PREJUDICE TO HONOUR OR REPUTATION IN COPYRIGHT LAW

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This article examines the author's right of integrity of authorship contained in the Copyright Act 1968 (Cth), which is the right of an author to object to a 'derogatory treatment' of his or her work. A treatment of a work is derogatory if it is 'prejudicial to the author's honour or reputation'. No Australian court has decided upon an issue of prejudice to honour or reputation yet. To reduce the uncertainty that currently surrounds the right of integrity, this article will thoroughly interpret the phrase 'prejudicial to the author's honour or reputation' and establish tests for determining whether a treatment is prejudicial to an author's honour or reputation.

I INTRODUCTION

In December 2000, the *Copyright Amendment (Moral Rights) Act 2000* (Cth) inserted moral rights legislation into the *Copyright Act 1968* (Cth) to meet the requirements of Article 6bis of the Berne Convention.[1] One of the moral rights introduced is the author's right of integrity of authorship, which subsists in 'works' (ie literary works, dramatic works, musical works, artistic works and cinematograph films in which copyright subsist[2]). The author's right of integrity in respect of a work is 'the right not to have the work subjected to derogatory treatment'.[3]

'Derogatory treatment' in relation to a literary, dramatic or musical work is defined in the legislation as:

a) the doing, in relation to the work, of anything that results in a material distortion of, the mutilation of, or a material alteration to, the work that is prejudicial to the author's honour or reputation; or

b) the doing of anything else in relation to the work that is prejudicial to the author's honour or reputation.[4]

'Derogatory treatment' in relation to an artistic work is defined in the same terms, but contains two additional components:[5] firstly, the 'destruction' of an artistic work can also amount to derogatory treatment if it is prejudicial to the author's

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1 *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 14 July 1967, 1161 UNTS 3 (entered into force 10 October 1974) ('Berne Convention').

2 *Copyright Act 1968* (Cth) s 189.

3 *Copyright Act 1968* (Cth) s 195AI.

4 *Copyright Act 1968* (Cth) s 195AJ.

5 *Copyright Act 1968* (Cth) s 195AK.

honour or reputation;[6] and secondly, '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' amounts to derogatory treatment.[7]

'Derogatory treatment' in relation to a cinematograph film is defined in the same terms as those in relation to a literary, dramatic or musical work, except the prejudice must be to the honour or reputation of the 'maker of the film'[8] (defined as the director, producer or screenwriter of the film[9]). In this article, a general reference to 'author' includes a maker of a film.

Essentially, the definition of 'derogatory treatment' consists of two elements: (1) there must be a treatment of the work (ie a 'material distortion', 'mutilation' or 'material alteration' of a work, a 'destruction' of an artistic work, or 'the doing of anything else in relation to the work'); and (2) the treatment must have a derogatory effect on the author (ie 'prejudicial' to the author's 'honour' or 'reputation'). This article focuses on the second element of 'derogatory treatment', as it is much more uncertain in meaning and controversial than the first element.

The definition of 'derogatory treatment' closely follows the words in Article 6bis of the Berne Convention, which establishes the right of integrity as follows:

> [T]he author shall have the right to ... object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.[10]

The definition of 'derogatory treatment' is broad in scope, and can give rise to real and significant disputes in copyright-related areas.[11] Much uncertainty currently surrounds 'derogatory treatment', because no court has made a decision on an issue of derogatory treatment yet, and the legislation and parliamentary and executive materials provide little or no guidance on how terms such as 'honour' and 'reputation' should be interpreted or applied.

This article seeks to reduce the uncertainty associated with the author's right of integrity in the *Copyright Act 1968* (Cth), by thoroughly examining a particular aspect of the definition of 'derogatory treatment': the requirement for the treatment to be 'prejudicial to the author's honour or reputation'. This article will interpret the phrase and establish tests for determining whether a treatment is prejudicial to the author's honour or reputation.

6 *Copyright Act 1968* (Cth) s 195AK(a).

7 *Copyright Act 1968* (Cth) s 195AK(b).

8 *Copyright Act 1968* (Cth) s 195AL.

9 *Copyright Act 1968* (Cth) s 189.

10 Berne Convention, art 6bis.

11 For example, in the recent case of *Ogawa v Spender* [2006] FCAFC 68 (Unreported, Sundberg, Kenny and Gyles JJ, 19 May 2006), the appellant complained that the use of one of her emails by a judge in his judgment infringed her right of integrity in her email, and sought to have it removed from the judgment. However, the Full Federal Court did not decide or consider whether the right of integrity was infringed by the action. Instead, the Court dismissed the claim on the ground that the common law judicial immunity (which makes judges immune to civil liability in respect of conduct performed judicially) applies to moral rights (at [16]).

When interpreting the meaning of prejudice to an author's honour or reputation, local materials are of little assistance. No explanation of the terms 'prejudicial', 'honour' or 'reputation' exists in the legislation, explanatory memorandum or parliamentary debates. This article therefore adopts a comparative law approach, which examines how courts in other countries (particularly Canada, the United Kingdom and the United States) have interpreted and applied the same terms found in their moral rights legislation.[12] Foreign moral rights cases should provide persuasive and compelling guidance on the development of the Australian right of integrity.[13] Article 6bis of the Berne Convention is also relevant to the interpretation of the terms, since the Australian right of integrity is expressly stated to give full effect to the right of integrity in the Berne Convention.[14] Although the Berne Convention itself does not explain those terms,[15] the historical proceedings regarding Article 6bis of the Berne Convention are relevant to the interpretation process.[16]

II MEANING OF 'PREJUDICIAL'

'Prejudicial' clearly means some kind of harm, but there is a question of whether the treatment must cause *actual* harm, or whether it is enough that the treatment has a *capacity* to cause harm. The latter interpretation is supported by the *Concise Oxford English Dictionary* definition of 'prejudice', which is 'harm or injury that results *or may* result from some action or judgement'.[17] More importantly, in the

12 Canada, the UK and the US have rights of integrity that are phrased in similar terms to the Australian right of integrity, since they all follow art 6bis of the Berne Convention: see *Copyright Act*, RSC 1985, c C-42 ('Canadian Copyright Legislation'), s 28.2; *Copyright, Designs and Patents Act 1988* (UK) c 48 ('UK Copyright Legislation'), s 80; 17 USC ('US Copyright Legislation'), § 106A(a)(3).

13 Copyright Law Review Committee, *Report on Moral Rights* (1988) 103. There is a history of Australian courts examining cases decided in foreign jurisdictions to seek guidance on the interpretation and development of Australian law. An empirical study in 2004 revealed that the High Court of Australia frequently considered foreign cases in its judgments, particularly cases from the United States: Paul von Nessen, *The Use of Comparative Law in Australia* (PhD thesis, Monash University, 2004) 323 and chs 8 and 9 generally. The Full Federal Court has examined foreign cases in the UK, the US and Canada regarding the copyright issue of originality: *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* (2002) 55 IPR 1.

14 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 31 October 2000, 21715 (Daryl Williams); Commonwealth of Australia, *Revised Explanatory Memorandum - Copyright Amendment (Moral Rights) Bill 1999*, Outline and [42]. Where domestic legislation is intended to give effect to a treaty or convention, courts will interpret the former in accordance with the meaning attributed to the latter in international law: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287-8 (Mason CJ and Deane J); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ).

15 The Guide to the Berne Convention merely states that the formulation of the right of integrity 'is very elastic and leaves for a good deal of latitude to the courts': World Intellectual Property Organization, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)* (1978) 42.

16 When interpreting a treaty, recourse may be had to preparatory work of the treaty and the circumstances of its conclusion in order to confirm its meaning or to resolve ambiguities or absurd results: *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 311 (entered into force 27 January 1980), arts 31 and 32.

17 *Concise Oxford English Dictionary* (11th ed, 2004) (emphasis added). The *Macquarie Dictionary* (4th ed, 2005) definition of 'prejudice' is not helpful on this point of interpretation.

Berne Convention, Article 6bis uses the words '*which would be* prejudicial',[18] which indicates that the right of integrity can be infringed without proving any actual harm. As the Australian right of integrity is directly derived from Article 6bis, it follows that establishing prejudice to honour or reputation does not require proof of actual harm to honour or reputation,[19] but merely requires the establishment of a capacity to harm the author's honour or reputation.[20] Support for this interpretation can be found in the Canadian Federal Court decision in *Prise de Parole Inc v Guérin, Éditeur Ltée*,[21] which stated that the right of integrity 'does not require the plaintiff to prove prejudice to his honour or reputation'.[22]

III 'HONOUR' AND 'REPUTATION' SHOULD HAVE DIFFERENT MEANINGS

A rigorous interpretation of the content of the right of integrity should involve a detailed examination of 'honour' and 'reputation' separately. There are several reasons why Australia should treat 'honour' and 'reputation' as two distinct concepts in the right of integrity, rather than as interchangeable terms.

Firstly, the Berne Convention historical proceedings reveal that there was a prevailing intention for 'honour' and 'reputation' to have different meanings. At the Rome Conference for revision of the Berne Convention in 1928, the countries that had pressed for a moral rights provision had wished to enshrine essentially the same type of moral rights protection that was given in their own countries, which went well beyond a protection of mere reputation.[23] After the term 'honour or reputation' was agreed upon, those countries did not complain that the wording failed to reflect the moral rights protection in their own countries; in fact, they expressed considerable satisfaction at the agreement reached.[24] This indicates that 'honour' was to have a meaning that extends significantly beyond 'reputation', as having its own distinct meaning. Furthermore, at the later Brussels Conference for revision of the Berne Convention in 1948, a number of member countries indicated that they saw 'reputation' and 'honour' as distinctly separate.[25]

18 (Emphasis added).

19 Although proof of actual harm is relevant when considering the remedy of damages once infringement of the right of integrity is established.

20 Elizabeth Adeney, 'The Moral Right of Integrity: The Past and Future of "Honour"' (2005) (2) *Intellectual Property Quarterly* 111, 129; Elizabeth Adeney, *The Moral Rights of the Author: Evolution and Transmigration of a Doctrine* (PhD thesis, Monash University, 2004) 443.

21 (1995) 66 CPR (3d) 257.

22 *Prise de Parole Inc v Guérin, Éditeur Ltée* (1995) 66 CPR (3d) 257, 265. The case is discussed in more detail later.

23 Adeney, 'The Moral Right of Integrity', above n 20, 122.

24 Ibid 122-3.

25 Ibid 124. For example, the Norwegian delegation at the Brussels Conference drew a distinction between 'honour' and 'reputation' when it complained that 'honour' was too general a term whereas 'reputation' was acceptable.

Secondly, the right of integrity for performers in the WIPO Performances and Phonograms Treaty[26] uses the phrase 'prejudicial to his reputation', without any reference to 'honour'[27] – which strongly indicates that 'reputation' and 'honour' are distinguishable concepts to be treated differently by courts.

Thirdly, it is conceivable that if 'honour' and 'reputation' are each given their ordinary common sense meanings,[28] then a particular treatment can prejudice one but not the other.[29] For example, it is possible that a material alteration to a literary work by a skilled editor can enhance the author's reputation (by deleting irrelevant or weak parts of the work, to the author's credit), but still prejudice the author's honour (because the author strongly considers that his or her work no longer retains its original integrity, and has been misrepresented),[30] and therefore constitute derogatory treatment.

Fourthly, the Australian moral rights legislation is based on the scheme proposed in the 1994 *Discussion Paper* on moral rights of authors ('Discussion Paper'), which expressly states that 'honour' and 'reputation' have different meanings, and suggests different meanings for them.[31]

Therefore, the meanings of 'honour' and 'reputation' will be examined separately, with a view to giving them different meanings. The Australian right of integrity contains two separate limbs: an 'honour' limb and a 'reputation' limb.

IV HONOUR OR REPUTATION OF THE AUTHOR IN WHAT CAPACITY?

Before examining the meanings of 'honour' and 'reputation' separately, we must first determine whether it is the honour or reputation of the author *as an author*, or the honour or reputation of the author *as a general person*, that is relevant to the right of integrity. There is a difference between the two. For example, if a publisher changes a part of a book to represent the author as having a certain opinion or view which he or she does not actually have (such as falsely representing that the author has a particular political view), the change might not affect the author's honour or reputation as a writer (since politics is irrelevant to writing ability), but might affect the author's honour or reputation as an individual (since political views are a significant aspect of an individual's personality and standing in the community). Would it be sufficient if the author's honour or reputation in his or her capacity as

26 *WIPO Performances and Phonograms Treaty*, opened for signature 20 December 1996, 36 ILM 76 (entered into force 20 May 2002) ('WPPT').

27 WPPT, art 5(1). Also see *US Free Trade Agreement Implementation Act 2004* (Cth) sch 9, pt 2, s 195ALB.

28 The ordinary meanings of 'honour' and 'reputation' are discussed in detail later.

29 Edward J Damich, 'The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art' (1990) 39 *Catholic University Law Review* 945, 950.

30 Staniforth Ricketson and Christopher Creswell, *The Law of Intellectual Property: Copyright, Designs & Confidential Information*, vol 1, [10.110].

31 Commonwealth of Australia, *Discussion Paper – Proposed Moral Rights Legislation for Copyright Creators* (1994) [3.49].

a general individual, rather than as a professional author, was prejudiced by the treatment?

At the Brussels Conference for revision of the Berne Convention in 1948, there was consensus among the delegates that the right of integrity protects the author as an author, *and* as an individual:

> The author will have the right to take proceedings against any action prejudicial to his honour and reputation and it generally emerged from the debate that the author should be protected as a writer just as much as in his capacity as a personality on the literary scene.[32]

Accordingly, the reference to 'honour or reputation' in Article 6bis of the Berne Convention means the honour or reputation of authors in their capacities as authors, *and* in their broader capacities as general individuals.[33] The same interpretation should be adopted by Australian courts,[34] and is used in the following examination of the meanings of 'honour' and 'reputation'.

V MEANING OF 'HONOUR' – A SUBJECTIVE CONCEPT

The word 'honour' has not been used in Australian law before, so there is no legal meaning for it. The ordinary (or literal) meaning of 'honour' must be found. According to the *Macquarie Dictionary*,[35] 'honour' means:

> 1. high public esteem; fame. 2. credit or reputation for behaviour that is becoming or worthy. ... 4. high respect, as for worth, merit, or rank: *to be held in honour.* ... 7. something conferred on someone as a mark of distinction... 10. high-minded character or principles; fine sense of one's obligations: *a man of honour.* ...

Also, according to the *Concise Oxford English Dictionary*,[36] 'honour' means:

> 1. high respect; a feeling of pride and pleasure from being shown such respect; a person or thing that brings credit. 2. a clear sense of what is morally right. ...

The dictionary definitions reveal two different types of meanings of 'honour': honour that is dependent on reputation (ie the good opinion and respect that *others* have of the author); and honour that is independent of reputation (ie the sense of self-worth or dignity that the *author* has of himself or herself, that may be based on the *author's perception* of his or her standing in the community).

32 Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, 2006) [10.27], quoting the report of the *rapporteur général* at the Brussels Conference.

33 Sam Ricketson, 'Is Australia in Breach of its International Obligations with Respect to the Protection of Moral Rights?' (1990) 17 *Melbourne University Law Review* 462, 474.

34 This is because the Australian reference to 'honour or reputation' is directly derived from the Berne Convention's reference to 'honour or reputation', and is intended to give effect to the Convention.

35 *Macquarie Dictionary* (4th ed, 2005).

36 *Concise Oxford English Dictionary* (11th ed, 2004).

The second meaning of 'honour' (ie the reputation-independent meaning) will be adopted for the Australian right of integrity, for two reasons. Firstly, since 'honour' is to have a different meaning to 'reputation' for reasons explained earlier, the reputation-dependent meaning of 'honour' is inappropriate. Secondly, if the reputation-dependent meaning was to be adopted, the right of integrity would essentially protect reputation only, thus largely replicating the existing tort of defamation.[37] This result would arguably be against parliamentary intention, since moral rights were enacted with a view to offer authors protection that goes further than the tort of defamation.[38] The reputation-independent meaning of 'honour' would have been intended in order to significantly extend protection beyond what the tort of defamation already provides.

The dictionary definitions of 'honour' can be distilled into a definition of 'honour' for the purpose of the right of integrity that is independent of reputation: 'honour' means the respectable traits, personality or dignity (including character and morality) that the author perceives himself or herself to have.[39] This definition of 'honour' is consistent with a French commentator's view that honour 'is moral dignity, a non-economic benefit that one enjoys when one has the feeling of meriting respect and of maintaining one's self esteem'.[40]

According to this interpretation of 'honour', it is a subjective concept because it involves the consideration of the *particular plaintiff author's* traits, personality and dignity that *the author thinks* he or she has (as opposed to a hypothetical ordinary author's traits/personality/dignity, or the author's traits/personality/dignity as perceived by others). The subjective concept of 'honour' is acknowledged by the Discussion Paper, which states that 'the term "honour" is generally associated with personal integrity and how a person considers he or she is perceived'.[41] It is also acknowledged by Australian commentators who state that '[t]he reference to "honour" indicates that more subjective factors are to be taken into account,

37 Nicholas Stuart Wood, 'Protecting Creativity: Why Moral Rights Should be Extended to Sound Recordings under New Zealand Copyright Law' (2001) 32 *Victoria University of Wellington Law Review* 163, 189.

38 In the Second Reading Speech on the Copyright Amendment Bill 1997, it was stated that Australia's *laws of defamation*, passing off, misleading or deceptive conduct and existing provisions in the *Copyright Act* provides 'fragmentary and *incomplete coverage* ... of the Berne convention moral rights obligations': Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 18 June 1997, 5548 (Daryl Williams) (emphasis added). The existing law of defamation was considered to be inadequate in meeting the requirements of the Berne Convention, so the moral rights legislation was enacted to extend protection beyond defamation law to meet the Convention's requirements.

39 Although the term 'dignity' is not mentioned in the English dictionary definitions of 'honour', it is clearly a term that encapsulates the concept of 'honour'. It is noted in Adeney, 'The Moral Right of Integrity', above n 20, 121 that in French dictionaries, the definition of 'honour' contains great emphasis on the notion of personal dignity. The French dictionary definition is particularly relevant because the French text of the Berne Convention, which contains the French word for 'honour', is to be taken as authoritative: see Berne Convention, art 37(1)(c). Also, other commentators have stated that 'honour' refers to the author's 'integrity as a human being', which is indicative of dignity: Sir Hugh Laddie et al, *The Modern Law of Copyright and Designs* (3rd ed, 2000) [13.19].

40 Laurent Carrière, 'Droit d'auteur et droit moral: quelques réflexions préliminaries', *Développements récents en droit de la propriété intellectuelle* (1991) 270. Extract translated from French to English in Adeney, *The Moral Rights of the Author*, above n 20, 234.

41 Commonwealth of Australia, *Discussion Paper*, above n 31, [3.49].

involving a consideration of the way that authors think about themselves and their artistic integrity'.[42] As 'honour' is a subjective concept, authors should be able to establish in court what their honour is by giving subjective evidence of the respectable traits, personality and dignity that they perceive themselves to have.

VI THE TEST FOR ESTABLISHING 'PREJUDICE TO HONOUR'

It follows from the above discussions on the meanings of 'prejudicial' and 'honour' that a treatment of a work will be 'prejudicial to the author's honour' if the treatment has the capacity to harm the particular author's respectable traits, personality or dignity as perceived by him or her.

There are three possible types of tests that can be used to establish prejudice to honour: (a) the subjective test (used in France), (b) the mixed objective/subjective test (used in Canada), and (c) the objective test (used in the UK). Test (a) is relatively straight forward, whereas tests (b) and (c) are more complex and will require a thorough review of relevant Canadian and UK cases that have explained and applied those tests.

There are two preliminary points to note about the Canadian and UK cases which will be discussed later regarding tests (b) and (c).

Firstly, the Canadian and UK cases are all decided on the basis of 'prejudice to honour or reputation' rather than 'prejudice to honour' exclusively. This can be explained by the fact that Canadian and UK courts have not attempted to give different meanings to 'honour' and 'reputation', but rather have treated them as a singular concept[43] – presumably because they have not been pressed by the parties to distinguish between 'honour' and 'reputation' yet. Also, the cases seem more concerned with 'honour' than 'reputation'.[44] Therefore, these cases – despite their references to 'honour or reputation' – are relevant to the test of prejudice to honour specifically.

Secondly, there is very little analysis of these cases in Canadian and UK texts,[45] so there are few references to Canadian and UK secondary materials in the discussion of the cases later.

42 Ricketson and Creswell, above n 30, [10.110].

43 This approach is undesirable, as 'honour' and 'reputation' should be distinguished from each other, for reasons given earlier.

44 This is because the Canadian and UK cases have not applied the defamation concept of 'reputation' to determine 'prejudice to honour or reputation' (which they probably would have done if they were concerned with reputation only), and also some of the Canadian cases applied a test of prejudice that clearly contains subjective elements, which is only possible in relation to honour. See the discussion of the Canadian and UK cases later.

45 For example, there is very little analysis of right of integrity cases in comprehensive Canadian and UK intellectual property textbooks such as David Vaver, *Copyright Law* (2000); David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks* (1997); John McKeown, *Fox on Canadian Law of Copyright and Industrial Design* (4th ed, 2005); Lionel Bently and Brad Sherman, *Intellectual Property Law* (2nd ed, 2004); William Cornish and David Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (5th ed, 2003); Kevin Garnett, Gillian Davies and Gwilym Harbottle, *Copinger and Skone James on Copyright* (15th ed, 2005); Laddie et al, above n 39.

A *The Subjective Test (France)*

Under the subjective test, the author's credible subjective evidence of prejudice to his or her honour is enough to conclusively establish prejudice to honour.[46]

This test is essentially the approach used in France, where it is generally presumed that any act which modifies the author's work is an injury to the author's personality amounting to infringement of the right of integrity, so that it is unnecessary for the author to objectively show prejudice.[47] As a general rule, the author's subjective view that the action complained of is derogatory is sufficient.[48] This is because strict interpretations of French moral rights theory insist that authors are the sole judges of whether the integrity of their works has been insulted.[49] There are only a few exceptions where the subjective test does not apply.[50] The French subjective test of prejudice is kept in check by a doctrine of abuse which allows courts to dismiss a moral rights claim brought for a purpose that is inconsistent with the purposes of moral rights.[51] Thus, the doctrine would prevent an author from exercising the right of integrity if the author is in fact using the right of integrity for an improper purpose (such as indirectly renegotiating the economic rights which he or she previously contracted to limit or give up,[52] obtaining leverage in a matrimonial dispute,[53] or avoiding the consequences of his or her own illegal actions[54]).

46 Brett Cottle, 'The Problems of Legislating to Protect Moral Rights' in Peter Anderson and David Saunders (eds), *Moral Rights Protection in a Copyright System* (1992) 103, 108-9.

47 *Godot*, TGI Paris, 15 October 1992, (1993) 155 RIDA 225; André Lucas and Henri-Jacques Lucas, *Traité de la propriété littéraire et artistique* (2nd ed, 2001) [366]-[427]. Note that the French IP Code (*Code de la Propriété Intellectuelle*, Law No. 92-597 of 1 July 1992, *Journal Officiel de la République Française*, 3 July 1992, 8801), art L121-1 establishes the right of integrity without mentioning any requirement of prejudice to honour or reputation. Also see Maree Sainsbury, *Moral Rights and their Application in Australia* (2003) 55; Ian Oi and Karen Gettens, 'Potential Problems with the Copyright Amendment (Moral Rights) Bill 1999' (2000) 12(10) *Australian Intellectual Property Law Bulletin* 109, 111.

48 J A L Sterling, *World Copyright Law* (2nd ed, 2003) 344-5; Cornish and Llewelyn, above n 45, [11-76]; Cyrill P Rigamonti, 'Deconstructing Moral Rights' (2006) 47 *Harvard International Law Journal* 353, 365.

49 Ian Eagles and Louise Longdin, 'Technological Creativity and Moral Rights: A Comparative Perspective' (2004) 12 *International Journal of Law and Information Technology* 209, 234.

50 For example, in cases of contextual abuse (ie presentation of a work in a prejudicial context without changing the work), the purely subjective test is not always applied by French courts: ibid. Also, in the case of computer software, only modifications that prejudice the programmer's honour or reputation infringe the right of integrity: French IP Code, art L121-7.

51 The French doctrine of abuse of moral rights is discussed in Eric Lauvaux, 'Moral Rights as Obstacles to the Exploitation of Musical Works (France)' in Cees van Rij and Hubert Best (eds), *Moral Rights: Reports Presented at the Meeting of the International Association of Entertainment Lawyers MIDEM 1995, Cannes* (1995) 71, 79; Carolyn McColley, 'Limitations on Moral Rights in French Droit d'auteur' (1998) 41 *Copyright Law Symposium* 423, 441ff.

52 *Chiavarino v Société S.P.E.*, Cass. Civ., 14 May 1991, (1992) 151 RIDA 272 {France}, discussed in McColley, ibid 442.

53 *Jamin et Rempler v Canal,* Cass. Civ., 14 May 1945, [1945] D. 1945-287 {France}, discussed in McColley, ibid 441.

54 Cass. Crim., 3 June 1986, [1987] D. 1987-301 {France}, cited in Eagles and Longdin, above n 49, 233.

B *The Objective/Subjective Test (Canada)*

Under the objective test that contains a mix of objective and subjective elements ('the objective/subjective test'), prejudice to honour is established if the author's subjective allegation of the treatment's prejudicial effect on his or her honour is objectively reasonable.

The objective element in this test is the reasonableness criterion, which involves an assessment of the treatment's prejudicial effect on the author by reference to a standard external to the author.[55] The court's assessment of reasonableness is aided by objective evidence regarding prejudice to honour (such as expert or public opinion). The court should carefully consider any expert evidence on the issue of prejudice, as the court may not be competent to determine standards relating to the aesthetic and artistic field.[56]

There are two subjective elements in the objective/subjective test.

Firstly, the test assesses the reasonableness of the author's *specific subjective complaint* of prejudice to honour (as opposed to assessing what an ordinary author's complaint might be). Thus the court should consider the author's subjective evidence regarding the treatment's prejudicial effect on his or her honour as a starting point when applying the test. For example, the author could adduce subjective evidence as to how outraged, injured, demeaned or diminished he or she feels by the treatment of the work.[57]

Secondly, the test assesses the reasonableness of the author's allegation of prejudice *to the particular honour that he or she believes himself or herself to have* (rather than to an ordinary author's honour, or to the honour that the community believes the author to have).[58] Thus the court should assess the reasonableness of the author's subjective allegation of prejudice to honour by reference to the author's particular honour as established by subjective evidence. The author could adduce subjective evidence of his or her particular or peculiar respectable traits, personality or dignity that make the treatment particularly prejudicial to him or her. For example, if an artist alleges that the exhibition of his painting alongside a sign that denounces religion is prejudicial to his honour, then that subjective allegation would not normally be considered reasonable, but if he establishes that his honour requires him to be deeply religious, prejudice to his honour is more likely to be regarded as reasonable. However, if the author alleges to have an honour that is absurd or unbelievable, that evidence could be disregarded for lacking credibility. Also, if the author alleges

55 *Butterworths Concise Australian Legal Dictionary* (3rd ed, 2004), definitions of 'reasonableness' and 'objective test'.

56 Jon A Baumgarten, 'On the Case Against Moral Rights' in Peter Anderson and David Saunders (eds), *Moral Rights Protection in a Copyright System* (1992) 87, 89. Where there is a dispute between expert witnesses on the issue of prejudice, the court may attempt to choose between the conflicting rival bodies of expert evidence on the basis of the relative credibility, qualifications or numbers of the experts giving the evidence.

57 Adeney, 'The Moral Right of Integrity', above n 20, 125 and 129.

58 For a similar view, see ibid 128: 'While the test still included the reactions of others to the work and its author, they were reactions viewed through the prism of the author's sensibilities.'

to have an honour that is grossly socially unacceptable (such as extreme racism), it could be disregarded on the basis that it falls outside the definition of 'honour', which requires the traits, personality or dignity to be *respectable*.[59]

Despite the subjective elements, the test is still predominantly objective in nature, because the final determination of prejudice to honour rests on the objective standard of reasonableness adopted by the court.

Courts in Canada and Germany have adopted the objective/subjective test in their rights of integrity. To better understand the objective/subjective test, we examine right of integrity cases in Canada that established and applied that test to particular facts. Although German cases have also used the objective/subjective test,[60] they are not as relevant to Australia as the Canadian cases, because the German right of integrity differs in content from the Australian right of integrity.[61] Accordingly, the German cases will not be discussed here.

1 *Canadian Cases that Established the Objective/ Subjective Test*

Canadian courts have interpreted the prejudice requirement in the right of integrity as involving a test that contains subjective elements as well as the objective element of reasonableness.[62]

The first Canadian case to articulate the test is *Snow v Eaton Shopping Centre*.[63] O'Brien J of the Ontario High Court of Justice began with the opinion that the right

59 See the meaning of 'honour' discussed earlier. So, for example, if a composer who is a Nazi supporter alleges that the use of her music in a film made by a Jew is prejudicial to her honour, then although it may be reasonable for a Nazi supporter to feel that way, the court may nevertheless decide that being a Nazi supporter is not a respectable trait that forms part of 'honour', and thus conclude that the use is not prejudicial to the composer's honour.

60 In order to avoid disruptive claims of prejudice by oversensitive authors, German courts only accept an author's subjective view of what jeopardises his or her intellectual or personal interests in his or her work if that view is rational, which is essentially an inquiry into whether the author's view is reasonably held: Eagles and Longdin, above n 49, 235 and fn 124; Adolf Dietz, 'ALAI Congress: Antwerp 1993 – The Moral Right of the Author: Moral Rights and the Civil Law Countries' (1995) 19 *Columbia -VLA Journal of Law & the Arts* 199, 233 speaking of Germany using the concept of 'balancing of interests' in its integrity right.

61 The German right of integrity does not use the term 'honour or reputation', and instead uses the term 'legitimate intellectual or personal interests in the work' (see *Gesetz über das Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz)*, 9 September 1965 (BGBl. I S. 1273), art 14). On the other hand, the Canadian right of integrity uses the term 'honour or reputation' (see Canadian Copyright Legislation, s 28.2(1)), which is what the Australian right of integrity also uses.

62 Edmond R Letain, 'From Colourization to "Happy-ization": Restrictions on Film Artists Enforcing Moral Rights in the Cinematographic Work' (1997) 11 *Intellectual Property Journal* 37, 74; Vaver, *Copyright Law*, above n 45, 163; Adeney, 'The Moral Right of Integrity', above n 20, 128; Sainsbury, above n 47, 56; Oi and Gettens, above n 47, 111-112.

63 (1982) 70 CPR (2d) 105 (Ontario High Court of Justice).

of integrity in former s 12(7) of the Canadian Copyright Legislation[64] was broader than the defamation cause of action,[65] which meant that prejudice to honour or reputation did not have to be assessed purely objectively as in defamation law. O'Brien J then stated that:

> the words 'prejudicial to his honour or reputation' ... involve a certain subjective element or judgment on the part of the author so long as it is reasonably arrived at.[66]

The test of prejudice in *Snow* was later expressly endorsed in *Prise de Parole Inc v Guérin, Éditeur Ltée*.[67] Denault J of the Federal Court of Canada explained that the legislative provision for the right of integrity, s 28.2(1) of the Canadian Copyright Legislation:[68]

> does not require the plaintiff to prove prejudice to his honour or reputation; rather, it must be proved that the work was distorted, mutilated or otherwise modified 'to the prejudice of the honour or reputation of the author' ... In my view, this nuance justifies the *use of a subjective criterion – the author's opinion – in assessing whether an infringement is prejudicial.*[69]

His Honour then referred to *Snow*, noting that it 'has, moreover, been recognized by the courts that this concept has a highly subjective aspect that in practice only the author can prove'.[70] Denault J went on to acknowledge the objective aspect of the test, stating that:

> in my view the assessment of whether a distortion, mutilation or other modification is prejudicial to an author's honour or reputation *also requires an objective evaluation of the prejudice based on public or expert opinion.*[71]

More recently in *Théberge v Galerie d'Art du Petit Champlain Inc*,[72] Binnie J on behalf of the Supreme Court of Canada majority commented on the non-economic

64 *Copyright Amendment Act,* SC 1931, 21-22 George V, c C-8, former s 12(7) stated: 'Independently of the author's copyright, and even after assignment, either wholly or partially, of the said copyright, the author has the right to claim authorship of the work, as well as the right to restrain any distortion, mutilation or other modification of the work that would be prejudicial to his honour or reputation.' Former s 12(7) was repealed and replaced with existing ss 14.1 and 28.2 in the Canadian Copyright Legislation in 1988.

65 *Snow v Eaton Shopping Centre* (1982) 70 CPR (2d) 105, 106.

66 Ibid.

67 (1995) 66 CPR (3d) 257 (Federal Court of Canada (Trial Division)).

68 Canadian Copyright Legislation, s 28.2(1) states: 'The author's right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author, (a) distorted, mutilated or otherwise modified; or (b) used in association with a product, service, cause or institution.'

69 *Prise de Parole Inc v Guérin, Éditeur Ltée* (1995) 66 CPR (3d) 257, 265 (emphasis added).

70 Ibid.

71 Ibid (emphasis added).

72 [2002] 2 SCR 336 (Supreme Court of Canada).

nature of moral rights and their differences from copyright.[73] Binnie J stated in obiter that 'moral rights are hedged about with the concept of reasonableness' and that the right of integrity does not involve a purely subjective test.[74] Significantly, Binnie J summarised the *Snow* decision without disapproving it,[75] which indicates that the objective/subjective test of prejudice established in *Snow* still stands.

2 Canadian Cases that Applied the Objective/Subjective Test

Several Canadian cases provide examples of the application of the objective/subjective test to particular facts.

In cases where there was objective evidence to support the author's subjective allegation of prejudice, Canadian courts have decided that the prejudice requirement was satisfied. Such cases include *Snow v Eaton Shopping Centre*[76] and *Pollock v CFCN Productions Ltd*.[77]

In *Snow v Eaton Shopping Centre*,[78] an Ontario High Court of Justice case, the defendant shopping centre attached Christmas ribbons to the necks of 60 geese forming a sculpture. The plaintiff author of the sculpture complained that it infringed his right of integrity.[79] The approach of O'Brien J was to first consider the plaintiff's subjective evidence of prejudice, then determine whether it was an objectively reasonable view of the prejudice:

> The plaintiff is adamant in his belief that his naturalistic composition has been made to look ridiculous by the addition of ribbons and suggests it is not unlike dangling earrings from the Venus de Milo. While the matter is not undisputed, *the plaintiff's opinion is shared by a number of other well respected artists and people knowledgeable in his field.* ... I am satisfied the ribbons do distort or modify the plaintiff's work and the plaintiff's concern [that] this will be prejudicial to his honour or reputation *is reasonable* under the circumstances.[80]

Accordingly, the judge ordered the ribbons to be removed. In *Snow*, the objective evidence of well respected authors and people knowledgeable in the author's field helped satisfy the objective/subjective test.

73 The court in that case did not have to determine whether there was a breach of moral rights. In that case, a painter of international reputation objected to an art gallery using a process of lifting the ink from posters embodying the artist's works and transferring it to canvas, on copyright grounds – seeking the remedy of writ of seizure. The court held that the artist's complaint related to moral rights infringement, not copyright infringement, and therefore the remedy of prejudgment seizure was not available.

74 *Théberge v Galerie d'Art du Petit Champlain Inc* [2002] 2 SCR 336, [90].

75 Ibid [18]-[19].

76 (1982) 70 CPR (2d) 105 (Ontario High Court of Justice).

77 (1983) 73 CPR (2d) 204 (Alberta Court of Queen's Bench).

78 (1982) 70 CPR (2d) 105 (Ontario High Court of Justice).

79 At the time, the plaintiff was claiming under former s 12(7) of the Canadian Copyright Legislation, which contained the right of integrity.

80 *Snow v Eaton Shopping Centre* (1982) 70 CPR (2d) 105, 106 (emphasis added).

In *Pollock v CFCN Productions Ltd*,[81] an Alberta Court of Queen's Bench case, a playwright applied for an interim injunction to restrain the defendants from televising a film screenplay version of her play on moral rights grounds. Moore ACJ, in deciding to grant the injunction, took into account the objective evidence of several other playwrights filed in support of the plaintiff's view that she would be prejudiced if the film was shown.[82]

Conversely, in cases where there was no objective evidence to support the author's subjective allegation of prejudice, Canadian courts have decided that the prejudice requirement was not satisfied.[83] Such cases include *Prise de Parole Inc v Guérin, Éditeur Ltée*[84] and *Ritchie v Sawmill Creek Golf & Country Club Ltd*.[85]

In *Prise de Parole Inc v Guérin, Éditeur Ltée*,[86] a Federal Court of Canada case, the plaintiff author of a novel complained that a publisher infringed his right of integrity in his novel, when it published a collection that contained only about one third of the novel. In particular, there were omissions of essential elements including the subplot, the plot order was altered, and the novel's divisions were omitted or changed. Denault J decided that the plaintiff's work was distorted, mutilated or otherwise modified,[87] and admitted the plaintiff's subjective evidence showing that he felt frustrated and greatly disappointed by the publication of the shortened version of his work.[88] However, Denault J noted the plaintiff's acknowledgement in evidence that after the publishing of the shortened version, he had not suffered any reduction in the number of guest lecture requests, had not been ridiculed or mocked by his colleagues or the newspapers, and had not personally heard of any complaints.[89] In light of this evidence, Denault J decided that:

> although the author has shown that his novel was substantially modified without his knowledge and that he was shocked and distressed by this, the evidence has not shown that, *objectively*, as required by s. 28.2(1) of the Act, his work was modified to the prejudice of his honour or reputation. Since this has not been proven, the plaintiff is not entitled to moral damages.[90]

This case indicates that objective evidence of the public ridiculing, mocking or criticising the author as a result of the treatment would help establish prejudice to the author's honour.

81 (1983) 73 CPR (2d) 204 (Alberta Court of Queen's Bench).

82 *Pollock v CFCN Productions Ltd* (1983) 73 CPR (2d) 204, 206.

83 Vaver, *Copyright Law*, above n 45, 163, noting that more recently Canadian courts have insisted on objective evidence of prejudice.

84 (1995) 66 CPR (3d) 257 (Federal Court of Canada (Trial Division)).

85 (2003) 27 CPR (4d) 220 (Ontario Superior Court of Justice).

86 (1995) 66 CPR (3d) 257 (Federal Court of Canada (Trial Division)).

87 *Prise de Parole Inc v Guérin, Éditeur Ltée* (1995) 66 CPR (3d) 257, 265.

88 Ibid 265-6.

89 Ibid 266.

90 Ibid (emphasis added).

In *Ritchie v Sawmill Creek Golf & Country Club Ltd*,[91] an Ontario Superior Court of Justice case, the plaintiff photographer alleged that the defendants infringed his right of integrity when they enlarged five of his photographs to make them into posters. The plaintiff gave the subjective opinion that the defendants harmed him by producing enlargements of such poor quality that they were 'horrifying'.[92] Ducharme J found that the enlargements were a modification of the original photographs, but decided that the plaintiff's subjective opinion was not reasonable:

> The enlargements are immediately recognizable for what they are and, despite Mr. Ritchie's powerful reaction, they are, in my view, not so markedly different in quality from the prints as to damage the author's honour or reputation. Indeed, *no objective evidence of prejudice was adduced to support Mr. Ritchie's own personal reaction*. For example, Mr. Windjack, a professional photographer of over 30 years' experience, was not asked his view of whether the enlargements were of such poor quality as to offend the integrity of the author.[93]

The judge then considered *Snow*, and distinguished it on the basis that the plaintiff in *Snow* succeeded in the right of integrity action because there were corroborative opinions of other well respected artists in the field, and that there were no such corroborative opinions in the present case.[94] Accordingly, there was no infringement of the right of integrity in the present case.

However, objective evidence of prejudice to honour was unnecessary to satisfy the prejudice requirement where the treatment was obviously prejudicial to honour.

In *Boudreau v Lin*,[95] an Ontario Court case, a plaintiff student had written a coursework paper, which the defendant professor revised without permission and published, naming himself as the author of the paper without attributing the student. This was clearly a prejudice to honour case, as the changes could not have affected the plaintiff's reputation. The plaintiff did not adduce any objective evidence of prejudice to honour, but Metivier J nevertheless held that the additions, deletions and changes made to the plaintiff's work had interfered with the integrity of the work and infringed the right of integrity.[96] Metivier J did not give reasons for this conclusion, presumably because it was obvious that the changes were objectively prejudicial to the plaintiff's honour.

In summary, the Canadian cases discussed above indicate that prejudice to honour would not normally be established under the objective/subjective test if there is no objective evidence to support or corroborate the author's subjective allegation of prejudice to honour, except where it is obvious that there is prejudice to honour.

91 (2003) 27 CPR (4d) 220 (Ontario Superior Court of Justice).

92 *Ritchie v Sawmill Creek Golf & Country Club Ltd* (2003) 27 CPR (4d) 220, [51].

93 Ibid [52] (emphasis added).

94 Ibid [53].

95 (1997) 75 CPR (3d) 1 (Ontario Court (General Division)).

96 *Boudreau v Lin* (1997) 75 CPR (3d) 1, [10] & [13].

C *The Objective Test (UK)*

Under this objective test that contains no subjective elements ('the objective test'), prejudice to honour is established if the treatment would be prejudicial to the honour of a reasonable author in the relevant field.

This test assesses prejudice to honour according to the objective standard of reasonableness only. The court's assessment of reasonableness is aided by objective evidence regarding prejudice to honour (such as expert or public opinion). It should carefully consider any expert evidence on the issue of prejudice.[97] Since the test contains no subjective elements, the author's subjective evidence of prejudice to his or her honour and subjective evidence of his or her particular honour would not be given much weight. The adoption of this test would make the 'prejudice to honour' limb of the right of integrity very similar to the 'prejudice to reputation' limb, which is wholly objective (discussed later).

To better understand the objective test, we examine UK right of integrity cases that seem to have established and applied that test to particular facts.[98]

1 *UK Cases that Apparently Established the Objective Test*

UK courts have not discussed the 'prejudicial to honour or reputation' phrase (found in s 80 of the UK Copyright Legislation[99]) as much as Canadian courts. The only clear judicial statement on the UK prejudice requirement can be found in *Tidy v Trustees of the Natural History Museum*,[100] where Rattee J of the High Court stated:

> [B]efore accepting the plaintiff's view that the [treatment] is prejudicial to his honour or reputation, I have to be satisfied that that view is one which is reasonably held, which inevitably involves the application of an *objective test of reasonableness*.[101]

97 This is because it may not be competent to determine standards relating to the aesthetic and artistic field: Baumgarten, above n 56, 89. Also Cottle, above n 46, 108 noting that although courts are used to working out what a reasonable person in the street would do or think, they might have difficulty working out what a reasonable author would do or think.

Where there is a dispute between expert witnesses on the issue of prejudice, the court may attempt to choose between the conflicting rival bodies of expert evidence on the basis of the relative credibility, qualifications or numbers of the experts giving the evidence.

98 The US has also adopted a wholly objective test of prejudice, but the US approach is not discussed in this Part of the article on prejudice to *honour* because US case law defines 'honor' to mean the same thing as 'reputation': *Carter v Helmsley-Spear Inc*, 861 F Supp 303 (SDNY, 1994), 323 (discussed later).

99 UK Copyright Legislation, s 80(2)(b) states that a treatment of a work 'is derogatory if it amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director'. Despite the use of the words 'or is otherwise', UK courts have decided that 'the mere fact that a work has been distorted or mutilated gives rise to no claim, unless the distortion or mutilation prejudices the author's honour or reputation': *Confetti Records (a firm) & Ors v Warner Music UK Ltd (t/a East West Records)* [2003] EWCh 1274, [150]; *Pasterfield v Denham* [1999] FSR 168, 182.

100 (1995) 39 IPR 501 (High Court (Chancery Division)).

101 *Tidy v Trustees of the Natural History Museum* (1995) 39 IPR 501, 504 (emphasis added).

There is uncertainty regarding whether the 'objective test of reasonableness' Rattee J spoke of contains any subjective elements. The way that *Tidy* and other UK right of integrity cases were decided does not clearly reveal whether subjective elements were present.[102] Consequently, it is unclear whether UK courts have adopted the objective/subjective test or the objective test.[103] Some English commentators indicate support for the objective/subjective test, stating that '[i]f "honour" is taken to refer to what a person thinks of themself ... it would seem that prejudice to honour might well involve a strong subjective element'.[104] Another commentator expressed her opinion that UK courts are expected to follow the Canadian approach of assessing whether the author's subjective response is reasonable.[105] On the other hand, some commentators are of the view that UK courts favour a wholly objective test of prejudice that contains no subjective elements.[106]

The better view is that the UK prejudice requirement, as it currently stands, involves an objective test of prejudice that contains no subjective elements, for three reasons.

Firstly, UK courts are aware of the Canadian mixed objective/subjective test of prejudice, but have chosen not to comment on whether any subjective element exists in the UK test of prejudice – instead choosing to comment on the objective element only.[107] This suggests an absence of subjective elements.

Secondly, during the Rome Conference on revision of the Berne Convention in 1928, the British delegation was strongly opposed to a subjective right of integrity.[108] It agreed to Article 6bis on the belief that its common law actions for defamation and passing off (which are wholly objective) would satisfy the Article,[109] which suggests that it considered Article 6bis as involving a wholly objective test of

102 The UK right of integrity cases are discussed later.

103 Bently and Sherman, above n 45, 247, noting that 'there is still some uncertainty as to whether the question of whether a treatment is prejudicial to the honour or reputation of an author is to be judged from an objective or subjective standpoint'.

104 Ibid.

105 Adeney, 'The Moral Right of Integrity', above n 20, 129.

106 For commentators' opinions that UK courts appear to favour a wholly objective reasonableness test in the right of integrity, see Delia Browne, 'The Age of Consent – Moral Rights in Film and Television' in Mathew Alderson (ed), *Current Issues in Film Law* (2001) 1, 13; Oi and Gettens, above n 47, 111. Also, in Laddie et al, above n 39, [13.19], it is stated that 'the court is more likely to adopt an approach similar to that in libel' when deciding whether there is prejudice to honour or reputation. The approach in libel involves a wholly objective test.

107 For example, in *Tidy v Trustees of the Natural History Museum* (1995) 39 IPR 501, 504, Rattee J referred to the Canadian case of *Snow v Eaton Shopping Centre* (1982) 70 CPR (2d) 105 and its statement regarding the 'subjective element' in the Canadian test of prejudice, but he did not comment on whether a similar subjective element exists in the UK test of prejudice. The other UK right of integrity cases (discussed below) also did not comment on whether a subjective element exists in the UK test of prejudice.

108 Ricketson and Ginsburg, above n 32, [10.09].

109 Ricketson, above n 33, 468-9. This is supported by the fact that the UK did not change its laws soon after Article 6bis was incorporated into the Berne Convention, and that a copyright reform report in 1952 affirmed that no change in UK law was needed to comply with Article 6bis: *Gregory Committee Report on Copyright Law* (1952) Cmd. 8662, 219-226. Also see Garnett, Davies and Harbottle, above n 45, [11-03].

prejudice that contains no subjective elements. Therefore, the UK right of integrity should be interpreted as involving a wholly objective test of prejudice, until a court makes a statement to the contrary.

Thirdly, all the UK cases that decided on the prejudice requirement are consistent with a wholly objective test of prejudice that contains no subjective elements. In particular, none of the judges in the UK cases gave any weight to the author's subjective allegation of prejudice to honour or the author's subjective evidence of his or her particular honour, when deciding whether there was the necessary prejudice.

As a result, the UK cases on the right of integrity will be construed as applying the objective test of prejudice.

2 *UK Cases that Apparently Applied the Objective Test*

Several UK cases provide examples of the application of the objective test.

In a case where there was objective evidence to show that the treatment would prejudice a reasonable author, the court decided that the prejudice requirement was arguably satisfied.

In *Morrison Leahy Music Ltd v Lightbond Ltd*,[110] an interlocutory High Court case, the plaintiff composers applied for an interlocutory injunction on moral rights grounds to restrain dealings with the defendant's sound recording, which had taken bits of music and words (ranging from 10 seconds to 32 seconds) from five of the plaintiffs' songs and combined them together. Morritt J stated that the defendant plainly engaged in a 'treatment' of the work, and since it was arguable whether such treatment amounted to 'derogatory' treatment, the interlocutory injunction was granted.[111] In reaching that conclusion, the judge had placed weight on opinion evidence from disc jockeys and professional songwriters regarding the mutilation of the songs.[112] This suggests that the reasonable person involved in the relevant industry should be consulted over whether there has been prejudice to the author's honour.[113]

Conversely, in cases where there was no objective evidence to show that the treatment would prejudice a reasonable author, courts have decided that the prejudice requirement was not satisfied. Such cases include *Tidy v Trustees of the Natural History Museum*[114] and *Pasterfield v Denham*.[115]

In *Tidy v Trustees of the Natural History Museum*,[116] a High Court case, the plaintiff author drew some black-and-white dinosaur cartoons to be exhibited in a museum.

110 [1993] EMLR 144 (High Court (Chancery Division)).

111 *Morrison Leahy Music Ltd v Lightbond Ltd* [1993] EMLR 144, 151.

112 Ibid.

113 Suzy Frankel and Geoff McLay, *Intellectual Property in New Zealand* (2002) [5.15.2].

114 (1995) 39 IPR 501 (High Court (Chancery Division)).

115 [1999] FSR 168 (Plymouth County Court).

116 (1995) 39 IPR 501 (High Court (Chancery Division)).

The museum, without permission, then arranged to have the cartoons printed in a book in a reduced size (about 70 per cent of the original size) and on a coloured background. The plaintiff author alleged that this constituted derogatory treatment because the reduced work had less of a visual impact and contained unreadable captions. Rattee J decided that since there was no objective evidence of the effect of the treatment in the minds of others, he could not draw the conclusion that there was prejudice to the author's honour or reputation, and accordingly rejected the plaintiff's application for summary judgment.

In *Pasterfield v Denham*,[117] a Plymouth County Court case, the defendant made some changes to the plaintiff's original drawings of a building in promotional leaflets: there were colour variations, deletions of minor details, and reductions in size of some parts. The plaintiff complained that the changes amounted to derogatory treatment. Judge Overend agreed that there was a treatment of the original work, and moved on to consider whether there was prejudice to honour or reputation. He decided that the colour variations were not such as to affect either the honour or the reputation of the plaintiff, because there are often colour variations when artwork is reproduced, and the colour variations were nowhere near the gross differences between a black and white film and a colourised version of the same film.[118] The remaining differences were all to the peripheral aspects of the drawing, and were so trivial that even the expert called for the plaintiff failed to identify all the differences. Accordingly, the differences could not constitute derogatory treatment.[119] The judge decided the right of integrity issue on the basis that the changes were too trivial to prejudice honour or reputation, and made it clear that '[i]t is not sufficient that the author is himself aggrieved by what has occurred'.[120]

However, objective evidence of prejudice may not be necessary to satisfy the prejudice requirement if the court can infer such prejudice from other compelling evidence.

In *Confetti Records (a firm) & Ors v Warner Music UK Ltd (t/a East West Records)*,[121] a recent High Court of Justice case, the plaintiff owner of a musical work complained that the defendant's addition of a rap line to the work constituted derogatory treatment, because it contained references to violence and drugs. Lewinson J decided that the words of the rap were 'very hard to decipher' and the meaning of the disputed words was in any event uncertain in the absence of expert evidence, which militates against the conclusion that the treatment was

117 [1999] FSR 168 (Plymouth County Court).

118 *Pasterfield v Denham* [1999] FSR 168, 182. The judge's reference to colourisation of a film seems to be a reference to a French case in which the colourisation of a black and white film was held to have infringed the director's right of integrity: *Turner Entertainment Company v Huston*, Cour Cass., 28 May 1991, (1991) 149 RIDA 197, translated in (1992) 23 IIC 702; CA Versailles, 19 December 1994, (1995) 164 RIDA 256.

119 *Pasterfield v Denham* [1999] FSR 168, 182.

120 Ibid.

121 [2003] EWCh 1274 (High Court of Justice (Chancery Division)).

derogatory.[122] Furthermore, the judge considered that since the author did not give any subjective evidence of prejudice caused to his honour or reputation, the judge was not open to infer prejudice[123] (thus indicating that it may be possible to infer prejudice if such subjective evidence had been given). Accordingly, the judge dismissed the moral rights claim.[124]

In summary, the UK cases discussed above indicate that prejudice to honour would not normally be established under the objective test if there is no objective evidence to show that the honour of a reasonable author in the relevant field would be prejudiced.

D *Which Test Should Apply in Australia?*

The Australian legislation is silent on the nature of the test that should be adopted to determine whether there is prejudice to honour.[125] Also, some Australian commentators clearly acknowledged the existence of the different tests, but chose not to recommend the test that should apply in Australia.[126] There is some uncertainty as to which test of prejudice to honour Australia should adopt.

1 *The Objective/Subjective Test Should Apply*

The test that should apply in Australia can be determined by a process of elimination that involves examination of the Berne Convention proceedings and the meaning of 'honour' explained above. Policy considerations would also assist in the determination.

The Berne Convention proceedings reveal that an obligation to adopt the subjective test for the right of integrity (ie the first test discussed earlier) was clearly not intended. At the Rome Conference, the initial proposal for the right of integrity contained the words 'prejudicial to his moral interests'.[127] The British delegation found the term 'moral interests' to be too vague and incapable of conveying any clear meaning in British law, so it was decided at the Conference as a compromise that the term 'moral interests' would be replaced with the term 'honour or reputation'.[128] 'Honour or reputation' was acceptable to the common law member

122 *Confetti Records (a firm) & Ors v Warner Music UK Ltd (t/a East West Records)* [2003] EWCh 1274, [153] & [155].

123 Ibid [157].

124 Ibid [162].

125 Kerryn Underwood, 'Moral Rights in Australia: A Reality at Last or at Least?' (2000) 6 *Entertainment Law Review* 125, 126.

126 For example, Alison Laurie, 'Moral Rights: Have They Really Made a Difference for Copyright Owners and Users in Australia?' (2004) 57 *Intellectual Property Forum* 14, 18; James Lahore, *Copyright and Designs*, vol 1, [48,112]; Oi and Gettens, above n 47, 112; Cate Banks, 'The More Things Change the More They Stay the Same: The New Moral Rights Legislation and Indigenous Creators' (2000) 9(2) *Griffith Law Review* 334, 341-2.

127 Ricketson and Ginsburg, above n 32, [10.07].

128 Ibid [10.09].

countries because it bore a close resemblance to the kind of personal interests already protected by the common law actions for defamation and passing off.[129] Since the term 'moral interests' has a more subjective meaning than the term 'honour or reputation', the rejection of 'moral interests' at the Conference signals that a subjective test was not intended. Later at the Brussels Conference, there was a proposal from European countries to broaden the phrase 'honour or reputation' to include 'spiritual, moral or personal interests'. The term 'spiritual, moral or personal interests' would raise subjective issues, as the author himself or herself would inevitably be the best judge of what affects him or her in those matters, and outsiders would not know how an author's spiritual or moral interests are affected.[130] However, the proposal was rejected on the basis that 'spiritual' was likely to be misunderstood as having a religious signification, and that 'moral or personal interests' was too vague and lacking in precision.[131] The rejection of the term 'spiritual, moral or personal interests' can be interpreted as a rejection of a wholly subjective right of integrity that would leave the author almost complete latitude to decide whether the right was breached.[132] This indicates that the Berne Convention does not require adoption of the subjective test of prejudice.

Since the Australian right of integrity should be interpreted in line with the interpretation of Article 6bis of the Berne Convention, it follows that the subjective test of prejudice does not apply to the Australian right of integrity.

The objective test of prejudice to honour (ie the third test discussed earlier) can also be disqualified. It assesses prejudice to honour by reference to the reasonable author's honour rather than the particular author's honour, which is tantamount to allowing third parties to decide what an author's honour should be, instead of leaving that decision for the author. This result would be inconsistent with the ordinary meaning of 'honour', which requires protection of an author's honour *as it is perceived by the author*, rather than as it is perceived by third parties.[133] Furthermore, the adoption of the objective test of prejudice to honour would essentially give 'honour' a reputation-dependent meaning that makes the 'honour' limb of the right of integrity almost identical to the 'reputation' limb, which would run contrary to the earlier reasons for giving 'honour' and 'reputation' different meanings.

On the other hand, there are no reasons for rejecting the objective/subjective test of prejudice to honour (ie the second test discussed earlier). It is consistent with the Berne Convention interpretation since it contains an objective element, and is consistent with the ordinary meaning of 'honour' since it contains subjective elements. Some Australian commentators (including the Australian government)

129 Ibid.

130 Ibid [10.27].

131 Ibid [10.11].

132 Ricketson, above n 33, 474.

133 See the meaning of 'honour' discussed earlier, which requires some subjective elements to be considered.

have suggested the adoption of a test of prejudice to honour that contains subjective elements,[134] which amounts to support for the objective/subjective test.

Furthermore, adoption of the objective/subjective test of prejudice to honour is consistent with several policy considerations:

- **The test encourages respect for authors and their works**, by requiring courts to consider the author's subjective opinion of the treatment's prejudicial effect and the particular author's honour. The test permits the author's subjective opinion to be disregarded *only if* it is not a reasonable view according to the court, as assisted by public and/or expert opinion. Only the unreasonable opinions of authors are not accorded full respect. There is nothing to indicate that the Australian government intended to encourage respect for unreasonable opinions of authors regarding treatments of their works.
- **The test provides incentives to authors to create works**, because it gives authors an objectively reasonable level of protection over the integrity of their works.
- **The test helps preserve culture**. Cultural preservation is a public goal that is intended to promote the interests of the general public rather than the author, as the general public and future generations benefit from cultural preservation. The reasonableness criterion in the objective/subjective test of prejudice to honour can give the general public some say over whether a treatment of a work constitutes derogatory treatment, since the court's determination of reasonableness is aided by public opinion adduced as evidence. Also, if a work is culturally valuable, a mistreatment of the work is more likely to be considered reasonably prejudicial to the author's honour (thus satisfying the objective/subjective test), because culturally valuable works are usually masterpieces of the author that embody significant honour.
- **The test maintains incentives of investors to invest in copyright industries**, because it contains an objective element that is essential to avoid deterring investment in copyright industries. Without the objective element of reasonableness in the test of prejudice to honour (ie if the subjective test applied), the author would be able to subjectively establish that just about any change or contextual use of his or her work is prejudicial to his or her honour and amounts to derogatory treatment. Producers and users would then have to guess at the aesthetic sensibilities of authors to avoid derogatory treatments, which produces uncertainty in the marketplace for copyright works, and accordingly deters investment

134 Ricketson and Creswell, above n 30, [10.110]: 'The reference to "honour" indicates that more subjective factors are to be taken into account, involving a consideration of the way that authors think about themselves and their artistic integrity.' Also Adeney, 'The Moral Right of Integrity', above n 20, 125: 'In general, it is cautiously observed that subjective authorial response is relevant to the "honour" limb of the inquiry' and 126: 'Subjective authorial response should therefore not be ignored in a consideration of the concept of "honour" as it is used in the Berne Convention' and 128: 'a regard for the author's subjective feelings, tied up in the word "honour", might be allowed some play'. Also, in Commonwealth of Australia, *Discussion Paper*, above n 31, [3.49] the government indicated support for subjective elements in assessing prejudice to honour, when it stated that 'the term "honour" is generally associated with personal integrity and how a person considers he or she is perceived'.

activity in copyright areas.[135] The objective element in the test of prejudice serves as a control that prevents abusive and unreasonable allegations of prejudice by oversensitive authors from succeeding, thereby giving investors more certainty that normal exploitations of works they have invested in can occur freely.

There is a concern that the objective/subjective test can still interfere with investment in the copyright industries, due to uncertainty regarding the objective standard that courts will apply.[136] However, courts in other countries such as Canada, the UK and Germany have demonstrated an ability to sensibly apply the objective reasonableness criterion in the moral rights context without upsetting investment in the copyright industries of those countries. The uncertainty associated with the objective reasonableness criterion is of an acceptable level. In any event, the uncertainty will be reduced as more cases on the right of integrity are decided in future.

- **The test maintains the freedom of users of works to create derivative works and to interpret works.** It is possible for the right of integrity to interfere with a legitimate use of an existing work to create new works, if the author of the existing work establishes that the derivative use is prejudicial to the author's honour or reputation.[137] Similarly, it is possible for the right of integrity to interfere with a legitimate interpretation of a work when it is presented in a particular way, if the author establishes that the presentation is prejudicial to the author's honour or reputation.[138] The objective element in the objective/subjective test of prejudice to honour helps avoid some of these interferences, by ensuring that authors cannot unreasonably object to derivative uses or interpretations of their works. The test requires authors' assertions of prejudice to their honour to be objectively reasonable, and it would not be reasonable for any author to feel that his or her honour is prejudiced merely because someone has derivatively used or interpreted his or her work. The objective/subjective test avoids giving authors too much power to stop others from using their works derivatively or interpretively.[139]

Australia should therefore adopt the objective/subjective test of prejudice to honour.

Guidance on an Australian objective/subjective test of prejudice to honour can be obtained from the Canadian cases already discussed above, for three reasons. Firstly, the Australian and Canadian rights of integrity are very similar, as they

135 Baumgarten, above n 56, 91.

136 Ibid 89-90.

137 Geri J Yonover, 'The Precarious Balance: Moral Rights, Parody, and Fair Use' (1996) 14 *Cardozo Arts & Entertainment Law Journal* 79, 122.

138 Ricketson and Ginsburg, above n 32, [10.22]; John Henry Merryman, 'The Refrigerator of Bernard Buffet (1976) 27 *Hastings Law Journal* 1023, 1045; Thomas Cotter, 'Pragmatism, Economics, and the Droit Moral' (1997) 76 *North Carolina Law Review* 1, 85.

139 Cornish and Llewelyn, above n 45, [11-76], noting that the French subjective test 'inevitably acts as a considerable constraint on the freedom of others to use the work as they in turn choose'. Also Wood, above n 37, 188: 'a subjective test might give authors too much power to stop others using their works.'

both contain the 'prejudice to honour or reputation' requirement.[140] Australia's moral rights legislation was even stated by the government to be partly based on the Canadian legislation.[141] Secondly, Australia and Canada are common law countries with similar legal histories and systems, thus allowing for easier transposition of laws between those countries. Thirdly, Australian judges and commentators frequently refer to Canadian laws.[142]

2 *Distinguishing Reasonableness in the Objective/Subjective Test from Australia's Reasonableness Exception*

The Australian *Copyright Act 1968* (Cth) contains a reasonableness exception to infringement of the right of integrity:

> 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.[143]

Reasonableness in this reasonableness exception, and reasonableness in the 'prejudice to honour' objective/subjective test, are separate concepts that should not be mixed together. In particular, reasonableness in 'prejudice to honour' *focuses on the plaintiff* – the court, in deciding whether there is derogatory treatment under the objective/subjective test of prejudice to honour, examines the reasonableness of the plaintiff's subjective allegation of prejudice to his or her honour, and the burden is on the plaintiff to establish such reasonableness. On the other hand, reasonableness in the reasonableness exception *focuses on the defendant* – the court, in deciding whether the reasonableness exception applies, considers whether the defendant's derogatory treatment of the work is reasonable,[144] and the burden is on the defendant to establish such reasonableness.[145] The reasonableness of the

140 *Copyright Act 1968* (Cth) ss 195AJ-195AL; Canadian Copyright Legislation, s 28.2(1): 'The author's right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author, (a) distorted, mutilated or otherwise modified; or (b) used in association with a product, service, cause or institution.'

141 Commonwealth of Australia, *Discussion Paper*, above n 31, [3.82].

142 See generally Von Nessen, above n 13. For example, in *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* (2002) 55 IPR 1, the Full Federal Court considered the Canadian approach to the copyright issue of originality before deciding on the Australian approach.

143 *Copyright Act 1968* (Cth) s 195AS(1).

144 None of the prescribed factors of reasonableness in *Copyright Act 1968* (Cth) s 195AS(2)-(3) relate to the treatment's effect on the author; most of the factors relate to the defendant's use of the work.

145 *Copyright Act 1968* (Cth) s 195AS(1): 'A person does not [infringe the right of integrity] *if the person establishes* that it was reasonable in all the circumstances to subject the work to the treatment' (emphasis added).

defendant's treatment should only be considered *after* concluding that there is prejudice to the author's honour.[146]

Support for this view can be found in the history of the Australian moral rights legislation. Initially, in the Discussion Paper, the government proposed to incorporate what is now the reasonableness exception into the meaning of 'derogatory treatment',[147] by requiring the prescribed factors of reasonableness to be taken into account when determining whether a treatment of a work is derogatory.[148] The fact that this proposal was not followed, and that the reasonableness exception now exists independently of 'derogatory treatment' in the legislation, indicates that reasonableness in the reasonableness exception and any reasonableness considerations in the term 'derogatory treatment' are separate issues.

3 *Example of the Objective/Subjective Test Applying in Australia*

We now consider a hypothetical example of how the objective/subjective test of prejudice to honour as discussed earlier could be applied in the Australian context.

A filmmaker bought a copyright licence to use a musical work in her film, without disclosing the details of the film to the composer. The completed film turns out to have an anti-communist theme. The composer, a communist-supporter, objects to the use of the music in the film on the ground that it would place his musical work in an inappropriate context that is prejudicial to his honour as a communist-supporter.[149] The composer gives subjective evidence that the use would be harmful to his honour, and subjective evidence of his particular political view favouring communism.[150] The composer also adduces objective expert evidence (from other professional composers and people knowledgeable in the film and music area) and

146 Dean Ellinson and Eliezer Symonds, 'Australian Legislative Protection of Copyright Authors' Honour' (2001) 25 *Melbourne University Law Review* 623, 640. This is because the wording in the reasonableness exception, *Copyright Act 1968* (Cth) s 195AS(1), assumes that a derogatory treatment has occurred: 'A person does not, by subjecting a work, or authorising a work to be subjected, to *derogatory treatment* ...' (emphasis added). See also *Meskenas v ACP Publishing Pty Ltd* [2006] FMCA 1136 (Unreported, Raphael FM, 14 August 2006), [18] where the Federal Magistrates Court of Australia decided that there was a prima facie breach of the moral right concerned before considering the reasonableness exception.

147 Commonwealth of Australia, *Discussion Paper*, above n 31, [3.49]: '"Derogatory treatment" shall be defined to mean any material distortion, mutilation or alteration to a work or an adaptation of the work *that is unreasonable* and is prejudicial to the honour or reputation of the author' (emphasis added).

148 Ibid [3.50].

149 A similar fact situation arose in *Soc. Le Chant de Monde v Soc. Fox Europe et Soc. Fox Americaine Twentieth Century*, CA Paris, 13 January 1953, [1953] 1 Gaz. Pal. 191 {France}. A film publisher had used the uncopyrighted music of four Soviet composers in a film that was unfavourable to Soviet foreign policy. The composers argued that the use of their music in the film implied that they were disloyal to their country, which violated their right of integrity. They succeeded in the French court. Discussed in Russell J DaSilva, 'Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States' (1980) 28 *Bulletin of the Copyright Society of the USA* 1.

150 The composer's political view on communism can be regarded as a respectable trait, and so can be a part of the composer's honour.

public evidence (from other communist-supporters) to corroborate his subjective view that the use would prejudice his honour as a communist-supporter.

The objective/subjective test of prejudice to honour would require the court to consider: Is the author's subjective allegation of the treatment's prejudicial effect on his honour, given that he is a communist-supporter, objectively reasonable? If the plaintiff's objective evidence supporting prejudice to his honour is credible and is not refuted by cross-examination or contrary objective evidence adduced by the defendant, then the court is likely to decide that the allegation of prejudice to honour is reasonable – thus satisfying the prejudice requirement. As the use clearly constitutes a 'doing of anything else in relation to the work', derogatory treatment would be established.

The court should then consider application of the reasonableness exception as a separate matter: Is the filmmaker's derogatory treatment of the musical work reasonable in all the circumstances?[151] This issue would involve a consideration of factors that may assist in determining whether the reasonableness exception applies.[152] For example, if the filmmaker's use of the music in her anti-communist film is necessary to promote the commercial success of the film (perhaps it would take too long and be too costly to find another musical work to use in the film), then that would be a factor in favour of the use being considered reasonable for the purposes of the reasonableness exception, since moral rights should not unduly interfere with the normal exploitation of large-scale investments.[153]

VII MEANING OF 'REPUTATION' – AN OBJECTIVE CONCEPT

A *Ordinary Meaning of 'Reputation'*

'Reputation' means, according to the *Macquarie Dictionary*:

> 1. the estimation in which a person or thing is held, especially by the community or the public generally; repute: *a man of good reputation.* ... 3. a favourable and publicly recognised name or standing for merit, achievement, etc.: *to build up a reputation.* ...[154]

Also, according to the *Concise Oxford English Dictionary*, 'reputation' means:

> the beliefs or opinions that are generally held about someone or something; a widespread belief that someone or something has a particular characteristic.[155]

151 *Copyright Act 1968* (Cth) s 195AS(1).

152 *Copyright Act 1968* (Cth) s 195AS(3) contains factors to be considered in determining whether it was reasonable to subject a film to derogatory treatment.

153 Gerald Dworkin, 'The Moral Right of the Author: Moral Rights and the Common Law Countries' (1995) 19 *Columbia -VLA Journal of Law & the Arts* 229, 263.

154 *Macquarie Dictionary* (4th ed, 2005).

155 *Concise Oxford English Dictionary* (11th ed, 2004).

The dictionary definitions of 'reputation' can be distilled into a definition of 'reputation' for the purpose of the right of integrity: 'reputation' means the particular characteristics, preferences or views that the community believes or recognises the author to have. This definition of 'reputation' is consistent with the Discussion Paper's statement that reputation 'is associated more, in the defamation context, as relating to a person's professional, business or personal standing in the community',[156] and is consistent with Australian commentators' view that 'reputation' in the moral rights context 'may be suggestive of the concept of reputation that arises in defamation cases: in this context, it would refer to the standing that particular authors have among their peers or the wider public'.[157]

'Reputation' can be distinguished from 'honour' in two ways. Firstly, 'reputation' is not necessarily about respectable traits, it is more about traits that the author is recognised by, whether they are respectable or not (for example, there is nothing inherently respectable or disrespectable about an author's reputation in specialising in a certain genre). Secondly, unlike 'honour', which is concerned with the author's perception of himself or herself, 'reputation' is an objective concept concerned with the *community's* perception of the author's characteristics, preferences or views.

B *Legal Meaning of 'Reputation' in the Defamation Context*

At the Rome Conference on revision of the Berne Convention, the term 'honour or reputation' in Article 6bis was only accepted by the common law countries on the basis that it resembled the kind of concepts already found in their existing laws of defamation and passing off, so that they did not have to change their domestic laws to comply with that Article.[158] This indicates that some connection between defamation law and the moral right of integrity was intended in the Berne Convention. Many commentators also suggest that the term 'reputation' in the right of integrity has links with that term as used in defamation law.[159] So, the legal meaning of 'reputation' in defamation law should be examined to help give meaning to 'reputation' in the right of integrity.

In Australia, all states and territories recently introduced uniform defamation legislation[160] which retains the existing tort of defamation at general law to the extent

156 Commonwealth of Australia, *Discussion Paper*, above n 31, [3.49].

157 Ricketson and Creswell, above n 30, [10.110].

158 Parliament of Australia, *International Copyright Conference, Rome, May and June 1928, Report of the Australian Delegate (Sir W. Harrison Moore)* No. 255, 31 August 1928, 6ff; Ricketson, above n 33, 468-9.

159 For example, Commonwealth of Australia, *Discussion Paper*, above n 31, [3.49]; Ricketson and Creswell, above n 30, [10.110]; Patricia Loughlan, 'The Right of Integrity: What is in that Word Honour? What is in that Word Reputation?' (2001) 12 *Australian Intellectual Property Journal* 189, 196; Banks, above n 126, 342; Garnett, Davies and Harbottle, above n 45, [11-44]; Laddie et al, above n 39, [13.19]; Bently and Sherman, above n 45, 247.

160 *Defamation Act 2005* (NSW), *Defamation Act 2005* (Vic), *Defamation Act 2005* (Qld), *Defamation Act 2005* (SA), *Defamation Act 2005* (Tas), *Defamation Act 2005* (WA), *Civil Law (Wrongs) Amendment Act 2006* (ACT), *Defamation Act 2006* (NT) ('Uniform Defamation Legislation'). Although the legislation in these jurisdictions are uniform, the section numbers can differ.

that the legislation provides otherwise.[161] According to the uniform legislation, a person has a cause of action for defamation 'in relation to the publication of defamatory matter about the person'.[162] There is no legislative definition of 'defamatory matter'. According to general law, matter is defamatory if it is likely to cause damage to the plaintiff's *reputation* (by subjecting the plaintiff to hatred, ridicule or contempt;[163] or by disparaging the plaintiff[164]), or tends to make society shun or avoid the plaintiff.[165]

'Reputation' in defamation law is the regard or esteem in which a person is held by others.[166] 'Reputation' of a person is about the type of person *others think* he or she is, and is to be distinguished from 'character' of a person, which is about the type of person he or she *actually* is.[167] Thus, a person's 'reputation' in defamation law is, like its ordinary meaning discussed earlier, an objective concept measured by people other than that person.

VIII THE TEST FOR ESTABLISHING 'PREJUDICE TO REPUTATION'

Since 'reputation' is an objective concept assessed according to the views of people other than the author, 'prejudice to reputation' must necessarily be assessed using an objective test (as opposed to a subjective or objective/subjective test).[168] Also, since 'reputation' in the right of integrity has a link with defamation law, it would be appropriate to look to defamation law for assistance and guidance on the objective test for establishing 'prejudice to reputation' in Australia.

161 Uniform Defamation Legislation, eg *Defamation Act 2005* (Vic) s 6.

162 Uniform Defamation Legislation, eg *Defamation Act 2005* (Vic) s 8.

163 *Parmiter v Coupland* (1840) 6 M & W 105, 108 (Parke B); *John Fairfax & Sons Ltd v Punch (1980)* 47 FLR 458, 468 (Brennan J); *Ettingshausen v Australian Consolidated Press Ltd* (1991) 23 NSWLR 443, 448 (Hunt J); *Brander v Ryan* (2000) 78 SASR 234, 245 (Wicks J).

164 *Hall-Gibbs Mercantile Agency Ltd v Dun* (1910) 12 CLR 84, 92-3 (Griffith CJ) and 102-3 (O'Connor J); *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1, 24 (Mason J).

165 *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1, 23-4 (Mason J); *Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449, 453 (Hunt J); *Ettingshausen v Australian Consolidated Press Ltd* (1991) 23 NSWLR 443, 447 (Hunt J). See also T K Tobin QC and M G Sexton SC, *Australian Defamation Law and Practice,* vol 1, [3010]; Des Butler and Sharon Rodrick, *Australian Media Law* (2nd ed, 2004) 34-5; Michael Gillooly, *The Law of Defamation in Australia and New Zealand* (1998) 43; *Halsbury's Laws of Australia*, [145-735]ff.

166 Tobin and Sexton, above n 165, [21,005].

167 *Plato Films Ltd v Speidel* [1961] AC 1090, 1137-8 (Lord Denning): 'A man's "character" it is sometimes said, is what he in fact is, whereas his "reputation" is what other people think he is. If this be the sense in which you are using the words, then a libel action is concerned only with a man's reputation, that is, with what people think of him; and *it is for damage to this reputation, that is, to his esteem in the eyes of others that he can sue, and not for damage to his own personality or disposition*' (emphasis added).

168 Banks, above n 126, 342.

A *The Objective Test of Damage to Reputation in Defamation Law*

In defamation law, there is damage to the plaintiff's reputation if the matter complained of tends to produce an adverse reaction in a hypothetical audience of reasonable people towards the plaintiff.[169] The hypothetical audience has been described by courts as 'right thinking members of society generally'.[170] Damage to reputation is 'ascertained by reference to general community standards'.[171] However, application of the concept of 'general community' is not rigid and can accommodate the views of a relevant sub-community.[172] Australian courts have indicated that it would be sufficient if the matter is defamatory in the estimation of an 'appreciable and reputable'[173] or 'substantial, intelligent and reasonable'[174] section of the community.[175] For example, the relevant sub-community could be those people within the plaintiff's profession or trade.[176] The plaintiff's own personal perception of the effect of the matter on his or her reputation is irrelevant, because the test of whether a matter is defamatory is a wholly objective one.[177]

B *Application of the Defamation Law Objective Test to the 'Reputation' Limb of the Right of Integrity*

If the objective test in defamation law is applied to the right of integrity context, then a treatment is 'prejudicial to the author's reputation' if it has the capacity to lower the author's reputation in the eyes of either 'right thinking members of society generally'[178] or an 'appreciable and reputable' or a 'substantial, intelligent

169 *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500, 505 (Brennan J). For a similar principle, see *Sim v Stretch* (1936) 52 TLR 669, 671 (Lord Atkin); *Gardiner v John Fairfax & Sons Pty Ltd* (1942) 42 SR (NSW) 171, 172 (Jordan CJ); *Brander v Ryan* (2000) 78 SASR 234, [25] (Wicks J). Also see Gillooly, above n 165, 45; Tobin and Sexton, above n 165, [21,005]; Butler and Rodrick, above n 165, 35; *Halsbury's Laws of Australia* [145-740]ff.

170 *Sim v Stretch* (1936) 52 TLR 669, 671 (Lord Atkin), cited in *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500, 505 (Brennan J). Other descriptions of the hypothetical audience used by courts include 'a man of fair average intelligence': *Slatyer v Daily Telegraph Newspaper Co* (1908) 6 CLR 1, 7; 'ordinary decent folk in the community, taken in general': *Gardiner v John Fairfax & Sons* (1942) 42 SR (NSW) 171, 172; and 'ordinary men not avid for scandal': *Lewis v Daily Telegraph Ltd* [1964] AC 234, 260.

171 *Readers Digest v Lamb* (1982) 150 CLR 500, 507 (Brennan J).

172 Tobin and Sexton, above n 165, [3140] and [3145].

173 *Hepburn v TCN Channel Nine Pty Ltd* [1983] 2 NSWLR 682, 694 (Glass JA).

174 *Grundmann v Georgeson* [1996] Aust Torts R 63,500, 63,503 (Davies JA).

175 Butler and Rodrick, above n 165, 36; Gillooly, above n 165, 46; J G Fleming, *The Law of Torts* (9th ed, 1998) 583: 'The increasing diversity of beliefs and attitudes in modern (Australian) society precludes an appeal to a single standard of 'right-thinking' people and suggests as sufficient that the allegation was calculated to stir up adverse feelings among a substantial and respectable group of the community, though not in other quarters.'

176 *Murphy v Australian Consolidated Press Ltd* [1968] 3 NSWR 200, 206 (Walsh JA).

177 Tobin and Sexton, above n 165, [3120].

178 Bently and Sherman, above n 45, 247, applying to the moral rights context the phrase 'right thinking members of society', which comes from the defamation case *Sim v Stretch* (1936) 52 TLR 669, 671 (Lord Atkin): see above n 170.

and reasonable' section of the community.[179] Such a section of the community could be those people within the author's trade or business,[180] like other authors, colleagues, arts critics and academics, and the artistic community generally.

Thus, to establish prejudice to reputation, the author should adduce objective evidence showing that the treatment has a capacity to at least make an 'appreciable', 'reputable' and 'substantial' section of the community lower its esteem or regard for the author's characteristics, preferences or views. Since the assessment of prejudice to reputation is purely objective, the author's views about the effect of the treatment on his or her reputation are irrelevant; all that matters are the views of the relevant community, as established by objective evidence.

Adoption of this wholly objective test of prejudice to reputation is consistent with several policy considerations underlying the right of integrity: it *encourages greater respect* for authors (by encouraging greater respect for their reputations); it *provides incentives for the creation of works* (by preventing treatments of works that objectively prejudice authorial reputation); it helps *preserve culture* (by preventing changes or destructions of cultural works that objectively prejudice authorial reputation); and it *does not unduly interfere with investment in copyright industries or with the freedom of others to create derivative works or interpret works* (since it does not extend protection much further than the protection already provided by the pre-existing tort of defamation).

C *US Case that Established and Applied an Objective Test*

The above-suggested objective test for determining prejudice to reputation, which is based on Australian defamation law, is similar to the test that the US adopted in a right of integrity case.

In *Carter v Helmsley-Spear Inc*,[181] decided in the District Court for the Southern District of New York, the plaintiffs sought to prevent the alteration of their sculptural installations in the lobby of a commercial building with their right of integrity.[182] District Judge Edelstein gave the terms 'prejudicial', 'honor' and 'reputation' the meanings found in the *Webster's Third New International Dictionary (unabridged)* (1971), stating that 'prejudice' is commonly understood to mean 'injury or damage

179 Supported by the defamation cases of *Hepburn v TCN Channel Nine* [1983] 2 NSWLR 682, 694 (Glass JA); *Grundmann v Georgeson* [1996] Aust Torts R 63,500, 63,503 (Davies JA); *Murphy v Australian Consolidated Press Ltd* [1968] 3 NSWR 200, 206 (Walsh JA). Also supported by commentators, see Loughlan, above n 159, 197 (in the moral rights context); Fleming, above n 175, 582-3 (in the defamation context).

180 *Murphy v Australian Consolidated Press Ltd* [1968] 3 NSWR 200, 206 (Walsh JA) (in the defamation context).

181 861 F Supp 303 (SDNY, 1994). The trial decision was later overturned by an appellate court, but on an issue unrelated to prejudice to honor or reputation: *Carter v Helmsley-Spear Inc*, 71 F 3d 77 (2nd Cir, 1995), concerning the issue of whether the work was 'made for hire'.

182 US Copyright Legislation, § 106A(a)(3)(A) states that the author of a work of visual art shall have the right 'to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right'.

due to some judgment of another'; 'honor' is commonly understood to mean 'good name or public esteem'; and 'reputation' is commonly understood to mean 'the condition of being regarded as worthy or meritorious'.[183] This adopted meaning of 'honor' is reputation-dependent (since it refers to the artist's standing in the eyes of the public), so the case essentially concerned 'prejudice to reputation' exclusively, despite its references to 'honor or reputation'. The judge then established that the test for assessing prejudice to honor or reputation was 'whether such alteration would cause injury or damage to plaintiffs' good name, public esteem, or reputation *in the artistic community*'.[184] This test, which assesses prejudice by reference to the artistic community's views, is consistent with the Australian defamation law concept of assessing damage to reputation by reference to the views of an 'appreciable', 'reputable' and 'substantial' section of the community (discussed earlier).[185] The judge then applied the test, and accepted the expert evidence of an art history professor, a president and director of an art gallery, and another arts professor, that the plaintiffs' honor or reputation would be damaged if the work was mutilated.[186] In particular, he accepted expert evidence that the plaintiffs' honor or reputation would be damaged if the work was modified because the work would then present to viewers an artistic vision materially different from that intended by the plaintiffs.[187] The plaintiffs were granted prospective injunctive relief.[188] No reference was made to the plaintiffs' subjective opinions of prejudice, which confirms that the judge applied a wholly objective test of prejudice to reputation.

This case demonstrates that a plaintiff can satisfy the objective test of prejudice to reputation by adducing expert evidence of arts academics or art gallery personnel who are in the relevant field. The case provides valuable guidance to Australian courts on the application of the objective test of prejudice to reputation, especially since Australian courts regularly refer to US cases.[189]

D *Differences Between the 'Reputation' Limb of the Right of Integrity and the Tort of Defamation*

Is the 'reputation' limb of the right of integrity, which uses the objective test, so similar to the long-existing tort of defamation that it provides no additional benefit to authors? Although there are many similarities between the two causes of action (in particular, both protect reputation), there are subtle differences: (1) to succeed under defamation law, the work being treated must be identifiable by the public as that of the specific author,[190] whereas to succeed under the 'reputation' limb

183 *Carter v Helmsley-Spear Inc*, 861 F Supp 303 (SDNY, 1994), 323.

184 Ibid (emphasis added).

185 The artistic community would be an appreciable, reputable and substantial section of the community.

186 *Carter v Helmsley-Spear Inc*, 861 F Supp 303 (SDNY, 1994), 323-4.

187 Ibid 324.

188 Ibid 330.

189 Von Nessen, above n 13, 323.

190 *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1, 23; *Bjelke-Petersen v Warburton & Burns* [1987] 2 Qd R 465, 467. Also see Tobin and Sexton, above n 165, [6001].

of the right of integrity, there is no strict requirement for the public to recognise the work as that of the author specifically, as long as the treatment somehow prejudices the author's reputation;[191] (2) a defamation action cannot be brought after the author's death,[192] whereas the right of integrity can be enforced after the author's death;[193] and (3) the defences for defamation are not the same as the defences for infringement of the right of integrity.[194] Therefore, an author could be better off using the 'reputation' limb of the right of integrity rather than the tort of defamation to prevent a mistreatment of his or her work. The interpretation of the 'reputation' limb adopted in this article is sufficiently different from the tort of defamation to be useful to authors.

E *Differences Between the 'Reputation' and 'Honour' Limbs of the Right of Integrity*

Are there situations where an author of a mistreated work would rely on the 'reputation' limb instead of (or in addition to) the 'honour' limb of the right of integrity? It will generally be easier for authors to establish prejudice to the subjective concept of honour than to establish prejudice to the objective concept of reputation, because their subjective personal opinions of prejudice can only be considered and given weight in a claim of prejudice to honour. This means that authors would generally prefer to bring a right of integrity infringement action based on prejudice to honour than prejudice to reputation. However, it can still be useful for an author to try to establish prejudice to reputation, for a few reasons. Firstly, if the author is unable to personally give evidence of his or her subjective response to the alteration or use of his or her work (either because he or she is dead, incapacitated or is otherwise unavailable), and if there is no evidence of what the author's subjective response would have been, then the right of integrity infringement action would have to be brought on the basis of prejudice to the author's reputation rather than honour. Secondly, if the prejudice pertains to the author's business standing more than to the author's respectable traits, personality or dignity, then it makes more sense to bring the right of integrity infringement action on the basis of prejudice to reputation rather than honour. Thirdly, if the plaintiff author primarily seeks the remedy of damages, it would be advantageous to establish prejudice to reputation, because such prejudice would have a greater monetary or financial impact on the plaintiff than mere prejudice to honour. The

191 Sainsbury, above n 47, 85; Irini Stamatoudi, 'Moral Rights of Authors in England: The Missing Emphasis on the Role of Creators' (1997) 4 *Intellectual Property Quarterly* 478, 486.

192 Uniform Defamation Legislation, eg *Defamation Act 2005* (Vic) s 10.

193 *Copyright Act 1968* (Cth) s 195AM(2)-(3); with the exception of the right of integrity in respect of films and works included in films, which expires on the author's death: *Copyright Act 1968* (Cth) s 195AM(1).

194 The defences for defamation can be found in the Uniform Defamation Legislation. For example, in *Defamation Act 2005* (Vic), the defences are justification (s 25), contextual truth (s 26), absolute privilege (s 27), publication of public documents (s 28), report of proceedings of public concern (s 29), qualified privilege (s 30), honest opinion (s 31), innocent dissemination (s 32), triviality (s 33) and other defences available under the general law (s 24). For commentary on the defences, see Tobin and Sexton, above n 165, [10,001]ff; *Halsbury's Laws of Australia*, [145-945]ff; Butler and Rodrick, above n 165, 51ff.

'reputation' limb, as it has been interpreted in this article, therefore has a useful role alongside the 'honour' limb of the right of integrity.

IX CONCLUSION

This article has examined a particular aspect of the author's right of integrity in the *Copyright Act 1968* (Cth): the phrase 'prejudicial to the author's honour or reputation', which is contained in the statutory definition of 'derogatory treatment'.

It was established that the term 'prejudicial' should not be interpreted to require the author to prove actual harm; it should only require the author to establish that the treatment has a capacity to cause harm to the author's honour or reputation.

The words 'honour' and 'reputation' should be given different meanings, so that the right of integrity contains two separate limbs, an 'honour' limb and a 'reputation' limb. 'Honour or reputation' should be interpreted as the honour or reputation of the author in his or her capacity as an author *and* a general individual.

'Honour' should be interpreted as the respectable traits, personality or dignity that the author perceives himself or herself to have. The author's 'honour' is a subjective concept because it should be established by the author himself or herself. 'Prejudice to honour' should be assessed using a mixed objective/subjective test that considers whether the author's subjective allegation of the treatment's prejudicial effect on his or her honour is objectively reasonable, given the author's particular honour as he or she sees it. Several Canadian cases provide examples of the application of this test. The adoption of this test results in an 'honour' limb of the right of integrity that is consistent with the Berne Convention, the ordinary meaning of 'honour' and the policy considerations underlying the right of integrity.

'Reputation' should be interpreted as the characteristics, preferences or views that the community perceives the author to have. The author's 'reputation' is an objective concept because it should be established by the community rather than the author. 'Prejudice to reputation' should be assessed using a wholly objective test (based on the defamation law test of damage to reputation), which considers whether the treatment has the capacity to lower the author's reputation in the eyes of an appreciable, reputable and substantial section of the community. A US case provides an example of the application of this kind of test. The adoption of this test results in a 'reputation' limb of the right of integrity that is consistent with the Berne Convention, the ordinary and legal meanings of 'reputation' and the policy considerations underlying the right of integrity. Also, this article's interpretation of the 'reputation' limb of the right of integrity is sufficiently different from the tort of defamation and the 'honour' limb of the right of integrity to be useful to authors.

These findings should improve understanding of the author's right of integrity overall, so that interested parties, legal practitioners and courts are better informed when confronted with a right of integrity issue. This article has also demonstrated that much guidance on the interpretation and application of the Australian right of integrity can be obtained from relevant foreign cases and historical proceedings of the Berne Convention.