Moral rights and the 'unreasonable' pseudonym in Australia

Elizabeth Adeney

I. Introduction

In his play *Romeo and Juliet* Shakespeare has his heroine, Juliet, lament the inconvenient surname that her lover, Romeo, bears:

'Tis but thy name that is my enemy;... What's Montague? It is not hand nor foot, Nor arm nor face, nor any other part Belonging to a man. O be some other name! What's in a name? That which we call a rose, By any other word would smell as sweet... 1

In doing so Shakespeare emphasises the disjunction between name and substance, a person's essence or individuality transcending the mere label that the person bears. In delinking the name from the person, Shakespeare was playing on a theme that has been returned to constantly in the ensuing centuries. Not only does a name in its classificatory function 2 poorly represent individuality, but the name under which a work is published may also be a poor indicator of the work's origins. Periodically the point is made – whether tacitly or expressly – that the name of the so-called 'author' is a mere arbitrary label whose attachment to the work is neither necessary nor particularly informative. 3 What is important

All translations are by the author, unless where otherwise indicated.
2 In this case classifying the person according to family background.
3 See, for example, comments by Jacob Grimm in 1811:

the poetry of the people emerges from the spirit of the Whole whereas what I call art poetry emerges from the individual. For this reason the new poetry names its poets, the old poetry knows no poets to name. It is not made by one or two or three people but is a sum of the whole... It is unthinkable to me that there was ever such a person as Homer or a writer of the Nibelungenlied. (Excerpt from a letter to Achim von Arnim, 20 May 1811, in Reinhold Steig and Hermann Grimm (eds.), *Achim von Arnim und die ihm nahestanden* (J. G. Cotta'schen Buchhandlung, first published 1904, republished by Herbert Lang, Bern, 1970), vol. 3, 116.)

156
is the expression contained in the work itself and perhaps also its representation of cultural thought. At other times and in other contexts, however, the attachment of a name to a work seems essential in the interests of maintaining human rights and ensuring the authenticity of the material. The two conflicting impulses seen here – to discard or devalue the name or to require and value its presence – seem to meet and be partially reconciled in the allowance that is made for authors to publish their work either anonymously or under a pseudonym. These days the protection of pseudonymity is typically, though not exclusively, contained in the moral rights provisions of our legislation. The protection of anonymity may or may not be a part of moral rights.

This chapter examines how the moral rights system in Australia protects but also limits the use of assumed names or pseudonyms by authors and performers. Such limitation on the freedom to choose a designation is imposed through the requirement that the assumed name be 'reasonable', yet no guidance is given by the legislature on what 'reasonable' is intended to mean. The chapter considers what might be a reasonable choice of name by an author or performer, a name to which the reputation of the person concerned can legitimately attach. It further suggests what types of name should never be classified as reasonable.

II. The moral rights system in Australia

Moral rights are the product of an individualist and human-rights-based movement in artistic thought. They are, in a nutshell, the non-property-based, non-economic rights of the author or performer. They are enjoyed in relation to the works (namely literary, dramatic, musical, and artistic works and films) or to the performance of the rights-holder. They are distinct from copyright, which is a statutorily created form of property and economic in nature, despite its capacity on occasion to protect the author and the author–work relationship in less commercial ways. They are also distinct from the statutory, economic rights of the performer.

During the Middle Ages the great Passion Plays and Corpus Christi cycles were practically never associated with particular named authors. More recently, Michel Foucault has written of the essential irrelevance of authorial naming: 'What is an Author?' (Josué V. Harari trans.) in Paul Rabinow (ed.), The Foucault Reader: An Introduction to Foucault's Thought (Parthenon Books, New York, 1984), 101.

This has been particularly the case since the early nineteenth century and the rise of the notion of authors' natural rights over their work. For the history of moral rights, see generally, Elizabeth Adeney, The Moral Rights of Authors and Performers (Oxford University Press, Oxford and New York, 2006), chs. 1 and 2; and, for more recent thinking, Sam Rickerson, 'The Case for Moral Rights' (1995) 25 Intellectual Property Forum 37, 40–1.

Copyright Act 1968 (Cth) ss. 195(2)(b), 195ABC(2)(b) ('Copyright Act').
The moral rights system in Australia was introduced in its current form in 2000 for the benefit of authors of literary, dramatic, musical or artistic works and films.\(^6\) In 2007 it was extended to protect the interests of performers in live or recorded performances.\(^7\) It is designed with the personal interests of the author and performer at heart. It is also designed to bring Australia into compliance with the country’s obligations under the Berne Convention and the WIPO Performances and Phonograms Treaty (WPPT).\(^8\)

Moral rights and reputation – the legislative scheme

In Australia the author and the performer are protected through three kinds of provision, one of whose practical effects is the maintenance and enhancement of reputation. Indeed this is probably the most significant of their functions, though certainly not the only one.

One set of provisions – embodying the right of attribution of authorship or performervship – ensures that the author’s or performer’s name will always be mentioned when the work or performance is used in a way that would make it available to the public.\(^9\) In other words, the so-called ‘paternity’ of the work is recognised; the recipient or audience should never be unaware of who has created the work or acted in the performance. This in turn means that, if the material is considered to be good, the author or performer will either have her existing reputation enhanced or she will start to accrue a desirable reputation. She will be judged by others through the material she has produced. Once the reputation is gained, that reputation will then flow through to and influence the public reception of later material that she produces. The work’s value as perceived by the public is transferred to the author, and the author’s perceived qualities are then anticipated in future works.

It is within this right of attribution of authorship or performervship that the protection of the pseudonym is situated. The author or performer is free, quite simply, to assume a name and therefore to attach the reputational advantage accruing from the work to that name. The second set of

---

\(^6\) Copyright Amendment (Moral Rights) Act 2000 (Cth), amending Copyright Act 1968 (Cth).

\(^7\) Copyright Legislation Amendment Act 2004 (Cth), amending Copyright Act 1968 (Cth) Part IX.

\(^8\) Revised Explanatory Memorandum, Copyright Amendment (Moral Rights) Bill 1999 (Cth) Oudine (taking account of amendments made by the House of Representatives to the Bill as introduced); Explanatory Memorandum, US Free Trade Agreement Implementation Bill 2004 (Cth), 73 [306].

\(^9\) Copyright Act ss. 193 and 194; ss. 195ABA and 195ABB.
provisions – containing the right against false attribution of authorship or performership – is complementary to the first and extends the ‘paternity’ idea.\textsuperscript{10} The provisions are drafted to produce two effects. First, they help to ensure that the author’s or performer’s work will not be presented to the public as the work of another person.\textsuperscript{11} So they guard against another person wrongfully appropriating the advantage of the creator’s reputation through plagiarism. Second, they ensure that the author’s or performer’s work, if altered by a third party without the creator’s authorisation, will not be presented to the public as the unaltered work of the author or performer.\textsuperscript{12} In other words the author or performer will not have to take public responsibility for amendments to the work/performance that she did not make, and that may have been badly made. The author’s or performer’s reputation will not be ‘diluted’ by association with substandard alterations.

The third set of provisions, containing the right of integrity of authorship or performership, focuses on: (1) certain types of treatment of the work or performance; and (2) the negative effect on the author or performer resulting from that treatment. The author or performer may take legal action if the work or performance is ‘derogatorily treated’.\textsuperscript{13} Derogatory treatment occurs if the work or performance is ‘materially distorted, mutilated or materially altered’ (and, in the case of an artistic work, if it is destroyed) in a way that is prejudicial to the reputation of the performer or the ‘honour or reputation’ of the author.\textsuperscript{14} The right is further infringed if the work or performance is reproduced or disseminated in forms that show the derogatory treatment.\textsuperscript{15} Again the maintenance of authorial or performer reputation is safeguarded. The value of this reputation then flows through to and maintains the value of the person’s future products.

The trade mark function of a name

Within this moral rights scheme, the name and the work of the author or performer are protected because they embody the personality and spirit of the individual creator. This protection, however, has the inevitable

\textsuperscript{10} Copyright Act ss. 195AC, 195AD, 195AE, 195AF, 195AG and 195AH; ss. 195AHA, 195AHB and 195AHC.
\textsuperscript{11} Copyright Act ss. 195AD–195AF and 195AHB.
\textsuperscript{12} Copyright Act ss. 195AG–195AH and 195AHC.
\textsuperscript{13} Copyright Act ss. 195AI and 195ALA.
\textsuperscript{14} Copyright Act ss. 195AJ–195AL and 195ALB.
\textsuperscript{15} Copyright Act ss. 195AQ and 195AXC.
effect of maintaining both commercial reputation (through safeguarding the integrity of the work) and the authorial or performer name (through safeguarding the badge of origin). The latter function can be, and frequently is, described as a trade mark function.16 Because the author or performer is free to appear to the public in the form of a verbal avatar or alter ego (the assumed identity), this alter ego inevitably represents the reputation and goodwill that accrue from the public exposure and that are protected by the integrity right and the right against false attribution. The author who chooses a name thus engages, for whatever purpose, in a form of self-branding.

The existence of this trade mark function of an authorial or performer name can, in turn, suggest to us ways in which some of the provisions governing the rights of attribution can or should be interpreted.

III. Names, pseudo-names and other identifiers – a historical perspective

While most authors will choose to publish under their inherited or given name, Western culture has long recognised the entitlement of the author (or indeed any other person) to either choose a form of designation or to forgo any particular form of designation for certain purposes. In other words, it has recognised the entitlement to use a designation both positively as an indication of origin and negatively as a mask behind which identity can be concealed.

Some accepted uses of pseudonymity and anonymity

When anonymity and pseudonymity were judicially discussed in the United States in a 1995 case the following general statements were made. They looked back in time and identified the use by authors of a masking device as an aspect of the freedom of speech which had long been protected by the Constitution:

Great works of literature have frequently been produced by authors writing under assumed names. Despite readers' curiosity and the public's interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may

be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.17

The assumed or masked identity allows an author to challenge religious or political norms at less risk to personal safety than might otherwise be the case. The masking function of the designation also allows experimentation and risk taking, permitting authors to take a step beyond what they can be sure is currently acceptable to their public. Without risking their current reputation, they can build the foundations of a new one.

It was on the apparently unquestioned entitlement to manipulate his public identity that Sir Walter Scott relied in the nineteenth century when, for many years, he declined to publish his novels under his given and inherited names, preferring instead to identify himself by reference to his previous publications, for example as the 'Author of Waverley'. His purposes were not merely self-protective.

In his preface to a late edition of the Waverley Novels Scott gave a number of reasons for his decision. Initially he had feared embarrassment should the novels fail. Later, his place in society assured, he had no particular need of fame, or so he said. The use of another identity ensured that he did not seem to monopolise the public attention. Scott's anonymity (or perhaps rather pseudonymity) further created for him a wraith-like freedom of movement, with the effect that

I could appear, or retreat from the stage at pleasure, without attracting any personal notice or attention, other than what might be founded on suspicion only. In my own person also, as a successful author in another department of literature, I might have been charged with too frequent intrusions on the public patience; but the Author of Waverley was in this respect as impassable to the critic as the Ghost of Hamlet to the partisan of Marcellus.18

Moreover the mystery surrounding his identity exercised a useful influence on the buying public:

18 Walter Scott, Waverley Novels (Adam and Charles Black, Edinburgh, 1862), vol. 1, General Preface, xi.
Perhaps the curiosity of the public, irritated by the existence of a secret, and kept afloat by the discussions which took place on the subject from time to time, went a good way to maintain an unabated interest in these frequent publications. There was a mystery concerning the author, which each new novel was expected to assist in unravelling, although it might in other respects rank lower than its predecessors.  

Scott’s analysis of the public reaction indicates that he had discovered, even in quasi-anonymity, a relatively sophisticated marketing function. Association of the unnamed person with the previous works acted as a fully adequate identifier, tapping in admirably to the reputation built up through publication of the previous novels. Even without naming himself in any way, Scott was, in trade marks terms, using the reference to Waverley to denote a certain quality of writing, to symbolise goodwill, to motivate consumers to buy and to differentiate his products from those of other authors. He was also teasing and tantalising the public. The public desire to identify the works’ provenance being what it was, the incompletely attributed works remained before the public eye and accretions to the œuvre functioned as clues in a literary paper chase. They were entertainments even before the first page had been turned.

The treatment of the pseudonym in copyright law

The US court in McIntyre was not wrong in pointing to the longstanding tolerance in legal circles of anonymity and pseudonymity. Copyright jurists have repeatedly stated that a fictionalised or incompletely revelatory authorial designation has equal status and value with the ‘true’ given or inherited or legally acquired names of the author. Not only is the assumed identifier seen in some contexts as protecting freedom of speech, but it has long been recognised as performing the same function in the marketplace as the ‘real’ name does. (Indeed, judging by Scott’s experience, it may have a considerably enhanced function.) Certainly there is no basis for according it an inferior claim to protection. The point appears to have been particularly thoroughly canvassed in Italy and was well made in the 1923 case of Mariani v. Bletti Publishing House, decided in the Court of Milan. There it was stated that:

The pseudonym and the inherited name both serve to identify the intellectual activity of individuals; they therefore have the same function and consequently the same juridical value. . . . [I]n this domain protection is not accorded to the inherited name as such, but only by reference to the fact that the person who

19 Ibid.
bears it uses it to identify his intellectual activity... [T]he name is intended to characterise by an external sign the intellectual activity of the individual.\(^{20}\)

The designation is an external identifier of the source of intellectual activity and to be respected as such.

This perception of equality was already well established in 1923. Rosmini noted in 1888 that the commentator, Amar, had maintained that 'principles of justice and equity compel equal protection for known and unknown authors'.\(^{21}\) Also in 1888, the conference of the Association littéraire et artistique internationale (ALAI) at Venice proposed that works signed with a pseudonym should be protected in the same manner as if they had been signed with the real name of the author.\(^{22}\) This proposal was then put into effect in the Berne Convention for the Protection of Literary and Artistic Works. The provision makes arrangements for the legal protection of anonymous or pseudonymous works whose author is known, works which are published but whose author is unknown and works which are unpublished and whose author is unknown.\(^{23}\)

**Pseudonymity and moral rights**

The principles in favour of allowing authorial choice of a designation existed and had made themselves felt independently of and even in the absence of moral rights protection. Witness the acceptance of this choice in the US, which has never had fully-fledged moral rights provisions.\(^{24}\) Nevertheless, the introduction of moral rights to the majority of countries around the world has provided a convenient vehicle for the perpetuation, codification and extension of these principles. Thus, it is not unusual in moral rights legislation, including the legislation of the Asia Pacific region, to find a clause that allows the author a freedom to choose the form of designation required and hence to determine the tag to which the reputation derived from the work will attach.

In Japan, for example, Article 19(1) of the Copyright Law states:

---

\(^{20}\) See Note, 'Italie' [Italy] (1926) *Le Droit d'Auteur* 85, 83.


\(^{22}\) *Acts de la Conférence réunie à Paris du 15 avril au 4 mai 1896* (Bureau International de l'Union, Berne, 1897) 78.

\(^{23}\) Berne Convention for the Protection of Literary and Artistic Works, opened for signature 9 September 1886, as last revised at Paris on 24 July 1971, 1161 UNTS 3 (entered into force 10 October 1974), art. 15 (previously art. 11).

\(^{24}\) Copyright Act of 1976, 17 USC § 302. Currently in the US the only statutory rights that could be described as 'moral rights' relate to narrowly defined 'works of visual art'.
The author shall have the right to determine whether his true name or pseudonym should be indicated or not, as the name of the author, on the original of his work or when his work is offered to or made available to the public.\textsuperscript{25}

The copyright Acts of Korea, New Zealand and Canada also provide expressly for the use of pseudonyms.\textsuperscript{26}

In Australia the author's right to choose the desired designation is given in s. 195 of the Copyright Act 1968 (Cth); the performer's right is given in s. 195ABC(2)(b).

**Negative aspects of the right to a pseudonym, and a legislative solution**

The use of a pseudonym or other chosen designation has, however, its negative aspects. For one thing, the pseudonym chosen may be intrinsically objectionable in its social context – for its obscenity, for example, or its tendency to incite hatred. Furthermore, although the majority of pseudonyms are necessarily and intentionally deceptive, there may be deceptions that are unacceptable in the circumstances of the case. It is clear, moreover, that the half-imagined,\textsuperscript{27} half-real safety of the mask tempts some authors to push at the boundaries of legality, defaming those who are normally protected by defamation law, publishing material which is injurious to persons, to social groups, to corporations or states.\textsuperscript{28}

No doubt in order to guard against problems of these kinds, and perhaps also in a recognition that, if the name is to operate as a trade mark, then it should be subject to limitations, just as trade marks are, the


\textsuperscript{27} Even to the extent that they are 'reasonable' and protected, anonymity and pseudonymity are always fragile protections – only as good as the secrecy of those who are in the author's confidence. Like the common or natural law principles which allowed authors to rename themselves in the past, this is not a regime which guarantees the maintenance or effectiveness of the mask.

Australian legislators have given the author the right to determine the designation only to the extent that it is 'reasonable in the circumstances':

Copyright Act 1968 (Cth), s. 195:
(1) Subject to subsection (2), the author of a work may be identified by any reasonable form of identification.
(2) If:
(a) the author of a work has made known, either generally or to a person who is required under this Part to identify the author, that the author wishes to be identified in a particular way; and
(b) the identification of the author in that way is reasonable in the circumstances;
the identification is to be made in that way.

A counterpart provision establishes the same principles for performers.29

The reasonableness concept that is of interest to us here is contained in sub-section (2)(b) above. Unlike the reference in sub-section (1),30 this requirement of reasonableness, which appears to be unique to Australia, indicates that authorial desires should be acceded to only if they are of a certain acceptable standard.

The existence of the reasonableness criterion has the potential to impose a significant limit on the range of designations supported by the Act. The unreasonableness of a pseudonym would give the publisher or gallery or production company, for example, a reason to refuse to use the name on the work or performance. It would further block an authorial or performer action against those who wished to use the author's or performer's real name in relation to the work or performance.

But the question remains what 'reasonable' means when applied to a person's choice of a pseudonym.

Reasonable in the circumstances?

The term 'reasonable' must be interpreted in its context in the Copyright Act and taking into account the purposes of the Act.31 The immediate context of the term is the protection of moral rights, and, through moral rights, of authorial or performer reputation, among other things. More broadly it is a context in which the interests of: (1) authors/performers; (2) copyright owners or other commercial interests; and (3) consumers of

---

29 Copyright Act s. 195ABC(2).
30 Which appears to impose an obligation of the person using the work to ensure that the designation is reasonable - presumably reasonable for effective attribution purposes. The focus is not here on the reasonableness of the form of attribution chosen by the author.
31 Acts Interpretation Act 1901 (Cth) 15AA and 15AB(1)(b)(ii).
the creative or created material are balanced for the purpose of ensuring that none of the trio of interests unacceptably dominates the others.

The question of 'reasonableness in the circumstances' has not been judicially discussed in relation to authorial designations in Australia and it is not yet clear what range of considerations it would embrace. In this sense 'reasonableness' in the choice of a designation is treated very differently from the defence of 'reasonableness' in the context of moral rights infringement actions, where extensive lists of factors to be considered are offered to the decision maker. Nevertheless, in both cases the reasonableness of a given act is for the tribunal to decide in an exercise of its discretion.

**Touchstone values** In determining what a reasonable pseudonym might be it is necessary to consider again the accepted purposes for which pseudonyms may be used. It would seem relatively uncontroversial to say that we as a society want the pseudonym to protect the vulnerable author against persecution. The pseudonym ought to be able to protect the author against oppression from government, religious bodies, or from other groups or individuals. Such protection is in turn likely to encourage the production of works and performances, and to enable a certain amount of literary, artistic or even musical risk taking. On the other hand the pseudonym should not itself come to serve the forces of oppression or to facilitate seriously antisocial behaviour.

We accept that, if a pseudonym is to be protective, it must also, of necessity, be either positively deceptive or at least no more than semi-informative. On the other hand we presumably do not want the pseudonym to be part of the mechanism by which forgeries, misrepresentations and calumnies are passed off on the public.

Apart from its protective effect, we are quite happy to accept the pseudonym as a marketing tool and as a means by which a playful author may tease and tantalise the public. We are always willing to be entertained by a minor mystery. We are not even necessarily averse to the odd literary or artistic hoax as long as it results in no more harm than a prickling of certain bubbles of pretension.

These values need, however, to be translated into some legal form.

---

32 For example, Copyright Act s. 195AR.
Moral rights and ‘unreasonable’ pseudonyms: Australia

The legal tools at hand If called on to do so, it is probable that a tribunal would look to trade marks law for initial guidance on how to deal with problematic authorial or performer designations. The overlap between the functions of a pseudonym and a trade mark would suggest as much. As a first step, the tribunal might well filter out those designations which could be described as ‘scandalous’, just as the Australian Trade Marks Act expressly filters out such marks. Those signs which are, for example, offensive to ordinary persons, and even a particular class of person, may be denied protection under the Act, though the playfully risqué trade mark is accepted readily enough by the trade mark Examiners. The Trade Marks Office Manual indicates that ‘Trade marks incorporating words and images which appear to condone and/or promote violence, racism or sociopathic behaviours fall within the ambit of “scandalous” marks. One might expect a similar logic to apply under the Copyright Act.

In addition to considering the position under Australian law, a tribunal might further look to United States law and its mode of distinguishing between acceptable and unacceptable trade marks. It might take note of s. 2(a) of the Lanham Act:

No trademark... shall be refused registration on the principal register on account of its nature unless it – (a) Consists of or comprises immoral, deceptive, or scandalous matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute.

This formulation is significantly broader than the bare word ‘scandalous’ used in the Australian Act.

Second, those names whose use would be ‘contrary to law’ by breaching Australian legislation (or common law) – for example through being overtly misleading and deceptive in falsely indicating an attachment of the work or performance to another author or performer – would, almost of necessity, be as unreasonable under the Copyright Act as they are unregistrable under the Trade Marks Act. What is unreasonable might therefore be interpreted as that which allows a competing authorial or performer reputation to be unnecessarily damaged and that which allows

---

24 Trade Marks Act 1995 (Cth) s. 42(a) (Trade Marks Act).
26 This can be ascertained by a simple search for the ‘word’ on the Australian (or US) online register.
27 IP Australia, Trade Mark Office Manual, para. 2.9.
28 Lanham (Trademark) Act of 1946, 15 USC. 42(b).
29 Trade Marks Act s. 42(b).
another person's legitimate commercial interests in the exploitation of their creation to be impinged upon. The rights of a given author or performer are naturally limited by the rights of other authors and performers. Where the motive for choosing a particular name appears to be a desire to appropriate another person's reputation, and particularly where this is done for commercial motives, it is hard to see how the use of the pseudonym could be justified.

Third, given the broader context of the provision — namely its position in a Copyright Act — it might also be thought that any pseudonym which had a negative impact on the saleability of a work or performance so as to prejudice the interests of a producer or copyright owner might also be considered unreasonable. The selection of a name capable of sabotaging the commercial operation would tend to upset the equilibrium which exists between the interests of the creator and those of the the exploiter of the material. And, after all, it is in no sense necessary that a particular pseudonym be chosen out of the infinite number available, so no injustice is done in the denial of the name. While moral rights are of their nature opposable against the copyright owner, the extent to which they may be used in this way is clearly intended by the legislators to be subject to limits. This is why defences to moral rights infringement are elsewhere built into the system.

Fourth, certain words that have a special and reserved significance in government, religious, political or economic circles would hardly be reasonable pseudonyms, just as some of them are expressly listed as unregistrable trade marks.

The deception dilemma The most difficult question is whether the principle enshrined in s. 43 of the Australian Trade Marks Act might be equally applicable in the establishment of reasonable and unreasonable author/performer designations:

An application for the registration of a trade mark in respect of particular goods or services must be rejected if, because of some connotation that the trade mark or a sign contained in the trade mark has, the use of the trade mark in relation to those goods or services would be likely to deceive or cause confusion.

As noted above, pseudonyms are of necessity deceptive and confusing in some way. Yet intellectual property systems generally show a deep aversion to names or marks which deceive or cause confusion. Not only is this evidenced in s. 43 of the Trade Marks Act, but it is also indicated,

40 Copyright Act ss. 195AR, 195AS, 195AT, and ss. 195AXD and 195AXE.
41 Trade Marks Act s. 39.
Moral rights and ‘unreasonable’ pseudonyms: Australia

in the moral rights context, by the fact that no reasonableness defence is allowed to a person who misattributes the author’s work to a person who did not author it or who misattributes a performer’s performance to another person.

We therefore need to examine further what deceptions might be regarded as acceptable and what might be regarded as unacceptable. This is an area in which the tribunals will have little material to assist them.

Truths and untruths in naming

Where something purporting to be the name of a human being identifies a product’s origin a conflict develops between the truth-telling and the marketing functions of the name.

Inherited surnames and also patronymics, by their nature, are instruments of familial and cultural coalescence. In their primary function, they identify the individual with a parent, a family, an occupation or a cultural group as the case may be. Given or first names, on the other hand, are a much more malleable quantity than inherited names or patronymics. Their choice is often dictated by no more than parental taste, though often within cultural confines. Even at their most arbitrary, however, they too carry more or less subtle indications about society and background.

No legal rules require that any of these personal names be retained throughout life, and some societal rules allow or require them to be changed or exchanged. But, by and large, names borne by persons are expected by the public at large to indicate some truth about cultural or civic identity. Truth telling, it might be thought, is a more fundamental function of language than artifice. This expectation that truth will be told is paired with a persistent desire to know the truth, illusory as the ‘truth’ may be in the artistic field. This was what Walter Scott had observed among his readership – the assumption that, once the name of the author is known, some vital truth about the work has been revealed. The tendency has also been commented upon by Foucault in his ‘What Is an Author?’

The expectation that a name will deliver a truth about provenance sits uncomfortably with the expectation predominant in commercial practice

---

42 A woman’s maiden name is commonly exchanged for the husband’s surname in Western cultures. Names can also be formally altered by deed poll.

43 Foucault, Foucault Reader, 101–20. As a construct, according to Foucault, a name must necessarily be to some degree misleading and false. Any naming of the author is also a type of masking of the true and diffuse nature of the authorship. The name is in a sense always a pseudonym.
that the name to be associated with a product (as an emblem of both origin and reputation) will be chosen primarily to enhance the marketability of the product. It should speak persuasively about the product’s desirability, and attract consumer attention. The expectation also sits uncomfortably with the fact that, for centuries, pseudonyms have been chosen with the aim of addressing consumer expectations, prejudices and desires in order to achieve the optimal distribution of the product and to protect the author. This was particularly evident in nineteenth-century England when a number of leading female novelists, fearing that they would not achieve success as women, chose to publish under male pseudonyms.44 It was also evident in the twentieth century with the choosing of more alluring screen names for the actors of Hollywood.45 Even today the desirability of the product in a particular segment of the market may be most easily established through its association with a particular gender or age of person, or with an interesting or topical social or ethnic group.

The question of the acceptability and hence reasonableness of a given pseudonym becomes most vexed when the assumed identity is that of an embattled or insufficiently understood minority. (Little question is raised, apparently, when a member of the minority wishes to assume the identity of the majority; the aspiration to coalesce with the dominant group seems to be taken for granted and generally approved.)46 In most if not all populations the potential exists for the exchange of inherited identity with chosen identity to cause offence, and this appears to be recognised in s. 2(a) of the US Lanham Act when it refers to marks ‘which may ... falsely suggest a connection with persons, living or dead’ or ‘beliefs’. It is argued here that these factors may have an impact on the reasonableness of the name.

The problematic pseudonym – Australian cases in point  In Australia one of the most notable recent cases of the problematic pseudonym was that of Helen Darville, the daughter of English immigrants to Australia. In 1994 she achieved first fame and then notoriety when she published a novel, The Hand that Signed the Paper,47 telling a story of Ukrainian experiences during the Second World War. The pseudonym under which

44 For example the Brontë sisters published under the gender-free names Curror, Ellis and Acton Bell; Mary Ann Evans later published under the name George Eliot.
45 For example, Michael Caine for Maurice Joseph Micklewhite; Diana Dors for Mavis Fluck; James Garner for James Scott Bumgarner; and Judy Garland for Frances Ethel Gumm.
46 Witness the names typically assumed in the past by aspiring filmstars: Kirk Douglas for Issur Danielovich Demsky; Doris Day for Doris Mary Ann von Kappelhoff; Charles Bronson for Charles Buchinsky.
Moral rights and ‘unreasonable’ pseudonyms: Australia

she chose to publish the book (and which the publishers apparently took to be her ‘real’ name) was ‘Helen Demidenko’, this alter ego being the supposed child of an illiterate Ukrainian immigrant. Darville went further, and appeared and was interviewed in public wearing Ukrainian national costume – dressing her avatar, as it were – and embracing the identity which accompanied the pseudonym. With the book she won the Australian/Vogel prize for young authors, the Miles Franklin Award and the Gold Medal of the Australian Literary Society. This critical success appears to have been partly due to the perceived ‘authenticity’ of the story which Darville related. The subsequent notoriety of the work was generated partly by the discovery of its author’s invented identity and partly by allegations of historical inaccuracy with an anti-Semitic slant.

When the veil was lifted the work was branded as a hoax, a label typically applied to works which cause acute embarrassment in literary or artistic circles due to their having initially been taken at face value and rated highly. In Australia commentators made comparisons with the earlier ‘Ern Malley’ hoax, where a fictional author was attached to poems apparently written with the intention of misleading, mocking and embarrassing a gullible literary establishment.48 It was not suggested, however, that mockery was the primary purpose of ‘Demidenko’.

The assumption of Ukrainian identity was something of a curiosity in Australia. More frequent are the cases of white Australians taking on the personae of indigenous Australians. Between 1994 and her death in 2000, Elizabeth Durack, a well-known artist of European descent and member of a prominent pioneering family, painted and exhibited under the name of ‘Eddie Burrup’, a fictitious Aboriginal painter.49 When the true origin of the ‘Burrup’ paintings was revealed the substitution caused anger in the indigenous community and was decried by the art galleries which had shown the work as Aboriginal art.50

The following, by way of explanation, is to be found today at the Elizabeth Durack website:

Eddie Burrup is a maban, a Man of High Degree, a stockman, a painter, a story teller and performer. He is the brush and pen name of the artist Elizabeth Durack

48 See above, n. 33.
49 Interestingly, Durack did not retreat so far into the character of Eddie Burrup that she abjured all attribution of the works to herself. According to an entry in Wikipedia ‘Elizabeth Durack [asserted] the moral right to be identified as the substituent of Eddie Burrup’ (Eddie Burrup (accessed 26 December 2010) Wikipedia http://en.wikipedia.org/wiki/Eddie_Burrup).
50 Susan McCulloch, ‘Blacks bash Durack for her art of illusion’, Weekend Australia (Sydney), 8 March 1997, 1.
Elizabeth Admey

and an integral part of the prodigious body of work she produced over a period of some 70 years.

First and foremost an ingenious work of art, the invention of Eddie Burrup initially was a device for Elizabeth Durack to obtain independent assessment of a breakthrough in work and ideas that had been gestating for years.

The persona himself appeared quite unexpectedly... Soon after that Eddie Burrup asserted his individuality and before long had taken possession of his creator...

Detractors and gatekeepers have disparaged the Eddie Burrup phenomenon. They describe it variously as a fiction, a hoax, a fraud, even a crime. They denounce Elizabeth Durack and contend she has appropriated Aboriginal culture...

From an historical viewpoint, the phenomenon of Eddie Burrup belongs to several well-documented traditions - to that of:

1. creative females resorting to the use of a male pseudonym in order to communicate original work and ideas
2. a writer or actor creating, or recreating, a character and in the process becoming that character
3. artists employing allegory or satire in order to comment on the follies and mistakes of those with power and influence.51

The traditions mentioned here are real enough, though these days the assumption of a female rather than male identity is sometimes thought to be the more productive move. For example, in a partial reversal of the Durack situation, it was revealed in 1997 that the prize-winning 'aboriginal' writer 'Wanda Koolmatie' was in fact a non-Aboriginal man, Leon Carmen,52 who claimed to have taken the name and identity of an Aboriginal woman in order to have his work published,53 women and Aborigines being implacably favoured in this regard.

The question, however, is whether our legislators have intended these various uses of a name, including that embraced by Durack, to be 'reasonable in the circumstances', so that the name can be assumed by the author as of right and will achieve the protection of moral rights. Also, regardless of what the legislators intended, is it desirable from a policy

52 In 1996 the author won the Nita May Dobbie Award, intended for a first published work by a female writer.
53 These cases were discussed widely in the media in early 1997. See, for example, Fiona Harari, 'The word's out: it's an epidemic', The Australian (Sydney), 14 March 1997, 1-2 and Adrian Bradley, 'Doped Publisher Calls in Lawyers', Weekend Australian (Sydney), 15-16 March 1997, 3.
point of view for such names to receive legal protection under our moral rights provisions?

The unimportance and importance of authenticity Cases of the type described here are generally deplored, either by a public that feels fooled by the deception (especially if it has extended some sort of special interest or sympathy to the author on account of the assumed identity) or by the cultural group whose name has been taken by a non-member of it. The cultural group may feel that the reputation of its genuine products has been diluted or contaminated by association with the pseudonymous works. But should all such designations be categorised as unreasonable due to the consumer or the group concern?

One way of thinking about the issue is to ask what the 'product' is, the reputation of which the name will embody. Does it in any way include the authorial identity and, if it does, for what period of time does it do so?

Is the product the novel, for example, or is it a novel by a certain person from a certain background – a second-generation Japanese or Ukrainian or Indian immigrant? Is it a novel by a man as opposed to a woman, or by a 20-year-old rather than an octogenarian? The answer of the arts world should surely be that the product – and the centre of interest – is the work itself, regardless of who wrote it. It would surely make no difference, artistically speaking, if War and Peace had been written by a Russian woman, if the Mona Lisa had been painted by an Albanian or if Beethoven had turned out to be Chinese.54

Yet perhaps such a response is simplistic in cases where the work is to be seen as embodying a historical or social or cultural truth – where the pre-eminent or even merely incidental purpose of the work is the communication of truths by its author. This is less likely to be the case, generally speaking, with musical works and even visually artistic works, where the dominant impact of the work is of human feeling translated into perceptible form. It will, however, be true when part of the importance of the art or the music lies in its being representative of a particular tradition. It is even more likely to be the case, at least for a time, with literary works.

In our societies the preponderant use of words is to relate facts. Most novels alternate fiction and fact, with the element of fact more important in some than in others. Many are designed to relate experiences which the

54 In relation to the Burrup incident, one NSW gallery director stated, 'We're not judging the artist, we're judging the work of art. So really what name is appended to it I don't think matters a great deal' (McCulloch, 'Blacks blast Durack', 1).
authors have had or of which they are intimately aware. For a time, the interest and social value of the work depends to a substantial degree on its authenticity. This will be so until the events related become so historically remote to their readership that it is of little significance whether they are true or not. At this point, stripped of several layers of meaning, the story is reduced to a pure expression of human thought or emotion. Nobody is particularly concerned these days whether Shakespeare has given us an authentic account of the life of Macbeth or of the character of Richard III. On the other hand, if an Anglo-Saxon Australian were to write a purportedly first-hand account of the life of an Afghan refugee, most of the interest which the work might have to its readership would evaporate as soon as the identity of the author was known.

To be sure, the reading public is tolerant. Ostensibly truthful autobiographies, for example, are notorious for sliding into fiction without creating very much of a stir. But in areas where a real value is placed on authenticity, where the public expects more of a story than an exercise in storytelling, and where the promise of a particular insight is made but the insight then turns out to be illusory, it might be thought that there is a sufficient element of deception conveyed by the assumed name for it to be called 'unreasonable'.55

The trade mark function as a formal solution to the deception dilemma?

Perhaps one way of resolving the issue in a principled way is to return to the function that the name on the work performs and, in doing so, to borrow from trade marks law. The function of a trade mark is to distinguish the goods or services of one person from those of another. To use a name on goods or services as a trade mark is to use that name in order to connect the goods or services with the source.56

In the context of moral rights it might be said that any name which was being used genuinely to connect the work with the author is reasonable (as long as the name is not scandalous, contrary to law or reserved for other purposes). The deception necessarily involved in the masking function of the name is within acceptable bounds. The name John Le Carré (for John Cornwell) is a case in point. Even if the true name of the author were not known, the name would be unproblematic. The same could be said of the name 'Ern Malley'.57 While it was used to perpetrate a literary hoax it is not in itself unreasonable.

55 This has been recognised elsewhere. See Heymann, 'Authorship', 202.
56 Trade Marks Act s. 17. 57 See Harris and Kerr, Angry Penguins.
The problematic names, on the other hand, are those that purport to connect the work with persons other than the author. At the less problematic end of the spectrum (in today's world) the name might connect the work with a person of a different gender, class or age. At the extremely problematic end of the spectrum are names which connect the work to a different race, nationality, culture or religion. The more embattled that race, nationality, culture or religion, the more questionable the association of a work with it. The work is a cuckoo in the cultural nest.

How the spectrum is imagined will, of course, be culturally determined and will vary according to time and place. What is acceptable in one age may not be acceptable in another. Acceptability may also depend on the circumstances in which the inquiry takes place. Accurate information about age and gender are, for example, a great deal more significant in the context of personal online communications than they are in the context of artistic publishing. This needs to be taken into account in judging reasonableness.

Connection to a particular family (a connection implied by most pseudonyms) may or may not be problematic. In the trade marks world a mark has enhanced capacity (greater inherent adaptability)\(^\text{58}\) to distinguish the rarer it is. Therefore those who wish to register a name will do a search of Australian surnames to try to gauge the distinctiveness of the name. On the other hand, the rarer the family name is, the greater the likelihood of deception or confusion. In other words, if the pseudonym suggests an association with a particular family, and especially a family that is well known for certain attributes, the name may seem unacceptably deceptive. On the other hand, if the name is so common that the bearer of the pseudonym need not necessarily be related to any other person bearing the name, the pseudonym would be unproblematic.

The name chosen will be most unacceptable and 'unreasonable' if its deception is apt to cast a particular light on other legitimate bearers of the name. If the name is clearly identifiable with a culture, the light may be cast onto the culture or race as a whole. Most harm will accrue to the group if the application of the name reflects negatively upon it, but I would suggest that the pseudonym will be unreasonable even if the group is cast in a positive light. Cases in point are the 'Demidenko', 'Burrup' and 'Koolmatrie' cases in Australia - all instances of an individual purporting to reveal insights which were associated, through the

\(^{58}\) Trade Marks Act s. 41.
name, with the cultural group. Moral rights around the world protect the individual against false attribution of authorship, i.e. the attribution of the author's work to another person. In the UK and New Zealand moral rights even protect non-authors from having the authorship of a work attributed to them. While only an individual can enjoy moral rights, it would nevertheless be a strange thing if moral rights law (with its human rights connotations) were actively to sanction the attribution of a work to a social group which had not authored it, particularly if this were detrimental to the interests of individuals within the group.

One of the most chilling cases in point is that of *The Protocols of the Elders of Zion*, a forged/plagiarised document attributed by its possibly Russian 'authors' to the 'Elders of Zion' and instrumental in promoting the anti-Semitism that led to the Holocaust and beyond. If one were inclined to see the use of assumed names as merely harmless and amusing, this instance of misattribution should give pause for thought. In cases of plagiarism and forgery, as in other cases, the name that is used to indicate the source of the work will be critical to its reputation, its reception and ultimately its social influence. The crime lies not solely in the plagiarism but in the attribution.

Thus it is suggested that a pseudonym will be most unreasonable when it strays from the simple trade mark function of attaching an author to a work or body of works. The same may be said of a performer's stage name. While a degree of deception is essential, that deception should not extend to attaching the work to a person, entity or social group that can be seriously misrepresented by their association with it. If this happens, the attributional or trade mark function of the name has been exceeded and the liberty to use the name abused.

**IV. Conclusion**

The express protection of pseudonymity under the current Australian Copyright Act challenges our concept of a name’s purpose – what a name really is, what the moral rights system really protects and what it should

---

59 While it was the Jewish rather than the Ukrainian community that saw most to object to in the Demidenko book, the propensity to misrepresent the community whose voice was assumed should not be underplayed.

60 Copyright, Designs and Patents Act 1988 (UK) s. 84; Copyright Act 1994 (NZ) s. 102.

Moral rights and 'unreasonable' pseudonyms: Australia

protect. All the moral rights are intended to protect the authorial or performer reputation in different ways. However, the common assumption that the attribution right and the right against false attribution ensure that the public will know about the true origin of the work gives way to a more nuanced truth. In some cases deception is promoted for the greater good of society and its individual members. Yet what bounds are to be put on this state-sanctioned deception remains unclear. This chapter has been an attempt to tease out the implications of the protection of reputation through pseudonymity and to establish principles on which the reasonable use of a pseudonym might be distinguished from uses that are unreasonable to the point of harm.
Index

trade marks and brands (cont.)
and law
and economics see under social benefits
and costs of trade marks and brands
legal perspective of brands see under
what is the value of a brand to a firm
licensing and assignment of registered
trade marks 18–19
names see names as brands
premised on reputation and goodwill
257–8
registering and protecting brands and components of brands 15–16, 17
extended protection for well-known trade marks 20–2, 107
the function protected by trade mark registration 17–19
refusal to register 167–9, 263
TRIPS and extent of protection granted to registered trade marks 19
relationship between trade marks and brands 27–8
reproduction rights see reproduction rights in US trade mark law
scandalous or unacceptable trade marks 167–9, 263
social benefits and costs see social benefits and costs of trade marks and brands
survey evidence see survey evidence in Australian trade mark and passing off cases
traditional knowledge see branding
indigenous peoples’ traditional knowledge
TRIPS see Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement
unregistered/common law trade marks 24–5
value of brands see what is the value of a brand to a firm
well known see well-known trade marks
see also under Australia; Hong Kong; Indonesia; Malaysia; Singapore; United Kingdom; United States
Trade-Mark Cases (1879) 122–3, 124
Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement
Article 15(1) 16
Article 16 107
Article 16(1) 19

Article 16(3) 21–2, 152–3
Article 22 (1) 236
Article 22(2) 237
Article 23 237–8
Article 23(1) 239
Article 24 238
definition of a trade mark 16
extent of protection granted to registered trade marks 19
extended protection for well-known trade marks 20–2, 107
geographical indications 236–9, 250
definition 236
traditional knowledge see branding
indigenous peoples’ traditional knowledge
Turner, Graeme 45, 46

unfair competition see expert evidence in unfair competition cases in Australia

United Kingdom (UK) 31–2
celebrity brand protection
limited protection of celebrities’ identities 67–8, 77
and passing off actions 46, 49, 50–2, 58
conference on brands 27–8, 40–1
copyright 67–8
dilution 37
Human Rights Act (1998) 78, 89, 90
misrepresentation 67–8
moral rights and authorship 176
passing off actions 16–17, 46, 49, 50–2, 58, 67–8
privacy protection 78, 89, 90
trade marks 67–8
well-known trade marks 37
United States (US) 81, 83, 89
anonymity and pseudonymity 160–1, 162, 163
certification marks 260
comparative advertising 41
Constitution 66, 92, 122–3, 160–1
copyright 121–7, 140–1
Copyright Act 126–7
dilution 22, 37, 130–3
Trademark Dilution Revision Act (2006) 130–2
geographical indications 235–6, 242, 248, 250
harmonisation and varying protection 67, 84
legal realism 91–3
misrepresentation 72, 77
Index

privacy protection 65–6, 67, 80, 89, 92–3, 97
Restatement (Second) of Torts (1979) 95
Restatement (Third) of Unfair Competition (1995) 47–8, 93
right of publicity and celebrity 46, 47–8, 51, 64–7, 89, 92–3, 97
trade marks 121–7, 140–1
economic theory influencing judicial decisions 25
Lanham (Trademark) Act (1946) 124, 126–7, 129, 134–5, 167, 170
reproduction rights see reproduction rights in US trade mark law
research into effectiveness of survey evidence in trade mark cases 183
Trademark Dilution Revision Act (2006) 130–2
unacceptable trade marks 167
unfair competition 77
US–Australian Ugg boots dispute 33–5, 39
well-known trade marks 37
WTO dispute against the EC 242

Victoria Park Racing and Recreation Grounds Co. Ltd v. Taylor (1937) 94–6, 98

Wadeson, Nigel 28
Warren, Samuel 65, 92, 93
Waverley 161–2
Webster, Elizabeth 30–1
well-known trade marks
and advertising function 20, 104
dilution see dilution
extended protection under TRIPS 20–2, 107
Indonesia see well-known trade marks in Indonesia
see also under Australia; Indonesia; Malaysia; United Kingdom; United States
Wells, H. G. 86
Wendt v. Host International Inc. (1997) 70
“What Is an Author?” (Foucault) 169
what is the value of a brand to a firm 3–22
brands and reputation, a legal perspective 15–22
advertising function and commercial value of brand in itself 20
extended protection for well-known trade marks 20–2, 107
the function protected by trade mark registration 17–19
protecting brands 15–16, 17
protecting goodwill of a business 16–17
TRIPS and extent of protection granted to registered trade marks 19
brands and reputation, a marketing perspective 3–9
brand valuation services 5–6
branding/building brand value/brand equity 4–6
brands delineating products as unique 3–5
importance of brand and reputational value as portion of overall value 6–9
promise-keeping 5–6, 14
promise-making 4–5, 9, 10, 15, 18
protection and utilisation 4
brands and reputation, strategic management 9–15
brands and internal strategic alignment 10–13
brands and partners’ strategies 14–15
brands and strategic signalling 13–14
multiple brands, problems of firms offering 12–13
importance of brands as tangible assets 3

White v. Samsung Electronics America Inc. (1992) 67
wine industry, Australian see under geographical indications
World Intellectual Property Organization (WIPO) 37
intellectual property/product branding project for developing countries’ SMEs 249–50
Performances and Phonograms Treaty 158
traditional knowledge
definition of traditional knowledge 253–4
work on objectives and principles to protect traditional knowledge 256–61, 264
World Trade Organization (WTO) 16, 83, 102, 242, 250
see also geographical indications

Yu, Peter 92

Zimmerman, Diane 71