

PROTECTION OF MORAL RIGHT IN COPY RIGHT LAW: COMPARISON BETWEEN INDONESIA AND AUSTRALIA

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PROTECTION OF MORAL RIGHT IN COPY RIGHT LAW: COMPARISON BETWEEN INDONESIA AND AUSTRALIA

ABSTRACT

¹⁴ *Berne Convention for the Protection of Literary and Artistic Works* requires Member States to protect moral right providing authors with the ¹² right to claim authorship of the work and to object to any distortion, mutilation or other modification of the which would be prejudicial to the author's reputation or honour. Indonesia and Australia have ratified Berne Convention, therefore, they have obligation to protect moral right in their national law. This essay will outline the general protection of moral rights, then it analyses the protection under existing law in Australia and Indonesia. It will then compare the protection offered in Australia with that offered in Indonesia before concluding whether the protection of moral right are adequately protected in Australia and Indonesia

Key words : protection, moral right, Indonesia, Australia

1. INTRODUCTION

The arrival of digital technology and information presents the protection of copy right and its exclusive rights, including moral right with a set of challenges. Technology enables production of copies very fast, easily and cheaply. Also it enable changes to be made to

originals without loss of quality. Distortion, modification, mutilation, alteration of copyright works and action without acknowledgement of an author is possible to a much higher extent which it can infringe the moral right of author. Moral right is the author's right consisting of the right of publication, withdrawal, attribution and integrity on creation.

Recognition of a moral right was originally confined to civil law jurisdictions. However, the widespread recognition of moral rights resulted in moral rights becoming a fundamental part of international copy right law. In Indonesia, the moral rights was introduced firstly in 1982 (in Copy Right Act No. 6 Year 1982). However, it is interesting to note that after long debates, Australia having a common law system, finally introduced recognition of a moral right into Australian law by an amendment to the Copy Right Act 1968(Cth) on 16 December 2000.

2. ORIGIN AND NATURE OF MORAL RIGHTS

a. The term of Moral Right

The term of ³ moral right is a translation of the French concept of '*droit moral*'. *Droit Moral* does not refer to a right in morality, but it exists in an individual 's personality which is more appropriately mentioned as 'right of the author's personality'². Then, the term of moral right is commonly accepted and is used in *Berne Convention*.

¹Kwall R., 'Copyright and the Moral Right : Is an American Marriage Possible?', (1985) 38 *Vanderbilt Law Review* 1 at 3, see also Maree Sainsbury, *Moral Right and Their Application in Australian* (The Federation Press, Sydney, 2003), at 13.

² Maree Sainsbury, *Moral Right and Their Application in Australian* (The Federation Press, Sydney, 2003), at 13.

b. Historical Background to Moral Rights

Originally, this moral right was a unique concept based in civil law. It was first recognized in 1814 in France

3. INTERNATIONAL OBLIGATION

Although the moral right originated in civil law, it has since been incorporated into international copyright law, through the following covenants/conventions :

3.1. Universal Declaration of Human Right (UDHR)

¹³ Article 27 (2) UDHR states :

Everyone has the right to be protected of the moral and material interest resulting from any scientific, literary, or artistic production of which he is the author³.

UDHR does not define the meaning of moral interest. However, Article 27 (2) acknowledges the protection of copyright (material interests) including moral right (moral interest). Article 27 (2) carries a common standard rather than a mandate for the enactment of binding and enforceable legislation. This article is more likely to refer to moral authority rather than legal authority⁴.

¹⁹ **3.2. International Covenant on Economic, Social and Cultural Right (ICESCR)**

⁴ Universal Declaration of Human Rights, General Assembly Resolution 217 (III), UN Doc A/180 at 71 (1978).

⁴ Maree Sainsbury, Op.Cit, p, 13

In 1966 ICESCR introduced binding obligations (effective on 3 January 1976) on UN Member states. The obligation to respect right is in Article 15 (1) (c) following the spirit of Article 27 UDHR. Article 15 (1)(c) states⁵ :

- ²⁴ (1) the States Parties to the present covenant ⁵ recognize the right of everyone
- (a) ...
 - (b) ...
 - (c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

The ICESCR only obligates UN members to submit a periodical report on the progress made and measures taken by member states to advance the right concerned⁶.

3.3. Berne Convention

The Berne Convention 1967 requires members to provide minimum standard of protection set out in the Berne Convention, including moral right⁷. Originally, Article 6bis was provided for the protection of moral right which was added to revised Berne Convention in Rome in 1928. The revised version of Article 6bis was adopted in Stockholm in 1967 and provides as follows⁸ :

- ⁶ (d) Independently of the author's economic right, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and

⁴ International Covenant on Economic, Social and Cultural Rights, General Assembly Resolution 2200a (XXI), 21 YBU GAOR Supp (No.16) at 49; UN Doc A/6316 (1966), 993 UNTS 3.

⁶ Lallah, R., 'International Human Rights Norms', p.7 cited from Masse Sainsbury, Op.Cit., p.15

⁷ Ibid, p.17

⁸ Andrew Christie, Stephen Gare, *Blackstone's statutes on Intellectual Property* (Blackstone Press, London, 2001), p. 419.

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to object to any distortion, mutilation, or other modifications of, or other action in relation to, the said work, which would be prejudicial to his honor or reputation.

- (e) 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 authorized 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.
- (f) 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.

The drafting of Article 6bis reflected disparate opinion among the member states because of the unfamiliar concept of Moral Right in Common law countries and a difference of philosophy between common law and civil law. Consequently, Article 6 bis set out minimum standards for moral right protection. The obligation to protect the moral right in Article 6bis is minimalist⁹. The difference between common law and civil law required amendment be made to Article 6bis twice. In 1948 in Brussels, Article 6bis was revised for the extension of moral protection after the author's death. At the Stockholm Revision Conference in 1967, the protection of moral right was made be compulsory.

4. PROTECTION OF THE MORAL RIGHT IN AUSTRALIA

Australia has ratified the *Berne Convention* and the *International Covenant on Economic, Social and Cultural Right* which both impose binding obligations. Australia has been obliged to provide protection for moral rights since the ratification of *Berne Convention*, originally as a colony of United Kingdom, and as an independent signatory in 1928. However, after a long

⁹ Maree Sainburry, Op. Cit, p. 18

history of debate, full moral right provisions were finally introduced into Australia by an amendment to the *Copy Right Act 1968* (Cth) on 16 December 2000.

4.1.Legislation

Australia was the last copy right country to legislate moral right provisions to comply with article 6bis *Berne Convention*¹⁰. Provisions for a moral right was proposed in 1958 and though Australia has had its own *Copy Right Act* since 1968¹¹, the full moral right provisions were introduced into Australia only in 2000.

4.1.1. Legislation of Moral Right for Authors

On 7 December 2000, the *Copy Right Amendment (Moral Right) Act* was passed. This amendment introduced a new Part IX into *Copy Right Act 1968* providing provisions for an author's right of attribution, integrity, and against false attribution. It came into force on 21 December 2000.

4.1.2. Legislation of Moral Right for Performers

In order to comply with WIPO Performances and Phonograms Treaty(WPPT), legislation was enacted by amending the *Copy Right Act 1968* to protect the moral right of performers in 2004. Section195ABA, section 195AHA, section 195ALA are introduced for that purpose.

¹⁰ Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (Oxford University Press, New York, 2006), p. 542.

¹¹ Before 1968 Australian copy right was governed by British Copy Right Act of 1911, see in Elizabeth Adeney, Op. Cit., p.542.

4.2.The Basic Concept of Moral Right Protection in Australia

4.2.1. Subject matter of Moral Right

Moral rights do not accommodate all subject matters. Moral rights are only granted in respect of literary, musical, dramatic works and cinematography films and not granted to sound recording, television and sound broadcast or published editions¹². The reason for having of exclusion from moral right is based on the rationale for moral right protection which requires a creative effort on the part of the author by investing a part of his/her personality in the subject matter. As a result, subject matter such as sound recording, television, sound broadcast or published editions not involving a creative effort are excluded from moral right protection.

The exclusion of sound recording, television, sound broadcast and published editions from moral right subject matter is one of the weakness of Australian moral right protections. Moral right is granted to the authors who create works meeting the copy right requirement. Australian copy right law requires the originality, material form, related factors and does not require the creative effort on creating works protected by copy right. As a result, any author's works including sound recording, television, sound broadcast or published editions should be protected as subject matter of Australian moral right provision.

¹² Maree Sainsburry, Op. Cit, p. 34

4.2.2. Type of Moral Right

In Part IX of the *Copy Right Act*, the moral right can be divided into the following three categories :

a. **the right of attribution of authorship**

²² The right of attribution is the right of the author to have his or her name associated with the work when the work is reproduced, published, performed in public, communicated to the public, adapted or exhibited.¹³ This is the right to be identified as the author whenever an attributable act occurs, that is the works are reproduced, published, performed, communicated, exhibited, copied or an adaptation is made¹⁴.

b. **the right to against false attribution.**

²³ The right against false attribution is divided into two components. First, it entails a prohibition on a person affixing to the work the name of a person who is not the author, and then on subsequent dealings with the wrongly attributed work. Secondly, it entails a prohibition on a person dealing with the work as the work of the author if that work has been substantially altered after it has left the author's hands¹⁵. The first component protects the authorial connection with the work and the right to be associated with it. The second protects authors from being associated with works that are no longer entirely their own¹⁶.

¹³ *Copyright Act 1968*, s 194.

¹⁴ Maree Sainsbury, Loc. Cit.

¹⁵ Elizabeth Adeney, "Moral rights and substantiality: some questions of integration", (2002) 13 AIPJ 5 at 12

¹⁶ Ibid.

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In relation to a literary, dramatic or musical work, the first component of the right against false attribution prevents :

(a) to insert or affix, or to authorise the inserting or affixing of, a person's name in or on the work, or in or on a reproduction of the work, in such a way as:

(i) to imply falsely that the person is the author or an author of the work;

or

(ii) to imply falsely that the work is an adaptation of a work of the person; or

(b) to deal with the work with a person's name so inserted or affixed, if the attributor knows that the person is not an author of the work or that the work is not an adaptation of a work of the person, as the case may be; or

(c) to deal with a reproduction of the work, being a reproduction in or on which a person's name has been so inserted or affixed, if the attributor knows that the person is not an author of the work or that the work is not an adaptation of a work of the person, as the case may be; or

(d) to perform the work in public, or communicate it to the public, as being a work of which a person is the author or as being an adaptation of a work of a person, if the attributor knows that the person is not an author of the work or that the work is not an adaptation of the work of the person, as the case may be¹⁷.

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It is an act of false attribution in relation to a literary, dramatic, musical or artistic work altered by a person other than the author of the work if :

(a) to deal with the work as so altered, as being the unaltered work of the author, or

(b) to deal with a reproduction of the work as so altered, as being a reproduction of the unaltered work of the author; if, to the knowledge of the attributor, it is not the unaltered work or a reproduction of the unaltered work, as the case may be, of the author.

c. the right of integrity

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The right of integrity is the right not to have the work subjected to derogatory treatment which is prejudicial to the author's honor and reputation¹⁸. Derogatory treatment', in relation to a literary, dramatic or musical work, means:

¹⁷ Copyright Act 1968, s 195AD

¹⁸ Copyright Act 1968, s 195AI(2).

(a) the doing, in relation to the work, of anything that results in a material distortion of, the mutilation of, or a material alteration to, the work that is prejudicial to the author's honour ² reputation; or
(b) the doing of anything else in relation to the work that is prejudicial to the author's honour or reputation.”¹⁹.

The phrase “prejudicial to the author's honor and reputation” was considered in case *Tidy v Trustee of the Natural History Museum*²⁰. In *C²⁶ter Swing and John Veronis v Helmsley-Spear Inc*²¹, the phrase “prejudicial to the author's hon⁸ and reputation” was interpreted by the natural meaning of the words. ‘Prejudice’ means injury or damage due to some judgment of another’. ‘Honours’ means ‘good name of public esteem’. Reputation was ‘the condition of being regarded as worthy or meritorious’.

Even though, there is a provision of the right to prevent false attribution in section 195 A, this provision seems a redundancy of the right of integrity and the right of attribution. It has been argued that it would better to simplify the moral right only into two types : the right of integrity and the right of attribution. However, it may be better to separate the ²¹ right of integrity and the right to prevent false attribution from the right of integrity and the right of attribution in different article.

4.2.3. The Duration of Moral Right

The right of integrity in a cinematograph film lasts until the death of authors (section 195AM (1)), while the right of integrity in works other than films lasts until the copy right of this works is expired (Section 195AM (2)). ⁷ On the other hand, the right of attribution and the right to prevent false attribution expires at the end of copy right protection (section 194AM (1)).

¹⁹ *Copyright Act 1968*, s 195AJ

²⁰ (1995) 39 IPR 501 at 504

²¹ 33 USPQ 2D (BNA0 1225

The duration of moral right in Australia is also one of the weak moral right protections. It has been argued that common law system focuses on protection of the creation or the product of the author, not the author itself. It results in the rationale of the moral right duration which states that if the creation ends, the right related the creation will also expire.

However, the protection of moral right should be longer than until the death of the authors because the rationale of moral right is to protect the author from distortion, modification, mutilation, alteration of copyright works and action without acknowledgement of an author not in limited time. In addition, the duration of moral right originated in civil law exists without limitation of time as it recognizes the right of author/personality of the author. Even though it can be argued that it is not big dealt in the integrity right, it will be big problem in the right of attribution. For instance, it is not fair that someone does not mention Michael Angelo as the painter of “Monalisa” though the this copy right is expired.

5. PROTECTION OF MORAL RIGHT IN INDONESIA

Indonesia ratified the Berne Convention in 1912, originally as a colony of the Dutch Kingdom, and as an independent nation on 7 May 1997 (*Presidential Decree No.*

18/1997)²². Therefore, Indonesia has been obliged to provide protection for moral rights in national laws.

5.1. Legislation

As a colony of the Dutch Kingdom, Indonesia copy right was governed by the Dutch Copy Right Act of 1912 (*Auteurswet 1912*). The Dutch Kingdom has a civil law system which acknowledges moral right protection, as result, *Auteurswet 1912* provides moral right provisions.

5.1.1. Legislation of Moral Right for Author

On 12 April 1982, Indonesia repealed *Auteurswet 1912* and replaced it with Indonesian *Copy Right Act No. 6 of 1982*. Then, in 1987 the *Copy Right Act No. 6 of 1982* was replaced by *Copy Right Act No. 7 of 1987* which was replaced again in 1997 with *Copy Right Law No. 12 of 1997*. This act provided moral right provisions in Article 24, Article 28 A, Article 41 and Article 43A. No change to the Moral Right provision was made during 1982-1997, while a slight change happened in new *Copy Right Act No 19 of 2002* which replaced the previous copy right act. In the *Copy Right Act No 19 of 2002* the moral right is provided for in Article 24, Article 33, Article 51 and Article 55.

Article 24 *Copy Right Act No 12 Year 2002* states that :

²² Even though on 15 March 1958 Indonesia decided not to be the member of Berne Convention, see footnote at Eddy Damian, *Hukum Hak Cipta Menurut Beberapa Konvensi Internasional, Undang-Undang Hak Cipta 1997 dan Perlindungannya terhadap Buku Beserta Perjanjian Penerbitannya* (Translation: *Copy Right Law based on International Conventions, Copy Right Act 1997 and its Protection on Book and Publication Contract* (Alumni, Bandung, 1997), p. 60.

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- (1) An Author or his heir shall be entitled to require the copyright holder to attach the name of the Author on his works.
 - (2) It is forbidden to make changes to a work though the Copy right has been transferred to another party, except with the consent of the Author or his heir if the ¹⁸ Author has been deceased.
 - (3) The provision referred to in paragraph (2) shall also be applicable to changes in the title and subtitle of a work, inclusion and changes in the name or pseudonym of the author.
 - (4) The author shall remain entitled to make changes to his work in accordance with social propriety.

Article 24 provides the type of moral right which Article 24 (1) obligates to attach the name of author on his work (the right of paternity/attribution). Article 24 (2) prohibits others to make changes to a work without the author's consent although the copyright has been transferred to another party (the right of integrity). Article 24 (3) prohibits others to change in the title and subtitle of work, inclusion and changes in ¹⁰ the name or pseudonym of the author (the right of integrity).

The good point in this provision is the conciseness of moral right's type which only 2 types but has the comprehensive range of content. It includes the basic content of moral right such as right of integrity and right of attribution. Other good point is the consideration of the social propriety in Article 24 (4). It means that article 24 balances the protection of moral right as the individual right and the acknowledgement of social value. Article 42 does not ignore the social propriety.

Article 33 states :

- The term of protection for the right of an author as ²⁵ referred to in :
- a. Article 24 paragraph (1) shall be without any time limit;

-
- b. Article 24 paragraph (2) and (3) shall be for the period of copyright on the work concerned, except for the mentioning and changing of name or pseudonym of author.

Article 33 provides the duration of moral right which is better than the duration in Australia. The strength point is in Article 33(b) because it gives any time limit for the right of paternity/attribution. This regulation meets the basic concept of moral right in civil law that the moral right exist as long as the work exist. It is arising from the notion of the author having externalized part of his personality in the work.²³

Article 55 states :

- 1 The submission of copyright on the entirety of a work to any other party shall not abridge the right of the author or his heirs to bring lawsuit against those who without his consent :
- a. deletes the name of the author which is attached to the work;
 - b. attaches the name of the author to the work;
 - c. changes or replaces the title of the work;
 - d. changes the content of the work.

Article 55 is the tool for the author/his heirs to sue anyone who infringes the moral right both the right of integrity and the right of paternity/attribution. This article complete the regulation of moral right which is not only consist of the right of integrity and paternity/attribution, but also the right to enforce.

5.1.2. Legislation of Moral right for Performers

²³ Elizabeth Adeney, Op. Cit, p. 60

Similar to the Australian Copy Right Act, Indonesia has also moral rights provision for performers. In Article 51 *Copy Right Act No. 19 of 2002*, the regulation for moral right in article 24 shall apply to performers as related rights.

Article 51 states :

Provision as referred to in Article 24 shall apply *mutatis mutandis* to related rights.

However, Indonesian Copy Right Law does not give the further explanation of moral right provision for performers.

5.2. The Basic Concept of Moral Right Protection in Indonesia

5.2.1. The subject matter of moral right

Different from Australia, the Indonesian *Copy Right Act* covers all subject matters of works. A moral right is not only granted in respect of literary, musical, dramatic works and cinematography films, but also granted in sound recording, television and sound broadcast or published editions.

5.2.2. The type of moral right

Different from Australia, Indonesia *Copy Right Act* only provides two categories of moral rights : the right of paternity and the right of integrity. The right of paternity is in Article 24 (1) giving the author the right to be entitled to require the copyright holder to attach the name of author on his work. The right of integrity is in Article

24 (2) prohibiting others to make changes to a work without the author's consent although the copyright has been transferred to another party. It also prohibits others to change the title and subtitle of work, inclusion and changes in the name or pseudonym of the author (Article 24 (3). However, the author shall remain entitled to make changes to his work in accordance with social propriety (Article 24 (4).

5.2.3. The duration of moral right

Different from Australia, Indonesia provides that the right of paternity shall be without any time limit (Article 33 (1). Whereas, similar to Australian, the right of integrity ends with the expiration of copy right (Article 33 (2).

6. HOW GOOD IS MORAL RIGHT PROTECTION IN INDONESIA AND AUSTRALIA?

The different system of law in Australia and Indonesia results in different measures in moral right protection. A Moral right derived from the civil law system represents the protection of the author and relates to the personality of the author²⁴. Australia is a common law system which concentrating on protecting the creation or work²⁵, therefore it is not easy to protect moral right derived from civil law which concentrates on protecting the author. It is interesting to note that although Australia has moral right provision, it does not provide the "full protection". For instance, Australia limits the

²⁴ Eddy Damian, Op Cit, p. 109

²⁵ Ibid.

protection of the moral right until the death of the author or the expiration of copyright of the works. In contrast, Indonesia protects the moral right without limitation of period, particularly for the right of paternity/attribution.

In addition, Australia limits the protection of moral right in respect of literary, musical, dramatic works and cinematography films and excludes sound recording, television and sound broadcast or published editions as a subject matter of moral right. In contrast, Indonesian moral right protection covers all subject matters of works, not only literary, musical, dramatic works and cinematography films, but also sound recording, television and sound broadcast or published editions.

Furthermore, at the first, introduction of moral right protection in Australian Copy Right Law faced criticism. The opponents said that the protection of a moral right in legislation is improper because to meet the obligation under the Berne Convention, common law's remedies in contract law and laws preventing defamation are adequate²⁶. In addition, they argued that the theoretical basis of moral rights protection in the common law system had not been identified, the violence of moral right were infrequent, there were insufficient support for moral right protection, it would not be accepted by Australian society and the legislation of moral right will raise the practical problem²⁷. After a long debates Australia finally legislated for a moral right to comply the Berne Convention. However, Australian has not fully complied. The basic reason of non full compliance with Berne

²⁶ Maree Sainsbury, Op.Cit, p. 32-33

²⁷ Ibid

Convention is the common law system itself which not recognize the moral right and the internal criticism which reject to apply moral right protection.

7. CONCLUSION

Although Moral right was originally confined to civil law, the widespread recognition of moral rights resulted in moral rights becoming a fundamental part of international copy right law. Both Indonesia representing a civil law state and Australia as a common law country apply the protection of moral right, although in different way. The different law system results the different context of moral right protection. Even though Australia has moral right provisions and complies the Berne Convention, this provisions do not reflect the “full protection and full compliance”. Particularly, the provision of moral right duration. Australia should learn from Indonesia and other civil law countries which apply the longer protection of moral right. The duration of moral right is very important to prevent distortion, modification, mutilation, alteration of copyright works and action without acknowledgement of an author.

On the other hand, though the content of right of integrity in Indonesia copy right law covers the right of false attribution, it would be better for Indonesia to learn from Australia to separate the right of false attribution in different section.

In general, Indonesia as civil law state is not difficult to apply an adequate moral right protection, whereas Australian as common law system faces difficulty to apply full protection of moral right.

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Copy Right Act No. 7 Year 1987

Copy Right Act No. 12 Year 1997

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. INFRINGEMENT OF MORAL RIGHT IN THE INTERNET

7. ENFORCEMENT OF MORAL RIGHT IN THE INTERNET

Not only Indonesia has problem to enforce moral right in digital age but also Australia identified as advanced technology state. Digital technology creates the difficulties of enforcing moral right because of the accessibility to multiple users in anywhere, easy transmission and reproduction. Therefore, it is not easy to control the place of transmission once it published on the internet. Moral right can be being infringed without the author's having any knowledge of it. In addition, it will be difficult to assess the damage of author suffering from the breach of the right of attribution. Also, it will be impossible to predict the damage of breach of the right of integrity on the author's honor and reputation.

Therefore, new or supplement measures are needed to keep track of the use of the works and to enforce the moral right provision in digital environment.

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