

# *Lost In Translation*

**A history of moral rights in Australian law**

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LLB (Hons), B Com

Submitted in fulfilment of the requirements of the degree of Doctor of Philosophy

October 2004

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## Statement of Originality

This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

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## *Warning*

**Aboriginal and Torres Strait Islander readers are warned that this thesis contains the names of some deceased people.**

## ABSTRACT

This thesis is a history of moral rights in Australian law. It traces the historical discourse about moral rights in Australian law and demonstrates how that discourse has shaped the meaning moral rights have come to assume in their current form under the current regime contained in the *Copyright Amendment (Moral Rights) Act 2000*.

This history examines the reception and later production of a moral rights discourse in Australian law, and reveals that the historical discourse about Australian moral rights was dominated by the three themes; foreignness, international obligation and economic impact. I contend these three themes fundamentally shaped moral rights as they now appear in the moral rights regime. As the history unfolds, it will become clear that the moral rights regime was organised around a specific repertoire of arguments and imaginings, and it is this discourse that informs this thesis

My argument is pursued in three stages. Section One of the thesis provides the historical detail of the moral rights trajectory in Australian jurisprudence, and reveals, within that history, the emergence of three dominant themes, which are pursued in subsequent detail. In addition to the history, this section also provides detailed discussion of the legislative provisions in order to illustrate moral rights as a product of the history, and it highlights some of the shortcomings of the regime and provides some background for the case study in Section Two

Section Two of the thesis interrogates the structure of the moral rights regime by applying the Act's provisions to the case study of indigenous creators, thus providing a contemporary example of how these rights may work in practice, as the result of the historical discourse. Thus this section sets the scene for final part of the thesis, which delves further into the historical discourse.

Section Part Three follows the themes of the moral rights debate as they emerged historically. Reconceptualizing the moral rights discourse in this way helps to explain why the debates about moral rights took a particular course and produced the outcomes it did. The starting point for these discussions is a detailed examination of the themes of

foreignness, international obligation and economic impact, and follows these themes as they evolved chronologically. In particular, the discussion reveals that the debates about moral rights effectively fall into two eras. The first era (1928-1988) centred around the question of *whether* Australia should introduce moral rights and the debates about the appropriateness of the reception. At the commencement of the second era (1988-2000) the question shifted to *what* form moral rights should take. This then provides a backdrop with which to understand why specific discussions about moral rights were sidelined during the years of debates leading up to the legislation; in particular, *the subject* and *the object*, which form the fulcrum of a moral rights action. This is an essential part of the history because it explains why *the subject* and *the object* came to be imagined and constructed in such a narrow and limited way and clarifies why the moral rights provisions appear manifestly ineffective, particularly for indigenous creators and their communities.

This thesis contributes to legal history in three important ways. First, it provides a detailed account of a discourse about moral rights in Australian law, and in doing so challenges the long held assumptions about their reception and production. Second, it highlights the importance of history to legal discourse. Just as regulatory regimes, institutions, and rules are integral to the law, so too are the informal practices, discourses and contexts on which they were based. Third, it reminds the reader that history is a signpost, and this history of moral rights demonstrates that the way this law was derived, imagined and constructed has significance for the social, cultural and legal context in which that process takes place.

## ACKNOWLEDGEMENTS

This thesis has been a journey for myself in so many ways, but I have also taken a myriad of people on that journey as well. Some chose to come along for the ride, some didn't have much choice! I'd like to thank them all, in no particular order, except the first!

A very special thanks to my beautiful daughter, Lily Violet Grace Banks. Lily, you are my inspiration, the most important person in my whole life and the best thing that has ever happened to me, even at 4.30 in the morning! This thesis has been around longer than you have been alive. Thank you for reminding me about how simple life can be, how little things can mean so much, and how much love I can possibly give. Thank you for your patience, your beautiful spirit and your inquisitive mind. Thank you for giving me the determination to keep on going, despite the many obstacles. I am so thankful that we can now get on with the rest of our lives.

A special thanks to my parents, Judy and Jonathan Banks who have experienced their own personal tragedies and have overcome many hurdles in their own lives. Thank you both for giving me this inquisitive mind and a will to just keep on going. Thank you for the myriad of things you did to assist me, including your editorial comments in the closing weeks of this thesis, it was invaluable! Thank you both for your love, generosity and support and for allowing me to stumble along and find out who I am, despite how convoluted my journey may have appeared at the time.

A special thanks also goes to my brother Josh for the positive words of encouragement, playing "shops" under great duress, the endless cups of coffee, Viennese crescents, and musings about our life in this weird but wonderful world. Josh, I don't even know where to start. Thank you from the bottom of my heart, your support has been unwavering and you have been an invaluable source of strength for me.

Thanks to Professor Brad Sherman for introducing me to the topic of moral rights and reminding me that all history is important. I would also like to thank you for all your helpful comments particularly at the end of this thesis. The irony of those chapters *maybe* sitting in a hotel in Japan will never be forgotten! Thanks also to Mr Shaun McVeigh whose critical mind and erudite comments has challenged me throughout this process. You have always been patient, supportive and encouraging, and for that I am appreciative. You both convinced me to start this project and I'm just glad we've finally come to the end in one piece.

Thank you to Professors Rosemary Hunter and Jeff Giddings who had faith in me to work on their project and start my own research project while completing this thesis. You have both encouraged and supported me and have made the last part of this journey a lot smoother.

Thanks to Emeritus Professor John Western, who despite having met me through a friend offered to read this thesis and with his inimitable wisdom provided some well-needed support at the end. John, your generosity and support was really appreciated.

A special thanks to James Rayner who bravely took up the reins as my research assistant in the final months of this thesis and jumped from task to task with relative ease. We've both weathered some surreal moments in the last couple of months but we've come out the other end with our senses of humour and some pretty awesome nicknames. James, you have been a fantastic help. Your kindness, thoughtfulness and spirit has been really refreshing, and despite some sooky episodes you always came through with the goods!

A special thanks to Dr Kathryn Dwan who often listened to my endless babble about the topic and invested some of her own time in editing part of this thesis. Your rendition of 'Stayin' Alive' is one of my own archival treasures. Your friendship has also been an important part of this

journey: supernatural experiences [housemates included], bumper crops, s52, labouring by the river, Echinaceas, and reminding me to eat, when lucidity was not the issue but safety was. May we continue to weather those wind warnings

Thanks to Bridget Mandikos, aka Buffy without whom I could have never resolved the *Boronia Incident*, the *air conditioning incident*, started B2 and enforced the numerous banishments to *The Island*. Your friendship has been a sanctuary for me particularly when lemon tarts from Sol Bread were involved. May we grow old on the royalties, *twisted sister*.

Thanks also to Barbara Hook, who always up for an *idea* challenge and started another project with me in the final year of this thesis. Barb, you have always had faith in me. Your warmth, love and enthusiasm has been greatly appreciated

Thanks to Cindy Reilly, aka N2 who was the other force behind this STAH and has been an amazing source of strength, particularly in the closing months of this thesis. The courage and tenacity you have shown in the last six months is admirable, and despite your own trial and tribulations you have always remained a constant, generous and supportive friend

Thanks also goes to Dr Jane Bathgate. Despite your initial reservations about the mini cosmetic counter and implicit references to popular culture you made the right choice in rooms. Thanks for being such a wonderful supportive friend and colleague. I am so glad you arrived at Griffith when you did. Now, where should we put that water-feature?

Thanks to Charles Mitchell for just being him. Oh, and reminding me that he could knock over 100,000 words in a few weeks while giving up smoking and train for a triathlon but more importantly, for trusting me to read his treasured work. Charlie your creativity, aesthetic judgement and sheer tenacity when it came to *Son Octopus Song* just inspired me

Thanks also goes to Damian Thomson for many debates about self-reflexivity, Pravinita Singh for allowing me to be a part of her wonderful loving family and my other friends, Eva Glasson, Mary Milivojev, Daniela Conte, Janine Brown, and Tomoko Takahashi. In one way or another, knowing you were there was very important to me

Sue Cher Collins, Diva and sister-in-song, what can I say? Except, thanks for your support over the years, but more importantly, thanks for reminding me that *hara is a privilege, not a right* and that *mullets are versatile*

Thanks to the Diva of the SLRC, Lady Pam Adams who was endlessly patient with me at times and checked in once in a while to see if I was still sane.

Thanks also goes to Charmaine McVea, Karen Lovelace, Leanne Holland, Ray Baker and Sheridan Coy. You are all people who have come in to my life at a significant moments during this process and in your own ways have made the journey, just a little easier.

Thanks also to my colleagues Mary Keyes, Richard Johnstone, Chris Butler and Catherine Scully, who gingerly checked once in a while that I was doing ok. Your warmth and collegiality came at times I really needed it.

Finally, institutional and financial assistance were provided from a number of sources. The Commonwealth of Australia made one part of the process a whole lot easier when I was granted an Australian Postgraduate Award. I was also fortunate to receive a number of small grants from the Law School to assist me with some of my numerous archival trips to Canberra and Melbourne. The beautiful natural campus of Griffith University provided a wonderful environment in which to think, and while I started to become a serial squatter, the staff of the Law School have always generously found me somewhere to work.

While in Canberra, the staff of Australian Archives have also been helpful and have often provided me with some invaluable assistance. In addition to this, I will be forever indebted to the staff of the Copyright Law Review Committee, in particular, Peter Treyde and Stephanie Crathern who really went out of their way to help me, provided me with some desk space while I was fossicking around files, and assisted me in whatever way they could. Thank you all.

My final acknowledgment is to the Indigenous People of Australia who have endured the ravages of colonisation since 1788 with determination, courage and strength, and who despite extreme adversity never yielded the impenetrable bond between people and land. That is truly humbling.

## PUBLICATIONS BY THE CANDIDATE RELEVANT TO THE THESIS

Banks, C. (2000) "The More Things Change The More They Stay The Same : The New Moral Rights Legislation and Indigenous Creators" *Griffith Law Review*, (Special Issue), 334.

*This thesis is dedicated to my only sister Samantha Banks who died on the 27<sup>th</sup> December 1992. Sammy, despite your faith in others you never gave yourself the chance to achieve great things. May you rest in peace.*