The concept of ‘reputation’ in the moral right of integrity

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Introduction

International copyright law, by virtue of Article 6bis of the Berne Convention, mandates that a moral right of integrity be granted to the authors of literary and artistic works. In the United Kingdom, this right is granted to authors of works and the principal director of a film by section 80 of the Copyright Designs and Patents Act 1988 (‘CDPA’). Crucial to the scope of the integrity right is the concept of prejudice to the author’s ‘honour’ or ‘reputation’. Yet, there has been limited exploration by courts or commentators of what ‘honour’ or ‘reputation’ means. This article will focus solely on the meaning of ‘reputation’ as it relates to an author’s right of integrity and specifically ask: what can the law of defamation teach us about the possibilities for this concept? It will argue that we can legitimately borrow from the law of defamation and that, if we do so, it is possible to conceive of a different approach to prejudice to the author’s reputation. In particular, rather than limiting

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1 Berne Convention for the Protection of Literary and Artistic Works 1971 (Paris)
3 For judicial interpretation see Part I below. In the U.S. context see Carter v Helmsley Spear (1994) 861 F. Supp 303, 323-324 for a discussion of prejudice to ‘honor’ or ‘reputation’ (but note this was not considered on appeal by the US Court of Appeals 2nd circuit (1995) 71 F 3d 77).
5 Davies & Garnett, [8-038], [8-041], [8-043] [8-046], [8-048] explore some potential insights from defamation law, as does Lim (2007), 317-322.
derogatory treatment to an objective test of *actual* prejudice to the reputation of the author, it is argued that defamation jurisprudence supports a test of *either* objective *potential* harm or a subjective approach, guided by the author’s views.

Which of these approaches should be adopted in the UK is open for debate. The contribution of this article is to show that it is legitimate to move beyond the present judicial conceptualisation of the scope of the integrity right. This is valuable given that the right of integrity is likely to be tested more frequently in future, now that a parody exception has been introduced into UK copyright law.\(^6\) The parody exception applies to the infringement of economic rights only, and not to moral rights.\(^7\) As such, there is the potential for tension to arise between a parody that is an exception under copyright law and an author’s right of integrity.\(^8\) A more informed debate about the legitimate scope of the right of integrity could help to resolve this tension.

This article is divided into four parts. Part I outlines the present scope of the right of integrity for authors in UK copyright law to show that the test for assessing infringement is not settled, but that it tends towards an objective test of *actual* harm. Part II then briefly describes the history of Article 6bis Berne to demonstrate why it is plausible to cross-pollinate ideas of reputation from defamation into the law of copyright. Part III discusses reputation in UK defamation law to argue that it is possible to conceive of an objective test of *potential* prejudice to reputation for section 80 CDPA. Finally, Part IV briefly examines Strasbourg jurisprudence on reputation to show that either an objective test of *potential* harm or a subjective test could be considered as possible means of assessing infringement of the right of integrity.

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\(^6\) See s.30A CDPA inserted 1.10.2014 by The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (SI 2014/2356).


Part I – the present scope of section 80 CDPA

Section 80 of the CDPA grants to authors of literary, dramatic, musical, and artistic works, and principal directors of films, the right, in certain circumstances, not to have their work subjected to derogatory treatment. Those circumstances are set out in section 80(3)–(6) and include such things as exhibiting in public a derogatory treatment of an artistic work or commercially publishing, performing in public, or communicating to the public a derogatory treatment of a literary, dramatic, or musical work. ‘Treatment’ means ‘any addition to, deletion from or alteration to or adaptation of the work’ but does not include a translation of a literary or dramatic work, or an arrangement or transcription of a musical work involving no more than a change of key or register.\(^9\) Arguably, the definition of ‘treatment’ does not embrace instances of re-contextualization; this is where the work itself is not modified, but is placed in a context that is problematic, such as a song being performed at a public right-wing rally or a religious work being displayed amongst pornographic images. Nevertheless, in Harrison v Harrison, Judge Fysh suggested, in obiter, that ‘treatment’ of a work is ‘a broad, general concept...[that] implies a spectrum of possible acts carried out on the work, from the addition of say, a single word to a poem to the destruction of the entire work’ and that the limit to the generality of ‘treatment’ was ‘surely to be found...in the possible prejudice to the honour or reputation of the author’.\(^{10}\) This dicta, while encouraging, may still not embrace re-contextualization of works where no physical change has been made. If that is the case, then section 80 CDPA is arguably inconsistent with article 6bis Berne.\(^{11}\)

According to section 80(2)(b), 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’. There are very few reported cases on UK moral rights and even fewer that discuss the meaning of ‘derogatory’ in relation to the integrity right. Moreover, the decisions emanate from lower courts and, as such,

\(^9\) CDPA, s. 80(2).
\(^{10}\) [2010] EWPCC 3, [2010] ECDR 12 (PCC), [60].
\(^{11}\) On the scope of Article 6bis as it relates to the integrity right and re-contextualization see Ricketson & Ginsburg (2006), [10.23].
have limited precedential value. However, these decisions provide at least a hint of the approach under UK law.

In *Morrison Leahy Music Ltd v Lightbond Ltd*,12 the plaintiffs complained that use of their literary and musical works in a ‘megamix’ (i.e. a medley of songs with fill-in music) was an infringement of their integrity right. In an application for an interim injunction, Morrit J (as he then was) found that it was arguable that the ‘treatment’ of the works amounted to a distortion or mutilation, but that it did not ‘necessarily’ amount to distortion or mutilation and was a matter that needed to be determined at trial. It is difficult to glean much from this decision, other than an assumption that ‘distortion’ and ‘mutilation’ were concepts disjunctive from prejudice to the author’s honour and reputation.

In *Tidy v Natural History Museum*,13 the plaintiff had created dinosaur cartoons for an exhibition which the defendants reproduced in a reduced size format. In an application for summary judgment, the plaintiff’s counsel suggested that it was ‘obvious’ from looking at the reproduction that this treatment was prejudicial to the author’s reputation and thus infringed section 80 CDPA. Rattee J, however, refused to grant summary judgment on this issue. He held that he was ‘far from satisfied that it is clear beyond argument’ that the reduced versions of the author’s artistic works amounted to distortion of the work or were prejudicial to the plaintiff’s reputation. He was especially reluctant to find prejudice ‘without having the benefit of evidence relating to the effect of the reproduction on his reputation in the minds of other people’. In other words, Rattee J treated the question of prejudice to reputation as requiring evidence of actual harm to reputation. The Canadian decision in *Snow v Eaton Centre*14 was cited to Rattee J, in which ‘prejudicial to his honour or reputation’ was interpreted as involving ‘a certain subjective element or judgment on the part of the author so long as it is reasonably arrived at’.15 This ‘reasonable-subjective’ test is a test that essentially asks whether the plaintiff’s/claimant’s

12 [1993] EMLR 144.
14 70 CPR (2d) 105.
15 p.106.
objection to the treatment is *reasonable* or not – making it, in fact, an objective test.\(^{16}\) Rattee J was skeptical of the *Snow* test and held that, even if such a test were applicable, it was arguable that the plaintiff’s reputation was not harmed in the mind of any reasonable person looking at the reproductions. Thus, in *Tidy*, the preferred test was an objective test of *actual* harm to the author’s reputation or, as a possible alternative, an objective test of *potential* harm, assessed through the eyes of a reasonable person. Neither was satisfied in this summary judgment application.

In *Pasterfield v Denham*\(^{17}\), a case involving deletions from an artistic work and changes in colour shading in order to use the work in a subsequent version of a brochure, the *Snow* case was cited in argument, along with the French decision in *Huston v Turner Entertainment*.\(^{18}\) *Huston* represents the typical French approach to the right of integrity, in which it suffices that the author objects to the treatment – in that case colorization of a black and white film, ‘*The Asphalt Jungle*’. However, without evaluation of the possible approaches to assessing breach of the integrity right, Judge Overend concluded that: ‘the plaintiff must establish...that the treatment accorded to his work is either a distortion or a mutilation that prejudices his honour or reputation as an artist. It is not sufficient that the author is himself aggrieved by what has occurred.’\(^{19}\) Thus, a subjective test of derogatory treatment was flatly rejected; perhaps in part because the judge saw derogatory treatment as akin to libel.\(^{20}\) The judge dismissed the expert evidence submitted by the plaintiff, on the basis that it was flawed and not specifically directed at assessing the honour or reputation of the author. He then concluded that the changes made to the artistic work were not ‘such as to affect either the honour or reputation of [the plaintiff] as an artist.’\(^{21}\) While the judge obviously preferred an *objective* test for assessing derogatory treatment, it is unclear whether he was applying a test that required actual or potential harm. Moreover, there is the rider that it is ‘reputation as an

\(^{16}\) Cf Adeney (2005), 128 who argues that *Snow* suggests only ‘objectively reasonable authorial judgments would establish the necessary prejudice’. She suggests that the reference to subjectivity was in fact giving effect to the ‘honour’ part of the composite ‘honour or reputation’ phrase.

\(^{17}\) [1999] FSR 168.


\(^{19}\) [1999] FSR 168, 178.


artist’ that must be prejudiced. This suggests that it is the reputation of the author as an author that is being evaluated.

The most authoritative decision so far is *Confetti Records v Warner Music Ltd*, a decision of Lewison J (as he then was) in the High Court. The complaint related to the addition of rap lyrics to a ‘garage’ backing track called ‘Burnin’. It was alleged that the rap lyrics were suggestive of violence and drug usage and, thus, that their addition to the music amounted to a derogatory treatment of the work. Lewison J held that the key to establishing derogatory treatment is prejudice to the author’s honour or reputation. However, the judge found that there was no such prejudice. It was questionable whether the lyrics were decipherable and, therefore, demonstrably offensive; and, according to the judge, ‘the fundamental weakness...is that I have no evidence about [the author’s] honour or reputation. I have no evidence of any prejudice to either of them. [The author] made no complaint about the treatment [of the work]...’ These statements suggest that Lewison J was applying an objective test of actual prejudice to the author’s honour or reputation and the fact that evidence was not adduced was fatal. The failure of the author to make a complaint is perhaps suggestive of a subjective test relevant to ‘honour’, but perhaps also an explanation for why Lewison J was not willing to ‘infer prejudice’ on behalf of the author. In other words, if an author is unwilling to complain how can there be, objectively, prejudice to the author’s honour or reputation? Interestingly, Lewison J does not address the language in *Pasterfield* of ‘reputation as an artist’ so it is unclear whether it is reputation as an author or of the author generally that is of concern.

Since *Confetti* there have been only a couple of decisions from the (then) Patents County Court on the right of integrity. In *Harrison v Harrison*, Judge Fysh commented in obiter that the word ‘prejudicial’ seemed to require the claimant to submit

23 [150].
24 [157]. (Emphasis added)
25 Adeney, [14.74] suggests evidence of prejudice is not the same as evidence of actual harm.
26 [157].
27 See also Davies & Garnett, [8-038] and Adeney, [14.75].
‘relevant evidence’. However, in *Delves-Broughton v House of Harlot Ltd*, the judge found a ‘distortion’ of the work without investigating whether this was prejudicial to the author’s honour or reputation. In this case, the defendant had used an altered version of the claimant’s photograph on its website for six months. The alterations were removing a forest background, reversing the image, and cropping it. The judge noted ‘that considerable time and effort went into the composition or creation of the original photograph, and it was important to the photographer that the forest background appeared... for artistic reasons’. He concluded that the changes amounted to a ‘distortion’ of the work and were therefore derogatory, and that ‘distortion’ was a separate requirement from prejudice to the honour or reputation of the author. Damages, in a minimal sum of £50, were awarded. It is unclear precisely what test was being used here. Arguably, a subjective test was being relied upon, given the weight that was accorded to the author’s views. However, *Pasterfield* and *Confetti Records* were not mentioned, and these decisions clearly preferred an objective test. Further, those decisions held that the test for derogatory treatment should be read in conjunction with the reputational clause, such that distortion or mutilation ‘is only actionable if it is prejudicial to the author’s honour or reputation’. Thus, given the failure to deal with previous case law, little reliance can be placed on *Delves-Broughton*.

In summary, the authorities, such as they are in UK copyright law, suggest an objective test of assessing derogatory treatment and one that is more comfortable with notions of ‘reputation’ than ‘honour’. However, it is unclear whether a test of actual or potential harm to reputation is being applied. It is also unclear whether honour or reputation relates to the claimant as an author, or to more general notions of honour and reputation. It can be tentatively concluded that the limited

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28 [66].
29 [2012] EWPCC 29
30 [24].
31 [24].
32 [24], [32].
33 *Confetti Records*, [150] citing *Pasterfield v Denham* on this point with approval.
34 See also Davies & Garnett, [8-040].
35 See also Cheng-Davies, 283-284 who argues that judicial considerations of integrity have appeared either to focus on ‘reputation’ or to conflate ‘honour’ with ‘reputation’.
case law points to an objective test of actual harm to the reputation of the author as an author, but there is no authoritative decision on the scope of the integrity right. Notably, the Canadian Snow test has not been adopted by English courts and the approach taken in other common law jurisdictions, such as Australia, has not been considered. Thus, English courts remain free to develop the law in this area in future. In so doing, this article argues that courts may want to borrow from defamation law. The next section explains why it is appropriate to look to defamation law to inform our understanding of prejudice to ‘reputation’ in the moral rights context.

Part II – why defamation law is relevant to the integrity right

The key reason for making the connection between defamation law and copyright law is that, historically, the word ‘reputation’ in Article 6bis was an attempt to appeal to common law sensibilities. Article 6bis was introduced at the Rome Conference in 1928. Commentators, such as Professors Ricketson and Ginsburg, and Professor Adeney, have examined the history of the provision in detail. All that needs noting here is that it was initially France and Poland that urged for the recognition of moral rights and, in response to their proposals, the Italian government drafted a provision which referred to, inter alia, ‘the right to oppose any modification of the work which would be prejudicial to...[the author’s] moral interests’ (emphasis added). Additional amendments were suggested by other delegations, and so, the issue was referred to a sub-committee for discussion. Common law countries, in particular the UK and Australia, objected to the wording ‘moral interests’, which was seen as vague and meaningless. As a result, a compromise text was reached which referred to prejudice to the author’s ‘honour or reputation’.

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36 There is limited case law in Australia too. In Perez v Fernandez [2012] FMCA 2, an alteration to the lyrics of the ‘Bon Bon’ song, which was streamed on a website, amounted to an infringement of the author’s integrity right. In this case, the court appeared to adopt an objective test of prejudice to the author’s honour or reputation, and one that seemed to require potential harm – see [87]-[88].
37 Ricketson & Ginsburg, [10.02]-[10.15]; Adeney (2005), 117-120.
38 See Records of the Diplomatic Conference: Convened in Rome May 7 to June 2, 1928, Appendix, p. 223 et seq, which may be found at Appendix 27 of Ricketson & Ginsburg (http://global.oup.com/booksites/content/9780198259466/) . See also Ricketson & Ginsburg, [10.07].
39 Records of the Diplomatic Conference: Convened in Rome May 7 to June 2, 1928, Appendix, p. 229-230 which may be found at Appendix 27 of Ricketson & Ginsburg (http://global.oup.com/booksites/content/9780198259466/). See also Ricketson & Ginsburg, [10.09]
The common law delegations, including the UK, were satisfied with this text because ‘reputation’ resembled the interests protected by existing causes of action in their jurisdictions; Article 6bis did not include an obligation to protect such moral rights via copyright law and no mention was made of post-mortem protection. As such, common law jurisdictions felt able to comply with the new Article 6bis in reliance on existing law, primarily defamation and passing off. Meanwhile, civil law delegations were reasonably content with the formulation of the integrity right because of the reference to ‘honour’, a term more suggestive of the dignity based concerns that animated their domestic moral rights regimes.

At the time of the Rome Conference the concept of ‘reputation’ was well established in UK law. English courts had long recognised the tort of defamation and an author of a work could sue its copyright owner for libel where the owner altered or ‘mutilated’ the work, without the consent of the author, in a way that damaged the author’s ‘reputation’. In addition, section 7 of the Fine Arts Copyright Act 1862 made it an offence to sell, publish, or offer for sale an altered painting, drawing, or photograph, or a negative of a photograph where the alteration was made during the life of the author by someone other than the author, without the author’s

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40 Ricketson & Ginsburg, [10.09]. See also Copinger and Skone James on Copyright 17th ed (Sweet & Maxwell, 2017), [11-07].
41 Adeney (2005), 121-122. See also Davies and Garnett (2016), p. 256.
42 See D. Ibbetson, A Historical Introduction to the Law of Obligations (Oxford, OUP 1999) 112-125, who notes that the action on the case for defamation developed in the royal courts in the 16th century (with its roots found earlier in the ecclesiastical courts). See also David Rolph, Reputation, Celebrity and Defamation Law (Ashgate, 2008), ch 2 and Lawrence McNamara, Reputation and Defamation (OUP, 2007), chs 3 & 4 discussing the history of defamation in English law.
43 Copinger and Skone James on Copyright 6th ed (Sweet & Maxwell, 1927) 324; Lee v Gibbings (1892) 67 Law Times 263 (recognizing that libel was a suitable cause of action for the author of a literary work to bring against the publisher/copyright owner where an edition had been subsequently revised in a manner that included significant omissions – however, an interim injunction was refused in this application); Archbold v Sweet (1832) 1 Moody & Robinson 162; 174 ER 55 (in which an author of a literary work brought an action for libel against the publisher/copyright owner where a subsequent edition of his work to which he did not contribute contained inaccuracies – held that this was injurious to the plaintiff’s reputation but that it was a matter for the jury whether purchasers would understand this edition was by the plaintiff – verdict for the plaintiff); Humphreys v Thomson & Co Ltd [1905-10] Mac. C.C. 148 (in which an author of a novel successfully bought a defamation claim where major changes had been made for serial publication).
consent. Professor Deazley describes section 7 as ‘a mid-nineteenth century forerunner to the contemporary moral right concerning the derogatory treatment of an author’s work’ and as ‘designed with the explicit purpose of safeguarding the reputation of an artist while he was still alive.’ Channell J in Carlton Illustrators v Coleman & Company Ltd confirmed that section 7 dealt with alterations to the work that ‘might affect the credit and reputation of the artist’. Thus, it is perhaps no surprise that the UK did not change its copyright law after the Rome Conference in order to implement Article 6bis of Berne.

At the Brussels Revision Conference in 1948, changes were proposed to the duration of moral rights and to the wording of the integrity right. The Belgian government proposed that the words ‘honour or reputation’ be replaced by ‘his spiritual interests’ – a proposal supported by several delegations. Different formulations were also put forward, but common law countries, including the UK, objected to these. The sub-committee that considered the proposals opted for a cautious approach and the suggested change was to include the language ‘...to object to any distortion, mutilation or other alteration to the said work or to any other action in relation to the said work, prejudicial to the honour, reputation or interests of the author’. Objections were also raised by the UK to extending moral rights beyond the death of the author, so the subcommittee recommended: ‘To the extent that national legislation permits it...[moral rights] are, after his death, to be safeguarded at least until the expiry of the copyright...’ These modifications were accepted, except for the reference to ‘interests’ of the author which was deleted in response to British objections.

44 Fine Arts Copyright Act 1862, s 7; discussed in Copinger and Skone James on Copyright 6th ed (Sweet & Maxwell, 1927), 323.
46 Carlton Illustrators v Coleman & Company Ltd (1911) 1 KB 771.
47 Carlton Illustrators v Coleman & Company Ltd (1911) 1 KB 77, 780 – as opposed to proof that the alteration had affected his character and reputation as an artist. Thus, like defamation claims, a claim under section 7 of the Fine Arts Copyright Act 1862 needed ‘likelihood’ of harm to reputation. These comments were cited with approval in Preston v Raphael Tuck and Sons Ltd [1926] Ch 667, 673.
48 Ricketson & Ginsburg, [10.11].
49 Ricketson & Ginsburg, [10.11].
At the 1967 Stockholm Revision Conference, the key proposal was to make post mortem protection compulsory.\textsuperscript{50} This attracted resistance from common law countries given that defamation actions were not post mortem and because of a concern that this would dissuade the US from joining Berne. Thus, a compromise position was reached, whereby countries who, at the moment of ratification or accession, did not provide for post mortem protection of moral rights could provide that some of these rights would cease to be maintained after the author’s death.\textsuperscript{51}

As mentioned, following the Rome Conference, the UK made no changes to its copyright law to implement Article 6bis, taking the view that existing actions sufficed. The Gregory Committee in 1952 remarked that this position had not been criticized by other Berne Union members.\textsuperscript{52} The Committee also considered the impact of the Brussels revisions to Article 6bis and concluded that these did not require legislative changes.\textsuperscript{53} The Committee observed that ‘In general, the common law… provides adequate remedies, and in addition there are certain statutory remedies to meet particular and defined cases [referring here to section 7 of the Fine Arts Copyright Act 1862]’.\textsuperscript{54} The Committee did recommend, however, the repeal of section 7 and its incorporation into the Copyright Act with modifications – specifically, not as a penal offence, but rather, as a civil claim to damages, as well as the extension of its application to literary and musical works, in addition to artistic works.\textsuperscript{55}

The Copyright Act 1956 repealed the Fine Arts Copyright Act 1862\textsuperscript{56} and introduced section 43. This provision created a statutory duty (rather than a criminal offence) relating to false attribution of a work and prohibited the commercial dealing of an

\textsuperscript{50} Records of the Diplomatic Conference: Convened in Stockholm June 11 to July 14, 1967, Volume II, pp. 298-300, which may be found at Appendix 29 of Ricketson & Ginsburg - http://global.oup.com/booksites/content/9780198259466/.

\textsuperscript{51} For discussion, see Ricketson & Ginsburg, [10.12]; [10.34].

\textsuperscript{52} Gregory Committee Report, [220].

\textsuperscript{53} Gregory Committee Report, [222].

\textsuperscript{54} Gregory Committee Report, [225].

\textsuperscript{55} Gregory Committee Report, [225].

\textsuperscript{56} Copyright Act 1956, Schedule 9.
altered artistic work as if it was an unaltered work.\textsuperscript{57} Protection lasted until 20 years post-mortem, and any damages claimed post-mortem would devolve to the person’s estate ‘as if the right of action had subsisted and had been vested in him immediately before his death’.\textsuperscript{58}

When the Whitford Committee came to consider moral rights protection in 1977, it commented that there were no equivalent provisions to Article 6\textit{bis} in the 1956 Act. The Committee discounted the relevance of section 43 of the Copyright Act 1956 to the right of attribution (querying whether attribution protection was achieved by passing off and the Trade Descriptions Act) and observed that the UK relied primarily on defamation law to give effect to its international obligations.\textsuperscript{59} However, the Committee noted that this was problematic because protection under defamation law was not post mortem whereas Article 6\textit{bis} Berne required protection for 50 years \textit{post mortem auctoris}.\textsuperscript{60} It thus suggested the introduction of rights of attribution and integrity into copyright legislation.\textsuperscript{61}

These recommendations were heeded when it came to the CDPA 1988 and it is interesting, when looking at the passage of the legislation, and specifically the right of integrity, that discussion focused on the importance of \textit{reputation} and indeed the importance of \textit{artistic} reputation, rather than honour.\textsuperscript{62} This illustrates, once again, a predisposition towards the more familiar concept in English law of ‘reputation’ rather than grappling with the more alien notion of ‘honour’.\textsuperscript{63}

\begin{footnotes}
\item[57] See s. 43 of the Copyright Act 1956.
\item[58] s.43 (9) Copyright Act 1956.
\item[59] Whitford Committee Report, [52] and [56].
\item[60] Whitford Committee Report, [53].
\item[61] Whitford Committee Report, [56].
\item[62] E.g. see Lord Beaverbrook HL Deb 10 December 1987 vol 491 §352: ‘The moral rights will enable the author to protect his reputation.’ Lord Young of Graffham HL Deb 12 November 1987 vol 489 §1478: ‘Moral rights are of great importance to authors and other originators of copyright works, who value their artistic reputations as much as the financial rewards for their works.’ Lord Hutchinson of Lullington HL Deb 12 November 1987 vol 489 §1498: ‘[droit moral] has to do with reputation and not with morality.’ Mr Clarke HC Deb 28 April 1988 vol 132 §528: ‘Obviously, it may be damaging to the reputation of an author, photographer or any artist if his work is used in a deliberately distorted or mutilated form. His reputation is damaged by the use of something that began as his work’. Mr Butcher HC Deb 25 July 1988 vol 138 §186: ‘The whole point of moral rights is to protect the author’s artistic reputation.’
\item[63] Note that the right of integrity for performers refers only to prejudice to the performer’s \textit{reputation} and omits honour: see Art. 5(1) WPPT and s. 205F(1) CDPA.
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Part III – Reputation in English defamation law and its relevance to integrity

Part II has shown that defamation law was considered the primary mechanism for protecting an author’s integrity right in the UK, until the post-mortem requirements that were subsequently introduced into Article 6bis made that unsatisfactory. However, even once Article 6bis was explicitly given effect by sections 77 et seq of the CDPA, it was apparent that ‘reputation’, rather than ‘honour’, was the more familiar and readily understood concept. The limitations of defamation, in terms of post-mortem protection, had been avoided by section 86 CDPA, but there seemed to be a shared, core notion of ‘reputation’. Given this historical link, it is appropriate to consider what defamation law may teach us about reputation, and to consider whether this should influence the interpretation of section 80 CDPA. To be clear, it is not suggested that section 80 CDPA simply incorporated the common law of defamation wholesale into its provisions. Rather, the argument is that we should explore further what insights the approach to ‘reputation’ in existing defamation law may offer into the right of integrity.

Briefly, let us consider the tort of defamation in English law. There are three key elements to the tort, which is strict liability in nature. The first is that the statement in question must be false; the second is that it must be defamatory; and the third relates to the probability of harm. A presumption of falsity operates and the burden rests on the defendant to prove the truth of the statement; if truth is proven, this is a complete defence. As to the definition of ‘defamatory’, different permutations have emerged in case law, but one of the frequently applied tests is whether a statement ‘would tend to lower the plaintiff in the estimation of right-thinking

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64 Which provides that the right of integrity and right of attribution subsists for as long as copyright subsists in the work.
65 See also Davies and Garnett, [8-036]. Note three key differences between the tort of defamation and s. 80 CDPA: i) a defamation action cannot be initiated post-mortem whereas the integrity right lasts for as long as the economic rights in the work; ii) there are different defences and remedies (including the use of a disclaimer for the right of integrity- s.103 CDPA); and iii) under defamation law, the work that has been treated must be identifiable by the public as being by the author whereas s. 80 CDPA requires only prejudice to the author’s honour or reputation: see Lim (2007), 320-321.
67 See s.2 of Defamation Act 2013. For other defences see ss. 3-8 of the Defamation Act 2013.
members of society generally or would be likely to affect a person adversely in the estimation of reasonable people generally’. Of course, this begs the question of how to decide the meaning that the words are capable of bearing. The Court of Appeal has provided guidance on this issue, emphasizing that words should be given their natural and ordinary meaning by the reasonable reader; that the reasonable reader is not naïve but also not unduly suspicious; that an overly elaborate analysis should be avoided, along with an overly literal approach. As well, meaning is to be judged according to ‘people generally’ as opposed to a subset of the community.

In addition, there is section 1(1) of the Defamation Act 2013, which provides that: ‘A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant’. Prior to the 2013 Act, there were decisions that had introduced an actionability threshold that the statement substantially affects in an adverse manner the attitude of people towards the claimant or ‘has a tendency to do so’. The extent to which section 1(1) Defamation Act 2013 changed the common law position was recently considered by the Court of Appeal in Lachaux v AOL. The court held that section 1(1) simply gives statutory effect to those cases that introduced a threshold of ‘substantially’, although the provision substitutes the word ‘serious’ and, in so doing, somewhat raises the threshold. The court also held that the common law presumption of damage continues, and, further, that ‘likely to cause’ in section 1(1) only requires the

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70 Tolley v Fry [1930] 1 KB 467 at 479 (Greer LJ); Modi v Clarke [2011] EWCA Civ 937, [12].
71 Thornton v Telegraph Media Group Ltd [2011] 1 WLR 1985, [96]; Cammish v Hughes [2013] EMLR 13, [40]. The presumption of damage helped to justify this threshold.
72 [2017] EWCA Civ 1334; [2018] QB 594. The leading judgment was delivered by Davis LJ. The case is pending an appeal to the Supreme Court - permission to appeal was granted on 21 March 2018 and the hearing was held 13-14 November 2018.
73 Particularly favouring the formulation of Tugendhat J in Thornton v Telegraph Media Group [2010] EWHC 1414 (QB); [2011] 1 WLR 1985, [96]: ‘the publication of which he complains may be defamatory of him because it [substantially] affects in an adverse manner the attitude of other people towards him, or has a tendency to do so.’ (emphasis supplied) See Lachaux, [49].
74 Lachaux, [78].
75 Lachaux, [58]-[59].
claimant to prove a *tendency to cause* serious harm to a person’s reputation.\textsuperscript{76} Thus, *Lachaux* in effect means that a claimant does not have to prove that the statement *has caused* serious harm to reputation, only that it has a *tendency* to do so.\textsuperscript{77} This can be assessed ‘by reference to the words used and...having regard to the circumstances in which the publication is made’, and does not require a lengthy evidential hearing.\textsuperscript{78}

To summarize, whether a statement is defamatory under English law is judged objectively, according to a test of whether it has a tendency seriously to affect the attitude of reasonable members of society towards the claimant. The key point is that this is an objective test of *potential* harm – one judged according to a mainstream view and not that of a subsection of society and one that does not require evidence of *actual* harm.\textsuperscript{79} The suggestion is that if this is the approach to reputation under defamation law, then an author in relation to her moral rights should not be worse off and required to satisfy an objective test that requires proof of actual harm to reputation. To have broadly consistent approaches to reputation would be justifiable, given that the UK implementation of moral rights very much had in mind the concept of reputation under defamation law.

If such an approach were followed, then an appropriate test for the right of integrity under UK law would be to show that the treatment of the work had a tendency seriously to harm the author’s reputation. In order for the claimant to establish infringement, the court would not require evidence of the author’s reputation, nor would it need evidence from members of the public or from experts in the artistic genre that they now think less of the author. Rather, the court could consider the treatment of the work through the eyes of the reasonable member of the public in

\textsuperscript{76} [2017] EWCA Civ 1334; [2018] QB 594, [40] et seq and summarized at [82].
\textsuperscript{77} See Gatley, [2.6].
\textsuperscript{78} Lachaux, [52]. See also Gatley, [2.5]-[2.6].
\textsuperscript{79} Although note the position for a body that trades for profit: see s.1(2) Defamation Act 2013 which requires serious financial loss or that such loss is likely to occur. Also note that evidence of reputation and harm to reputation would be helpful at the remedies stage.
order to judge whether there was potential prejudice to reputation.  

Unlike defamation law, however, that assessment generally would not occur in the context of the publication or exploitation of the work. This is because section 80 of the CDPA separates out the notion of ‘derogatory treatment’ from the circumstances in which dissemination of the derogatorily treated work is prohibited. Thus, in the situation of a reduced sized copy of an artistic work being displayed in a gallery, the fact of display is not relevant to whether there is derogatory treatment, only the reduction in size. But if alteration is found to be derogatory treatment, then the fact that the altered work has been exhibited in public will constitute an infringing act. The only situation in which the circumstances of publication would be taken into account in assessing derogatory treatment is where there is re-contextualization. In such circumstances, it is the performance or exhibition of the work in the new context that arguably constitutes the derogatory treatment, and, if that is the case, it will also amount to one of the infringing acts.

A final point to consider is whether the claimant must show a tendency seriously to harm the author’s reputation as an artist or generally. Defamation law would suggest the latter because the assessment occurs according to right-thinking members of the public generally and not a sub-set of the community. However, the travaux relating to Article 6bis Berne at the Brussels Revision Conference indicates that ‘honour or reputation’ might be in relation to the author as author or as a person. Arguably, both notions of an author’s reputation could be considered because they may not always be easily separated and would, in any event, still be judged according to a standard of reasonable persons or right-thinking members of

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80 Note the different objective test of Lim (2007), 319 drawn from Australian defamation law that focuses on the ‘capacity to make an “appreciable” section of the community lower its esteem or regard for the author’s characteristics, preferences or views’.
81 Davies & Garnett, [8-041].
82 Although, as noted above, it is debatable under UK copyright law whether ‘treatment’ covers re-contextualisation.
the public generally.\(^{84}\)

**Part IV – Reputation in Strasbourg jurisprudence and its relevance to integrity**\(^{85}\)

This next section looks at the broader landscape of English defamation law by considering the influence of Strasbourg jurisprudence. Article 8 of the European Convention on Human Rights (ECHR) does not include express reference to the protection of ‘reputation’. Instead, reputation only receives express mention in Article 10 of the ECHR as an exception to the right to freedom of expression. While the *travaux preparatoires* to the ECHR indicate that reputation was deliberately omitted from Article 8, no explanation is given for this decision.\(^{86}\) Traditionally, the approach of the European Court of Human Rights (ECtHR) was to follow the plain text of the ECHR: freedom of expression was seen as the paramount interest and any restriction on that right for the protection of reputation was treated as a narrowly construed exception.\(^{87}\) However, this approach was significantly altered in 2004 when the ECtHR recognised for the first time that reputation was protected as part of the right to ‘respect for private life’ under Article 8.\(^{88}\) As a consequence, reputation and freedom of expression started to be treated as equally competing interests, with a ‘fair balance’ having to be struck between the two.\(^{89}\) More recently, however, the ECtHR has partially retreated from this approach by finding that harm to reputation will not always engage Article 8. Importantly, the ECtHR has held that reputation and private life are conceptually distinct interests: it is the external evaluation of a person which makes up their reputation and, therefore, reputation

\(^{84}\) See also Davies & Garnett, [8-038]. Contrast Lim (2007), 318-19 who argues that the objective test should be judged according to a subset of the community – e.g. art critics, peers, other authors – although this is based on Australian defamation law.

\(^{85}\) Substantial parts of this section draw directly from T Aplin and J Bosland, ‘The Uncertain Landscape of Article 8 of the ECHR: The Protection of Reputation as a Fundamental Human Right?’ in A Kenyon (ed) *Comparative Defamation and Privacy Law* (CUP, 2016), ch 13, pp. 265-290.


\(^{87}\) See, eg, *Lingens v Austria* (1986) 8 EHRR 407.

\(^{88}\) *Radio France v France* (2005) 40 EHRR 29, [31].

\(^{89}\) See, eg, *Chauvy v France* (2005) 41 EHRR 29, [70]; *Pfeifer v Austria* (2009) 48 EHRR 8, [38].
per se is not related to private life. In a further development, the Court has also held that harm to reputation must attain a certain degree of seriousness before Article 8 comes into play.

It has been argued at length elsewhere that the preferred interpretation of this Strasbourg jurisprudence is that damage to reputation can cause harm to private life and that this is conceptually justified, at least in part, by a dignity theory for the protection of reputation. A dignity theory, first suggested by Robert Post, relies on a sense that our own self-worth is constructed by social perspectives and interactions. Alistair Mullis and Andrew Scott have critiqued this basis for protecting reputation, arguing that it ‘does not amount to a specific justification’ and ‘is at once everything and nothing’. In making this argument, they rely upon scholarship that sees dignity, particularly in a human rights context, as a complex, uncertain and malleable concept. Thus, for Mullis and Scott, dignity only operates as an effective justification if it is used in conjunction with ‘the more empirical concept of psychological integrity’, by which is meant ‘self-esteem’. In particular, they adopt the ‘looking-glass self’ theory to argue that ‘it is primarily the perceived level of esteem that we think others hold for us that affects our judgments of self-worth.’ As such, defamatory statements have the capacity to have a negative impact upon our self-esteem and it is in this way that a person’s dignity is affected.

90 Karakó v Hungary (2011) 52 EHRR 36, [23].
91 A v Norway (28070/06, 9 April 2009), [64]; Karakó v Hungary (2011) 52 EHRR 36, [23]; Alex Springer AG v Germany (2012) 55 EHRR 6, [83].
92 Aplin & Bosland (2016).
93 It is also supported by a sociality theory: see David Howarth, ‘Libel: Its Purpose and Reform’ (2011) 74 MLR 845.
95 Mullis & Scott, above 39.
98 Mullis & Scott, above 39.
99 This terminology comes from C.H. Cooley, Human Nature and the Social Order (Charles Scribner’s Sons, New York, 1922), Chapter V, 184.
100 Alistair Mullis and Andrew Scott, ‘Reframing libel: taking (all) rights seriously and where it leads’ (2012) 63(1) Northern Ireland Law Quarterly 3, 8.
Other commentators also support a dignity rationale for the protection of reputation.  

While the dignity rationale for protecting reputation may not be universally accepted, it does have solid scholarly support. There is also support from Strasbourg and English case law. For example, in Lindon v France, Judge Louciades recognised that protecting reputation was about protecting the dignity of individuals in Pfeifer v Austria, the Court stated that ‘a person’s reputation, even if that person is criticized in the context of a public debate, forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her ‘private life’. While there is no express reference in this passage to dignity, it is implicit in the statements that Article 8 includes a person’s identity and psychological integrity that the Court’s approach is based on a concern for human dignity. In Axel Springer AG v Germany the Court again made reference to the right to private life as encompassing ‘physical and psychological integrity’. Further, in Putistin v Ukraine and Someşan v Romania, the Court made specific reference to reputation as having a connection with personal identity and psychological integrity, albeit without explanation as to the nature of that

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102 For a critique of the dignity theory and an alternative sociality theory see David Howarth, ‘Libel: Its Purpose and Reform’ (2011) 74 Modern Law Review 845. Howarth argues that reputation is protected because it impacts upon a person's ability to form and maintain relationships, which in turn affects well-being.

103 (2008) 46 EHRR 35.
105 (2007) 48 EHRR 175.
106 (2007) 48 EHRR 175, [33], [35]. While Judge Loucaides dissented in this case he agreed that Article 8 includes the protection of reputation: ibid, [0-111].
109 Ibid.
110 (16882/03, 21 November 2013), [32].
111 (45543/04, 19 November 2013), [23], [29].
connection. Finally, English courts have also linked the protection of reputation to dignity, such as in *Reynolds v Times Newspapers Ltd.*

Conceptualizing reputation as a dignity interest could be utilized in how we conceive of prejudice to the author’s reputation in UK moral rights. This may be useful because, at present, at least in common law systems, there is no clear normative justification for the protection of moral rights. In authors’ rights regimes, moral rights are usually associated with Kantian or Hegelian personality based theories, which see a work as the ‘spiritual child’ of the author and moral rights as protecting the ‘intimate bond’ between the author and her work. They justify strong but not necessarily absolute protection of moral rights. In common law systems, however, we see mainly utilitarian justifications put forward. For example, Professor Ginsburg has argued that respecting an author’s moral rights helps to create a climate that is conducive to authorship and creativity. Professors Hansmann and Santilli, meanwhile, have argued that moral rights in fact serve economic interests, i.e. preserving an artist’s reputation so that the price of future works that he or she creates is not damaged. Professor Ginsburg and others have also argued that moral rights protection ensures accurate information exists about creative works and leads to conservation or preservation of our cultural heritage.

An understanding of reputation as a dignity interest could lead us away from utilitarian understandings of moral rights. Harm to reputation could be conceived as

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112 [2001] AC 127, [91]: ‘Reputation is an integral and important part of the dignity of the individual’.
115 Hansmann & Santilli (1997), 104-5.
harm to the dignity of the author, rather than as economic harm or harm to the cultural heritage concerns of society. Further, if the dignity of the author is at stake, this might translate to a stronger normative basis for protecting the integrity right and, in turn, support tests for derogatory treatment that are pitched at an appropriate standard. Thus, we could shift from an objective test of demonstrating evidence of *actual* prejudice to honour or reputation, on the basis that this standard is incompatible with protecting an author’s dignity, whereas, an objective test of *potential* harm to an author’s honour or reputation might be more apt. Arguably, with a dignity basis for protecting reputation, one would could even go further and adopt a subjective test, one that prioritises the author’s objection to the treatment and her belief that it is prejudicial to her honour or reputation. In so doing, this might bring notions of ‘honour’ and ‘reputation’ closer together in conceptual terms and signal a less stark difference between common law and civil law approaches to authorship and moral rights.

**Conclusion**

The contribution of this article has been to link notions of ‘reputation’ in moral rights to those that exist in defamation law, both in the English context post-Defamation Act 2013, and as influenced by Strasbourg. Once we do this, different possibilities emerge for how to assess when the right of integrity is infringed. There is, at the very least, a strong case for making any objective test in relation to section 80 CDPA a test of *potential* as opposed to actual harm to the reputation of the author and, even more boldly, to move towards a subjective test linked to the author’s objections to the treatment of her work. Which is the most suitable choice among these alternatives should be left open for future discussion.