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Authors’ Rights in Works of Public Sculpture: A German/Australian Comparison

I. Introduction

Works of public sculpture often give rise to community dissent, but the issues surrounding them are not frequently litigated. This is partly because, under the copyright1 or authors’ rights laws of many countries, the works are treated differently from works remaining in a more private domain, public interests often being allowed to take precedence over the interests or preferences of the rights-holder. Commercial use of the otherwise protected image is tolerated, even encouraged. But the law does draw limits around the exploitation of such a work, and enterprising businesspersons who wish to make free use of images of the sculptural work may be stopped in their tracks. This is particularly the case in countries where there is strong protection of the moral rights of the author. Germany is one such country, having protected the moral interests of authors to varying degrees, through legislation or jurisprudence, since the late 19th century. Australia has just joined this family of countries, the relevant federal legislation having come into force in late 2000.2 The present article discusses a case that was litigated in Germany several years ago.3 It considers the way the appeal court there applied the German Copyright Act (Urheberrechtsgesetz)4 to deal with issues surrounding a public sculpture. The article goes on to consider how the facts of the case might be treated under the Australian Copyright Act 1968, in the light of the recent moral rights amendments.

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1 The word “copyright” will be used here to denote both the economic rights of the copyright owner and those systems of law that are based on ownership of the copyright commodity.


4 Urheberrechtsgesetz – the legislation pertaining to authors’ rights, passed in 1965, as amended.
II. The Facts

On a grassy traffic island at the end of Holbeinstraße in Freiburg im Breisgau stands a sculpture of a foal. It is in the attitude of a baby animal standing unsteadily on its own feet for the first time. The unadorned concrete sculpture was created in 1936 by the sculptor Werner Gürthner and was placed in the Freiburg street some years later. For a long time, we are told, it did not attract a great deal of attention. But this changed when it became the object of a type of artistic vandalism. Unknown persons took to decorating it, following particular themes. It was given a (painted) bathing costume, it was painted in the trademark colours of Milka chocolate and Nivea cosmetics; it was got up as a unicorn and as a zebra; it was wrapped in the manner of a Christo horse; it had political slogans applied to it. In these and many other manifestations it achieved great popularity.

The action was brought by four plaintiffs – the relevant collecting society and three of the author’s heirs, the author being deceased and his heirs having inherited the capacity to exercise his personal and economic rights. The plaintiffs here complained of an infringement of both the author’s exclusive right to exploit the work commercially and his right to defend the integrity of the work. This latter was a component of the Urheberpersönlichkeitsrecht, the author’s right of personality or moral right.

There had been several potentially infringing acts in this case. The first and most obvious was the initial distortion of the work – the painting or other treatment of the original sculpture. However these primary acts of distortion were not the main issue here, as the perpetrators remained unknown. This lawsuit focused on the actions of a photographer/businessman. At various times he had taken pictures of the foal in its decorated state and had used these photographs to produce a series of postcards, a calendar and subsequently a book. He had, furthermore, taken an image of the work and altered it by means of an unspecified technological process to produce a red foal with Santa Claus hat and boots. This was entirely his own alteration. What the court had to decide was whether these various acts by the photographer could be construed as infringements of the author’s moral right of integrity. Furthermore, was the reproduction of the foal image an infringement of the author’s economic right of exploitation? Did the fact that the

5 In Germany the sculptor Christo, with his partner, had achieved particular notoriety through wrapping the Reichstag, an act which itself became the subject of litigation when he tried to prevent others from using photographs of the work.

6 At the time this article was written, in late 2000, the horse was painted to resemble a German police car. Previous coats of yellow and blue paint were still visible beneath the current white, dark green and black.

7 See S. Ernst, 1997 AIP (Archiv für Presserecht) 458, 459.

8 VG Bild-Kunst, the collecting society for visual artists, photographers and the authors of films.

9 Copyright Act, Sec. 28. The power to exercise the economic rights, however, had been passed to the collecting society.
work was in a public place provide the photographer with a sufficient
 defence? Were other defences available?

III. The Action in the German Court

1. Infringement of the Right of Integrity – The Treatment of the Foal by
   Unknown Persons

The core right of integrity is expressed in the German legislation in the
following terms: "The author has the right to prohibit a distortion or any
other impairment of his work that is apt to endanger his legitimate intellec-
tual or personal interests (seine berechtigten geistigen oder persönlichen
Interessen) in the work." 11

In this case the Mannheim District Court, on appeal, had no difficulty in
finding that the initial treatments of the sculpture were distortions of a kind
that could infringe this right. The fact that some might have seen the altera-
tions to the horse as charming could have no influence on the court's
findings. While the legislation in numerous countries limits the right of
integrity by reference to the effect on the author that the impugned altera-
tions are required to have, 12 German legislation contains a particularly
broad formulation of this effect. Whereas many countries have chosen the
relatively specific requirement that the author's honour or reputation should
be prejudiced, 13 the German requirement that the impugned act should be
apt to endanger the author's legitimate intellectual or personal interests in
the work catches a much wider range of acts. 14 The reference here to geistige
Interessen (intellectual interests, the interests arising out of the personal
bond between author and work) makes any inquiry as to the artistic or other
value of the alterations unnecessary:

10 This is not the only provision in the legislation covering the "right of integrity" but it is
   the primary provision. In relation to works, it is supplemented by Secs. 39, 62 and 93.
11 Copyright Act, Sec. 14.
12 South Africa, Copyright Act 1978, Sec. 20 (prejudice to honour or reputation); Switzer-
   land, Swiss Copyright Law, Art. 11 (damage to personality); Austria, Copyright Act,
   Sec. 21 (impairment of intellectual interests); the Netherlands Copyright Act 1912,
   Art. 25 (derogation to honour or reputation or value as an author).
13 In these they have followed Art. 6th of the Berne Convention: "[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, mutila-
   tion or other modification of, or other derogatory action in relation to, the said work, which
   would be prejudicial to his honour or reputation."

Such countries are Canada, the UK, Australia, Italy, Spain and South Africa.
14 The inclusion of the honour or reputation test was mooted at the time the current legisla-
   tion was being drafted, but was rejected in favour of a formulation that put more empha-
   sis on the intellectual or spiritual interests of the author and less on the way the author
   was seen by others: DIETZ in: G. SCHRECKER, (ed.) "Urheberrecht" 285 (2nd ed.,
Whether an alteration of the work is to be seen as a distortion in the sense of Sec. 14 of the Copyright Act does not depend on whether the alteration is to be assessed as negative in any way. According to the purpose of Sec. 14, a distortion will always occur when the alteration has the effect that significant aspects of the work take on a different bias, produce a different effect (eine andere Färbung oder Tendenz erhalten).\(^{15}\)

The recognition of the personal bond between author and work implies that the author has the right to decide how his or her work appears to the public. The work must be presented to the public in a way that is true to the author’s conception of it. In this case, while the original work had achieved its effect through its form alone, through the vulnerable, shaky stance of the young animal, the sculpture in its various subsequent manifestations did so through the superimposition of colour and other material. Significant aspects of the work had been altered. This being the case, all the alterations to the sculpture by unknown persons were necessarily violations of this authorial prerogative. They could, therefore, while not leading immediately to any relief, form the basis of further aspects of the judgment.

2. The Photographs of the Earlier Distortions

The photographer had played no role in the initial distortions of the original sculpture. Regarding these distortions he had done no more than to photograph them and to disseminate the photographs to the public. Could dissemination without alteration lead to liability on the part of the defendant photographer? The German legislation does not provide expressly, as does the legislation in the copyright countries, for infringement of the moral rights of authors through dealings with the work. On the other hand dissemination of a work may be a significant factor supporting the plaintiff’s case under some circumstances.\(^{16}\) In this particular instance it became clear that, because the right of the author is the right to determine how the work will appear to the public, the person who disseminates images of the already distorted work is considered to be participating in the infringement through aggravating the initial breach.\(^{17}\) The matter was dealt with by the observation that the production of the postcards, calendar and book “meant that the altered work is made available to a circle of people who would otherwise have no knowledge of it. The prejudice to the author caused by the distortion was therefore increased (vertieft) by the defendant.”\(^{18}\)

\(^{15}\) 1997 GRUR 364, 365 (from the reasons given by the Court).

\(^{16}\) See, for example, E. Ulmer, “Urheber- und Verlagsrecht” 219 (3rd ed., Springer-Verlag, Berlin, Heidelberg, New York 1980): “In the case of altered copies, an infringement of the author’s right of personality is, as a rule, only to be found if they are made available to the public.”

\(^{17}\) Commentary on this case has described this as being equivalent to an indirect infringement of the author’s rights in the work: Dietz in: Schrieker, supra note 14, at 293.

\(^{18}\) 1997 GRUR 364, 365.
Thus, there was no doubt here that the treatments of the sculpture were distortions of the relevant kind and that the photographer’s actions came within the ambit of the legislation. But this was not the end of the matter. It needed to be considered whether there were further factors to be brought into the equation.

3. Justifications for the Defendant’s Use of the Distorted Image

The court then considered factors that might be placed in the balance against the authorial interests, for example circumstances where publication of the distorted work might have been justified. This balancing of interests (Interessenabwägung) is indicated by the wording of the legislation and is an integral and formal part of the inquiry into whether there has been an infringement of the right of integrity. Thus, while the work may have been altered in a way that prejudices the author’s interests, there will still be no infringement if sufficiently strong arguments in favour of the alterations or other infringing act can be mounted, or if the author’s claim to the work’s integrity is weak. Factors taken into account in this balancing of interests might be: the type and extent of the interference with the work, the level of creativity embodied in the work itself, and whether the work has been created within an employment relationship. Such a mechanism for balancing the relevant interests provides the element of flexibility essential for the proper working of such legislation in the commercial world.

In this case the discussion was brief. It was merely noted that the photographs might justifiably have been used to illustrate a newspaper article about the distortion of the sculpture. In that case the interests of the public in being given the relevant photographic information (and hence the right of the photographer to give it to them) might have prevailed against the interests of the author or author’s representatives in preventing the publication. But in this case the publication had taken place solely in the artistic and financial interests of the photographer:

As far as the defendant was concerned... it was not a matter of satisfying the justified interests of the public in receiving information. Rather, it was primarily a matter of using these various manifestations of the Holbein horse, through the reproduction and dissemination of the photographs, for his own artistic and financial purposes. Under these circumstances the interests of the defendant must give way to the interests of the second to fourth plaintiffs [the heirs], being those persons capable of exercising the personal rights of the author, in the undistorted presentation of the work.

In a further attempt to defend his actions, the photographer argued that one of the plaintiff heirs had consented to the dissemination of the distorted

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19 In this section it is set in train by the words “berechtigte ... Interessen”, expressing that the author’s interests must not only exist but must be legitimate or justified interests. See Dietz in: Schlicker, supra note 14, at 283 et seq.
20 See Dietz in: Schlicker, supra note 14, 296-298.
images. This argument was dealt with cursorily by the court. An effective consent could only have been granted by all the heirs, not by any single one of them. Nevertheless the case does indicate the potential for consent to counteract what would otherwise be an infringement of the moral right.\(^{22}\)

Under the circumstances of this case the moral rights of the author, enshrined in Sec. 14, had been infringed by the photographer’s use of the distorted image.\(^{23}\)

4. The Economic Rights and Sec. 59

The first plaintiff, the collecting society, was in a position to claim for infringement of the right of exploitation (Verwertungsrecht), namely the exclusive right to reproduce and distribute the work. But how did the provisions governing the economic rights function in a case where a distorted work was reproduced? This question led to a close consideration of the legislation and particularly the provisions governing works in public places. The relevant provision, Sec. 59, was considered: “It shall be permissible to reproduce, by painting, drawing, photography or cinematography, works which are permanently located on public ways, streets or places and to distribute and publicly communicate such copies. For works of architecture, this provision shall be applicable only to the external appearance.”\(^{24}\)

This provision has counterparts throughout the world\(^ {25}\) and has a long history in Germany. In federal legislation it goes back to 1876 and existed even earlier in local statutes.\(^ {26}\) It has been justified by the notion that such works have already, in a sense, been made part of the public domain and cannot therefore be considered in quite the same way as works that are to some greater extent withheld from the public.\(^ {27}\) Indeed the lower court in

\(^{22}\) This is confirmed by SCHRICKER in: SCHRICKER (ed.), supra note 14, at 510: “As a rule, these kinds of agreement affecting the author’s right of personality are bound up with the granting of exploitation rights and take a contractual form…. But unilateral consent to the treatment of the work, removing the illegality of the treatment, is also possible.”

\(^{23}\) VOGEL in: SCHRICKER, supra note 14, at 917, comments on the type of relief available: “The author can demand of a person who is reproducing and disseminating his distorted work that this person cease those activities and, if the person has caused the distortion himself, the author can claim damages”.

\(^{24}\) Copyright Act, Sec. 59 (WIPO translation).

\(^{25}\) South Africa, Copyright Act 1978, Sec. 15(3); Switzerland, Federal Copyright Law, Art. 27; Austria, Copyright Act, Sec. 54(1)(5); Netherlands, Copyright Act 1912, Art. 18; Canada, Copyright Act, Sec. 32.2(1)(b).

\(^{26}\) VOGEL in: SCHRICKER, supra note 14, at 912.

\(^{27}\) In the justificatory material accompanying a draft artists’ rights bill in 1904 it was stated that the draft expressed a “principle… that works which are permanently situated on public streets or places are, in a sense, in the public domain and may be reproduced by anybody as long as this does not occur in the same artistic form… In the face of the cultural and other general considerations that are at issue here the author’s interest in the exclusive use of his work must take a secondary position. If it is suggested that the reproduction of a streetscape, of which the work forms a part, should be permissible, but not (Cond. on page 170)
the present case had noted that such a work had been "dedicated to the community (der Allgemeinheit gewidmet)". 28 Because this provision makes inroads into the exclusive rights of the author, it must be read narrowly. 29 For the provision to apply, the work must be situated in a public thoroughfare, street or open space (it appears that other places that the public may freely enter such as an underground railway precinct or a railway hall would not satisfy the provision). 30 The work must also be situated there on a more or less permanent basis. 31 For the exemption to apply, the work may only be reproduced by means of a two-dimensional work, so that, for example, a smaller model of a sculpture could not be made. All these criteria were fulfilled in the case of the foal. But two arguments could still be mounted against the photographer to establish that Sec. 59 did not apply: the fact that the work was already altered and the fact that there was a limitation on the Sec. 59 exemption.

a) The Copying of a Prior Distortion

The first of these arguments was unsuccessful. The fact that, when the photographer made his images of this work, it had already been distorted by third persons failed to convince the court that Sec. 59 ceased to apply. Section 59 had removed the right of the author to the sole right of exploitation under the circumstances outlined in the section. This right could not be restored to the author because third parties had distorted the work. The economic interests of the author were in the fruits of his own achievement. He and his successors in title could not now claim the fruits of a treatment of the work that had been carried out by others.

(Contd. from page 169)

the reproduction of the work itself, then it must be observed that a distortion of this kind would be difficult to draw since it is often precisely that work which determines the streetscape. Apart from that, in many of the cases that we are looking at here, e.g. postcards, photographs, pictures of the city etc., the work itself is the real object of the reproduction, and the depiction of the area surrounding the work is only incidental, framing material. An abolition or limitation of this freedom of reproduction, which is rooted in our legal and cultural life would also be of concern from a social point of view since the interests of numerous small businesspeople are tied up with the free trade in postcards and photographs. The material went on to note the concerns of artists that their works might be devalued by inferior reproductions but argued that these reproductions are not created for artistic purposes but in the interest of the community: A. Osterrieth, "Bemerkungen zum Entwurf eines Gesetzes betreffend das Urheberrecht am Werken der bildenden Künste und der Photographie" 126-7 (Carl Heymanns Verlag, Berlin 1904).

28 Freiburg Local Court, judgment of 10 July 1996, 1997 NJW 1160.
30 Vogel, ibid., at 914.
31 Ibid., at 915. See also Nordemann in: Fromm & Nordemann, supra note 29, at 449. This was the issue in the Christo case. His "Veiled Reichstag" was found not to be sufficiently permanent to satisfy the provision on the basis that its lifetime was, from the start, limited under the terms of the contract formed between Christo and the administration of the German parliament.
In the court's view it is unimportant, with respect to Sec. 59, whether the work is photographed in its original state or in a state that has been altered by third persons. Section 59 has the effect of limiting the economic rights of the author in favour of a person who photographs the work. In spite of the basic rules expressed in Secs. 16 and 17, the author's exclusive right to exploit the work in the nominated ways is thus withdrawn. In the court's view these exploitation rights cannot become available to the author again through the fact that third persons – without altering the location of the work – have made alterations to it. Rights of exploitation accrue to the author because of the principle that the fruits of his creative activity accrue to him. The result of the view put to the court by the plaintiffs would, on the other hand, be that the author or his successors in title could lay claim to the financial gain produced by the actions of a third person. This is not to be reconciled with the legal reasoning underlying either Sec. 59 or Secs. 16 and 17 of the Copyright Act.32

b) The Photographer's Own Alterations and Sec. 62

Nevertheless the photographer was caught by another provision, Sec. 62. It may be recalled that, apart from reproducing images of the already distorted foal, the photographer had also made his own alterations to a previously undistorted image of the foal. He had, by technical means, dressed it in a Santa Claus hat and boots. These acts, according to the appeal court, brought Sec. 62 into play. This section, which operates in tandem with Sec. 59, provides that in cases where the statute creates exemptions in favour of particular uses of a work, alterations to the work cannot be made.33 (The appeal court, like the lower court, read this as meaning that alterations could not be made by the person seeking to rely on Sec. 59.) The section is one of the outlying manifestations of the personality right, the central provision being Sec. 14. The control that it exerts over provisions governing the economic rights is consistent with the monist doctrine that the economic and moral interests of the author, and the provisions that protect them, are all part of the same whole and interact with each other.34 The outcome here was that the alterations to the work carried out by the photographer made it impossible for him to rely on the exemption offered by Sec. 59.35 The

32 1997 GRUR 364, 366. Sections 16 and 17 are the sections stating the exclusive rights of reproduction and distribution.
33 “Where the use of a work is permissible under the provisions of this Chapter, no alteration may be made to the work, Section 39 shall be applicable mutatis mutandis.” (WIPO translation). Section 39 provides that changes to the work or its title, to which the author cannot in good faith refuse his consent, are permissible.
34 See Vinck in: Fromm & Nordemann, supra note 29, at 456. See also Dietz in: Schrick, supra note 14, at 989 et seq.
35 In the words of the court “the exploitation of this photograph is not covered by Sec. 59 Copyright Act”: 1997 GRUR 364, 366. Dietz points out that the action of the photographer also involved an infringement of the right of personality embodied in Sec. 62, an infringement that could be the subject of an independent action, supra note 3, at 177-178; and Dietz in: Schrick, supra note 14, at 998.
photographer had infringed the author’s economic exploitation rights in this regard. 36

But was there, or could there have been, a further line of defence available to the photographer?

5. Sec. 24 and Parody

German legislation provides for cases where a second author produces a work based on the work of an earlier author. If the derivative work fulfills certain criteria when compared with the original work, it will not be considered an infringement, either of the economic or of the moral rights. The relevant provision is Sec. 24 providing for free Benutzung or free use of a work. 37 This section creates the route by which parodic works, among others, are protected under German law, but will do so only if a sufficient distance can be established between the original work and the allegedly new work. The criteria by which this distance is established are quite clearly expressed in judicial pronouncements, but are perhaps not always easy to apply:

The requisite for “free use”, according to constant judgments of the Federal Supreme Court, is that the original work is only to have served as an inspiration for further individual creativity. The result must be that the borrowed characteristics of the original work must pale by comparison with the individuality of the new work. 38

When the test was applied in the case of the altered “Santa Claus” photograph, these criteria were not considered to have been fulfilled. The photograph was conceded to have a comic effect through the addition of the hat and boots, in other words through the foal having been given a get-up that was intrinsically inappropriate to a horse. But this did not produce the effect that the original work paled in the light of the newly created work. On the contrary, the nature of the original tended rather to be accentuated by the comic treatment. To be sure, the courts had responded to the social need to protect parody by indicating that, in cases of parody, the requirements for the existence of a free use were to be read generously. But this treatment of the foal was not to be considered a parody.

A parody is characterised by an antithematic dialogue (Auseinandersetzung) with the older work. In the case of the defendant it was not a matter of a creative dialogue with the older work of the sculptor A. Rather it was a matter

36 The limited range of this finding is considered a mistake by some. Nordeumann writes: “Incorrect Mannheim District Court … which holds that a person’s entitlement to exploit a work situated in a public place is limited only by the prohibition on alterations to the work carried out by that person, according to Sec. 62(1). It overlooks the fact, however, that the prohibition in Sec. 14 is directed at everyone including a person who exploits a distortion carried out by another”, supra note 29.

37 Copyright Act, Sec. 24(1) “An independent work created by free use of the work of another person may be published and exploited without the consent of the author of the used work” (WIPO translation).

38 1997 GRUR 364, 366.
of producing an alienation between sculpture and audience and thus using the sculpture as a means of producing a comic effect. Individual creative characteristics extending beyond the alienation of the Holbein horse in its original form could not be shown by the defendant and are not evident.\textsuperscript{39}

For his own distortions, then, the photographer could find no exemption under the legislation. He had infringed both the moral and the economic rights of the author. For his use of the already distorted work, on the other hand, he had infringed the moral right of the author to the integrity of the work, but had not infringed the economic right of reproduction.

\textbf{IV. How Would the Photographer Fare in Australia?}

In Australia, an assertion of the author's right of integrity could be mounted under the new moral rights provisions of the \textit{Copyright Act 1968}, enacted in the \textit{Copyright Amendment (Moral Rights) Act 2000}. These provisions were passed on 7 December 2000 after a gestation period of almost 20 years. They came into operation on 21 December 2000 and apply to, \textit{inter alia}, copyright artistic works created before or after the entering into force of the legislation, as long as the infringing act occurred subsequent to this date.\textsuperscript{40}

The following is an examination of how the German case might be dealt with were it to occur in Australia today. Although the Australian provisions will be the focus of attention here, many of the principles discussed will be equally applicable in other copyright countries.

The question of the economic rights would be dealt with under the copyright provisions of the Act and it would first need to be established that the author or his successors were in fact the copyright owners. This cannot be taken for granted, the copyright being freely assignable property, but it will be assumed for the purposes of this article that the copyright had remained with the author and subsequently passed to a beneficiary.

\textbf{1. Duration and Exercise of the Right of Integrity of Authorship}

By way of preliminary historical comment, it may be observed that for a time it did not appear that any action could be taken in a case of this kind. This was because the "right of integrity of authorship", as the Australian legislation calls this aspect of the moral rights, \textit{did not survive the death of the author}. Only quite late in the legislative process was the right of integrity in relation to non-cinematographic works extended to the period of copyright protection.\textsuperscript{41}

\textsuperscript{39} \textit{Ibid.}

\textsuperscript{40} Sec. 195A/2O Copyright Act 1968.

\textsuperscript{41} In relation to cinematographic works it remains the lifetime of the author, reliance here being placed on concessions made at the Brussels Revision Conference for certain countries: \textit{Art. 6\textsuperscript{m}(2)} "... 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 (Contd. on page 174)
When a legislature chooses that the right of integrity should survive the author, it must also decide who is to exercise that right. In the German case this right was exercised by the author's heirs, the successors to the complete range of authorial rights. This could not happen in Australia, since the moral rights of the author are not transmissible by will or capable of devolution by operation of law. The only person capable of exercising the rights in this case would be the author's executor (legal personal representative). This might be the original executor, as chosen by the author, or a subsequent appointee. It might be a corporate executor. Special arrangements for the funding of litigation would presumably need to have been put in place by the author during his or her lifetime. If this did not occur, the likelihood of litigation would be remote, especially towards the end of the period of protection (50 years post mortem auctoris in Australia, since the duration of most moral rights protection is tied to the period of copyright protection).

2. Infringement of the Right of Integrity?

The provisions instituting the right of integrity in Australia are a great deal longer than, but in some respects not as broad as, their German counterpart. The right is defined exhaustively as "the right not to have the work subjected to derogatory treatment". "Derogatory treatment" in turn, and in relation to an artistic work such as the sculpture in this case, means (again exhaustively):

(a) the doing, in relation to the work, of anything that results in a material distortion of, the destruction or mutilation of, or a material alteration to, the work that it prejudicial to the author's honour or reputation; or
(b) an exhibition in public of the work that is prejudicial to the author's honour or reputation because of the manner or place in which the exhibition occurs; or
(c) the doing of anything else in relation to the work that is prejudicial to the author's honour or reputation.

(Contd. from page 173)

of the author of all the rights set out in this preceding paragraph may provide that some of these rights may, after his death, cease to be maintained."

Earlier pieces of draft legislation, for example the Copyright Amendment Bill of 1997, provided for the right of integrity to exist, for all works, for the full period of copyright protection. The 1999 bill changed this, providing that the entire right should be limited to the lifetime of the author. This position was itself later changed in amendments introduced by the Government in the House of Representatives on 31 October 2000.

42 Sec. 195AN Copyright Act 1968.

43 Compare the Copyright, Designs and Patents Act 1988 (UK), Sec. 95; the Copyright Act 1994 (NZ), Sec. 119; the Copyright Act (Canada), Sec. 14.2(1); the Copyright and Related Rights Act 2000 (Ireland), Sec. 119; the Copyright Act (Germany), Sec. 28.

44 Sec. 195AN Copyright Act 1968. Only copyright in film is treated differently. See supra note 41.

45 Sec. 195AL(2) Copyright Act 1968.

46 Sec. 195AK Copyright Act 1968.
The first of these definitions seems most apt to apply to the situation in question.47

The insertion of the express materiality requirement at this point seems to be unique to Australia and is perhaps indicative of excessive caution by the legislature. One may ask whether alterations or distortions that are prejudicial to the honour or reputation of the author could ever fairly be classified as non-material. Be that as it may, in the present case there seems little doubt that an Australian court would find a “material distortion”, a “mutilation” or at least a “material alteration” of the work to have taken place, given the extreme nature of the interference with the foal image either by the unknown vandals or by the photographer.48 It is more questionable, however, whether this interference would be found to be prejudicial to the author’s honour or reputation.

The insistence on prejudice to honour or reputation here derives from the wording of Art. 6bis of the Berne Convention.49 The article has, however, been criticised in some of the civil law countries for what has been seen as the excessive narrowness of the test.50 We have seen that its wording has not been adopted in Germany, whose formulation, in accordance with doctrine and jurisprudence, is more compendious. Neither has it been adopted in France where it is broadly stated that the author “shall enjoy the right to respect for his name, his authorship and his work”.51

For Australian courts, the difficulty with the test is that the word “honour”, as a legal term, is relatively unfamiliar to the courts. “Reputation” is more

47 The third limb of the definition, specifically the words “anything else”, is stated in the Explanatory Memorandum to the bill to be “intended to address those instances where a work is used in an inappropriate context and prejudices the author’s honour or reputation.” To what extent the phrase “anything else” is limited by this gloss is uncertain.

48 The most problematic of the treatments is the wrapping of the horse. It might be argued that this merely obscures the image rather than altering it. It may be of importance here that the image of the animal should show through the wrapping so that it is indeed an altered animal that is seen rather than no animal at all.

49 See supra note 13.

50 As early as 1929, Dress in Germany had written that, through the Berne wording, the emphasis was shifted unjustifiably away from the rights of the author to the rights of the user of the work: “It is undesirable that domestic legislation should adopt this terminology… Third parties have, in principle, no right to make alterations to the work; rather the author has a fundamental right to prevent any alteration.” W. Dress, “Zur Frage des Persönlichkeitsrechtes im Kunstschutzrecht,” 1929 GRUR 456. Prior to the 1948 revision conference of the Berne Convention, the Belgian administration and the office of the Berne Union argued that the provision failed to reflect the prevailing attitude in doctrine and practice (“Documents de la Conférence de Bruxelles 5–26 Juin 1948” 184 (Bureau de l’Union Internationale pour la Protection des Oeuvres Littéraires et Artistiques, Berne 1951); and in 1966 Desbois, in France, noted his concern that emphasis would be shifted from protection of the author to the satisfaction of community wishes (H. Desbois, “Le droit d’auteur en France” 32 (2nd ed., Dalloz, Paris 1966).

51 Article 1, 121-1, Code de la Propriété Intellectuelle (WIPO translation).
easily dealt with, given its currency in defamation law, but emphasis on this term will inevitably lead to an objectification, and hence narrowing, of the test for infringement. A court in Australia, in considering the issue of reputation, would do what the German court in the present case stated that it did not need to do. It would consider whether the distortion of the work was so negative in the eyes of others that it reflected badly on the author or the author’s memory.

If it were found that the author’s reputation remained unaffected by the alteration of the work, it might then be asked whether consideration of the “honour” limb of the test would produce a different outcome. Is the concept of “honour” in English capable of covering the same ground as the notion of geistige Interessen – the interests deriving from the personal bond between the author and the work – and hence of protecting the integrity of the artist’s original conception? The word itself offers no strong reason why this should not be so, “honour” having a more general meaning than “reputation” and approaching a notion of authorial dignity. It has been recognised in Australia that the word has a more personal bias than “reputation”, extending at least as far as the author’s sense of how he or she is perceived. Unfortunately, however, there are quite weighty indications that it is being interpreted internationally as adding little, if anything, to the notion of reputation. It was, in 1996, abandoned in Art. 5 of the WIPO Performances and Phonograms Treaty (relating to performers), an article that otherwise duplicates the words of Art. 6 quite faithfully. The recent Irish legislation, providing now for moral rights, is another case in point. Again, the notion of honour has been dropped, prejudice to reputation remaining alone as the ultimate criterion for infringement of the right of integrity.

Assuming, conservatively, that prejudice to honour or reputation would be assessed solely according to the reactions of third parties to the distortions, what would the outcome be in the present case? It is likely that those seeing the work would be considered by a court to be sufficiently discerning to be able to distinguish the sculpture as created by its author from the altered work. Thus the good name and public standing of the author would not be prejudiced. On the other hand, if it could be thought that the alteration was the work of the author, then a different outcome might be expected, honour or reputation being more vulnerable here. This seems unlikely in the present

52 In the 1994 Discussion Paper (“Proposed Moral Rights Legislation for Copyright Creators”), at 45, para. 3.49, it was said . The terms ‘honour’ and ‘reputation’ may also need to be defined, given their different meanings. That is, the term ‘honour’ is generally associated with personal integrity and how a person considers he or she is perceived. ‘Reputation’, on the other hand, is associated more, in the defamation context, as [sic] relating to a person’s professional, business or personal standing in the community.

53 It is significant here that the treaty is dealing not with the treatment of works, but with neighbouring rights, so that there is no contradiction of Berne in this case.

54 Copyright and Related Rights Act 2000, Sec. 109(1).
case. In any event, the outcome would be a great deal less certain than in Germany.55

a) The Original Distortions and Their Publication

Assuming that infringement can be established at all, it is clear that under Australian law, as under German law, there will be various layers of infringement in this type of case. The initial treatment of the work by the unknown persons can, if it is serious enough, be an infringement of the right capable of founding an action by the author: "A person infringes an author's right of integrity of authorship in respect of a work if the person subjects the work, or authorises the work to be subjected, to derogatory treatment".56 Therefore a civil action under the moral rights provisions for interference with the incorporeal work, as well as a possible criminal action under any local laws for defacement of the physical sculpture, would be possible. The possibility would, of course, be only theoretical as long as the perpetrators remained unknown. Even if they were known, the matter might be dealt with more effectively by criminal law, especially since vandals (even artistic ones) would not ordinarily be in a position to pay substantial damages.

With respect to the dissemination of the already infringing treatment of the work by the photographer, the Australian legislation is more explicit than its German counterpart. Under the provisions dealing with infringement, it provides expressly that

If an artistic work has been subjected to derogatory treatment of a kind mentioned in paragraph (a) of the definition of derogatory treatment in

55 We can look here to the Canadian experience, Canada having generated a number of decisions based on its moral rights provisions. Note the commentary of Y. GENDREAU & D. VAVER in: P.E. GELLER & M.B. NIMMER (eds.), "International Copyright Law and Practice", Can 78–79, 77[2][h][j] (Vol. 1, Matthew Bender, New York 1988): "Both unknown authors and well-known ones, whose fame may be beyond onslaught, may find it equally difficult to demonstrate prejudice to honor and reputation. The right of integrity may become largely illusory except in the most egregious cases, if prejudice is strictly construed. … For example, the right of integrity was considered in a case where a published school anthology included, without the authority of either the copyright owner or the author, a version of a novel that was, in the author’s opinion, poorly abbreviated. While finding that a distortion, mutilation, or modification had occurred causing the author subjective distress, the court held that no violation of moral rights had taken place because no objective prejudice had been proved, the author’s career and professional life remaining apparently unaffected. In another case, a university student whose work was plagiarized by his professor failed to obtain damages for breach of his right of integrity because he was unable to show any damage to his reputation."


56 Sec. 195A(2) Copyright Act 1968. The authorisation element of the infringement is a feature on which Australia has placed particular emphasis during the last stages of drafting the legislation.
section 195AL that infringes the author's right of integrity of authorship in respect of the work, a person infringes the author's right of integrity of authorship in respect of the work if the person does any of the following in respect of the work as so derogatorily treated:
(a) reproduces it in a material form;
(b) publishes it...  

The same ground is therefore covered in the two jurisdictions and, in the absence of any valid defence, the actions of the photographer would be subject to sanction in Australia since he had both reproduced and published the work. It is important to note, however, that infringement through dissemination can occur only if the initial derogatory treatment of the work occurred after the new Act came into operation. It is not enough simply for the dissemination to have taken place after that date.  

In addition, the plaintiff could claim under a separate provision that the photographer had infringed the right of integrity by dealing with an article, knowing or being in a position to know that it was an infringing article. “Dealing with” includes, in this context, publication and distribution for sale. An infringing article is, among other things, an article that embodies an artistic work, or a reproduction of an artistic work, “being a work... in respect of which a moral right of the author has been infringed.” No matter who had carried out the original infringement, the actions of the photographer in disseminating the photographs would seem to be caught.

b) The Photographer's Own Distortion

Regarding the distortions carried out by the photographer himself on the photographic image of the foal, the same considerations would apply as discussed above. Not only had he distorted the work (“the work” being the foal image, not the physical sculpture itself), but had also reproduced and published it in its distorted form. He had, further, sold infringing articles when he could reasonably have known that they were infringing.

3. Defences to the Claim that Moral Rights Have Been Infringed

The notion of a balancing of interests, in its technical sense (the German Interessenabwägung), is foreign to Australian law. Australia provides, how-

57 Sec. 195AQ(4) Copyright Act 1968. Publication is defined to include, in the case of an artistic work, supply of reproductions of the work, whether by sale or otherwise, to the public: Sec. 29(1)(a) Copyright Act 1968.
58 Sec. 195AZO(3) Copyright Act 1968.
59 Sec. 195AV(1) Copyright Act 1968. The wording here is “An author's moral right in respect of a work is infringed by a person who, in Australia, deals with an article if the person knew, or ought reasonably to have known, that the article was an infringing article.”
60 Secs. 195AV(2) and 189 (definition of “deal”) Copyright Act 1968.
61 Sec. 189 (definition of “infringing article”) Copyright Act 1968.
62 See supra notes 57–61 and associated text.
ever, for a similar approach to the question of infringement. To escape liability, the alleged infringer must prove to the court that his or her actions were reasonable. The legislation gives a non-exhaustive list of matters to be taken into account by a court in deciding on the reasonableness of the defendant’s act. The fundamental question remains, however, that of whether the action was reasonable in all the circumstances:

A person does not, by subjecting a work, or authorising a work to be subjected, to derogatory treatment, infringe the author’s right of integrity of authorship in respect of the work if the person establishes that it was reasonable in all the circumstances to subject the work to the treatment.

The matters to be taken into account in determining for the purposes of subsection (1) whether it was reasonable in particular circumstances to subject a literary, dramatic, musical or artistic work to derogatory treatment include the following:

(a) the nature of the work;
(b) the purpose for which the work is used;
(c) the manner in which the work is used;
(d) the context in which the work is used;…

Some of these provisions are ambiguous in that it is not clear whether “use” of the work here denotes use of the work by the author or other person entitled to use the work, or whether it is use of the work by the alleged infringer, who may or may not be so entitled. The present case is a good example of a situation where there are two quite disparate uses of the work. However one might make the following tentative observations:

- The nature of the work is art. It is not utilitarian, and it expresses a personal vision of its author. It is likely to exhibit a relatively high level of originality, and it is serious rather than comic.
- The purpose for which the work is used is, in the hands of the authorities, to enhance a public space. This was presumably also the purpose for which the work was created by the sculptor. In the hands of the photographer the purpose of the use is to provide the basis for an economic and marginally artistic enterprise based upon the comic effect of the distortions.
- The manner and context in which the work is used are, in the hands of the authorities, permanent placement on the street. In the hands of the photographer they are the production of postcards, a calendar and a book. In his hands the work is also used as the subject of technological

63 Sec. 195AS Copyright Act 1968. The section continues, less relevantly:

“(e) any practice, in the industry in which the work is used, that is relevant to the work or the use of the work;
(f) any practice contained in a voluntary code of practice, in the industry in which the work is used, that is relevant to the work or the use of the work;
(g) whether the work was made in the course of the author’s employment;
(h) whether the treatment was required by law or was otherwise necessary to avoid a breach of any law;
(i) if the work has 2 or more authors – their views about the treatment.”
manipulation, again in the context of producing commercial materials. The manner in which the photographer has used the work is not of a kind contemplated by the author or the owner of the original work. Nor is it a type of use that is necessary for any legitimate exploitation of the work.

Given the uncompromising nature of art, the wide discrepancy between the intended, established use of the work and the use to which the work in this case was subsequently put, given the absence of public interest (beyond the diversion or entertainment of the public) to be found in the actions of the defendant, and given the tendency of courts to deal relatively harshly with actions that are solely for the commercial benefit of defendants, one might imagine that in Australia the photographer would fail to satisfy the onus of establishing the reasonableness of his actions. The only complicating factor is perhaps that the reproduction of the sculpture took place, as in Germany, under a statutory dispensation (see further below). But the fact that a person may photograph or otherwise reproduce and disseminate the work in derogation from what would otherwise be the rights of the copyright owner should not indicate that it is reasonable to distort the work, or deal in reproductions of the distorted work, in derogation from the conceptually and legally quite different rights of the author. Hence, regarding the legitimacy of the defendant’s actions, the Australian court would be likely to come to a finding similar to that of the German court.

The more conventional defences that a defendant might be tempted to look to in Australia would not be available in this situation. Fair dealing defences,\(^{64}\) for example, apply only in relation to infringement of the copyright and, in Australia, the moral rights of the author do not come within the definition of copyright, being conceived of as special statutory rights of a personal nature. This distinguishes the situation in Australia sharply from that in Germany, where all the rights of the author of an artistic work are embraced by the concept of the Urheberrecht. The other typical line of defence, that the defendant’s action did not relate to a substantial part of the work,\(^{65}\) would probably be untenable on the present facts, though it still remains to be seen how courts will treat the question of substantiality in the moral rights context.

The argument that one of the heirs had consented to the impugned actions of the photographer could not prevail in Australia. While the Australian legislation provides that “[i]t is not an infringement of a moral right of an author in respect of a work to do . . . something if the act . . . is within the scope of a written consent genuinely given by the author or a person representing the author”,\(^{66}\) it could not be considered that the heir in this case was “a person representing the author”. Such a person is defined as “a person who . . . is

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\(^{64}\) Secs. 40-42 Copyright Act 1968.

\(^{65}\) Sec. 14 Copyright Act 1968.

\(^{66}\) Sec. 195AWA Copyright Act 1968.
entitled to exercise and enforce the moral right concerned". Heirs are not so entitled, the consent needing to be granted by the legal personal representative in this type of case.

4. The Economic Interests of the Author and the Public Places Exemption

In the German decision, in as far as it applied to the economic interests of the author, much depended on the exemption concerning works in public places and its applicability, or lack of it, in this situation. The attempt to claim the protection of the exemption was defeated by reference to the moral rights of the author in their broader sense – the prohibition on alteration to a work for which a special exemption has been given. Like many other countries, Australia has long had its own “public places” provision – Sec. 65 of the Copyright Act 1968:

(1) This section applies to sculptures and to works of artistic craftsmanship of the kind referred to in paragraph (c) of the definition of artistic work in section 10.

(2) The copyright in a work to which this section applies that is situated, otherwise than temporarily, in a public place, or in premises open to the public is not infringed by the making of a painting, drawing, engraving or photograph of the work or by the inclusion of the work in a cinematograph film or in a television broadcast.

The section is supplemented by Sec. 68, which provides that publication of the resulting reproduction will also be non-infringing.

The Australian provisions are narrower than their German counterpart, not covering all types of artistic works in public places. They differ also in that there is no requirement that the work be in an open area. On the other hand, it is necessary that the work be situated on premises that can be defined as “open to the public”. The type of reproduction allowed by Sec. 65 is the same as in Germany – it is reproduction in two dimensions only, so that a sculpture cannot be reproduced by a smaller sculpture. Undoubtedly the provisions would cover the photographic reproduction and publication of the foal image just as the German counterpart did, and would hence preclude copyright infringement.

But what of the reproduction of a distorted version of the foal? Would there be an infringement of the copyright here at all? If so, would the infringement be covered by the public place exception?

On the question of copyright infringement, the court’s reasoning in Australia would be quite different from the German line of reasoning seen in this decision. The question would inevitably be answered by reference to the

67 Sec. 189 Copyright Act 1968.
68 Strictly speaking, it is incorrect to speak of a work situated in a public place since a work is incorporeal and incapable of being situated anywhere. Its embodiment (or one of its embodiments) is situated in the public place.
69 Buildings and models of buildings are covered by Sec. 66 Copyright Act 1968.
substantiality test. Copyright in the image of the foal would be infringed if a substantial part of the original image were appropriated. Substantiality is a notoriously malleable concept in common law jurisprudence, but one thing can be stated with certainty: it is determined on qualitative, not solely quantitative grounds.\textsuperscript{70} Thus a court might look at the recognisability of the part copied and at its importance to the whole, as well as the proportion of the original work that it represents.\textsuperscript{71} A substantial part would seem clearly to have been appropriated if the entire foal image with advertising material painted or stuck on it were reproduced, as long as the original horse was recognisable beneath it. This recognisability should be assured in the present case by the importance of the foal’s stance to the character of the work as a whole. The only exception might be the case of the foal wrapped in the manner of a Christo sculpture, where, perhaps, only its location could have identified it as the author’s sculpture.

Turning to the question of the statutory exemption for work in public places, the protection offered by Sec. 65 is offered to all those who would be infringing the right of the copyright owner by reproducing a substantial part of the original work. Distortions of the work that had occurred prior to the reproduction should, in Australia, have no particular bearing on this question as long as they did not have the effect that the substantiality test could not be satisfied. Thus the photographer here would be protected by the public place exemption, unless this exemption were itself statutorily curtailed.

The German court, in considering breach of the economic rights, relied on the statutory limitation of the Sec. 39 exemption embodied in Sec. 62. No alteration was to be made to the original work. However the Australian legislation contains no counterpart to this provision. This is explained by the fact that the personality rights of the author have been relatively little recognised in this country’s legal thought up till now and have not been seen as limitations on statutory dispensations.\textsuperscript{72} They have not interacted with and influenced the commercially-oriented copyright provisions in the way that is natural in a monist regime such as Germany’s. Therefore the photographer should be able to rely on the public place exemption in relation to the allegation of copyright

\textsuperscript{70} See, e.g., Hawkes & Son (London) Ltd v. Paramount Film Service Ltd [1934] 1 Ch 593.
\textsuperscript{72} Prior to recent amendments there was only one instance in the Australian legislation where a statutory exemption is followed by a similar type of proviso, prohibiting the work’s debasement. This was in relation to the statutory licence granted to those who wished to produce recordings of previously recorded musical works: Sec. 55(2) Copyright Act 1968 (now repealed). In this case, however, the debasement of the work would lead to an action by the copyright owner, not the author. See E. Adeney, “Moral Rights/Statutory Licence: the notion of debasement in Australian Copyright Law”, (1998) 9 AIJ 21.
infringement. This would have no bearing, though, on his vulnerability to an action for infringement of the right of integrity.

5. Exemptions for Derivative Works and Parody?

The photographer in this case had tried to argue under the German Sec. 24 that his manipulations had created a new and independent work and therefore he could not be liable for infringement of either the author's moral or economic rights. The Australian legislation has no equivalent of Sec. 24. Case law has determined that, in relation to copyright, the question of parody and the status of derivative works is again governed largely by the substantiality principle.73 Was a qualitatively substantial part of the work's expression appropriated in the making of the derivative work? If so, there will be an infringement. The concepts of an original work paling in the face of a second work or of the second being effectively a new work by virtue of its own creative achievement are unlikely to be used in Australian law to establish that the derivative work does not infringe the copyright.74

In this particular case an Australian court would be likely to find that a substantial part of the original had been appropriated and would thus reach a similar conclusion to the German court on this issue. Whether or not the manipulated work was a new work and capable of sustaining its own copyright protection (which it no doubt was), it still showed the signs of having taken a substantial part of the original sculpted image.

In relation to the moral rights, Australia has no precedent to follow in circumstances where the derivative work is claimed to be a parody. There have, however, been several statements by the legislature or by semi-legislative bodies that moral rights are not intended to interfere with parody. For example it was stated in the Second Reading Speech for the Copyright Amendment Bill 1997 that

it should be emphasised that the introduction of moral rights, in particular the right of integrity, is not intended to impede or adversely affect the time-honoured practices of parody and burlesque. The moral right of integrity is not intended to stifle satire, spoof or lampoon any more than does the existing law of defamation.75

73 For a discussion of this see RICKETSON, supra note 71, at [9.35].
74 To be sure, there are parody cases that suggest that the newness of the parodic work will protect it from infringement: see, e.g., Glyn v. Western Feature Film Co [1916] 1 Ch 261 per Younger J.; and Joy Music Ltd v. Sunday Pictorial Newspapers (1920) Ltd [1960] 1 All ER 703 per McNair J. But this view has been put aside in favour of the substantiality test in subsequent United Kingdom decisions such as Schweppes Ltd v. Wellingtons Ltd [1984] FSR 210; and Williamson Music Ltd v. The Pearson Partnership Ltd [1987] FSR 97. In the 1989 Australian Federal Court case of AGL Sydney Ltd v. Shortland County Council [(1989) 17 IPR 99] substantiality was again endorsed as the dominant test in the face of an argument based on the "parody cases".
75 House of Representatives, Hansard, 18 June 1997, per the Hon. Daryl Williams. Similar points were made by the minority of the Copyright Law Review Committee in 1988 (Contd. on page 184)
There is no reason to think that government policy had changed by 1999 when the current legislation was first introduced to Parliament. Counsel representing the photographer could, therefore, attempt to establish the “Santa Claus” distortion as belonging to one of the above types of discourse, hence as a reasonable treatment of the work. (There would be no need to establish that the distortion fitted within any strict definition of parody, given the breadth of the parliamentary formulation.) Such an argument is encouraged by the requirement that the court take the purpose for which the work is used, and the manner of its use, into account in deciding whether the defendant’s action was reasonable. The weakness of the argument is that this comic treatment of the work may not be covered by the intention of the legislature at all. “Parody”, “burlesque”, “satire”, “spoof” and “lampoon” all suggest an element of comment on the underlying work that is arguably absent in this case. It may well be, then, that the Australian defendant would have no more success through drawing attention to the nature of his own work than the German defendant had.

V. Conclusion

Overall it would seem that, though their approaches are different, the German and the Australian legislation could, subsequent to the introduction of moral rights legislation to Australia, produce similar results in this type of case. This would be good news for authors given that the Berne Convention operates on national treatment principles and therefore the artists of one country may be reliant on the legislation of another member country to protect their rights. We must, however, be cautious in the prediction of outcomes.

For one thing, it has been seen that the public place exception in Australia, in the circumstances of this case, is significantly less circumscribed in its operation than its German equivalent. It therefore offers more protection to those who would otherwise infringe the copyright. Furthermore, in relation to the moral rights, there remains the other major point of concern – the test of whether the honour or the reputation of the author has been prejudiced and therefore whether there has been any infringement at all. Given the lack of binding authority in Australia, a court that was inclined to do so could read this requirement very strictly with the result that here, as in the other countries that follow the wording of the Berne Convention, it could be very difficult to establish that the requirement had been fulfilled. Given that the artist’s protection pivots on this concept, a strict reading would leave an author or author’s estate without any realistic means of redress against those

(Contd. from page 183)


76 Berne Convention for the Protection of Literary and Artistic Works, Art. 5(1).
77 Although it is more circumscribed in terms of the types of artistic work it covers.
who either distort a work of public sculpture or publicise such a distortion by visual means. Litigants from other Berne Union countries such as Germany might not find that the rights to which they are accustomed are duplicated, in practical terms, in Australia. On the other hand they could not complain that the formulation failed to comply with the Berne Convention. There are those, of course, who might think that this strict reading of the test was a good thing, emphasising the argument that has been stated to underlie the public place exemption—that such a work of art is already, practically if not legally, in the public domain and that restraints on the use that can be made of it, within the bounds set by the criminal law, are an unjustifiable inhibition of economic and artistic enterprise. On the other hand it might be argued that the level of vulnerability of an author whose work is displayed on the streets makes it desirable that the requirement of prejudice to “honour or reputation” be read as broadly as possible.

Tshimanga Kongolo*

Towards a New Fashion of Protecting Pharmaceutical Patents in Africa – Legal Approach**

1. Introduction

The struggle between developing and developed countries over patent protection in general and pharmaceuticals in particular is not new. Under the pre-existing system of protection as provided within the framework of the Paris Convention for the Protection of Industrial Property, every country was free to determine the appropriate level of patent protection by opting for or against the protection of pharmaceuticals (process or product). Until recently, a large number of developing countries did not provide protection in respect of pharmaceuticals. From the same perspective, there were countries which provided protection only to pharmaceutical process patents while refusing the same protection in respect of pharmaceutical products.

78 See supra note 27.
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