acceded to the Convention in 1988, it did so without enacting specific moral rights legislation and relied explicitly upon the sufficiency of its existing common law and statutory protections.[75] None of these examples proves anything in relation to proof of a subsequent practice between Berne members: it still remains therefore for Australia to establish that its existing laws do, in fact, give effect to the requirements specified under article 6*bis*.

(2) A further, but related, argument is to be found in the report of the majority of the Copyright Law Review Committee which inferred an acceptance by other Berne Union States of Australia's current position on the basis that it 'was not aware of any criticism at the international level [of this].' In this regard, Professor Crawford states:

> . . . the continuation of a treaty obligation is not dependent upon complaint by other States at any actual or possible violation, at least unless that violation specifically affects the interests of that State. A state party to a treaty is not required to protest 'in the abstract' at the failure of another State fully to implement the treaty: except in very special circumstances, issues of acquiescence would only arise in relation to specific violations involving that State or its citizens.[76]

Professor Crawford goes on to state that, given that Australia is not a world literary or artistic centre, few, if any, actual cases involving the non-recognition of foreign authors' moral rights have ever occurred,[77] so the occasion for protest from another State has not arisen. In any event, had there been occasion for such a protest, the supposed acquiescence by the State in question would hardly bind any other State which wished subsequently to complain of the matter.[78] As with the issue of proof of subsequent State practice, very little, if anything, can therefore be inferred from the apparent acceptance of Australia's current level of protection for moral rights by other Berne Union members.

What follows from non-compliance

If it is accepted that Australia stands in breach of its international obligations under article 6*bis* of the Berne Convention, what flows from this in legal terms?

[74] Copyright, Designs and Patents Act 1988 (Cth), Chapter IV. See further, Cornish, W. R., 'Moral Rights Under the 1988 Act' [1989] *European Intellectual Property Review* 449.

[75] Ginsburg, J. C. and Kernochan, J. M., 'One Hundred and Two Years Later: The U.S. Joins the Berne Convention' (1989) 13 *Columbia-VLA Journal of Law and the Arts* 1.

[76] *Crawford Opinion*, 13.

[77] *Ibid.*

[78] *Ibid.*

The Convention contains no specific provision dealing with its enforcement and has no sanctions against non-compliance. The only provision that might be useful here is article 33 which provides for the reference of disputes concerning the interpretation of the Convention to the International Court of Justice. However, this applies only to contracting states that have accepted the jurisdiction of the Court[79] and does not provide a means for private parties who are aggrieved to bring actions. Furthermore, article 33 does not contain any procedure for enforcement of the Court's decision against a country which is in breach: the Court's function is simply to provide an interpretation of the provision in question and it is assumed that the states concerned will henceforth apply that interpretation in their dealings with each other.

It is possible that, at the time a state accedes to the Convention for the first time, other members could refuse to accept its membership of the Berne Union in the event that it did not provide adequate protection for moral rights and was therefore unable to comply with its obligation under article 36(2) to be in a position to give effect to the provisions of the Convention under its domestic law. This has happened once in the history of the Berne Union,[80] but it seems highly unlikely that member states would take this step in the case of moral rights. It is possible that this objection might have been raised in the case of the recent accession by the United States to the Convention. However, it is clear that no existing Berne member wished to put the obvious advantages of Berne accession by that country at risk by an objection that protection of moral rights under US law was inadequate.[81]

Outside the Convention itself, the only means of coercing an offending Union member into compliance are to be found in the rules of customary international law or through diplomatic or trade pressures. As to the first of these, it seems that customary international law recognizes a form of fundamental breach of treaty obligations that entitles other states to suspend or terminate their conventional relations with the recalcitrant state.[82] It is unlikely that any state would take this step in the case of moral rights and certainly to date no state has done so in any other instance. Diplomatic and trade pressures perhaps provide the best means of achieving compliance, and here the willingness of a state to exercise such pressure will no doubt be influenced by the pressure which it in turn receives from its own authors, publishers and producers who are concerned at the disregard of moral rights in the other country. It is nevertheless inconceivable that a country would take such action unless there were strong economic and trade advantages in favour of doing so. In this regard, it is noteworthy that in the

[79] As at January 1990, 16 States had not accepted the jurisdiction of the Court: [1990] *Copyright* 6-8.

[80] In the case of Turkey in 1931 which refused adequate protection in the case of translation rights: see Ricketson, S., *The Berne Convention, op. cit.* 758-9.

[81] This is a matter which was the cause of considerable debate within the United States itself. See further, Ginsburg, J. C. and Kernochan, J. M., *op. cit.* 449.

[82] *Vienna Convention on the Law of Treaties*, article 60(2) and (3). See further, Ricketson, S., *op. cit.* 832-4.

current GATT negotiations concerning 'trade-related intellectual property rights', the recognition of standards for the recognition and protection of moral rights have not been included.[83]

VI *CONCLUDING COMMENTS*

The purpose of this article has been to examine whether Australia fails to comply with its international obligations with respect to the protection of the moral rights of authors under the Berne Convention. In reaching the contrary view that our existing law was sufficient in this regard, the majority of the Copyright Law Review Committee entered the following caveat:

> The only basis on which the majority could be persuaded that legislation for the protection of moral rights should be enacted would be that Australia's continuing membership of the Berne Convention so requires. . . . Although opinions vary, the preferable view appears to be that our Berne membership does not require any additional protection in the area of moral rights.[84]

It has been established above that, in a number of important respects, present Australian law does not satisfy the stipulations contained in article 6*bis*. The basis for the majority's view does not therefore exist, and the case for legislative change to correct this situation is compelling. While it is extremely doubtful that other Berne Union members will take us to task for our failings in this area, it is hardly a desirable state of affairs for a country such as Australia to be seen to be in clear breach of a treaty obligation. Although the merits of moral rights protection may be a subject of controversy, the overall advantages of Berne Union membership are overwhelming — a fact obviously accepted by the majority of the Copyright Law Review Committee in the passage quoted above. It brings us into copyright relations with some 84 other states,[85] ensuring automatic protection for Australian authors in each of those countries. The benefits that run the other way are just as considerable and provide the basis for a world-wide trade in cultural and scientific products for which Australia provides a ready and eager market. As in any transaction, the strictness and good faith with which parties observe their obligations is a matter of some importance. In almost all other areas of international copyright, Australia has been scrupulous in ensuring that it complies with its obligations under the Berne and Universal Copyright Conventions. Our failings, then, in the area of moral rights bring us into a disrepute that is otherwise not merited. Any move by Australia, therefore, to correct this position must be seen as a general demonstration of good faith in our international copyright dealings as a whole. It will give us added credibility in the current international moves for the suppression of piracy, and will correct a flaw in our otherwise sound reputation as a nation which values and protects the products of literary and artistic creation.

[83] See, for example, the recent 'Checklist of Issues' prepared by the GATT Secretariat for the Negotiating Group on Trade-Related Rights of Intellectual Property Rights, including Trade in Counterfeited Goods, dated 26 January 1990.

[84] Copyright Law Review Committee, *Report on Moral Rights* (1988) 11.

[85] As at 1 January 1990: see [1990] *Copyright* 6.