

501, it was found that a museum's alteration of black and white cartoons by reducing their size and adding coloured backgrounds was not an infringing act. Interestingly, the colouring of black and white film classics such as *Casablanca* is what initially sparked debate about moral rights in the United States' film industry.)

When would such uses not infringe an author's moral rights of attribution and integrity?

Non-infringing uses

An author's right of integrity will not be infringed if:

- the act performed was done in good faith to restore or preserve the work (section 195AT(5));
- in the case of moveable artistic works, the work is destroyed only after the author is given a reasonable opportunity to remove the work (section 195AT(1));
- in the case of moveable artistic works situated in a public place and specifically designed for that location, the work is removed or relocated only after the remover has:
 - (a) been unable to locate or identify the author or his or her representative, after having made all reasonable inquiries; or
 - (b) complied with the notice and consultation requirements as set out under the Act (section 195AT(4A)).
- in the case of buildings, or artistic works which form part of or are affixed to buildings, the work is changed, relocated, demolished or destroyed only after the owner of the building has:
 - (a) been unable to locate or identify the author or his or her representative, after having made all reasonable inquiries; or
 - (b) complied with the notice and consultation requirements as set out under the Act (section 195AT(2) and (3)).

Defences

It is a defence to an infringement of an author's moral rights if:

- the act or omission was "reasonable"; or

- the act or omission had been consented to by the author in accordance with the Act.

In determining whether an act or omission is "reasonable", the Act sets out a number of non-exclusive factors to be taken into account (sections 195AR and 195AS):

- the nature and purpose of the work;
- the manner and context in which the work is used;
- relevant industry practice or voluntary codes in the industry in which the work is used;
- whether the work was made in the course of employment or under a contract of service;
- except in the case of films, the views of any co-authors about the act or omission;
- in regard to the right of attribution, any difficulty or expense that would have been incurred as a result of identifying the author; and
- in regard to the right of integrity, whether there was a lawful excuse for the treatment.

Consent will only be valid if it is made in accordance with the Act. The Act requires that consent be (sections 195AW and 195AWA):

- in writing;
- from the individual author, or authors, or his or her representative (where there are joint authors, the consent of one does not affect the position of the other. For films, there is provision in the Act for co-authorship agreements governing the exercise of moral rights);
- given in relation to specified acts or omissions or to specified types of acts or omissions (which can have occurred before or after the consent is given); and
- given in relation to either a specified work in existence at the time of the consent or a specified work or work of a particular description which is not yet in existence.

For employees however, the Act makes the consent requirements less onerous. Consent can be given for the benefit of the employer in relation to all or any acts or omissions (whether they occur before the consent is

given or after) and in relation to all works made by the employee during the course of his or her employment. It is therefore easy for employers to side-step the moral rights of employees by simply inserting broad consents into employment contracts.

Because the defence of "reasonableness" has not been clearly defined, there seems to be a tendency emerging that when industry or government engages contractors, a requirement is imposed on those contractors to ensure that all individual authors engaged on the project have consented to a waiver of their moral rights in any work that may be created under that project. Contractual requirements of this nature, particularly if imposed in relation to works of artistic creativity, will limit the effectiveness of moral rights legislation.

How effective are moral rights in protecting the personal interests of authors?

It is difficult at this early stage to assess the efficacy of the Act in protecting the personal in art. The remedies which may be granted range from damages to injunctions and orders for public apologies. Some criticisms of the legislation are that it does not incorporate the full range of moral rights found in other jurisdictions, nor does it include suggested amendments recognising collective moral rights of indigenous communities which are of particular concern in Australia. Furthermore it provides a fairly weak enforcement regime, preferring consultation to court-enforceable rights.

The Government did however make it clear that the legislation was not intended to grant rights which would be routinely enforced through the court system, but instead would encourage good industry practice and raise awareness in an "educative way" of the need to respect the creativity of authors. Time will tell whether this approach has been successful. However, legislation which affirms the importance of an author's creative integrity and relationship to their work is at least a step in the right direction. ■

Rupert Burns:

Actor, comedian and lawyer

Catherine Symons, Madgwicks Lawyers

Rupert Burns turned to the study of law on a whim. After 10 years treading the boards and about 7 years spent constructing them (Rupert was previously a carpenter and joiner), he enrolled in law at Melbourne University.

The final stages of his law studies coincided with the arrival of twins to his household. As Rupert describes it, this was a period characterised by intense sleep deprivation, at the end of which he woke, somewhat bemused, with a law degree.

Following on from this discovery, Rupert spent a number of years working with a Melbourne law firm, drawing on his extensive background and experience in film, television, theatre and comedy to provide specialised advice to local and interna-

tional film and television production companies and to performers.

He acquired a particular expertise in the area of defamation law and was responsible for approving work in the arts for publication and performance.

Last year Rupert moved to the Victorian Government Solicitor's Office ("VGSO") where he is part of the enormously active native title practice. His job involves dealing with high volumes of challenging work and with that comes a significant level of responsibility.

Which begs the question: how does somebody who has spent so much time in a previous life pursuing artistic endeavours reconcile this interest with the practice of law?

For Rupert the answer is two-fold: he is able to keep his artistic temperament in check through his involvement with the Board of the Melbourne Fringe Festival and his attempts to bring humour into the workplace. Although some might argue that the job of getting lawyers to laugh would be his toughest gig, Rupert would probably disagree.

Rupert's commitment to the Melbourne Fringe Festival is both time consuming and incredibly satisfying. Fortunately for Rupert,



RUPERT BURNS PULLING A RABBIT OUT OF A HAT AT THE LEGAL COMEDY DEBATE

he has the support of the VGSO that allows him to work pro-bono for the organisation.

The Melbourne Fringe Festival is a non profit organisation that takes on the enormous task of facilitating and coordinating the production of approximately 300 independent shows for its annual showcase in September. Work for this event continues relentlessly throughout the year and demands almost daily involvement from its Board members. As a lawyer, Rupert is able to assist with the identification of the myriad of legal issues that arise in relation to just about every aspect of the organisation's work.

Last year, the Melbourne Fringe Festival was instrumental in coordinating, funding and producing the Spencer Tunick photograph of naked Melburnians. According to

Rupert, this one event raised an enormous range of legal questions, as well as eyebrows.

Rupert says that recurring legal issues confronting arts organisations include issues relating to contracting, intellectual property, industrial relations, insurance and public liability, director's duties and media law. Rupert states that it is the sad reality that many arts organisations simply do not have the resources to adequately deal with legal issues such as these and consequently are often unable to fully exploit opportunities that present themselves.

Rupert urges all young lawyers who have an affinity for the arts to make themselves available, in a pro-bono capacity, to help these organisations. Knowing where to start can be as simple as approaching an organisation with which you already have an affiliation. It may be that your local theatre group is crying out for legal assistance. Otherwise, Rupert suggests that you contact more established groups or volunteer your services to the Arts Law Centre of Australia (see article in pro bono section of the Journal).

Rupert represented young lawyers back in April at the Legal Comedy Debate and his sparkling wit on the night put to bed the theory that lawyers have no sense of fun. ■

A small voice at the UN

Kirsten Hagon writes about her experience as a Youth Representative on Australia's Delegation to the 56th Session of the United Nations General Assembly & Special Session on Children.

Eleanor Roosevelt said that human rights "carry no weight unless the people know them, unless the people understand them, unless the people demand that they be lived". How can we ever demand that human rights be lived, if so many have no voice?

My role for the last few months of 2001 was precisely about this. About providing a voice for an enormous demographic, and extremely vulnerable section of society, but a group generally ignored - youth. This was the focus of my role as the Australian Youth Representative to the UN General Assembly.

What is a youth representative?

For the last three years the Australian government has sent (although only partly

funded) a young Australian to New York as part of the Australian delegation to the UN General Assembly. The position is open to all Australian youth (the UN definition of youth being 15 to 24). The selection process is co-ordinated by the United Nations Youth Association (who originally lobbied for the creation of the position) in conjunction with past Youth Representatives and other youth organisation representatives. The Youth Representative spends approximately 8 weeks as a fully accredited member of the Australian Delegation, based in the Third Committee which deals with human rights and social issues.

The Youth Representative is predominantly responsible for providing a youth perspective on issues to be discussed by the Australian Delegation. In my role, I also made a statement to the General Assembly, negotiated resolutions (including the Youth Resolution) on behalf of Australia, co-ordinated the drafting and negotiating process for the resolution on the United Nations Decade of Human Rights Educa-

Kirsten Hagon, Mallesons Stephen Jacques



KIRSTEN DELIVERING THE AUSTRALIAN STATEMENT ON THE YOUTH ITEM TO THE GENERAL ASSEMBLY (THIRD COMMITTEE)

tion and attempted to persuade other Member States, UN agencies and non governmental organisations ("NGOs") of the importance and value of youth participation, particularly the value of having a Youth Representative.

Why have a Youth Representative?

Young people face problems such as discrimination, high levels of unemployment, homelessness, deterioration of their