

# The Impact of Moral Rights on Research & Development

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## Synopsis

*This article examines the ways in which moral rights can significantly impact on research projects, and the practical steps that should be taken to deal with them.*

## Pitfalls of moral rights in research projects

Moral rights in Australia are rights related to copyright material that became recognised under the Copyright Act just over two years ago. There are three specific rights, which arise automatically at the same time as copyright:

1. Right of attribution of authorship
2. Right not to have authorship falsely attributed
3. Right of integrity of authorship

There are many aspects of moral rights that could cause significant problems in research projects, such as:

- Works do not need to be ‘artistic’ to give rise to moral rights – written works such as research reports, presentations, reviews and publications may all attract moral rights (and usually will).
- Moral rights cannot be transferred and cannot be waived – they are permanent rights lasting as long as copyright.
- Moral rights do not pass with copyright – while copyright may be purchased, the moral rights remain with the author(s).
- Moral rights cannot be held by companies: it is always the individuals creating the work that acquire the moral rights.
- Moral rights do not pass in employment arrangements, even though copyright usually does.
- The transfer of “Project Intellectual Property” does not necessarily include any rights relating to moral rights.

- Moral rights attach to existing works as well as those yet to be created – moral rights may restrict the use of works already acquired by third parties.

## **Possible infringing actions**

Actions such as the following may amount to infringement of moral rights:

- Publishing a report under the name of the author's senior when that senior person did not write the report;
- Publishing a report under the name of someone who has reviewed the work but who is not the author or one of the authors;
- Publishing a report under the name of one person when other authors were also involved;
- Altering a work and still attaching the author's name;
- Editing a report or using extracts from it in a way that amounts to a distortion of the original work;
- Placing material on the Internet in an altered or manipulated form;
- Attributing authorship in a way that is not sufficiently prominent.

## **The way to deal with moral rights - consent to infringement**

While moral rights cannot be transferred, authors can 'consent to the infringement' of their rights. Such a consent, if properly drafted, can have the same practical effect as a transfer. The consent to infringement given by authors must comply with the requirements of the Copyright Act.

Comprehensive consent (eg, "I consent to any or all acts or omissions") may be given by employees in relation to works made in the course of their employment.

Restrictions apply to the type of consents that may be obtained from anyone other than employees, including contractors and independent researchers. These consents must specify the actions or types of actions for which consent is given and must relate to specific works or works of a particular description already existing or in the pipeline at the time the consent is given. In practice, the list of specific acts consented to can be sufficiently broad as to equate to a comprehensive consent. A broad consent along the lines of the following example may be used for both employees and other persons in the context of multiple research institution arrangements.

**Example consent:**

“I, *Consultant*, hereby irrevocably consent to any acts or omissions of the *Client*, its permitted successors and assigns, in using, modifying or reproducing the [*scientific outcomes*] (“Scientific Outcomes”) which would constitute an infringement of my moral rights where such acts or omissions are for any of the following purposes:

- (a) carrying out further research and development of the Scientific Outcomes;
- (a) publishing articles relating to the Scientific Outcomes;
- (b) obtaining Intellectual Property protection for the Scientific Outcomes; or
- (c) commercially exploiting the Scientific Outcomes.”

It is critical, however, that any consent be freely given and genuine. A ‘consent’ will be invalidated if obtained by duress or false and misleading statements, and in relation to works, including those made by employees, the consent that is given must be ‘genuine’.

## Management of moral rights

Some action taken that would otherwise be an infringement may be permissible on the grounds of “reasonableness”. There are limited situations where this defence can apply, but may include, for example, leaving the name of the author off a logo created for a business letterhead, or treating a work in a derogatory manner as part of a parody. However, arranging from the outset for those involved to give their consent to infringement where necessary is a safer and more comprehensive approach than relying on defences, which may require resolution through the litigation process.

If you would like to discuss the contents of this article please contact Peter Francis at Francis Abourizk Lightowlers, Commercial and Technology Lawyers.

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